



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAIROBI**

**ELC NO.20 OF 2009**

**GEOFREY NJERU REUBEN MUKATHA.....PLAINTIFF**

**VERSUS**

**ROSELYNE DOLA OUKO ( Administrator of Estate of JASON**

**ATINDA OUKO deceased).....1<sup>ST</sup> DEFENDANT**

**AARON TAYARI OUKO Administrator of the estate of JASON**

**ATINDA OUKO Deceased.....2<sup>ND</sup> DEFENDANT**

**JOSEPH C WAMBUGU.....3<sup>RD</sup> DEFENDANT**

**A W MATHENGE.....4<sup>TH</sup> DEFENDANT**

**REGISTRAR OF TITLES.....5<sup>TH</sup> DEFENDANT**

**J U D G M E N T**

**Background and the Pleadings**

1. This suit was commenced by way of plaint dated 14th January 2008 which was subsequently amended on 31<sup>st</sup> January 2011. By the amended plaint the plaintiff prayed for judgment against the defendant as follows:-

*a. A permanent injunction restraining the 3rd and 4<sup>th</sup> defendants by themselves, the agents, servants and employees from trespassing into the plaintiff's property herein LR No. 3589/6 Lang'ata.*

*b. A permanent injunction restraining the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants by themselves, through their servants, agents and employees from selling, disposing, alienating or dealing with L.R No.3589/6 Lang'ata.*

*c. An order as against the 1<sup>st</sup> and 2<sup>nd</sup> defendants for specific performance of the agreement therein.*

*d. An order declaring the plaintiff the legal owner of L.R No.3589 Lang'ata.*

*e. Damages*

*f. Costs and interests as the Court may deem fit.*

*g. Any further or better relief as the Court may deem fit.*

2. The Plaintiff's action was founded on the abortive sale agreement dated 28<sup>th</sup> September 1976 entered into between the plaintiff and his wife on one part and the late Jason Ouko (deceased) on the other part. In spite of prolonged exchange of correspondences between the parties legal representatives the transaction was not completed precipitating these proceedings.

3. The 1<sup>st</sup> and 2<sup>nd</sup> defendant as the administrators of the estate of Jason Atinda Ouko filed a statement of defence to the plaintiff's amended plaint. While the 1<sup>st</sup> and 2<sup>nd</sup> defendants admitted the agreement dated 28<sup>th</sup> September 1976, they averred that the plaintiff failed to honour the terms of the agreement with the result that the agreement was rescinded on account of failure to abide by the terms of the agreement.

4. The 3<sup>rd</sup> and 4<sup>th</sup> defendants filed a statement of defence and counterclaim dated 21<sup>st</sup> February 2011. The 3<sup>rd</sup> and 4<sup>th</sup> defendants denied the averments made against them by the 1<sup>st</sup> plaintiff in the amended plaint. They specifically pleaded that on 29<sup>th</sup> April 1979, the late Jason Atinda Ouko entered into an agreement with the late Raphael Nderitu Mathenge (husband to 4<sup>th</sup> defendant) for sale of the suit property and they were thus in possession of the property as beneficial owners. They denied they were trespassers on the suit property.

5. By the counterclaim the 4<sup>th</sup> defendant as the wife and personal representative of the late Raphael Nderitu Mathenge averred that they had fulfilled the terms of the agreement dated 29<sup>th</sup> April 1979 and had taken possession of the land. They stated that the late Jason Atinda Ouko had pursuant to supplementary agreement made on or about 20<sup>th</sup> February 1991 acknowledged full payment of the purchase price and undertaken to transfer the property to the later Raphael Nderitu Mathenge. The 4<sup>th</sup> defendant stated that she on 5<sup>th</sup> August 1994 entered into a sale agreement with the 3<sup>rd</sup> defendant to sell a portion of one (1) acre out of the suit property and that the 4<sup>th</sup> defendant took possession of and has developed his one (1) acre portion. The 3<sup>rd</sup> and 4<sup>th</sup> defendants by the counterclaim prayed for judgment for: -

*(a) A declaration that the estate of the late Raphael Nderitu Mathenge is the legal owner of subdivision of L.R No. 3589/6 Langat Nairobi measuring five (5) acres identified on the scheme of subdivision as letter "C";*

*(b) An order to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to execute transfer instrument in favor of the 4<sup>th</sup> defendant for the 5 acres of L.R No.3589/6 Langat Nairobi and all other documents necessary to effect the transfer;*

*(c) In the alternative, an Order to the Deputy Registrar High Court to execute transfer instrument in favour of the 4<sup>th</sup> Defendant for the transfer of 5 acres of L.R No.3589/6 Langata Nairobi and all other documents necessary to effect the transfer;*

*(d) A permanent order of injunction do issue to restrain the Plaintiff, his agents, employees from trespassing, occupying, claiming, dealing or interfering with the 4<sup>th</sup> Defendant's quiet possession or in other way howsoever dealing with the 5 acres of L.R No.3589/6 Langat Nairobi.*

*(e) Damages for trespass, costs and interest.*

6. The 1<sup>st</sup> and 2<sup>nd</sup> defendants in answer to the counterclaim by the 3<sup>rd</sup> and 4<sup>th</sup> defendants admitted that there was an agreement entered into on 29<sup>th</sup> April 1979 between the late Jason Atinda Ouko and Raphael Nderitu Mathenge for sale of apportion of 5 acres. The 1<sup>st</sup> and 2<sup>nd</sup> defendants contended that by the time of his death, the late Raphael Nderitu Mathenge had not honoured the terms of the agreement dated 29<sup>th</sup> April 1979 and the supplementary agreement dated 20<sup>th</sup> February 1991 and would therefore not be entitled to the orders sought in the counterclaim. As relates to the purported sale of a portion of one (1) acre to the 3<sup>rd</sup> defendant the 1<sup>st</sup> and 2<sup>nd</sup> defendants averred that the sale if any, was made in clear breach of the agreement between the late Jason Atinda Ouko and Raphael Nderitu Mathenge which expressly forbade any sale and /or transfer to any third party.

7. The suit was heard before me at Nairobi on diverse dates during service week(s). The plaintiff had prepared a trial bundle and all documents in the bundle were admitted in evidence by all the parties by consent. The plaintiff testified and called two witnesses. The 4<sup>th</sup> defendant testified as DW1, the 3<sup>rd</sup> defendant as DW2. The 2<sup>nd</sup> defendant testified as DW3 on behalf of himself and the 1<sup>st</sup> defendant. The 5<sup>th</sup> Defendant Registrar of Titles, did not participate in these proceedings. The parties following the conclusion of the trial filed their respective written submissions.

#### **The Plaintiffs Case:**

8. The plaintiff, Geoffrey Njeru Reuben Mukatha, testified as PW1. He relied on his recorded witness statement dated 20<sup>th</sup> January 2012 and the documents as listed in the bundle of documents dated 20<sup>th</sup> January 2012. It was his evidence that he entered into a sale agreement with the late Jason Ouko to purchase a portion of 5 acres out of land parcel L.R 3589/6. The portion was identified as plot 'C' in the proposed subdivision Scheme. The sale agreement dated 28<sup>th</sup> September 1976 was exhibited as Document (1) in the plaintiffs bundle of documents. As per the agreement the total purchase price was Kshs130,000/= and the plaintiff paid a deposit of Kshs26,000/= upon execution of the agreement representing 20% of the purchase price. The balance of Kshs104,000/= was to be paid on completion of the transaction. The plaintiff stated that after waiting for about one year for the title documentation to be ready to enable completion of the transaction without getting anything from the seller's advocates his advocates (the plaintiff's) wrote to the seller the letter dated 26<sup>th</sup> August, 1977 exhibited as document No.3 in the plaintiff's bundle of documents. In the letter the plaintiff's advocate was raising concerns in regard to the delay of the transaction. Inter alia part of the letter stated:-

*" In pursuance of the Agreement for sale and purchase our clients duly paid Shs.26,000/= to House & Estates on 28<sup>th</sup> September 1976 being the 20% deposit of the original purchase price of shs.130,000/=. It was an express condition of the said agreement for sale that completion of the said property transaction would take place within four months from 28<sup>th</sup> September 1976, i.e by the end of January, 1977.*

*We are instructed by our clients that despite repeated requests by telephone calls from Mr. Mukatha to Mr Mario Pala of the House estates there has been no response from either Mr. Jason Ouko or from the said Estate Agent."*

9. The plaintiff's advocates continued to follow up in regard to the completion documents for the transaction and on 18<sup>th</sup> January 1979 wrote to M/s Daly & Figgis Advocates for the Seller as follows:-

**RE: Mr & Mrs G.H.R MUKATHA – PLOT 'C' LR 3589/6**

*We refer to the Agreement of Sale dated 28<sup>th</sup> September,1976 and to your letter of 9<sup>th</sup> September,1977.*

*It is now over two years since the above agreement was made and the necessary deposit paid by our clients; we fail to understand why it is taking such a long time to complete this transaction.*

*In view of the above, unless we receive the necessary Deed plans for the sub-division to be sold to our client on or before 18<sup>th</sup> February,1979, our instructions are to file the necessary court proceedings against your clients jointly and severally for specific performance of the said agreement and also to claim interest at the rate of 15% per annum from 1<sup>st</sup> February, 1977 without further notice whatsoever and at our clients' risk as to the costs and consequences.*

*Yours faithfully*

*B.R. PATEL & CO.*

*C.C. Clients*

10. After some prodding M/s Daly & Figgis Advocates wrote to the plaintiff's Advocates the letter dated 19<sup>th</sup> July, 1979 which was in the following terms:-

*Dear sirs:-*

**L.R NO.3589/6- LANGATA**

*We refer to your letter dated 23<sup>rd</sup> April, 1979.*

*We have at last been able to obtain some instructions from our client who has offered to refund your client his deposit of shs.26,000/= in full.*

*Please let us know urgently whether this is acceptable.*

*Yours faithfully*

*For: DALY & FIGGIS*

*P.J.S HEWETT*

*Cc: Mr. JA Ouko*

11. The plaintiff in his evidence explained that he rejected the offer for refund of the deposit paid to the seller and by his advocates letter dated 3<sup>rd</sup> September 1979 to the seller's Advocates exhibited as documents 7 in the bundle sought confirmation that the seller would effect transfer of plot 'C' to the plaintiff. The said letter intimated that the plaintiff would seek specific performance of the agreement if no confirmation in regard to the transfer was forth coming.

12. The plaintiff further explained that following a change of his advocates his new advocates M/s Vohra & Gitao Advocates continued correspondence with the firm of Kagwe & Co. Advocates who were representing the seller which saw the exchange of various letters dated 2<sup>nd</sup> September 1994, 10<sup>th</sup> October 1994, 4<sup>th</sup> March 1995 and 4<sup>th</sup> November 1995 exhibited from pages 28-31 in the plaintiffs bundle of documents. The said letters all touched on the issue of completion of sale transaction to the plaintiff by the sellers.

13. The plaintiff further testified that the seller's advocates M/s Kagwe & Co Advocates in an effort to resolve the matter regarding the completion of the sale transactions conveyed meetings with the buyers. The letter dated 4<sup>th</sup> November 1995 exhibited at page 31 of the bundle of documents explained why the completion of the transaction was hampered and suggested a meeting to discuss the matter. The letter addressed to the plaintiff was in the following terms :-

*Dear sir,*

**RE: RELEASE OF TITLES- SUB-PLOT NO.12**

**OF L.R NO.3589/6- MR JASON ATINDA OUKO**

*We act for Mr. J.A Ouko, the registered owner of the above-mentioned piece of land which he subdivided in 1976. We have been informed that you are a purchaser of the above mentioned sub-plot. You are aware that you cannot obtain title for your sub-plot because some purchasers have placed caveats and Court Orders against the whole piece of land. Our efforts to streamline the subdivision scheme and procure deed plans for all, have been hampered by several drawbacks, but now hinges on your utmost – co-operation .*

*It has therefore been proposed that all the purchasers avail themselves for a meeting in our offices on Saturday, 25<sup>th</sup> November 1995 at 10.30 a.m. Our Offices are situated in WESTLANDS, MAIN SHOPPING CENTRE, WAUMINI HUSE, WESTERN WING, 2<sup>ND</sup> FLOOR. We intend to discuss one option which may assist in concluding this matter which has been outstanding for years.*

*Your presence in the meeting will be highly appreciated.*

*Yours faithfully*

*KAGWE & Co.*

*M THANDE (MRS)*

14. The plaintiff affirmed that the meeting called for vide the letter was duly held on 25<sup>th</sup> November 1995 as scheduled and that he attended the meeting with his wife together with other purchasers as indicated in the minutes of the meeting exhibited at pages 35 to 37 in the trial bundle. He stated the 3<sup>rd</sup> and 4<sup>th</sup> defendants did not attend the meeting. He stated at the meeting issues concerning the delay in completion were discussed and specifically minute 6 explained the problem in regard to obtaining approval and the Deed plans. He explained that the seller's advocate vide the letter dated 27<sup>th</sup> June 1996 exhibited at page 38 of the bundle informed them about the death of the seller.

15. The plaintiff further in his evidence stated that he was not aware of the agreement entered into between the seller and Raphael Nderitu Mathenge dated 29<sup>th</sup> April 1979 exhibited at page 96 of the trial bundle. He stated he was never served with any notice rescinding his agreement with the seller. He stated that it was on 24<sup>th</sup> August 1998 that the firm of Ndungu Njoroge & Kwach Advocates wrote to him notifying him that R N Mathenge was in the process of purchasing plot No. 'C' of L.R No. 3589/6 which was the same plot that had been sold to him ( letter at page 39 trial bundle). The letter was in the following terms: -

*Dear sir,*

***PLOT 'C' OF L.R NO.3589/6***

***R N MATHENGE- DECEASED***

*We act for the widow of the late R N Mathenge who at the time of his death was in the process of purchasing the above-mentioned property and had installed water-piping thereon.*

*Our instructions are that towards the end of last year you wrongfully took over possession of the property, cut our client's trees growing thereon and put up an iron-sheet structure thereon and that you have since cultivated on the property and continue doing so.*

*Our client wishes that you stop forthwith this invasion of her property and we accordingly hereby give you notice to vacate the property and remove the said structure within ten days from the date of this letter, failing which our client will take such steps as may be necessary to regain possession of the property.*

*Yours faithfully*

*NDUNGU NJOROGE & KWACH*

*Raphael K Ng'ethe*

*CC: D O Langata Area*

*Chief – Langata Location*

*OCS Langat*

16. The plaintiff testified that he was in possession of plot C as from 1982 when he constructed a mabati structure on the property. The plaintiff's advocates responded to letter of 24<sup>th</sup> August 1998 exhibited at page 40 of the trial bundle where it was explained the plaintiff had purchased the property and that the delay in completion of the transaction was occasioned by the vendor's inability to avail the completion documents. The plaintiff explained that the advocates of the 3<sup>rd</sup> and 4<sup>th</sup> defendants engaged his advocates in correspondence and there was a suggestion that I agree to an apportionment of the plot between ourselves. The plaintiff stated he was opposed to any apportionment of the plot he had purchased with anybody else.

17. The plaintiff further testified that the 3<sup>rd</sup> and 4<sup>th</sup> defendants around 2001 unlawfully entered into occupation of the suit property which prompted the plaintiff's advocates M/s Kamau Kuria & Kiraitu Advocates to write to the seller's advocates on 21<sup>st</sup> March 2001 complaining about the illegal entry onto his plot. He was emphatic that before 2001 there were no structures erected by the 3<sup>rd</sup> and 4<sup>th</sup> defendants on the plot. The plaintiff stated that though he presently resides in Meru, his son Richard Njeru and his workers have been in possession and occupation of the land. He however stated that on 18<sup>th</sup> February 2018 some people forcibly invaded the land with the object of evicting his son and the workers. The group of people numbering about 40 demolished his houses as captured in the photos exhibited in the supplementary bundle and forcibly evicted them.

18. The plaintiff further testified that the 3<sup>rd</sup> defendant first came to the land in 2001 and he started constructing thereon but stopped when the plaintiff reported the matter to the police. The plaintiff stated that in order to protect his interest in the property he lodged a caveat and later instituted the present suit in 2009. He explained that he took sometime from 2001 to file the suit because there were negotiations and he was hoping the matter could be settled. However as the matter was pending hearing, the plaintiff stated that he was forcibly evicted in February 2018 notwithstanding that the Court had in 2009 when the suit was filed ordered the observance and maintenance of the status quo. The plaintiff stated he believed that the 3<sup>rd</sup> and 4<sup>th</sup> defendant had something to do with the invasion of the property in February 2018.

19. The plaintiff in conclusion of his evidence stated that he had always been ready able and willing to pay the balance of the purchase price. He reiterated that position and urged the court to grant him the reliefs sought in the plaint.

20. Under cross examination by Mr. Muchoki advocate for the 1<sup>st</sup> and 2<sup>nd</sup> defendants, the plaintiff insisted the balance of the purchase price was payable against the completion documents being available. The completion documents never got ready and hence the balance did not fall due to be paid. The plaintiff affirmed that following the death of the seller (Ouko) he never approached the administrators to pay the balance or to discuss the matter.

21. Cross examined by Mr. Thuku advocate for the 3<sup>rd</sup> and 4<sup>th</sup> defendants, the plaintiff stated he was a retired Civil servant and presently resided in Meru. He stated he personally never resided on the suit property. He stated his wife passed away in 2001 and that Richard Njeru was his foster son having been a son of his wife's sister whom he brought up. He stated he visited the suit land in 1976 when he was buying and took possession after he paid the deposit pursuant to the sale agreement. The plaintiff stated he placed a caveat over the land in 1980 and took possession under the advice of his advocates in 1984 even though he had not paid the full purchase price.

22. The plaintiff stated that he sued the 3<sup>rd</sup> and 4<sup>th</sup> defendants because they had entered onto his land. He stated he put structures on the land in 1990 comprising three roomed mabati house. He stated his worker, Mutembei had been on the land since about 1994. The plaintiff reiterated that his agreement was never revoked and that he had given the seller intimation that he would sue for specific performance of the agreement of sale.

23. PW2 Richard Njeru Mukatha in his evidence stated he was one of the persons who were evicted from the land in Karen in February 2018. He affirmed his father, the plaintiff had purchased the Karen land and had constructed some temporary houses on the land where the farm hands were residing. He stated his father had put up 2 mabati houses and he (PW2) in 1987/88 put up another mabati house where he lived from 2001 to 2018. He stated lived on the land with one Mutembei.

24. The witness affirmed that he knew the 3<sup>rd</sup> defendant and stated that the 3<sup>rd</sup> defendant came to the suit land in 2003 and started building on a portion of the land but they stopped him after he had done the foundation slab. The witness however said the 3<sup>rd</sup> defendant later built a mabati structure on the land. He said he first saw the 4<sup>th</sup> defendant in February 2018.

25. He stated the 4<sup>th</sup> defendant was claiming ownership of the land. He stated on 5<sup>th</sup> February 2018 a group of persons descended on the land and demolished and damaged their houses. He said they made a report to the police at Hardy police Station but that notwithstanding the 3<sup>rd</sup> and 4<sup>th</sup> defendants later sent a bulldozer to the land which flattened everything on the land.

26. In cross examination the witness stated he was only 4 years in 1976 when the sale agreement was entered into. He admitted he was an adopted son of the plaintiff. He reiterated that he started living on the land on a permanent basis in 2001. He was emphatic that the 3<sup>rd</sup> defendant only came to the land in 2003 when he started building a house. He stated the 3<sup>rd</sup> and 4<sup>th</sup> defendants were not personally present when unknown persons invaded the land and forcibly evicted them.

27. PW3 Mutembei Mboria in his evidence stated he was employed by the plaintiff in 2003 at his land in Langata near Bomas of Kenya. He stated that at the time he was employed there were two (2) other workers on the land, a Mr. Kimathi and a Mr. Kariuki. He stated he was residing in the mabati house which had 3 rooms. He stated he left employment of the plaintiff in 2011. He stated in cross examination that Mr. Wambugu, the 3<sup>rd</sup> defendant found him on the land.

### **The 3<sup>rd</sup> & 4<sup>th</sup> Defendants case**

28. The 4<sup>th</sup> Defendant, Agnes Wachuka Mathenge testified as DW1. She testified that she was the widow of Raphael Nderitu Mathenge who died in April 1991. She was resident in the United Kingdom having migrated there in December 1995. She relied on her witness statement dated 14th June 2012. In her evidence she stated that she took out letters of administration for her late husband's estate in 2014 as per the Grant of letters exhibited in the supplementary bundle of documents dated 7<sup>th</sup> May, 2014. The 4<sup>th</sup> defendant stated that her late husband was a lawyer and before his death was running the firm of RN Mathege & Company Advocates. She stated that her husband in 1979 entered into a sale agreement for the purchase of portion of 5 acres out of land parcel LR 3589/6 (subdivision 'C' as per the scheme) for the consideration of Kshs.260,000/= whereby he paid a deposit of Kshs.114,000/= leaving a balance of Kshs.146,000/= which was payable on completion. The witness stated the sale agreement dated 29<sup>th</sup> April 1979 under clause 4 permitted the taking of possession and that in pursuant thereof she took possession of the land.

29. The witness stated the agreement dated 29<sup>th</sup> April 1979 entered into by her husband and the seller rescinded the plaintiff's earlier agreement entered into with the seller in 1976. The 4<sup>th</sup> defendant stated that her late husband paid the balance of the purchase price as per the terms of the further agreement dated 20<sup>th</sup> February 1991. She stated the further agreement was supplemental to the agreement of 29<sup>th</sup> April 1979 and that under preamble (a) of the further agreement the balance of the purchase price was acknowledged by the seller thus:-

*(a) The balance of purchase price under the said agreement namely Kenya shillings one hundred and forty six thousand (Kshs.146,000/=) has on or before the execution hereof been fully paid and satisfied to the vendor as the vendor doth hereby acknowledge.*

30. The witness explained that her husband died barely after 2 months after he entered into the supplementary agreement on 20<sup>th</sup> February 1991. She further explained that as her husband had a loan with consolidated bank which she had difficulties in paying she decided to sell a portion of one (1) acre of the land purchased by her husband to 3<sup>rd</sup> defendant who was her elder brother. She entered into a sale agreement with her brother dated 5<sup>th</sup> August 1994 where her brother was to pay her Kshs.950,000/= for the one acre portion. The 3<sup>rd</sup> defendant paid a deposit of Kshs.800,000/= on execution of the agreement and the balance of Kshs150,000/= was to be paid on completion. The 4<sup>th</sup> defendant testified that the 3<sup>rd</sup> defendant was to take possession immediately and he in that regard applied for water and electricity to be connected to the property with her consent. The witness further stated she in 2001 authorized her lawyers to write to the 3<sup>rd</sup> defendant authorizing him to construct on the property. The 3<sup>rd</sup> defendant went ahead and built a house on the land in which he resides.

31. The witness stated the 3<sup>rd</sup> defendant has 2 houses on the land and that as at the time he constructed the houses there were no other structures on the land. She denied she had anything to do with the eviction of PW2 from the land and stated she was not aware where the photographs exhibited by the plaintiff were taken.

32. Cross examined by Mrs Ligunya advocate for the plaintiff, the 4<sup>th</sup> defendant (DW1) conceded that she obtained the letters of administration to her husband's estate in 2014 and that in 1994 she did not have any letters of administration to her late husband's estate. She stated as at 179 her husband was acting as Mr. Ouko's (deceased) lawyer. She stated she did not know why it took so long to complete the sale agreement entered into by her husband in 1979. She maintained as the wife of RN Mathenge who had entered the agreement with the vendor she had ostensible authority to act on behalf of her husband even though she had not taken out letters of administration for his estate.

33. The witness further cross-examined by Mr. Muchoki for the 1<sup>st</sup> and 2<sup>nd</sup> defendants stated that she had never resided on the suit property as she was living in Runda before she migrated to the UK in 1995. She admitted she was not present when her husband and Ouko entered into the agreement of 29<sup>th</sup> April 1979 and 20<sup>th</sup> February 1991 though she came to learn of their contents. She maintained the agreement of 20<sup>th</sup> February 1991 acknowledged payment of the balance of the purchase price. She admitted she never consulted Ouko's family before selling the one acre to the 3<sup>rd</sup> defendant.

34. Joseph Charles Wambugu the 3<sup>rd</sup> defendant testified as DW2 and it was his evidence that he purchased a portion of one (1) acre from the 4<sup>th</sup> defendant out of the suit land for Ksh950,000/= in 1994. He stated he paid the full purchase price of Kshs.950,000 and took immediate possession as provided in the agreement and has remained in possession since 1994. He has constructed a 2 bedroomed house on the property where he said he lives with his sons and grandson.

35. He stated he intended to construct a permanent house and as evidence he referred the court to the drawing plans, application for approval and payment receipt attached to the 3<sup>rd</sup> and 4<sup>th</sup> defendants supplementary bundle of documents. He stated the plot he bought was connected to water and electricity in 1994 after he paid all the appropriate charges and that he continued to pay bills for the utilities.

36. The witness stated he had fenced his plot with barbed wires on posts while the entire 5 acres portion has a keapple fence round with a lockable gate. He said he looked after the entire portion of 5 acres within which his one (1) acre is incorporated. He said he had authority from the 4<sup>th</sup> defendant to look after the land. He stated he did not know the plaintiff and the 2 witnesses who testified on his behalf. He maintained that for the period he had resided on the land there had been no other person who had resided on the land. He denied the plaintiff and the 2 witnesses who testified as PW2 and PW3 had ever been on the land and/or farmed thereon. He stated the plaintiff had no houses and/or any structures on the land that he could have damaged or destroyed. He denied he was a trespasser on the suit land and insisted he was in occupation as of right.

37. In cross examination the 3<sup>rd</sup> defendant maintained there had been no demolitions on the suit land in February 2018. He stated the one (1) acre he bought was part of the 5 acres portion. He stated he bought the one (1) acre from the 4<sup>th</sup> defendant in 1994 as the owner. He stated he was not aware whether the agreement between Mr. Ouko and R N Mathenge had been completed and/or whether the 4<sup>th</sup> defendant had obtained letter of administration to her husband's estate. The witness maintained he took possession of the land in 1994. He however stated he was not able to confirm when he built his house on the land in the face of correspondences urging him to take occupation and build on the plot running from 1998 to 2001 from the 4<sup>th</sup> defendants advocates.

#### **The 1<sup>st</sup> and 2<sup>nd</sup> defendant's case**

38. Aaron Tafari Ouko the 2<sup>nd</sup> defendant testified as DW3 on behalf of himself and the 1<sup>st</sup> defendant. He adopted his witness statement as part of his evidence. He affirmed that the plaintiff and his wife entered into the sale agreement dated 29<sup>th</sup> September 1976 with their deceased father. The witness however stated the plaintiff failed to pay the balance of the purchase price which prompted their later father to rescind the agreement. He maintained the plaintiff did not pay the balance of the purchase price of the purchase price and in terms of the agreement he was not entitled to possession until completion.

39. The witness stated that the agreement with Raphael Nderitu Mathenge ( 4<sup>th</sup> defendant's husband ) entered into on 29<sup>th</sup> April 1979 was after the agreement with the plaintiff had been rescinded. As relates to the agreement with R N Mathenge the witness stated the consideration was Kshs.260,000/= and only a deposit of Kshs.114,000/= was paid leaving balance of Kshs.146,000/=. The witness further stated the supplemental agreement entered into between their father and R N Mathenge in February 1991 was intended to cater for the balance of the purchase price whereby R N Mathenge was to provide legal services to their father in lieu of payment of the balance. He however stated Mr. Mathenge died shortly thereafter without rendering the anticipated legal services.

40. The witness stated after the death of Mr. R N Mathenge their father engaged another firm of advocates M/s Kagwe & Company advocates to represent him. He stated the family of R N Mathenge never paid the balance of the purchase price after his death. The witness stated the Ouko family was not involved in the agreement between the 3<sup>rd</sup> and 4<sup>th</sup> defendants. In conclusion he asserted that neither the plaintiff nor Mr. Mathenge and/or his family honoured their agreements to entitle any of them to the orders they seek against the estate of Jason Ouko in the plaint and the counterclaim respectively.

41. The witness under cross examination by Mrs Ligunya advocate for the plaintiff affirmed that he was appointed as administrator of the estate in 2006. Previously he stated one Scott Ongosi ( now deceased) was the administrator. He stated that it was his understanding that the sale agreement with the plaintiff had been rescinded before their father and Raphael Nderitu Mathenge entered into the agreement dated 29<sup>th</sup> April 1979 .

42. He admitted there was no letter exhibited that expressly rescinded the agreement with the plaintiff. He further stated that he had no knowledge whether the deposit paid by the plaintiff was ever refunded. The witness further affirmed that having regard to the correspondences exchanged, the plaintiff was actively involved with the Ouko family in the pursuit of the completion documents.

43. The witness further cross examined by Mr. Thuku advocate for the 3<sup>rd</sup> and 4<sup>th</sup> defendants reiterated that Raphael Nderitu Mathenge had not paid the balance of the purchase. He stated that although the agreement of February 1991 under clause (a) acknowledged payment of the balance, clause (b) of the same agreement was in conflict as it was obliging Mr. Mathenge to continue rendering legal services which he did not. It was his view that Mr. Mathenge was to deliver future services which he did not. The witness stated that they never at any time made any demand either to the plaintiff or the 3<sup>rd</sup> & 4<sup>th</sup> defendants to honour their obligations under their respective agreements.

44. Following the close of the trial the court directed the parties to file their written submissions. All the parties complied and filed their submissions. Upon a review of the pleadings, the evidence adduced by the parties and consideration of the submissions filed by the parties the following issues arise for determination.

**(i) Whether the sale agreement dated 28th September 1976 entered into between the plaintiff and Jason Ouko was valid, and if so, whether the sale was rescinded by the vendor?**

**(ii) Whether the agreement dated 29<sup>th</sup> April 1979 entered into between one Raphael Nderitu Mathenge and Jason Ouko Atinda was valid and enforceable?**

**(iii) Who between the plaintiff and the 3<sup>rd</sup> and 4<sup>th</sup> defendants was in possession of the suit property?**

**(iv) Whether the plaintiff's suit against the defendant is statute barred under the provisions of the Limitation of Actions Act?**

**(v) Whether the remedy of specific performance of the agreement of sale dated 28<sup>th</sup> September 1976 is available to the plaintiff?**

**(vi) Whether the estate of Raphael Nderitu Mathenge are entitled to be declared as beneficial owners of the portions of 5 acres subdivision 'C' of LR No.3589/6 Langata.**

**(vii) Who should bear the costs of the suit?**

45. On the evidence adduced there is no contestation that there was a sale agreement entered into on 28<sup>th</sup> September 1976 between Mr. G.N.R. Mukatha and Mrs. E.I Mukatha on the one part and Mr. Jason Ouko ( deceased) on the other part . The agreement was for a portion of 5 acres marked 'C' on subdivision scheme of LR No.3589/6. A sketch of the subdivision scheme was attached to the agreement and hence the property the subject of the sale was appropriately identified. The purchase price was Kshs130,000/= out of which a deposit of Kshs.26,000/= representing 20% of the total purchase price was paid by the purchaser leaving a balance of Kshs.104,000/= which was to be paid on completion. The 1<sup>st</sup> and 2<sup>nd</sup> defendants who are the administrators of the estate of Jason Ouko did not deny there was the agreement between their late father and the plaintiff and his wife. The 1<sup>st</sup> and 2<sup>nd</sup> defendants' position was that though there was an agreement, the plaintiff failed to honour the terms thereof in that the balance of the purchase price was not paid . The 1<sup>st</sup> and 2<sup>nd</sup> defendant contended that the plaintiff's sale agreement was rescinded by their late father after the plaintiff failed to perform his part.

46. Upon examination and review of the sale agreement dated 28<sup>th</sup> September 1976 I am satisfied that it met the threshold of what amounts to a valid agreement as envisaged under section 3(3) of the Law of Contract Act, Cap 21 Laws of Kenya which before the 2003 amendment was in the following terms:-

*3(3) No suit shall be brought upon a contract for disposition of an interest in land unless the agreement upon which the suit is founded, or some memorandum or note thereof, is in writing and is signed by the party to be charged or by some person authorized by him to sign it.*

47. In the instant matter the land the subject of the sale was aptly described, the consideration was set out amongst other terms. The agreement was signed by the purchasers and was signed by the vendor and/or by his duly authorized agents. The agreement was thus a valid and enforceable agreement.

48. Having determined that the plaintiff and the 1<sup>st</sup> and 2<sup>nd</sup> defendants deceased father had entered into a valid and enforceable sale agreement, I now turn to consider whether the agreement was rescinded and/or cancelled as alleged by the 1<sup>st</sup> and 2<sup>nd</sup> defendants. The plaintiff contended that the agreement for sale was never at any time rescinded and that he was never given any notice of any intention to rescind the agreement. The plaintiff in his evidence asserted there was delay in the completion of the agreement but the delay was attributable to the vendor's inability to avail the documents necessary to complete the transaction. The plaintiff maintained there were active efforts being made by the vendor with the active participation of the purchasers to find a solution but the vendor died before such a solution was found.

49. The 1<sup>st</sup> and 2<sup>nd</sup> defendants together with the 3<sup>rd</sup> and 4<sup>th</sup> defendants pointed to the sale agreement dated 29<sup>th</sup> April 1979 between one Raphael Nderitu Mathenge (deceased husband to 4<sup>th</sup> defendant) and Jason Atinda Ouko (deceased) father of the 1<sup>st</sup> and 2<sup>nd</sup> defendants to buttress their contention that the agreement with the plaintiff was rescinded. The plaintiff however countered that he was not aware that the vendor had entered into any agreement with the 4<sup>th</sup> defendant's deceased husband and was not made party to the agreement. To the contrary, the plaintiff stated that the vendor Jason Ouko, conducted himself in a manner that suggested he recognized the agreement with the plaintiff was alive as exemplified in the various correspondences exchanged with the lawyers representing the vendor and in the attempts made through meetings conveyed at the instant of the vendor to seek a solution to the delays that had prevented the sale transactions(s) with the various purchasers from being completed.

50. Rescission is the act where a contract is cancelled, annulled, or abrogated by the parties, or one of them. Rescission may be consensual or by way of notice usually to the defaulting party by the other party to the contract. Halsbury's Laws of England 4<sup>th</sup> Edition volume 42 at paragraph 242 provides as follows as relates to rescission:

*“ If the contract contains a condition entailing the vendor to rescind on the happening of certain events and those vents happen, the vendor may rescind. In the absence of such a condition the vendor may rescind only if the purchaser's conduct is such as to amount to a repudiation of the contract and the parties can be restored to their former positions..”*

51. The plaintiff has submitted that he did not consent to any rescission of the agreement and that there was no formal notice of any alleged rescission given to him by the vendor. The plaintiff contended the purported rescission exercised by the vendor by entering a separate agreement between himself (the vendor) and a third party was ineffectual as the plaintiff was not privy or party to that contract. The plaintiff further submitted that in order for rescission to take effect, notice of rescission ought to have been formally given to him and placed reliance on sections 39 and 41 of the Land Act, 2012. Section 39 of the Act is in the following terms:-

39. *If, under the contract for a sale of land, the purchaser has entered into possession of the land, the vendor may exercise, his or her contractual right to rescind the contract by reason of a breach of the contract by the purchaser by:-*

*(a) resuming possession of the land peaceably; or*

*(b) obtaining an order for possession of the land from the court in accordance with the provisions of section 41.*

52. In the Court of Appeal case of **Njamunyu –vs-Nyaga (1983) KLR 282** cited with approval in the case of **Elijah Kipkorir Barmalel & another –vs- John Kiplagat Chemweno & 3 others (2010) eKLR** the court considered when rescission may be applicable and inter alia stated :-

*“7. Where completion does not take place as intended by the parties ( in this case after the consent was obtained), the option open to the concerned party is to give notice to the party in default therefore making time of the essence . Where there is no express agreement or notice making time of the essence the court will require precise compliance with stipulations as to time whenever the circumstances of the case allow .*

*8. Before an agreement such as this can be rescinded the party in default should be notified of the default and given reasonable time within which to rectify it. Once notice of default has been given failure to rectify will result in rescission of the contract”.*

53. In the case of **Elijah Kipkorir Barmalel & Another – Vs- John Kiplagat Chemireno & 3 others ( supra)** the court of Appeal on the issue of rescission stated :-

*“25. We have carefully considered the evidence on record, the findings of the superior court and the submissions of counsel and we think the superior court cannot be faulted in its conclusions on the issue of rescission.*

*As stated by this court on the Njamunyu case, although the parties to a sale agreement upon which consent has been obtained may choose to terminate it, in the absence of an express agreement on time being of the essence, notice must be served on the defaulting party before any assertion can be made that time was of the essence .In this case there was an express provision ( clause 8(2) as to when time would become of the essence but the clause was never invoked by the vendor . It was not the vendor's case in the superior court either in his pleadings or evidence , that the refusal to accept the balance of the purchase price made time of essence. There was no counterclaim for rescission either. His case was rather that he had served notice in 1980 which was not complied with and therefore he was not obliged to accept the balance of the purchase price. As correctly held by*

*the superior court the notice was a nullity and therefore of no consequence to the agreement between the parties. We would for those reasons agree with Mr. Machiro that there was no valid rescission of the sale agreement.*

54. In the instant suit there was no evidence adduced that the plaintiff was in fact served with a notice to rescind the agreement for any reason. In the letter dated 19<sup>th</sup> July 1979 exhibited at page 25 of the trial bundle the vendor through his advocates made an offer to refund the deposit of Kshs26,000/= which the plaintiff did not accept. The letter from the vendor's advocates dated 10<sup>th</sup> October 1994, 2<sup>nd</sup> September 1994, 4<sup>th</sup> March 1995 and 4<sup>th</sup> November 1995 exhibited at page 28, 29, 30 and 31 of trial bundle respectively illustrate that the vendor was treating the agreement with the plaintiff as being alive. The correspondence clearly shows the vendor was intent on having the sale transaction completed. The letter of 4<sup>th</sup> November 1995 indeed was inviting the plaintiff to a meeting at which issues that were occasioning the delay in completion were to be discussed. On the evaluation of the evidence it is my finding that the agreement the plaintiff had entered into with Jason Ouko (deceased) was not lawfully rescinded by the vendor.

#### **Validity of the sale agreement dated 29<sup>th</sup> April 1979.**

55. The plaintiff has contended that the agreement entered into by the vendor, Jason Atinda Okuko (deceased) on one part and Raphael Nderitu Mathenge (also deceased) husband to the 4<sup>th</sup> defendant on 29<sup>th</sup> April 1979 was invalid as his (plaintiff's) agreement over the same parcel of land in respect of which the agreement related to was still valid and in force. The 4<sup>th</sup> defendant took the position that the plaintiff's agreement had been rescinded which paved the way for her husband to enter into the agreement. The 4<sup>th</sup> defendant placed reliance on the agreement of 29<sup>th</sup> April 1979 where under recital (c) and (d) the agreement provided thus :-

*(c) The vendor had earlier contracted to sell the plot to Mr. & Mrs Mukatha but has now revoked and rescinded the said agreement.*

*(d) The vendor may be liable to any amount of special and general damages as a consequence of revoking and rescinding the contract aforesaid.*

56. As discussed above there was no notification of rescission of the sale agreement to the plaintiff and therefore the agreement had not been revoked and/or rescinded as stated in the agreement of 29<sup>th</sup> April 1979. As pointed out the conduct of the parties (Jason Ouko and the plaintiff) as illustrated by the correspondences referred to at pages 28-31 of the trial bundle indicated the parties acknowledged the existence of the agreement and were seeking ways and means of having the same completed. It is not lost to the court that Raphael Nderitu Mathenge (Deceased) was himself a lawyer and while in his agreement with the vendor he acknowledged the earlier agreement the plaintiff had entered into with the vendor, no evidence was adduced to support the revocation and/or rescission of the plaintiff's agreement. Having held that the plaintiff's agreement with the vendor had not been lawfully rescinded, it follows that the vendor could not validly have entered into an agreement of sale relating to the same parcel of Land that was the subject of the earlier agreement. The said Raphael Nderitu Mathenge (deceased) had notice of the agreement the plaintiff had with the vendor and he either failed to do appropriate due diligence to ascertain the status of the agreement or did not care. Had he done due diligence he would have discovered the agreement was still in force. He did not and the result was that he entered into an agreement that was invalid as there was in existence a valid agreement over the same subject property. The agreement dated 29<sup>th</sup> April 1979 was null and void *ab initio*. If the agreement of 29<sup>th</sup> April 1979 was null and void as I have found, it follows that the supplementary agreement entered into in February 1991 between Jason Atinda Ouko and Raphael Nderitu Mathenge equally could not be valid.

57. The 3<sup>rd</sup> defendant in turn claimed he purchased a portion of one (1) acre from the 4<sup>th</sup> defendant, the widow of Raphael Nderitu Mathenge. The 4<sup>th</sup> defendant claimed she was acting as administrator of her late husband's estate. The plaintiff has submitted the 4<sup>th</sup> defendant lacked any capacity to represent her deceased husband as she had not taken out letters of administration in 1994 when the agreement with the 3<sup>rd</sup> defendant was entered into. I agree with the plaintiff's submission that indeed the 4<sup>th</sup> defendant had no capacity to enter into the sale agreement with the 3<sup>rd</sup> defendant. She lacked any locus to represent the estate of Raphael Nderitu Mathenge. Thus, even if the late Raphael Nderitu Mathenge had entered into valid sale agreement with the vendor, after his death, the 4<sup>th</sup> defendant could not enforce that agreement and/or deal with the property the subject of agreement without obtaining a grant of letters of administration to the deceased estate.

58. Section 82 of the Law of Succession Act, Cap 160 Laws of Kenya makes it clear that it is only a duly appointed personal legal representative of a deceased estate has power and/or authority to represent the estate of a deceased person and/or deal with the assets of such estate. Section 82(a) and (b) of the Law of Succession Act provides thus:-

*82. Personal representative shall subject only to any limitation imposed by their grant, have the following*

*powers:-*

*(a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative;*

*(b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best:*

*Provided that—*

*(i) any purchase by them of any such assets shall be voidable at the instance of any other person interested in the asset so purchased; and*

(ii) no immovable property shall be sold before confirmation of the grant;

59. Section 80 (2) of the Act is clear that a grant of letters of administration takes effect only from the date of such grant. In the instant matter the 4<sup>th</sup> defendant obtained a grant of letters of administration to her late husband's estate in 2014 and therefore could not have had any authority to deal with the assets of the deceased estate in 1994 when she purported to enter into an agreement for sale of a portion of one(1) acre out of the suit premises. The agreement was illegal and could not pass any proprietary interest.

#### **Possession of the Suit Property**

60. The plaintiff on one part and the 3<sup>rd</sup> and 4<sup>th</sup> defendants on the other part have each claimed to have been in occupation of the suit property to the exclusion of the other. The plaintiff has claimed to have been in occupation of the suit premises from 1976 to 2018, when he claimed he was forcibly evicted by persons he believed were agents of the 3<sup>rd</sup> and 4<sup>th</sup> defendants. The 3<sup>rd</sup> and 4<sup>th</sup> defendants for their part claimed to have exclusively occupied the suit land from 1979 as per the 4<sup>th</sup> defendant. It was their evidence that the plaintiff never occupied the suit property at any time at all.

61. On the evidence adduced by the parties it is apparent that the plaintiff had occupied and taken possession of the suit land as is evidenced by the various correspondences exchanged between the plaintiff's advocates, the vendor's advocates and the 4<sup>th</sup> defendant's advocates between 1994 and 2001 exhibited in the trial bundle. The evidence points to the plaintiff having been in possession except that in 2001 there was intrusion by the 3<sup>rd</sup> defendant who occupied a portion of the land (perhaps limited to the portion of one acre) that he stated he bought from the 4<sup>th</sup> defendant. The 3<sup>rd</sup> defendant constructed some structures on this portion which stand to date. The plaintiff as per the evidence protested the invasion by the 3<sup>rd</sup> defendant but it appears the situation remained with the 3<sup>rd</sup> defendant occupying a small portion of the land and the plaintiff the rest of the land until February 2018 when the plaintiff's agents were forcibly evicted and their structures on the land demolished. There was no clear evidence as to who carried out the demolitions though the plaintiff pointed fingers at the 3<sup>rd</sup> and 4<sup>th</sup> defendants. My view is there was no proof that the 3<sup>rd</sup> and 4<sup>th</sup> defendants were responsible for the eviction and demolitions. However on the issue of occupation and possession it is my determination that the plaintiff was in occupation and possession of the land from 1976 to 2018 save that the 3<sup>rd</sup> defendant from 2001 occupied a small portion of the land where he (3<sup>rd</sup> defendant) built his structures. The 4<sup>th</sup> defendant did not personally occupy and/or possess the suit land and/or any portion of the same.

#### **Whether the suit is statute barred by limitation**

62. The 1<sup>st</sup> and 2<sup>nd</sup> defendants by their defence pleaded that the plaintiff's suit against them was statute barred by reason of limitation. In their submissions they have contended both the plaintiff's suit and the 3<sup>rd</sup> and 4<sup>th</sup> defendants counterclaim were statute barred under the provisions of section 4 (1) (a) and section 7 of the Limitation of Actions Act, Cap 22 of the Laws of Kenya. The Court acknowledges that the issue of limitation goes to the jurisdiction of the court to entertain the action and that it can be raised at any point including at the submissions stage. The rationale is that the issue being one touching on the jurisdiction of the court the court should, at whatever stage of the proceedings when the issues are taken consider and determine it. If the court lacks jurisdiction whatever decision it makes is futile and is liable to be voided. A decision made by a court without jurisdiction is null and void and of no legal effect.

63. It is the 1<sup>st</sup> and 2<sup>nd</sup> defendants submission that the sale agreements relied upon by the plaintiff and the 3<sup>rd</sup> and 4<sup>th</sup> defendants were entered into well over six years before the institution of the suit and therefore could not be enforced under the provisions of section 4 (1) (a) of the Limitation of Actions Act. The 1<sup>st</sup> and 2<sup>nd</sup> defendants contend the causes of action giving rise to the suit arose well over six years before the suit was instituted and consequently the suit was brought outside the period of limitation and no leave to bring the action out of time was obtained.

Section 4 (1) (a) of the Limitation of Actions Act provides as follows: -

*4 (1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued.*

*(a) Action founded on contract .*

64. In the case of **Gathoni -Vs - Kenya Co-operative Creameries Ltd (1982) KLR 104** Potter JA stated the rationale of the law of limitation thus :-

*“ The law of limitation of actions is intended to protect defendants against unreasonable delay in bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest”*

65. In the case of **Joas components' Co Ltd -vs- The County Government of Homa Bay (2017) eKLR** cited by the 1<sup>st</sup> and 2<sup>nd</sup> defendants in support of their submission Omondi, J in considering the application of Section 4(1) (a) of the Limitation of Actions Act, cited with approval the case of **Richard Toroitich -vs- mike K Lelmet & 3 others(2014) eKLR** where the court made reference to the case of **Director Ltd -vs- Samani (1995-1998) 1EA** where the court stated as follows: -

*No one shall have the right or power to bring an action after the end of six years from the date on which a cause of action accrued on the action founded on contract. The corollary to this is that no court may or shall have the right or power to entertain what cannot be done namely an action that is based on contract six years after the cause of action arose or any application to extend such time for bringing of the action based on contract”*

66. In the case of **Rawal -vs- Rawal (1990) KLR 275** the court stated thus:-

*“ the object of any limitation enactment is to prevent a plaintiff from prosecuting stale claims on the one hand, and on the other hand protect a defendant after he has lost his evidence for his defence from being disturbed after a long lapse of time. It is not to extinguish claims”*

67. The net effect of the statute of limitation is that it bars the bringing of various causes of action after the expiry of particular periods of time. The fact that a cause of action may be barred from being brought by reason of expiry of the period within which it could have been brought does not mean the cause of action is extinguished. It is only that such cause of action cannot be enforced by way of litigation.

68. In the present matter the plaintiff entered into a sale agreement on 28<sup>th</sup> September 1976 where he paid a deposit of Kshs26,000/= while the balance of Kshs.104,000/= was to be deposited with vendor's advocates before the completion date. The completion date for the transaction was to be within four months of the date of execution of the agreement (on or before the end of January 1977) as per the plaintiff's advocates letter to the vendor dated 26<sup>th</sup> August 1977 exhibited at page 19 of the trial bundle. The exhibited sale agreement paragraph 7 providing for completion is not legible but it was not disputed completion was to be within four months of execution of the agreement.

69. It is common ground that the agreement was not completed and neither did the plaintiff pay the balance of the purchase price as provided. In the letter of 26<sup>th</sup> August 1977 the plaintiff was concerned about the delay in the completion of the agreement which prompted him to give the vendor notice of 14 days to make available the completion documents failing which he threatened to sue for specific performance among other remedies.

70. The plaintiff's advocate further letter of 18<sup>th</sup> January 1979 to the vendor's advocates acknowledged default had occurred on the part of the vendor for failing to avail the completion documents. The plaintiff again intimated he would institute an action in court for specific performance and other remedies against the vendor. The vendor vide the letter dated 19<sup>th</sup> July 1979 offered to refund the deposit of Kshs.26,000/= paid by the plaintiff in full. This was an intimation by the vendor that he did not intend to honour the terms of the agreement. The plaintiff's advocates responded to the vendor's advocates letter on 3<sup>rd</sup> September 1979 and sought confirmation that the vendor would transfer the plot within 7 days failing which a suit for specific performance of the agreement and for damages would be instituted.

71. After the plaintiff's advocates letter of 3<sup>rd</sup> September 1979 there was a lull as the next activity was from 1994 when the firm of Kagwe & Company advocates came on record for the Vendor. It does appear the firm of Kagwe and Company advocates was dealing with all purchases generally and not specifically with the contract of sale between the plaintiff and the vendor as is evident from the firms letter dated 2<sup>nd</sup> September 1994 addressed to the plaintiff.

72. In my view having regard to the evidence, the plaintiff's cause of action on the sale agreement firstly arose when the contract ought to have been completed by 28<sup>th</sup> January 1977 and it was not. Further when the Vendor offered to make a refund of the deposit paid on 26<sup>th</sup> July 1979, that was an indication he did not intend to proceed with the transaction. This would constitute a fresh cause of action within the agreement for sale. In both instances the plaintiff's advocates acknowledged a cause of action had arisen and properly gave notice of intention to sue.

73. The plaintiff did not initiate any action within six years within either of the causes of actions. The present suit was filed on 16<sup>th</sup> January 2009 well over 28 years after the cause of action accrued.

74. The plaintiff on the other hand in 1998 discovered the plot he bought had been sold to someone else and according to him the 3<sup>rd</sup> defendant forcibly invaded the land in 2001. Even assuming these acts constituted fresh causes of action predicated on the sale agreements, still the institution of the suit would clearly be outside the limitation period of six years. In the premises it is my determination that the plaintiff's suit against the defendants is statute barred on account of the Limitation of Actions Act pursuant to section 4 (1) (a).

#### **The 3<sup>rd</sup> and 4<sup>th</sup> defendants counterclaim.**

75. The 3<sup>rd</sup> and 4<sup>th</sup> defendants counter claim was predicated on the sale agreements made on 29<sup>th</sup> April 1979, 20<sup>th</sup> February 1991 and 5<sup>th</sup> August 1994. By the agreement dated 29<sup>th</sup> April 1979 entered into between the deceased 4<sup>th</sup> defendant's husband and Mr. Jason Atinda Ouko, the buyer was to pay the sum of Kshs.260,000/= as the consideration and paid a deposit of Kshs114,000/= leaving a balance of Kshs.146,000/= which was to be paid on the date of completion. For unexplained reasons the transaction was not completed and neither was the balance of the purchase price paid until the parties entered into a supplemental agreement dated 20<sup>th</sup> February 1991. The latter agreement made provisions respecting the payment of the balance. While the preambular part (a) of the agreement of 20<sup>th</sup> February, 1991 indicated the balance of Kshs146,000/= had been paid in full, the principle part of the agreement and a letter issued on the same date by the 4<sup>th</sup> defendant's husband who drafted the agreement gave the impression that the balance of Kshs146,000/= was to be defrayed from legal services the late Mr. R N Mathenge was to render to the vendor, Jason Atinda Ouko.

the preambular part (a) of the agreement provided as follows: -

*(a) The balance of purchase price under the said agreement namely Kenya shillings one hundred forty – six thousand( Kshs.146,000/= has on or before the execution hereof been fully paid and satisfied to the vendor as the vendor doth hereby acknowledge.*

76. The body of the agreement stated as follows :-

*NOW THIS AGREEMENT WITNESSETH that in consideration of the premises the vendor acknowledges as herein before stated*

*and undertakes to proceed with the transfer of the said plot to the purchaser in accordance either the terms of the said agreement AND the purchaser for himself and his legal firm hereby agrees to do and continue to render professional services to the vendor generally and attend to the several matters relating to the subdivision of the vendors land LR No.3589/6 Langata until completion and the purchaser will henceforth charge to the vendor only one half the fees chargeable under the appropriate parts of the advocates Remunerations order .*

77. In the letter by R N Mathenge & co. Advocates on the same day of the supplemental agreement paragraphs 1 and 2 stated as follows:-

*Following our meeting today and with reference to our agreement of the same date, I confirm that I will not raise any fees against you for the transfer of all the plots on LR No.3589/6 Langata.*

*You may now treat our agreement as amended in so far as it states that half the scale fees chargeable are for your account .*

78. Clearly having regard to the preambular provision and the body of the agreement there is evident ambiguity and/or contradiction. On one hand the agreement acknowledges full payment of the balance in kind by way of provision of legal services while on the other part the advocate states he would forego half of the legal fees. The vendor must have raised issues and the advocates vide a letter of the same date clarified he would not charge the vendor any fees for the subdivision and transfers that would arise in regard to LR No.3589/6. Those fees and charges were for future legal services and it is against the delivery of those services the balance of Kshs146,000/= was to be deemed paid. I consider this an appropriate case where the “*contra proferentem*” rule would be held to be applicable such that the ambiguity in the contract is interpreted against the party who drafted the contract. See the case of ***Ian Edwards –vs- bytes Technology Group Kenya Ltd (2018) eKLR*** and ***United Millers Ltd-vs- Nairobi Java house Ltd (2019) eKLR***

79. Mr R.N Mathenge died barely 2 months after entering into the sale agreement dated 20<sup>th</sup> February 1991 on 12<sup>th</sup> April 1991 and after his death another law firm was engaged by Jason Atinda Ouko to deal with matters relating to LR No.3589/6. In the premises the consideration Mr. R N Mathenge was to offer for the payment of the balance of Kshs.146,000/= failed to crystallize and it is my determination that there was no proof that the balance of the purchase price was paid by Mr. R N Mathenge before his death or by his estate. The evidence adduced does not show that the estate of R N Mathenge engaged with Jason Ouko at all before he himself died on 1996 or later with his estate before the institution of this suit.

80. Be it as it may be, after the death of Mr. R N Mathenge on 12<sup>th</sup> April 1991, his estate did not follow up the performance of the contract and no action was taken to enforce the contract by his personal administrators for six years following his death. It is my view no action would be maintainable against the estate of Jason Ouko by the 3<sup>rd</sup> and 4<sup>th</sup> defendant’s on the basis of the agreements dated 29<sup>th</sup> April 1979 and 20<sup>th</sup> February 1991. The 3<sup>rd</sup> and 4<sup>th</sup> defendants counterclaim dated 21<sup>st</sup> February 2011 and subsequently amended on 2015 was barred by limitation and was not sustainable.

81. Having determined that both the plaintiff’s suit and the 3<sup>rd</sup> and 4<sup>th</sup> defendants counter claim were statute barred on account of the Limitation of Actions Act, Cap 22 Laws of Kenya that should be sufficient to dispose of the entire suit. The court is without the jurisdiction to entertain the suit as jurisdiction is taken away by the statute .However, as the issue of limitation was not taken as a preliminary issue I will consider the merits of the plea for specific performance urged both by the plaintiff and the 3<sup>rd</sup> and 4<sup>th</sup> defendants in their counter claim.

### **Specific performance**

82. Both the plaintiff and the 3<sup>rd</sup> and 4<sup>th</sup> defendants have sought specific performance of the respective contracts in the plaint and the counterclaim respectively. For a party to be entitled to an order of specific performance of a contract, such party must demonstrate and /or prove that they had performed all the terms of the contract either expressly and /or impliedly as at the time of the institution of an action and that the opposite party had no reason not to perform their part of the bargain. Indeed specific performance is an equitable remedy and thus a party approaching the court for such remedy must come to court with clean hands. Gicheru, J.A ( as he then was) in the case of ***Gurden Singh Birdi & Narinder Singh Gatora as Trustees of Ramgharia Institute of Mombasa –vs- Abubaka Madhubuti (1997) eKLR*** in considering in what instances specific performance, may be ordered expressed himself as follows:-

*“ It cannot be gainsaid that the underlying principles in granting the equitable relief of specific performance has always been that under all the obtaining circumstances in the particular case, it is just and equitable so to do with a view to doing more perfect and complete justice. Indeed as is set out in paragraph 487 of volume 44 of Halsbury’s Laws of England Fourth Edition, a plaintiff seeking the equitable remedy of specific performance of contract :-*

*“ must show that he has performed all the terms of the contract which he has undertaken to perform, whether expressly or by implication, and which he ought to have performed at the date of the writ in the action . However this rule applies to terms which are essential and considerable. The court does not bar a claim on the ground that the plaintiff has failed in literal performance, or is in default in some non- essential or important term. Although in such cases it may grant compensation.*

*Where a condition or essential term ought to have been performed by the plaintiff at the date of the writ, the court does not accept his undertaking to perform in lieu of performance, but dismisses the claim”*

83. In the same case Gicheru, JA went on to state as follows”-

*“ when the appellant came to court seeking the relief of specific performance of their agreement they had not performed their one essential part of*

*the agreement . Namely; payment of the balance of the purchase price of the suit property. Indeed, right up to the conclusion of the proceedings in the superior court, they had not done so. In those circumstances no court of equity properly directing its mind to the same would have considered it just and equitable to grant them the equitable relief of specific performance of the agreement with a view to doing more perfect and complete justice”*

84. In the present suit, the agreement dated 28<sup>th</sup> September 1976 which the plaintiff seeks specific performance of provided for a completion date within four months. The plaintiff at the execution of the agreement paid a deposit of Kshs26,000/= and was required to deposit the balance of kshs.104,000/= with the vendor's Advocates M/s Daly & Figgis advocates before the completion date. It is evident that the plaintiff admitted during the trial that he had not paid the balance to date.

85. Payment of the balance of the purchase price in my view was an essential condition of the agreement which the plaintiff ought to have fulfilled before he could approach the court for the equitable remedy of specific performance. Although the plaintiff contended the vendor had not availed the completion documents, and that was the reason he had not paid the balance that was no reason for him not to tender the balance of the purchase price as the agreement provided. The plaintiff could not insist that the vendor performs his obligations yet he had not on his part performed his obligations under the agreement. In those circumstances the remedy of specific performance would not be available to the plaintiff.

86. As regard the 3<sup>rd</sup> and 4<sup>th</sup> defendants, in as much as I held the sale agreement of 29<sup>th</sup> April 1979 to have been void in the face of the Vendor's agreement with the plaintiff, even if the agreement had been valid, the remedy of specific performance would be unavailable to the 3<sup>rd</sup> and 4<sup>th</sup> defendants. I have earlier in this judgment held that the 4<sup>th</sup> defendant's husband had not paid the balance of the purchase price by the time he died on 12<sup>th</sup> April 1991. That was an essential condition of the agreement and without the same having been fulfilled the 4<sup>th</sup> defendant cannot be entitled to an order of specific performance.

87. From the discussion and analysis of the various issues the Court had identified, it is evident that neither the plaintiff nor the 3<sup>rd</sup> and 4<sup>th</sup> defendants is entitled to be declared as the owner of the suit property. The plaintiff has not on a balance of probabilities proved his case and neither have the 3<sup>rd</sup> and 4<sup>th</sup> defendants proved their cases to the required standard. I accordingly order the plaintiffs suit dismissed. The 3<sup>rd</sup> and 4<sup>th</sup> defendants counter claims is equally dismissed.

88. On the question of costs I have taken account of the attendant circumstances in this matter. It is evident the parties have been dilatory in pursuing their rights and all have been guilty of laches. The laxity of the parties must have contributed to the prolonged and convoluted litigation. In the premises and in the exercise of my discretion order that each party bears their own costs of the suit and the counterclaim.

89. Orders accordingly.

**Judgment dated signed and delivered electronically (virtually) at Nakuru this 7<sup>th</sup> day of July 2020.**

**J M MUTUNGI**

**JUDGE**