



Highland Plaza Limited v Ondieki & 6 others (Environment & Land Case 104 of 2016 & 35 of 2007 (Consolidated)) [2023] KEELC 17360 (KLR) (2 May 2023) (Ruling)

Neutral citation: [2023] KEELC 17360 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 104 OF 2016 & 35 OF 2007 (CONSOLIDATED)**

LL NAIKUNI, J

MAY 2, 2023

BETWEEN

HIGHLAND PLAZA LIMITED PLAINTIFF

AND

EVANS ONDIEKI 1ST DEFENDANT

MANYALA AWUOR 2ND DEFENDANT

GEORGE OMONDI 3RD DEFENDANT

MOSES KURGAT 4TH DEFENDANT

SAMUEL KENYATTA 5TH DEFENDANT

CHARLES KOTUT 6TH DEFENDANT

SAFARICOM LIMITED 7TH DEFENDANT

RULING

I. Introduction

1. By a notice of motion application dated 9th December, 2022 and filed on 13th December, 2022, the 1st and 2nd Defendants/ Applicants, Evans Ondieki and Manyala Awuor, moved this Honorable Court for its determination. They brought the application under the provisions of Order 2 Rule 15 (1) (d) of the Civil Procedure Rules, 2010 and Sections 1A and 1B of the [Civil Procedure Act](#) Chapter 21 Laws of Kenya.
2. Subsequently, the 7th Defendant herein, “Safaricom Limited” filed a Notice of Preliminary Objection dated 24th March, 2023. The Honorable Court will be deliberating on these objections at a later stage of this Ruling hereof.



II. The 1st and 2nd Defendants/Applicants case

3. From the filed application, the 1st and 2nd Defendants/Applicants sought for the following:-
 - a. That the Amended Plaint dated 23rd May 2022 and filed in court on 24th May 2022 be struck out for being otherwise an abuse of the court process and the suit be dismissed with costs.
 - b. Costs.

4. It was premised on the grounds, testimonial facts and a 12 Paragraphed Supporting Affidavit sworn by Evans Ondieki Anyona dated 9th December, 2022 together with one annexure marked as “EOA – 1” annexed thereto. He averred that: -
 - a. The Plaintiff/Respondent herein filed an Amended Plaint on 24th May 2022 pursuant to obtaining the leave granted by this Honorable Court on 10th May 2022.
 - b. From the Amended Plaint the Plaintiff introduced a new cause of action of fraud against the Defendants which allegedly occurred in the year 2004.
 - c. Based on the evidence shared and filed in the Plaintiff’s list of documents annexed hereto and marked as “EOA - 1” the Plaintiff/Respondent herein was aware of the alleged fraud from as early as May 2004.
 - d. Claims for fraud being claims in Tort were time barred after three (3) years hence the Plaintiff/Respondent’s claim introduced vide an amendment in the year 2022 was statutorily time barred.
 - e. To continue sustaining proceedings in Court that were time barred and with no hope of life being injected into them amounts to wastage of valuable judicial time and was an abuse of the court process.
 - f. The claim as it stood was time barred and amounted to an abuse of the Court process.
 - g. The original was filed on 16th May 2016.
 - h. The Plaintiff/Respondent never served summons to appear on the Defendants.
 - i. The Plaintiff/Respondent then sought orders to extend the summons on 23rd July 2019 which was after the lapse of two (2) years.
 - j. It meant that there was no summons to be extended by the time the extension was made.
 - k. The order purporting to extend summons was made “Ex Parte” hence this was the Defendants/Applicants’ chance to address it.
 - l. Without the Summons to Enter Appearance, the Plaintiff/Respondent’s suit stood on quick sand, it was unsuitable, incompetent and incurably defective.
 - m. To continue maintaining it and consuming invaluable judicial time as it would amount to an abuse of the Court process.
 - n. It was imperative that the case herein from the facts deponed above being otherwise an abuse of the court process.



III. The 7th Defendant's Case.

5. On 27th March, 2023, the 7th Defendant raised a preliminary objection to the effect that:-
 - a. The Plaintiff/Respondent's Amended Complaint dated the 23rd May 2022 ousted the jurisdiction of this Honourable Court as it sought to plead an action which was time barred by dint of the provision of Section 26 of *Limitation of Actions Act*, Cap. 22 of the Laws of Kenya.
 - b. Consequent to (1) above, the Honorable Court never had jurisdiction to hear the proceedings anchored in the Amended Complaint or grant the reliefs/remedies thereunder.
 - c. As a result, the Amended Complaint dated 23rd May 2022 was an abuse of the process of the Court.

IV. The Plaintiff's Responses.

6. The application was opposed through a 27 Paragraphed Replying Affidavit by BEATRICE MBELA, a Director at the Plaintiff/Respondent's Company dated 23rd March, 2023. She averred that:
 - a. She swore this affidavit in opposition to the 1st and 2nd Defendants/Applicants' Notice of Motion dated 9th December, 2022 and accompanying Supporting Affidavit which sought that the Amended Complaint dated 23rd May, 2022 be struck out and the suit be dismissed with costs.
 - b. The 1st and 2nd Defendants/Applicants averred that the suit was time barred for being brought outside the three (3) year limitation period for a claim for fraud. This suit was instituted vide a Complaint dated the 12th of May, 2016 at which time the Plaintiff sought to have the 1st and 2nd Defendants/Applicants removed from its property, Mombasa/ Block IX/ 238 as trespassers having unlawfully erected structures thereon.
 - c. Summons were effected on the 9th of October, 2019 vide substituted service following an application dated 7th May, 2018 and the resultant order of 23rd July, 2019 which order had not been appealed or vacated.
 - d. By design, applications for Substituted service was done "ex parte" when service upon the Defendants proved futile. At the time of instituting the suit the Plaintiff was under the impression that the Defendants were merely trespassers. This was further affirmed by the numerous search results from the Ministry of Lands that revealed the Plaintiff/Respondent was the proprietor of the suit land. (Annexed and marked as "BMM - 1" were copies of the searches from the Ministry of Lands).
 - e. Initially, while in the process of processing its title, it became aware of other persons attempting to have a lease registered in their names at the Mombasa Lands Registry. The matter was settled when the Commissioner of Land confirmed the Plaintiff/Respondent to be the legal owner and directed all other documents to the contrary be expunged. Sometime in the year 2005, the Plaintiff/Respondent became aware of the intention to lease a portion of the property for purposes of erecting a communication mast by persons claiming to be the proprietor.
 - f. This prompted the Plaintiff/Respondent to institute the Civil Suit - ELC No. 35 of 2007 (formerly the High Court No. 20 of 2006) against the 7th Defendant with the 1st Defendant/Applicant joined as a Third Party on application by the 7th Defendant. The 1st and 2nd Defendants/Applicants herein now claim to the parts of the property, as sub - divisions of the suit property. The Plaintiff/Respondent herein had never applied for the suit property to be sub - divided at all.



- g. Sometimes in the year 2016 that the Plaintiff/Respondent herein became aware of the attempt at the sub - division of the suit property. The Plaintiff/Respondent on numerous occasions tried to access its parcel file at the Ministry of Lands to ascertain the legitimacy of the supposed sub - divisions but the same proved futile as it was met by blockades from accomplices at the Ministry of Lands who indicated that the file was missing.
- h. It was only after a formal complaint was made the file miraculously appeared. (Annexed and marked as “BMM - 2” was a copy of the Plaintiff/Respondent’s letter to the Land Registrar). The Plaintiff/Respondent thereafter and through its Advocates who alerted the Ministry of Lands and Physical Planning of the fraudulent sub - divisions. (Annexed and marked as “BMM - 3” was a copy of the letter dated 5th April, 2019 to the Department of Survey.”).
- i. The Department of Survey conducted its own internal investigations and concluded that in deed the sub - divisions were fraudulent. Consequently the same were expunged and the original parcel No. 238 restored. (Annexed and marked as “BMM - 4” was a copy of the letter dated 2nd September, 2019 from the Ministry of Lands, Department of Survey).
- j. A claim for recovery of land ought to be brought within a period of 12 years.
- k. Time for fraud started running at the discovery of the fraud which in this instance was when the attempted sub - division was discovered and thwarted.
- l. To date, the records at the Ministry of Lands reflect the Plaintiff/Respondent and the registered proprietor of the suit property. That par adventure time had run out, the law allowed for extension of time limited by the act in the cases for Fraud.
- m. In light of the following the application by the 1st and 2nd Defendants/Applicants was ill conceived and prayed for the same to be dismissed with costs.

V. Submissions

- 7. On 28th March, 2023 in the presence of all the parties, the Honourable Court directed and gave an extension for the canvassing of the Notice of Motion dated 7th December, 2022 and Preliminary objection dated 24th March, 2023 by way of written submissions and the delivery of the ruling was reserved for the 2nd May, 2023 accordingly.

A. The Written Submissions by the 1st and 2nd Defendant/Applicants.

- 8. On 1st April, 2023 the Learned Counsel for the 1st and 2nd Defendants from the Law firm of Messrs. Jengo Associates Advocates filed their written submissions dated 30th March, 2023. Mr. Jengo Advocate commenced by submitting that what was before the Honourable Court was the 1st and 2nd Defendants/Applicants Notice of Motion dated 9th December, 2022 and a Preliminary Objection dated 24th March, 2023 by the 7th Defendant.
- 9. The Notice of Motion was brought under the Provisions of Order 2 Rule 15 (1) (d) of the Civil Procedure Rules, 2010 and the Sections 1A and 1B of the *Civil Procedure Act*, Chapter 21 Laws of Kenya. According to the Learned Counsel, primarily the application was for striking out of the Amended Plaint filed in Court on 24th May 2022 for being otherwise an abuse of the court process and dismissal of the suit with costs. The application was based on the Supporting affidavit of the Deponent - Evans Ondieki annexed to the application and whose contents they adopted in their entirety. Being heard simultaneously with the application was the preliminary objection by 7th Defendant. Indeed,



the 1st and 2nd Defendants/Applicants were also in support of the said objections. The Plaintiff/Respondent had filed responses in opposition to the application.

10. The Learned Counsel submitted that the Honorable Court in making a decision should apply the following principle from the Case of “Equitorial Bank Limited – Versus - Jodam Engineering Works Limited & 2 Others (2014) eKLR where the Court of Appeal held:-

“It cannot be gainsaid that the striking out of a pleading should be done sparingly. It is a procedure which is to be resorted to in very clear and plain cases. However, it should be noted that while the Defendant is entitled to have his defence proceed to trial, the Plaintiff is equally entitled to efficacious and speedy determination of his claim. This was the position adopted in the case of Diamond Trust Bank (K)Ltd - Versus - Martin Ngombo & 8 Others [2005] eKLR where W. Ouko, J. held that:

“This summary procedure is intended to give quick remedy to the Plaintiff which is being delayed in realizing his claim against the Defendant by what is generally described as sham Defence.”

11. The Learned Counsel submitted that taking the said principle into account, he submitted as here below on the merits of the application:
 - a. That the claim based on fraud was time barred.
 - b. That the suit was incompetent for lack of valid Summons to Enter Appearance.
12. On the issue of the claim based on fraud being time barred, the Learned Counsel submitted that from the Amended Plaint filed in Court on 24th May 2022, the Plaintiff/Respondent’s claim was based on the Tort of fraud, hence ought to have been filed in Court within statutory period of three (3) years of the occurrence discovery of the alleged fraud. From the annexure marked as “EOA - 1” which was part of the Plaintiff/Respondent’s documents in support of the claim and which it was never disputed even in its Replying Affidavit the Plaintiff/Respondent wrote to the then Commissioner of Lands on 26th January 2004 and who responded on 4th February 2004 showing that the lease herein Block IIX/238 was in the name of another party and not the Plaintiff/Respondent. Legally speaking, the latest the Plaintiff/Respondent could file a suit against the Defendants/Applicants, the Learned Counsel argued was on 26th January 2007 but certainly not now. On the contrary, the Plaintiff/Respondent only filed the claim in the year 2016 and then amended it on 24th May 2022 to introduce the claim for fraud.
13. The Learned Counsel contention was that being a Tort under the provision of Section 4 of the *Limitation of Actions Act* Chapter 22 Laws of Kenya the time within which an action for fraud had to be lodged in Court was within a statutory period of three (3) years. The provision of Section 26 of the *Limitation of Actions Act*, Cap. 22 states that time begun to run when the fraud was discovered. The annexures attached on the Replying Affidavit and the Supporting Affidavit all show that the Plaintiff/Respondent became aware of the alleged fraud in 2004 meaning time for filing the claim sought to be introduced lapsed in the year 2007. Annexure marked as “EOA – 1” on the Supporting Affidavit showed that the Plaintiff/Respondent was aware of the Defendants/Applicants claim in year 2004. The upshot of all that was that for any claim based on fraud, the defence of Limitation of Actions, Cap. 22 had accrued to the Defendants/Applicants and the Plaintiff/Respondent had no way of surmounting it.



14. The Learned Counsel submitted that the Plaintiff/Respondent hopelessness of the Plaintiff/Respondent's suit was further endured when the provisions of Section 17 of the [Limitation of Actions Act](#) Chapter 22 of Laws of Kenya. The Provisions provide as here below verbatim:-

“Title extinguished at end of Limitation period. Subject to Section 18 of this Act, at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including a redemption action), the title of that person to the land is extinguished.”

15. It was manifested from all that the Plaintiff/Respondent claim was bound to fail. The suit against the Defendants/Applicants having been filed out of time and the claim for fraud having been introduced out of time too, the court had no jurisdiction to listen to it and it should be struck out. This was unequivocally stated in the Civil Suit case:- “Spin Knit Dairy Limited & Mwaniki Anderson (2019) eKLR where the Court held:-

“16. I do note that a suit that is filed out of the statutory period would in essence oust the jurisdiction of the Court in determining that dispute. Furthermore, jurisdiction is everything, without which a court of law downs its tools. It is not a procedural technicality which can be cured by the application of Sections 1A and 1B of the [Civil Procedure Act](#), Cap. 21 commonly known as the overriding objectives of the law; and or invocation of Article 159(2)(d) of [the Constitution](#) of Kenya. (see Owners of Motor Vessel Lilian S' - Versus - Caltex Oil (K) Ltd [1989] KLR and David Githumbi Thande – Versus - Dairy Farmer's Co-operative Society and 9 Others HCC 2004[2010] e KLR.”

16. The Learned Counsel submitted that the ousting of the jurisdiction was supposed to ensure that parties had a fair hearing as further set out in “Spin Knit Dairy Ltd & Mwaniki Anderson (2019) eKLR viz:-

“18. The learned Judge in the above case was citing with approval the decision in Dhanesvar V Mehta Vs Manilal M Shah [1965] EA 321 where the court Stated that:-

“The object of any limitation enactment is to prevent a plaintiff from prosecuting stale claims on the one hand and on the other hand to protect a Defendant after he had lost the evidence for his defence from being disturbed after a long lapse of time. The effect of a limitation enactment is to remove remedies irrespective of the merits of the particular case.

19. And in lga – Versus - Makerere University [1972] EA 62 it was held inter alia that:-

“A plaint which is barred by limitation is a Plaint “barred by law.” A reading of the provisions of Sections 3 and 4 of the Limitation Act (Cap 70) together with Order 7 Rule 6 of the Civil Procedure Rules seems clear that unless the Appellant in this case had put himself within the limitation period by showing the grounds upon which he could claim exemption the Court “ shall reject” his claim....the limitation Act does not extinguish a suit or action itself, but operates to bar the claim or remedy sought for, and when a suit is time barred, the court cannot grant the remedy or relief.



20. The holding in the Iga – Versus - Makerere University case (supra) What the above decisions speak is that once a claim is statute barred, unless the barrier of limitation is lifted by extension or enlargement of time, the claim shall be rejected irrespective of its merits.”

17. The Learned Counsel submitted that it also helped promote the maxim of justice delayed is justice denied. This was enumerated in the case of:- “Oriental Commercial Bank Limited – Versus - Central Bank of Kenya (2015) eKLR where it was held:-

“In the case of KOTHARI -VERSUS - QURESHI [1967] E.A. 564 Gachuhi J.A expressed himself thus, when talking about the obligation imposed on a Plaintiff, to prosecute his claim without delay;

“A Plaintiff, in equity is bound to prosecute his claim without undue delay. This is in pursuance of the principle which has underlain the Statute of Limitation vigilantibus et non dormientibus lex securit. A court of law refuses its aid to stale demands, where the Plaintiff has slept upon his rights and acquiesced for a great time. He is then said to be barred by his laches...

It is clear that the Court had jurisdiction; what the Judge meant was that he had no power to grant any relief as the remedy was barred by limitation”.

18. The Learned Counsel averred that the fact that the suit had been filed on time but the claim for fraud was introduced later on, it could not affect the fact that the claim against the Defendants/Applicants was time barred. The doctrine or principle of relation back in amendment of pleadings never apply to the new claims based on fraud introduced. It was stated as such in the case of “Oriental Commercial Bank Limited – Versus - Central Bank of Kenya (2015) eKLR where the Court expressed itself thus:-

“In Auto Garage & Others Vs Motokov (NO.3) [1971] 1 E A 514, the Court of Appeal was handling a matter in which the plaintiff was said to have failed to disclose a cause of action. The question which had arisen at the High Court is whether or not a plaintiff which did not disclose a cause of action could be amended.

When the matter went before the Court of Appeal, Spry V. P. said;

“I respectfully agree, also, with the judgment of Sir Joseph Sheridan in Corbellini’s case. What he was saying was, in effect, that where a Plaintiff fails to disclose a cause of action, it is not a Plaintiff fails to disclose a cause of action, it is not a Plaintiff at all and you cannot amend a nullity.”

In the light of that fact, could an amendment be allowed if the result of such an amendment would be to defeat the defence of limitation” That question arose in that case, and this is what the Court of Appeal said;

“There is a long line of East African cases to the effect that discretionary powers should not be exercised so as to defeat limitation. This has arisen particularly in relation to the exercise of the inherent powers of the Court”.



19. The Learned Counsel submitted that this was reiterated in “Mushimiyimana Aimable – Versus - Jonathan Leakey Limited & Another (2009) eKLR where the Court held:-

“The cause of action herein arose on the 28th of August, 1989, 20 years or so before the application to join the 1st defendant to the suit. S. 4(2) of the Limitation of Action Act Chapter 22 of the Laws of Kenya provides –

“An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued”

In Otieno Versus Omoro Civil Suit No. 52 Of 1976 At 677 Trainor J. held –

1. Where an amendment has the effect of adding a new party that new party should not be prejudiced.
2. Any defence available to the added party will be open to him as if the proceedings had been first instituted at the time of granting of the amendment, in this instance the defence of Limitation.
3. The Limitation period is calculated up to when the proceedings are instituted, in the case of an added party time continues to run until the amendment adding him as a Defendant is ordered.
4. The amendment order should be treated as if there has been a fresh suit on the date the orders are made. To permit the proceedings to continue against the new party as if the amendment never took place, would be to allow the amendment to have a retroactive effect to the date the original plaint was filed would be prejudicial to the rights conferred on by the Law of Limitation
5. There is a distinction as laid out in the Civil Procedure Rules, 2010 between the substitution of a party or addition of a party to proceedings and the amendment of the pleadings, and the position in the instant case is governed by Order 1 Rule 10.
6. At the time the name of the new party was added, the plaintiff had lost the right to sue and the only option available was to obtain leave of the court to institute proceedings out of time as laid out in section 27 of the Limitation of Actions Act Chapter 22 of the Laws of Kenya.”

The principle as expounded in the above case is similar to what the court adopted in Reuben Ashikoli Ashikanga 3- Versus - Norman Lidigu & Pan African Paper Mills Ltd Civil Suit No. 5130 Of 1989 in this case Ringera J (as he then was) held inter alia:-

“In my Judgment, the doctrine of relation bulk of amendments cannot apply to substitution or addition of a person as a defendant to the suit by way of amendment to the plaint. In such a case the amendment ought to speak from the date when the order granting leave to amend was given. To hold otherwise would, in my view, be to propound a doctrine that the express provisions of section 4(2) of the Limitation period of three years for tort claims can be overcome by the expedient of invoking the discretionary jurisdiction conferred by order 1 Rule 10 (2) and Order VIA Rules 3(1) and 5(1) of the Civil Procedure Rules to add a



Defendant to a suit and to allow an amendment to that effect at any stage of the proceedings. I decline to be lured to subscribe to such a doctrine which cannot but be subversive of written substantive Law.”

The Court then concluded:-

It is noteworthy that the Plaintiff did not apply for leave to file suit out of time under Section 27 of the Limitation of Action Act. In this case therefore, without leave to file suit out of time the amendment takes effect from the date when the leave to amend was granted. To agree with the Plaintiff's counsel would be to deny the 1st Defendant the right conferred upon him by Provision of S.4 (2) of the Limitation of Actions Act Chapter 22 of the Laws of Kenya. To borrow the words of Ringera J (as he then was) I decline to be lured to subscribe to such a doctrine which cannot but be subversive of written substantive Law.

20. The Learned Counsel submitted that penultimately and more specifically dealing with fraud, the Court of Appeal in case:- “Benja Properties Limited -Versus - Syedna Mohammed Burhannudin Sahed & 4 others (2015) eKLR, the Court held:-

“Our re-evaluation of the evidence on record leads us to find that the appellant's cause of action arose when it came to its actual knowledge that a third party, in this case the 1st, 2nd and 3rd respondents were laying claim to the suit land. This actual knowledge came into being when the appellant was served with the 1st, 2nd and 3rd respondents' Statement of Claim in the year 2000. Limitation period against the 4th and 5th respondents began to run in the year 2000. We find that the trial court did not err in holding that the appellant's claim against the 4th and 5th respondents was statute- barred. It is our view that under the provisions of Sections 3 (1) and (2) of the Public Authorities Limitation Act, the appellants claim is statute barred. We see no reason to delve into discussions that Section 13 A of the Government Proceedings Act had been declared unconstitutional by the High Court because our holding pursuant to Section 3 (1) and (2) of the Public Authorities Limitation Act, is a bar to the appellant's claim against the 4th and 5th Respondents. It is also our considered view that even if the appellant established facts in support of the doctrine of estoppel, estoppel cannot alter the provisions of statute, estoppel cannot enlarge the limitation period and estoppel is no bar to implementation of express statutory provisions. (See_ Tarmal Industries Limited -Versus - Commissioner of Customs & Excise (1968) EA 471; see also Marimite Electric Co. Limited -Versus - General Dairies Ltd. [1937] 1 All ER 748; see also Henry Muthee Kathurima -Versus - Commissioner of Lands & Another [2015] eKLR, Nyeri Civil Appeal No. 8 of 2014 wherein it was stated that estoppel cannot be used as a shield to protect unlawfully acquired property or override express statutory procedures. And as a principal, estoppels only applies to stated matters of fact not law.”

21. Lastly, the Learned Counsel argued, in civil case of: “Abubakar Zain Ahmed -Versus- Premier Savings & Finance Limited & 4 Others (2007) eKLR, the Court of Appeal held:-

“We think also that the Learned Judge cannot be faulted in holding that all the acts upon which the appellant has built his case against the 1st, 3rd, 4th and 5th Respondents are in tort actions which occurred between the years 1987 and 1998 and were indisputably within the knowledge of the Appellant as at 25th May, 1998 and must of necessity follow that his claim against the said respondents is time barred by virtue of the provisions of the Limitation of Actions Act, for the reason that the torts were brought outside the cause of action or the



date the appellant became aware of the facts constituting the cause of action. This being the position, it would appear that there is no point to sustain an otherwise hopeless claim which obviously discloses no reasonable cause of action. The claim as lodged does not show a mere semblance of a cause of action and should not be sustained. Grounds 2, 3, 4, 5, 7 and 8 of the grounds of appeal are, therefore, without merit.”

We agree and must therefore reject the complainant.”

22. It then concluded:-

“The claim was hopelessly time barred and it would be an exercise in served in trying to sustain the suit by further amendment. In our view, the learned Judge was right when he observed:

“There would be no point in allowing this claim to go to trial. Doing so would be allowing the parties to waste large sums of their own or somebody else’s money in an attempt to pursue a cause of action which must eventually fail.”

23. On the issue of the suit by Plaintiff/Respondent being incompetent for lack of valid summons to enter appearance, the Learned Counsel submitted that the Plaintiff/Respondent filed this suit on 16th May 2016 and they were valid upto 16th May 2017. They then could only be extended for a further 24 months meaning upto 16th May 2019. However, this was not done until the Plaintiff/Respondent purported to get extension for the six (6) months which also went contrary to the rules on 23rd July 2019 when there was nothing to extend, and the suit had effluxes. The summons validity on 23rd July 2019 had expired and there was nothing available to extend. The order for extension being an “ex - parte” order, its trite that the only time the other party (in this case the Defendants) can challenge it as once they start participating in the matter hence our objection to the extension was merited.

24. The Learned Counsel submitted that summon that had already expired could not be extended hence this suit was a nullity was set out by the Court of Appeal in the case of Civil suit of “Udaykumar Chandulal Rajani & 3 Others – Versus - Charles Thaithi (1991) eKLR where it was held:-

“Order V Rule 1 provides a comprehensive code for the duration and renewal of summons, and therefore the noncompliance with the procedural aspect caused by failure to renew the summons under this inherent power of the court under Section 3A of the Civil Procedure Act cannot cure. The first summons having expired and the Deputy Registrar having held that there was no proper service he could not in the circumstance’s re-issue fresh summons after the expiry of the aforesaid 24 - month period. Neither did the entry of appearance by the Defendants revive the summons which had expired.

The original summons in an action is only valid for the purposes of 1996, could only by order extend its validity from time to time for such period not exceeding 24 months from the date of its issue if satisfied that it was just to do so. However, in this case, neither the Plaintiff nor his Advocate did exhaust the provisions of Order V rule 1(5) by making any application for extension of the validity of the original summons; and consequently, the court had no power to extend the validity of summons beyond 24 months, when in fact there was no valid summons in existence. It follows, therefore, that the alleged service upon the Defendants was ineffective and invalid and so were the summons issued on 28th August, 1992.

Accordingly and, for the reasons above stated, the Learned Judge was plainly wrong in the decision to which he came. Consequently, this appeal is allowed. The preliminary objection



made in the superior court is sustained and the suit, H.C.C.C. NO. 1300 of 1987, stands dismissed with costs. The Defendants will have the costs of this appeal.”

25. The Learned Counsel concluded that as could be seen in this case, the Court of Appeal sustained a challenge of the validity of the summons and competence of the suit, within the suit as it was doing in the instant application.

B. The Written Submission of the 7th Defendant.

26. On 27th March, 2023 the Learned Counsel for the 7th Defendant from the Law firm of Messrs. Daly Inamdar Advocates LLP filed their written submissions dated 24th March, 2023. M/s. Akwana Advocate submitted that the issues for determination as raised by the 7th Defendant’s Preliminary Objection dated 24th March 2023 were:-

- a. Whether the 7th Defendant had met the threshold for a preliminary objection;
- b. Whether the preliminary objection raised in merited; and
- c. Whether the Honorable Court had jurisdiction to hear and determine the action as introduced in the Amended Plaintiff.

27. The Learned Counsel submitted that at Paragraph 4 of the Amended Plaintiff dated 23rd May 2022, the Plaintiff/ Respondent) expressly pleads that “sometime in the year 2004” while in the process of having its lease registered, it became aware of other persons attempting to have a lease to the same parcel registered in their names at the Mombasa Lands Registry”. At Paragraph 6 of the Amended Plaintiff dated 23rd May 2022, the Plaintiff/Respondent stated that “sometime in 2005” the Plaintiff discussed through its agents that the suit property had been invaded by squatters who illegally began occupying it and putting up illegal structures on its property”.

28. The Learned Counsel submitted that the threshold for a preliminary objection:-

In answer to the question of whether the Defendants/Applicants had met the threshold for a preliminary objection, the Court of Appeal in Civil case: - “Mukisa Biscuit Manufacturing Limited – Versus - West End Distributors [1969] EA 696, defined a preliminary objection as follows:-

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, if, which is argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court or a plea of limitation, or a submission that the parties are bound by the context giving rise to the suit to refer the dispute to arbitration.

A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the fact pleaded by the other side are correct.”

29. In the authority of the case of “Sohanlaldurgadass Rajput & Another – Versus - Divisional Integrated Development Programmes Co Ltd [2021] eKLR attached hereto as LOA 1, the Court stated that:-

“For a preliminary objection to be maintained, the pure points of law raised must sprout from the pleadings.”

30. The Learned Counsel argued that from the Plaintiff/Respondent’s own pleading (Amended Plaintiff), sprouted the averment that it became aware of the alleged fraud by the Defendants/Applicants



sometimes in the year 2004. This in essence meant that a claim and/or action founded on the alleged fraud was to be instituted in the year 2007. Even if the Court went by the year 2005 which was pleaded under paragraph 6, the action needed to have been commenced in the year 2008. It was the Learned Counsel's submission that the Plaintiff/Respondent's pleading (Amended Plaintiff) raised a pure point of law (limitation) which if heard and determined by this Court will dispose of the suit in its entirety.

31. On the merit of the preliminary objection, the Learned Counsel opined that the Plaintiff/Respondent had now in the year 2022, more than twelve (12) years after the period within which it was claim an action on grounds of fraud; amended its Plaintiff by introducing an action barred by time. So fatally defective and incurable was this amendment that even if the Plaintiff/Respondent were to file an application for enlargement of time (which in any event had not been filed), the Honorable Court was under a Statutory obligation not to grant such an extension by dint of the provision of Section 27 of the Limitation of Action Act, Cap.22.

32. Further, the Learned Counsel relied on the provision of Section 4(2) of the *Limitation of Actions Act* provides that:-

“An action founded on tort may not be brought after the end of 3 years from the date on which the cause of action occurred...”

33. The provision of Section 26 of the *Limitation of Actions Act* provides as follows:-

“Where, in the case of an action for which a period of limitation is prescribed, either-

- (a) the action is based upon the fraud of the defendant or bis agent, or of any person through whom he claims or bis agent;
- the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it:

34. The Learned Counsel submitted that in the case of “Edward Moonge Lengusuranga – Versus - James Lanaryara & Another [2019] eKLR attached hereto as LOA 2, the Court noted that:-

“From the Plaintiff's pleadings as well as the copy of the green card in regard to the suit land and the same are clear that the alleged fraud was committed on the 13th January 2004 when the 1st Defendant was registered as the proprietor of the suit land. The cause of action against the 1st Defendant therefore arose on the 13th January 2004”

“The Plaintiff needed to commence bis claim within the time prescribed under Section 7 of the *Limitation of Actions Act*. It follows therefore that by the time the Plaintiff filed this suit (Amended Plaintiff dated 23rd May 2003, the claim was statute barred.”

35. She further referred Court to the case of: “Edward Moonge case (Supra), the Court recognizes that a cause of action was:-

“a set of facts sufficient to justify a right to sue to obtain money, property or the enforcement of a right against another party. The term also refers to the legal theory upon which a Plaintiff brings a suit. According to Section 26 of the *Limitation of Actions Act* the cause of action accrues when the fraud is discovered. In the present and a period of 3 years ended on 13th



January 2018. These proceedings were filed on the 20th August 2018 which period was beyond the 3 years from the date the fraud was discovered.”

36. By its own pleading, the Plaintiff/Respondent confirmed that the cause of action arose sometime in year 2004, hence making it imperative that the action founded on the alleged fraud ought to have been filed in year 2007 and pleaded as such. In the case of “Sohanlaldurgadass case (Supra), the Court upheld the preliminary objection on similar grounds of limitation and struck out the suit for being time barred.

37. The Learned Counsel submitted that the Honourable Court in finding that the amendments effected in the Amended Plaint dated 23rd May 2022 give rise to a cause of action which is barred by time, do strike out the Amended Plaint with costs to the 7th Defendant. The Honourable Court has jurisdiction to hear and determine the action as introduced in the Amended Plaint as the Court in the “Sohanlaldurgadass case (Supra) went on to state that:-

“The question of limitation is a question that go to the jurisdiction of this Court. It is a clear point of law, which if argued as preliminary point may dispose of the suit. In the case of Bosire Ongero – Versus - Royal Media services [2015] eKLR, the Court stated that the question of limitation touches on the jurisdiction of the Court, which means that if a matter is statute barred, the Court would lack jurisdiction to entertain it. I therefore find and hold that the Preliminary Objection raised in the instant case is on a point of law, and the same is validly and properly taken.”

38. Further, the Honorable Court in the case of “Edward Moonge (Supra) in finding that limitation was a matter that goes to the jurisdiction of the Court held that:-

“Limitation being a substantive law, the provisions of Sections 1A and 1B of the *Civil Procedure Act*, Cap. cannot be invoked with a view to disregard the provisions of another Act of Parliament. Even if the *Limitation of Actions Act* was a procedural legislation, Section 3 of the *Civil Procedure Act* provides:-

In the absence of any specific provision to the contrary, nothing in this Act shall limit or otherwise affect any special jurisdiction or power conferred, or any special form or procedure prescribed, by or under any other law for the time being in fore.”

39. In upholding the preliminary objection, and striking out the Plaintiff’s suit as guided by the Lilian S. case, Odundo J, in the case “Edward Moonge case (Supra) stated that:-

“clearly this Court lacks jurisdiction and the matter is at its end. I will have to down my tools and take no further step.”

40. The Learned Counsel concluded that guided by the authorities it was their submission that the Honourable Court had no jurisdiction to hear and determine this matter as founded by the Amended Plaint [which raised a cause of action barred by time], consequently ought to down its tools and take no further step forward other than striking out, with costs to the 7th Defendant, the Amended Plaint dated 23rd May 2022.

C. The Written Submission of the Plaintiff/Respondent.

41. On 14th April, 2023 the Learned Counsel for the Plaintiff/Respondent from the Law firm of Messrs. Kittony Maina Karanja Advocates filed their written submissions dated 14th April, 2023. M/s Rimunya Advocate commenced the submissions by stating in respect of the 1st and 2nd Defendants/Applicants



Notice of Motion dated 9th December, 2022 and the 7th Defendant's Preliminary Objection dated 24th March, 2023 both seeking the Plaintiff/Respondent's Amended Plaintiff be struck out for being time barred. The Application was opposed by the Plaintiff/Respondent through a Replying Affidavit of Beatrice Mbela dated 27th March, 2023. She reiterated that striking out pleadings was a draconian and an extreme measure which should only be resorted to where it was clear that a party was abusing the court process.

42. On the issue of the claim based on fraud being time barred, the Learned Counsel submitted that it was the 1st and 2nd Defendants/Applicant's case that the Plaintiff's suit being one for fraud was time barred by virtue of having been filed outside the statutory time limitation of three (3) years. The Plaintiff/Respondent never conceded that a claim for fraud under the provision of Section 3 ought to be brought within three years. This however being a claim for recovery for land based on fraud, they submitted that the limitation of time fell under the provision of Section 7 of the Act which states that;

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him”.

43. She referred Court to J Odeny in the case of “Silvester K. Kaitany – Versus - Nyayo Tea Zones Development Corporation & another; National Land Commission & another (Interested Parties) [2020] eKLR quoting with approval of the case of “Justus Tureti Obara – Versus - Peter Koipeitai [2014] eKLR wherein J. Okong'o stated:-

“I am in agreement with the Plaintiffs submission that the Plaintiff's claim is for the recovery of the suit property from the Defendant and as such the limitation period of such claim is 12 years as provided for in section 7 of the Limitations of Actions Act, Cap 22 Laws of Kenya. I would wish to point out further that the Plaintiff's case although for recovery of land is barred by fraud.”

44. Additionally, where fraud is pleaded, Section 26 of the Limitation Act provided that time started running once the fraud was discovered or could with reasonable diligence had been discovered. It had been the Plaintiff/Respondent's case that it was not until the 1st and 2nd Defendants/Applicants entered appearance and filed their Defence that it became clear that they claimed ownership of the suit property and the 7th Defendant as the 1st Defendant's Tenant. The Plaintiff/Respondent had deponed that it had faced challenges initially in the year 2004 while applying to have the title to the suit property issued, which challenges were resolved by the Commissioner for Lands indicating that the Plaintiff/Respondent was the rightful owner. Consequently a title was issued to the Plaintiff/Respondent for the suit property.
45. Later on, upon discovering encroachers to its land, the Plaintiff/Respondent instituted a suit against the 7th Defendant for trespassing on the suit land. She argued that it was worth noting that this suit was only against the 7th Defendant and for trespassing. By that time, the Plaintiff/Respondent had no knowledge of any fraudulent dealings on the land and its Title at this point. According to the Counsel, this was further evidenced by the number of search results from the Ministry of Lands conducted by the Plaintiff/Respondent which indicated that it was the registered owner. It was not until sometimes in the year 2016 when the Plaintiff/Respondent was alerted to attempts at sub - dividing the suit property that it became aware that the problem went further than just mere trespassing. Curiously, it was also around the same time that the parcel file at the Ministry of Lands went missing prompting letters from then Plaintiff/Respondent's advocate.



46. It was the contention by the Learned Counsel that this attempt at sub - division was a continuous injury which in and of itself created a separate cause of action and raised issues of facts to be supported by evidence and that ought to be canvassed at trial. A perusal of the Defendants' list of documents included a copy of Title through which the Defendants/Applicants wished to lay claim to the suit property as sub - divisions of the suit property. Conspicuously, none of the Defendants/Applicants' names appeared on the said Title. The Learned Counsel averred that the Plaintiff/Respondent was therefore still well within the time frames envisioned under the provision of Section 7 read together with Section 26. Peradventure that the suit was indeed time barred, Section 26 allowed for the enlargement of time where fraud was pleaded.

47. To buttress on this point, the Learned Counsel relied on the ELC court sitting at Nyahururu while deliberating on the same issue held in the case of "Eunice Nduta & another – Versus - Lilian Chemutai & 2 others [2021] eKLR;

“The High Court had occasion to consider the effect of that Section in *Nzoia Sugar Co. Ltd – Versus - Kenya Ports Authority* [1990] eKLR whereby the court observed that:

“Although Sections 22 and 26 of the *Limitation of Actions Act* refer to extension of the limitation period in case of disability or fraud or mistake respectively, it seems to me that these sections do not envisage an application for leave to extend the limitation period and an application based on those sections would be incompetent. Rather these provisions empower a party to file a suit despite the expiry of the limitation period prescribed for the action and give the court jurisdiction to disregard the limitation period prescribed for the action if the suit falls within the scope of Sections 22 and 26 of the *Limitation of Actions Act*. If it was intended that applications under Sections 22 and 26 of the *Limitation of Actions Act* be made in court, then enabling rules similar to order XXXVI Rule 3C providing for application for extension of limitation period under Section 27 of *Limitation of Actions Act* could have been made”.

48. Additionally, it was the Learned Counsel's submission that the issue of fraud as pleaded and when it was discovered was a matter of fact that ought to be determined during trial and not preliminarily through the 7th Defendant's Preliminary Objection. It was trite that a Preliminary Objection must not deal with disputed facts and must not derive its foundation from factual information which ought to be tested by the rules of evidence. This was the finding in the Civil case "Silvester K. Kaitany – Versus - Nyayo Tea Zones Development Corporation (ibid).

49. The Learned Counsel submitted that similarly, J Mugo Kamau in the case "Delilah Ondari – Versus - Francis Ondieki Atandi [2022] eKLR held:-

“It would defeat the purpose of this court as set out in Sections 1A, 1B and 3A of the *Civil Procedure Act* to not determine when the fraud was actually discovered and I refrain myself from holding a mini trial on the facts of the cause in this Preliminary Objection as it would cease being a Preliminary Objection and become a Notice of Motion for striking out the suit.”

50. The Learned Counsel submitted that from the above it was clear that the Plaintiff/Respondent's claim was on of recovery of land based on fraud discovered in the year 2016 consequently the same fell under the provision of Section 7 of the *Limitations Act* and therefore well within the limitation period and which she invited the Honorable Court to find similarly.



51. On whether the suit was incompetent for lack of valid summons, the Learned Counsel submitted the Defendants/Applicants argument was that the suit ought to be struck out for lack of valid summons. The learned Counsel averred that the record was clear that the Plaintiff/Respondent took out summons in the year 2016 but was unable to serve the same upon the Defendants necessitating them effecting service of the said summons through substituted way under Order 5 Rule 17 of the Civil Procedure Rules, 2010. Under the covering provision of of Order 5 Rule 2 and 17 and order 50 Rule 6 the Plaintiff sought to have the same extended and service be effected by way of substituted service which application was allowed and substituted service effected upon the Defendants. This limb by the Defendant was a roundabout way of reviewing an order that was given in the year 2018. The provision of Order 5 Rule 2 allowed for extension and renewal of summons. Additionally, the provision of Order 50 Rule 6 relied on in the Application for renewal and substituted service clothes the Court with the powers to enlarge time. It states;

[Order 50 Rule 6.]

“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed”.

52. The Learned Counsel held that this was the conclusion by J. Chepkwony in the Civil case of “Letshego Kenya Limited – Versus - Timothy Kimenyi Mungathia [2021] eKLR where the court held:-

“I, therefore find that a party can apply for enlargement of time, if the original duration given has already expired. In the case of summons, I do not agree with the trial court, that one must apply for their extension only when the summons is still valid. There is nothing in the law that bars the court from extending the validity of summons because such application is made after the original summons have expired. The court therefore has discretion to consider an application for extension of validity of summons even where the said summons have expired. See Kenya Commercial Bank Limited- Versus - Ann Kajuju Charles /2012] eKLR, where Mabeya J stated:-

“...My reading of Order 5 Rule 2(2) is that the validity of a summons to enter appearance may be extended on application. The rules do not specify at what time such an application may be made. Whether it is before or after the validity has expired does not make any difference since under the above provision time may be extended for making such an application if good reasons are advanced...”

53. In conclusion, the Learned Counsel invited the court to be persuaded as such and find that the Court was right to renew and extend the summons. She prayed that the Court finds that it has jurisdiction to entertain this claim the same having been filed within time and valid summons served upon the Defendants. Accordingly, that the Applicant’s application of 9th December, 2022 and the Preliminary Objection dated 24th March, 2023 be dismissed with costs.

VI. Analysis and Determination

54. I have keenly considered all the filed pleadings herein being the Notice of Motion Application dated 9th December, 2022 by the 1st and 2nd Defendants/Applicants herein, the Preliminary objection dated 24th March, 2023 by the 7th Defendant and the responses by the Plaintiff/Respondent herein, the written



submissions and the myriad authorities cited, the relevant provisions of *the Constitution* of Kenya, 2010 and the statutes.

55. For the Honorable Court to reach an informed, reasonable, fair and Just decision on the subject matter, it has condensed the subject matter into the following three (3) salient issues for its determination. These are:-
- a. Whether the Preliminary Objection dated 24th March, 2023 raised by the 7th Defendant meets the laid - down threshold of an objection as founded in Law and Precedents. If the answer is in the affirmative, whether the Preliminary Objection raised is merited.
 - b. Whether the Notice of Motion application dated 9th December, 2022 by the 1st and 2nd Defendants/Applicants had met the threshold for the dismissal and/or striking out suit by the Plaintiff/Respondent.
 - c. Who will bear the Costs of the objection and the application.

ISSUE No. a). Whether the Preliminary Objection dated 24th March, 2023 raised by the 7th Defendant meets the laid - down threshold of an objection as founded in Law and Precedents. If the answer is in the affirmative, whether the Preliminary Objection raised is merited.

56. In the now famous case of:- “Mukisa Biscuits Manufacturing Ltd –Versus - West End Distributors (1969) EA 696 where their Lordships observed thus:

“----a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration”.

In the same case Sir Charles Newbold, P. stated:

“a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop”.

57. The summation of the preliminary objection raised by the 7th Defendant is that this matter based on the Amended Plaint dated 24th May, 2022 is a Tort of fraud which occurred in the year 2004 showing that the lease which is the subject of the suit property in this matter was in the name of another party and not the Plaintiff/Respondent. They argued that the latest the Plaintiff/Respondent could have filed the suit was the year 2007. However, the Plaintiff/Respondent filed the claim in the year 2016 and then amended it on 24th May, 2022 to introduce the claim of fraud.
58. Secondly, according to the objection, this matter also involved a cause of action founded on fraud which is a tort herein and which ought to have been brought within three (3) years from the date the cause of action arose.



59. In the case of “Justus Tureti Obara – Versus - Peter Koipeitai [2014] eKLR wherein J. Okong’o held that:-

“I am in agreement with the Plaintiff’s submission that the Plaintiff’s claim is for the recovery of the suit property from the Defendant and as such the limitation period for such a claim is 12 years as provided for in Section 7 of the Limitation of Actions Act, Cap. 22, Laws of Kenya. I would wish to point out further that the Plaintiff’s case although for recovery of land is based on fraud. The proviso to Section 26 (a) of the Limitation of Actions Act, Cap. 22, Laws of Kenya provides that where an action is based on the fraud of the Defendant or his agent, the period of limitation does not begin to run until the Plaintiff has discovered the fraud or could with reasonable diligence have discovered it. As to when the Plaintiff herein discovered the fraud alleged against the Defendant is a matter to be ascertained at the trial.”

60. To contextualize the point of the preliminary objection raised by the 7th Defendant, on this point, it is necessary to set out the relevant provisions of the Limitation of Actions Act which she relies on and I set the same out hereunder:-

61. The provision of Section 4 (2) of the Act reads:

“An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued:

Provided that an action for libel or slander may not be brought after the end of twelve months from such date”

62. Further the provision of Section 26 of the Limitation of Actions Act provides as follows:-

“Where, in the case of an action for which a period of limitation is prescribed, either—

- (a) the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or
- (b) the right of action is concealed by the fraud of any such person as aforesaid; or
- (c) the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it”

63. From the Amended Plaint dated 23rd May, 2022, paragraph 4 the Plaintiff/Respondent averred:-

“That sometime in 2004, when the Plaintiff was in the process of having its lease registered, it became aware of other persons attempting to have a lease to the same parcel registered in their names at the Mombasa Lands Registry.”

64. From the filed pleadings, it is that the Plaintiff/Respondent discovered the fraud in the year 2004 as stated under the averments of Paragraphs 4 to 10. The Plaintiff/Respondent avers in the Amended Plaint that as a result of the finding, the Plaintiff filed a suit against the trespasser under ELC No. 35 of 2007 seeking to have the offending communication mast removed for trespassing which matter is now consolidated with this suit.

65. A cause of action is a set of facts sufficient to justify a right to sue to obtain money, property, or the enforcement of a right against another party. The term also refers to the legal theory upon which a



Plaintiff/Respondent brings suit. According to Section 26 of the *Limitation of Actions Act* the cause of action accrues when the fraud is discovered. In this present scenario therefore the alleged fraud was discovered in 2004 and a period of three years ended in 2007. The proceedings that incorporate the aspect of fraud in this suit were filed in 2022 which period is beyond 3 years from the date the fraud was discovered.

66. The provision of Section 7 of the *Limitation of Actions Act* provides:

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person”

67. In the case of “Bosire Ongero – Versus - Royal Media Services [2015] eKLR the Court held that the issue of limitation goes to the jurisdiction of the court to entertain claims and therefore if a matter is statute barred the court has no jurisdiction to entertain the same.

68. By and large, I have critically considered the foregoing submissions by the Learned Counsels for the Defendants/Applicants herein. It goes without saying that the issue of limitation is not only cardinal, paramount but also a substantive law. It cannot be wished away casually. In the ordinary circumstances, it is not one of these that may be rescued under the traditional overruling objectives as provided for under the provisions of Sections 1A, 1B, 3 and 3A of the *Civil Procedure Act*, Cap. 21 nor Article 159 (1) and (2) of *the Constitution* of Kenya, 2010 can be invoked with a view to disregard the provisions of another Act of Parliament. Even if the Limitation of Act was a procedural legislation, Section 3 of the *Civil Procedure Act* provides:-

“In the absence of any specific provision to the contrary, nothing in this Act shall limit or otherwise affect any special jurisdiction or power conferred, or any special form or procedure prescribed, by or under any other law for the time being in force.”

69. In the “locus classicus” on jurisdiction is the celebrated case of Owners of the Motor Vessel “Lillian S” – Versus - Caltex Oil (Kenya) Ltd [1989] KLR 1 where Justice Nyarangi of the Court of Appeal held as follows:

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

70. Clearly, from the foregoing, it is my view that the preliminary objection raised by the 7th Defendant has merit and definitely carries the day. It must be allowed by all standards of the word and law.

ISSUE No. b). Whether the Notice of Motion application dated 9th December, 2022 by the 1st and 2nd Defendants/Applicants had met the threshold for the dismissal and/or striking out suit by the Plaintiff/Respondent.

71. Under this sub title, having settled the issue of whether or not the preliminary objection met the threshold, the Honorable Court now devolves onto the issue of striking out of pleaded under the



provision of the Order 2 Rule 15 of the Civil Procedure Rules, 2010 as pleaded by the 1st and 2nd Defendants/Applicants in their filed application. The said provision states as follows:-

“ 15.(1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—

- (a) it discloses no reasonable cause of action or defence in law; or
- (b) it is scandalous, frivolous or vexatious; or
- (c) it may prejudice, embarrass or delay the fair trial of the action; or
- (d) it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be. ”

72. To begin with, it is important to note that abuse of the court process is one of the grounds for striking out suits. The other notable grounds for striking out suit include; non-disclosure of the reasonable cause of action; the suit being scandalous, frivolous or vexatious and the same being an embarrassment and or delay the fair trial of the action. These ingredients for striking out were extensively deliberated upon by the Learned Judge Emukule J. in the case of “Kenya Airways Limited – Versus - Classical Travel and Tours Ltd.(2003) LLR 2704(CCK), found that allegations in a pleading are scandalous if they state matters which are indecent or offensive or are made for the mere purpose of abusing or prejudicing the opposite party. Additionally, in the case of: “G.B.M Kariuki v Nation Media Group Limited & 3 Others [2012] eKLR, H.C at Milimani, Civil Suit 555 of 2009, the Learned Judge Odunga J. observed that a pleading is scandalous if it consists of inter alia, matters that prejudice the opposing party while a pleading is vexatious if it lacks bona fides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble or expense.

73. In the case of: “Kenya Airways Case (Supra)”, the said Learned Judge Emukule J. on defining what frivolous means observed as follows;

“...Cases which are clearly unsustainable fall within this category (Day v. William Hill (Park Lane) Ltd 1949 All ER 219 CA). An action is frivolous when it is without substance or unarguable. A proceeding may be said to be frivolous when a party is trifling with the court (Chaffners v. Goldsmid(1894)1QB 186..., when to put it to forward would be wasting the time of the court (Dawkins v. Prince Edward of Saxe-Weimar (1876) QBD 499 per Mellor J, when it is not capable of reasoned argument or is unarguable; or it is without foundation; or where it cannot possibly succeed; or where the action is brought or the defense is raised only for annoyance; or to gain some fanciful advantage; or when it can really lead to no possible good; or when it can really lead to no possible good;-(Wills – Versus - Earl of Beauchamp 1886 11 PD 59 per Bowen LJ at 65 described the action as hopeless...and would lead to no good result...”

74. In the case of:- “Knowles – Versus - Roberts(1888)38 Ch D 263 at 270) the Court explained on pleadings tending to prejudice, embarrass or delay fair trial as follows:-

“It seems to me that the rule that the court is not to dictate to parties how they should frame their case, is one that ought always to be preserved sacred. But that rule is of course, subject to this modification, that the parties must not offend against the rules of pleading which have been laid down by the law; and if a party introduces a pleading which is unnecessary, and it



tends to prejudice, embarrass, and delay the trial of the action, it then becomes a pleading which is beyond his right.”

75. While in the case of “Kenya Airways Limited case, (Supra), the learned judge Emukule J. opined that:

“A pleading is said to be embarrassing when:

- a. It is ambiguous or unintelligible, or
- b. States immaterial matter and or so raises irrelevant issues which involve expense, trouble and delay and thus will prejudice the fair trial of the action, or
- c. Contains unnecessary or irrelevant allegation, or
- d. Involves a claim or defence which a party is not entitled to make use of, or
- e. The Defendant does not make clear how much of the statement of claim lie admits and how much he denies, or
- f. Is a plea of justification leaving the plaintiff in doubt what the defendant has justified and what lies has not, or
- g. Involves denials in a defence where they are vague or ambiguous or are too general

76. Additionally, the Learned Judge Emukule J. further explained Abuse of the Court Process as follows:-

“The term “abuse of process” is often used interchangeably with the term “frivolous”, or “vexatious” either separately or more-usually in conjunction. An action is an abuse of the process, of court where it is “pretenceless” or “absolutely groundless” and the court has the power to drop it summarily and to prevent the time of the public and the court being wasted”. I entirely agree with these findings.

77. Applying these legal principles and precedents to the this instant case, it is undisputed that the Plaintiff/ Respondent sought for the amendment of its pleadings and upon being granted leave through its Amended Plaint, introduced the Tort of fraud which occurred in the year 2004 under Paragraph 4 of the Plaint which reads to wit:-

“That sometimes in 2004 when the Plaintiff was in the process of having its Lease registered it became aware of other persons attempting to have a Lease of the same parcel registered in their names at the Mombasa Land’s Registry”

As I have previously explained in this ruling, definitely the suit, and I fully concur with the Learned Counsels for the Defendants, is time barred by the *Limitation of Actions Act*. In view of the extensive holding by the Learned judge Emukule J. in the case of “Kenya Airways Ltd – Versus - Classical Travel and Tours Ltd supra, and considering grounds for dismissal as envisaged under Order 2 Rule 15(1), it is apparently clear that the instant suit does not qualify any of the ground thereof and hence ought not to be struck out on these grounds.

78. Be that as it may, over and again it has been held that jurisdiction to strike out suit must be exercised sparingly and in clear and obvious cases and unless the matter is plain and obvious, a party to civil litigation is not to be deprived of his right to have his suit or defence tried by a proper trial. While here,



I cannot avoid citing the famous case of “DT Dobbie & Company (Kenya) Limited - Versus – Joseph Mbaria Muchina & Another C.A 37 of 1980” eKLR where Justice Madan held:-

“No suit ought to be summarily dismissed unless it appears so hapless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for the Court of Justice not to act in darkness without the full facts of case before it”.

79. In another case of:- G.B.M Kariuki – Versus - Nation Media Group Limited & 3 Others[2012]eKLR, H.C at Milimani, Civil Suit 555 of 2009, the Learned Judge Odunga J. delivered himself at length as follows:-

“As already indicated the application was primarily under Order 2 Rule 15 of the Civil Procedure Rules. In the exercise of its powers under the said provision there are certain well established principles that a court of law must adhere to. Whereas the essence of the said provisions is the striking out of a pleading, that is a jurisdiction that must be exercised sparingly and in clear and obvious cases and unless the matter is plain and obvious, a party to civil litigation is not to be deprived of his right to have his suit or defence tried by a proper trial. The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a mini-trial thereof before finding that a case or defence does not disclose a reasonable cause of action or defence or is otherwise an abuse of the process of the court. The power to strike out pleadings must be sparingly exercised and it can only be exercised in clearest of cases. If a pleading raises a triable issue even if at the end of the day it may not succeed then the suit ought to go to trial. However where the suit is without substance or groundless of fanciful and or is brought or instituted with some ulterior motive or for some collateral one or to gain some collateral advantage, which the law does not recognise as a legitimate use of the process, the court will not allow its process to be used as a forum for such ventures. To do this would amount to opening a front for parties to ventilate vexatious litigation which lack bona fides with the sole intention of causing the opposite party unnecessary anxiety, trouble and expense at the expense of deserving cases contrary to the spirit of the overriding objective which requires the court to allot appropriate share of the court’s resources, while taking into account the need to allot resources to other cases.”

In The Co-Operative Merchant Bank Ltd. – Versus - George Fredrick Wekesa Civil Appeal No. 54 of 1999 the Court of Appeal stated as follows:

“The power of the Court to strike out a pleading under Order 6 rule 13(1)(b)(c) and (d) is discretionary and an appellate Court will not interfere with the exercise of the power unless it is clear that there was either an error on principle or that the trial Judge was plainly wrong...Striking out a pleading is a draconian act, which may only be resorted to, in plain cases...Whether or not a case is plain is a matter of fact...Since oral evidence would be necessary to disprove what either of the parties says, the appellant’s defence cannot be said to present a plain case of a frivolous, scandalous, vexatious defence, or one likely to prejudice, embarrass or delay the expeditious disposal of the respondent’s action or which is otherwise an abuse of the process of the court. The defence raises a fundamental issue, namely, whether there was any misrepresentation as alleged by the respondent, a question which, cannot possibly be answered at the stage of an application for striking out; nor will it be competent for the court of appeal to try to answer it as its jurisdiction



only extends to identifying whether, if any, there are issues which are fit to go for trial. The court has no doubt whatsoever, that the above is a fundamental triable issue...A Court may only strike out pleadings where they disclose no semblance of a cause of action or defence and are incurable by amendment. The appellant's defence cannot be said to fall into that category and had the trial Judge considered fully all the matters alluded to, he would not have come to the same conclusion as he did"

80. In the case of: "Co - Operative Merchant Bank Ltd. – Versus - George Fredrick Wekesa Civil Appeal No. 54 of 1999 the Court of Appeal stated as follows:

"The power of the Court to strike out a pleading under Order 6 rule 13(1)(b)(c) and (d) is discretionary and an appellate Court will not interfere with the exercise of the power unless it is clear that there was either an error on principle or that the trial Judge was plainly wrong...Striking out a pleading is a draconian act, which may only be resorted to, in plain cases...Whether or not a case is plain is a matter of fact...Since oral evidence would be necessary to disprove what either of the parties says, the appellant's defence cannot be said to present a plain case of a frivolous, scandalous, vexatious defence, or one likely to prejudice, embarrass or delay the expeditious disposal of the respondent's action or which is otherwise an abuse of the process of the court. The defence raises a fundamental issue, namely, whether there was any misrepresentation as alleged by the respondent, a question which, cannot possibly be answered at the stage of an application for striking out; nor will it be competent for the court of appeal to try to answer it as its jurisdiction only extends to identifying whether, if any, there are issues which are fit to go for trial. The court has no doubt whatsoever, that the above is a fundamental triable issue...A Court may only strike out pleadings where they disclose no semblance of a cause of action or defence and are incurable by amendment. The appellant's defence cannot be said to fall into that category and had the trial Judge considered fully all the matters alluded to, he would not have come to the same conclusion as he did"

81. The law is that a statement of claim should not be struck out and the Plaintiff driven from the judgement seat unless the case is unarguable and where the hearing involves the parties in a trial of the action by affidavit, it is not a plain and obvious case on its face. All said and done, taking all the circumstances of this case into consideration, I am fully satisfied that based on the principles of natural Justice, Equity and Conscience, fairness and justice of the case will be attained by terminating this suit at this stage as after all as the Honourable Court has analyzed above. In any case, the preliminary objection as raised by the 7th Defendant by itself concludes the case. It can never be assisted in whatever way but being halted at this earliest juncture. The suit fails to succeed.

ISSUE No. c). Who will bear the Costs of the application and the objection.

82. It is now well established that the issue of Costs is under the discretion of the Court. Costs mean the award that is granted to a party upon the conclusion of a legal action, process or proceedings in any litigation. The proviso of the provision of Section 27 (1) of the Civil Procedure Rules, 2010 hold that Costs follow the events (See the Supreme Court case of:- "Jasbir Rai Singh Rai – Versus - Tarchalon Singh (2014) eKLR and the Court of Appeal cases of "Kenya Sugar Board – Versus – Ndungu Gathini



(2013) eKLR, RoseMary Wambui Munene – Versus – Ihururu Dairy Co operatives Societies Limited
(2014) eKLR) where the Courts held:-

“ The basic rule on attribution of Costs is that Costs follow the event. It is well recognized that the principles on Costs follow the events is not to be used to penalize the losing party rather it is for compensating the successful party for the trouble taken in presenting or defending the case”.

83. By events, it means the results of the legal action, process or proceedings by parties thereof. In the instant case, 7th Defendant and the 1st and 2nd Defendants/Applicants have managed to successfully sustain the objections and the reliefs sought from the filed Preliminary objection and the application against the suit filed by the Plaintiff/Respondent through the Amended Plaint. For that reason, therefore, they are entitled to costs of the objection, application and the suit.

VII. Conclusion and Disposition

84. Ultimately, having caused an indepth and elaborate analysis of the framed issues herein emanating from the filed Preliminary Objection by the 7th Defendant and the application by the 1st and 2nd Defendants/Applicants, the Honorable Court on preponderance of probability makes the following specific findings:-

- a. That the Notice of Preliminary Objection dated 24th March, 2023 be and is hereby allowed in its entirety with costs.
- b. That the Notice of Motion application dated 9th December, 2022 by the 1st and 2nd Defendants/Applicants herein be and is hereby found to be meritorious and hence allowed with costs.
- c. That the suit instituted by the Plaintiff through the Amended Plaint dated 23rd May, 2022 against the 1st, 2nd, 3rd, 4th, 5th, 6th and 7th Defendants herein be and is hereby struck out and thus dismissed as a consequence thereof.
- d. That an order be and is hereby made that this suit finalized and file is now closed.
- e. That these orders to apply “Mutatis Mutandis” to the ELC No. 35 of 2007 which was consolidated with this file.
- f. That costs of the application and the objection to be borne by the Plaintiff and awarded to the 1st, 2nd and 7th Defendants herein.

It is so ordered accordingly.

RULING DELIVERED THROUGH MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 2ND DAY OF MAY, 2023.

.....
HON. JUSTICE L. L. NAIKUNI (JUDGE)

ENVIRONMENT AND LAND COURT

MOMBASA

In the presence of:

- a. Mr. Wesonga, the Court Assistant.**
- b. M/s. Rimunya Advocate for the Plaintiff/Respondent.**



c. Mr. Jengo Advocate for the 1st and 2nd Defendants/Applicants.

d. No appearance for the 3rd, 4th, 5th and 6th Defendants.

e. M/s. Akwana Advocate for the 7th Defendant

