Kakad v Anne (Suing as legal representative to the Estate of Lucas Oluoch Mumia) (Civil Appeal 174 of 2019) [2025] KECA 1757 (KLR) (24 October 2025) (Judgment)

Neutral citation: [2025] KECA 1757 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 174 OF 2019

P NYAMWEYA, AO MUCHELULE & GV ODUNGA, JJA

OCTOBER 24, 2025

BETWEEN

PRAVINCHANDRA JAMNADAS KAKAD ..... APPELLANT

AND

HABAYAWEZA MAWAZO ANNE (SUING AS LEGAL REPRESENTATIVE TO THE ESTATE OF LUCAS OLUOCH MUMIA) ..... RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Nairobi (J. Kamau J.) dated 18th October 2018 in HCCC No. 582 of 2012)

JUDGMENT

1. The main issue in this appeal, which is a first appeal, is whether the High Court at Nairobi properly evaluated the evidence adduced before it, in reaching the decision that the suit filed therein by Pravinchadra Jamnadas Kakad (the appellant herein) had not been proved and was time barred. The appellant had in the said suit, being HCCC No. 582 of 2012, sought the sum of Kshs 206,926,300/- together with interest and costs from Lucas Oluoch Mumia, who is since deceased and substituted by his legal representative namely Habayaweza Mawazo Anne (hereinafter the respondent"). The appellant's claim was that he was induced and misled by the respondent's misrepresentations and false pretence into releasing the said sum of Kshs 206,926,300/- to the respondent.

2. The different facets of the aforestated issue are elaborated in the appellant's Memorandum of Appeal dated 5th April 2019, in which he raises the following thirteen grounds of appeal:

    1. The Learned Hon. Judge erred in law and fact in failing to consider unchallenged documents filed by the Plaintiff and adopted by the Court as examination in chief.

    2. The Learned Judge erred in law and in fact in finding disparities between the amounts claimed by the Plaintiff against the amounts advances to the Defendant despite clear corresponding account statement filed by the Plaintiff an adopted by the Court

3. The Learned Judge erred in Law and in fact by finding that the full amount as claimed by the Plaintiff was not proved but still failing to give judgment in favour of the Plaintiff for the amount she found proved

4. The Learned Judge erred in law and in fact in denying the Plaintiff and opportunity to explain his bundle of documents stating that there was no need as the same stood unchallenged but finding that the same bundle of documents was unexplained.

5. The Learned Judge misdirected herself in finding that there existed an agreement between the Plaintiff and the Defendant

6. The Learned Judge erred in law and in fact in assuming the Defendant's position in an undefended suit

7. The Learned Judge erred in law and in fact in finding that the Plaintiff's claim was filed out of time despite lack of any ground or any such claim even on the defence filed

8. The Learned Judge erred in law and in fact in dismissing an unchallenged suit despite prove and evidence of service on both the Defendant and his advocates on record.

9. The Learned Judge erred in law and in fact by requiring the attendance of a separate witness to corroborate the Plaintiff's

bank statement despite the same having been produced by the Plaintiff.

10. The Learned Judge failed to consider cheques issues by the Defendants to the Plaintiffs as an acknowledgment of the Defendant's indebtness to the Plaintiff.

11. The Learned Judge erred in law and in fact in failing to take into consideration the credibility of a long-standing advocate of the High Court of Kenya.

12. The Learned Judge erred in law and in fact in failing to take into account the Defendant's criminal history in various similar matters as filed but the Plaintiff in his documents

13. The Learned Judge erred in law and in fact in dismissing the

Plaintiff's claim.

3. A brief background to the appeal is as follows. The appellant claimed the respondent sourced the said sum of money from him in 2004 for business activities, and on the representations that: he was owed the sum of Two Hundred and Ten Million Kenya Shilling (Kshs 210,000,000/-) by the Central Bank of Kenya (CBK), which he would utilise to repay the sum; he would obtain and forward the requisite bankers' cheque from CBK that would replace the said sums; and that he was a businessman and a civil servant with unimpeachable credentials. Further, that these representations were made orally and contained in various cheques drawn from various accounts including in the CBK. However, that the representations turned out to be untrue and fraudulent, as there was no such sum due and owing to the respondent from CBK, the cheques issued by the respondent were worthless, and the respondent was not an unimpeachable businessman or civil servant . The appellant particularised this misrepresentation and fraud in his plaint, as well as his loss and damage.

4. The respondent denied the appellant's claim and assertions in his statement of defence and pleaded that he was not the author of the documents attributed to him or from the CBK; the appellant's suit disclosed no reasonable cause of action; and the suit was premature as no demand notice or intention to sue was served upon him. The appellant testified as a witness during the trial in the High Court, and produced a set of documents as his exhibits, while the respondent did not call any witnesses nor file

any documents. After evaluating the appellant's evidence, the High Court (J.Kamau J.) reached the following conclusion in its judgment delivered on 18th October 2018:

> "25. Accordingly, having perused the oral and documentary evidence that was adduced by the Plaintiff, his Written Submissions and the case law that he relied upon, this court came to the firm conclusion that although the veracity or otherwise his evidence was not tested through cross-examination, he did not prove on a balance of probabilities that he was entitled to the prayers sought. His evidence had unexplained and gaping gaps. He failed to set out his case step by step and the court had to do it itself to unearth the merits or otherwise of his case"

5. The appellant, being aggrieved, filed the instant appeal, which we heard on this Court's virtual platform on 12th November 2024. Learned counsel Ms. Koki appeared for the appellant, while learned counsel Mr. Paul Macharia appeared for the respondent. Both counsel highlighted their respective submissions dated 31st October 2024 and 30th October 2024. In commencing the determination of this appeal, we are mindful of the duty of this Court as a first appellate court, which was reiterated and set out in the decision of Selle and another vs Associated Motor Boat Co. Ltd & Others (1968) EA 123. We will therefore reconsider the evidence adduced at the trial court, evaluate it, and draw our conclusions. In addition, we will only depart from the findings by the trial court if they were not based on evidence on record; where the said court is shown to have acted on the wrong principles of law as was held in Jabane vs Olenja [1986] KLR 661, or where its discretion was exercised injudiciously as was held in Mbogo & Another vs Shah [1968] EA 93.

6. The first limb of the issue before us is whether the evidence adduced by the appellant proved his claim. In this regard, the High Court noted that the appellant adduced evidence of copies of cheques and bank statements from Fidelity Bank showing the various amounts that he paid to the respondent and also tendered in evidence copies of cheques for various amounts from the respondent. The High Court's findings were as follows as regards whether the appellant thereby discharged his burden of proving his claim:

> "14. This court carefully perused the two (2) Statements in pp 16-24 of the Plaintiff's Exhibit "P" and noted that there were several payments amounting to Kshs 121,465,000/= and Kshs 57,896,300/= respectively. The Account Number was shown as Account Number 112-2489.
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> 15. The total of the cheques that the Plaintiff contended he had given to the Defendant amounted to Kshs 7,470,220/=. The computation total was 7,230,000/=
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> 16. It appeared to this court that there was a disparity between the sum that the Plaintiff had claimed in his suit, the amount showed in his Statements and the amount showed in the actual cheques that he presented to this court. In view of this disparity which the Plaintiff did not explain, this court was not satisfied that he had released the sum of Kshs 206,926,300/= to the Defendant as he had contended."

7. The trial Judge also observed that the appellant ought to have called witnesses from CBK to confirm that the letters he was given by the respondent and he relied upon were forgeries, and the contents of his letter dated 1st September 2005 addressed to CBK authorising it to release the sum of Kshs

210,000,000/= to Fidelity Bank and Kshs 140,000,000/= to Commercial Bank of Kenya; and witnesses from Fidelity Bank to corroborate the evidence that he made payments to the respondent as was contended in the letter of Fidelity Bank dated 9th August 2008.

8. Arising from these findings, Ms. Koki urged that the trial Judge failed to consider the unchallenged claim and documents, and cited the decision of this Court in the case of Karugi & another vs Kabiya & 3 others [1983] eKLR that a Court may consider unchallenged evidence and proceed upon it, unless it is clear that it is intrinsically unreliable. Counsel urged that the trial Judge did not find any document intrinsically unreliable and was obliged to consider the appellant's case based on the evidence presented before the Court. Further, that there were no disparities and the appellant could account for the amount claimed of KShs 206,926,300/- since the letters forwarding the appellant's bank statements proved the following payments by the appellant to the respondent: the one of 9th September 2008 showed a payment of Kshs 27,565,000/-; the one of 31st December 2012 showed a payment of Kshs 121,465,000/-, and the one of 32nd (sic) December 2012 showed a payment of Kshs 57,896,300/-.

9. Furthermore, that the letters dated 9th September 2008 and 31st August 2012 from Fidelity Bank were addressed to the appellant, he was thus competent to testify on the said documents under section 125 (1) of the *Evidence Act*, and the failure by the Legal Manager of Fidelity Bank to testify after signing a witness statement did not negate the appellant's competence to produce the letters. The counsel also made lengthy submissions to the effect that the trial Court failed to consider the appellant's credibility as a longstanding advocate, as against the evidence of the respondent's criminal history. Lastly, that the trial Judge failed to award the amounts proved by the appellant, yet the respondent failed to disprove the appellant's evidence since he did not attend the hearing in the trial Court. Counsel relied on the decision in Kenya Power and Lighting Company Limited vs Nathan Karanja Gachoka & another [2016] eKLR to submit that even though the appellant's evidence was uncontroverted, he had demonstrated in fact and evidence that he paid the Respondent Ksh.206,926,300/= and the payment was induced through misrepresentation and fraud.

10. In reply, Mr. Macharia, while citing the decision in Palace Investment Limited vs Geoffrey Kariuki Mwenda & Dollar Auctions [2015] KECA 616 (KLR), submitted that the burden of proof placed upon the appellant was to be discharged on a reasonable degree of probability, but not so high as is required in a criminal case. However, that the appellant never substantiated his claim; did not call key witnesses in support of his case; did not properly tabulate the money paid; and the money received and pleaded did not tally with what was demanded. Furthermore, and while citing the decisions in G. Patel vs Lalji Makanji (1957) EA 314 and Vijay Morjaria vs Nansingh Madhusingh Darbar & another [2000] eKLR, that the appellant did not prove the allegations of fraud on a standard higher than a balance of probabilities as required. It was the respondent's case that besides delivering documents to Court, the appellant did not attempt to cogently support them by calling their makers nor individuals who would substantiate the allegations thereto.

11. We have considered the arguments made by the appellant and respondent. It is settled that a claimant bears the burden of prove the existence of any facts relied upon in a claim by way of credible and reliable evidence, as stated in sections 107, 108 and 109 of the *Evidence Act*. Section 3 of the *Evidence Act* (Cap 80) defines evidence as follows:

> "--- the means by which an alleged matter of fact, the truth of which is submitted to investigation, is proved or disproved, and without prejudice to the foregoing generally, includes statements by accused persons, admissions and observations by the court in its judicial capacity."

12. Accordingly, as held by the High Court in Kenya Power and Lighting Company Limited vs Nathan Karanja Gachoka & another [supra] and by this Court in Daniel Toroitich Arap Moi vs Mwangi Stephen Muriithi & another [2014] KECA 642 (KLR) , a claimant must prove its case whether or not its evidence is challenged or controverted. In the present appeal, the appellant pleaded that he was induced to pay the respondent a sum of money be representations that were "fraudulent, false and untrue" and he gave the particulars of the misrepresentation and fraud and gave the particulars thereof. The appellant alleged that the respondent at the time of making the representations "knew them to be false or untrue, or made them recklessly not caring whether they were true or false".

13. It is therefore necessary at the outset to discern the applicable law and requirements to be proved with respect to the misrepresentation that was being alleged by the appellant. Misrepresentation takes multiple forms, namely innocent, negligent and fraudulent misrepresentation, and each type has different legal consequences and remedies. Innocent misrepresentation, which occurs when a false statement is made without knowledge of its inaccuracy, and the misrepresenting party believed the statement was true at the time of the agreement. While the most common remedies for misrepresentation is contract rescission (undoing the agreement and paying back the contract sum) or financial compensation for damages incurred, in cases of innocent misrepresentation contract rescission is awarded rather than financial damages.

14. Negligent misrepresentation on the other hand happens when a party fails to take reasonable care in verifying a statement's accuracy, and a party making the claim may be liable for damages if it can be proven that their negligence led to financial loss. Fraudulent misrepresentation is the most severe form of misrepresentation, where a false statement is made intentionally to deceive the other party, and the injured party may sue for damages, including punitive damages in some cases, and can also lead to criminal liability if it involves fraud.

15. Therefore, proving misrepresentation involves establishing five key legal elements. The first is the false representation, and a plaintiff must demonstrate that a material fact was falsely stated; the second (depending on the type of misrepresentation) is the intent or negligence, that is the defendant either intended to deceive or failed to verify their claim; the third is reliance, that the plaintiff reasonably relied on the false statement when agreeing to the contract; the fourth is causation, which is a direct link between the misrepresentation and the plaintiff's decision to enter into the contract; and the fifth and last is that of damages, which is the financial or legal harm suffered due to the misrepresentation.

16. The standard of proof in relation to innocent, negligent and fraudulent misrepresentation is also different, in that while the normal standard of a balance of probability will apply to allegations of innocent and negligent misrepresentation, a higher burden and standard applies to fraudulent misrepresentation. This is because fraud requires proof of an element of intention. In order to prove fraud, it must be shown that the person making the false statement, knew that it was false, and made the statement with the intention of deceiving the other party. In innocent or negligent misrepresentation no proof of a fraudulent intention is required. Put differently, fraudulent misrepresentation involves intentional deception, while innocent and negligent misrepresentation can occur without intent. It is in this regard settled that allegations of fraud must be strictly proved and although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required. See the decisions of this Court in Urmilla w/o Mahendra Shah vs Barclays Bank International Ltd and Another [1979] KLR 76; [1976-80] 1 KLR 1168, Vijay Morjaria vs Nansingh Madhusingh Darbar & Another [2000] eKLR, and Ndolo vs Ndolo (2008) 1 KLR (G & F) 742.

17. In the present appeal, it is evident that the appellant pleaded fraudulent and negligent misrepresentation. In his testimony, the appellant reiterated his claim and produce a bundle of documents as exhibits in support of the claim. His testimony was brief, and we shall therefore reproduce it verbatim as follows:

> " My name is Pravinchadra Jamnadas Kakad. I am the plaintiff in this matter. I filed a witness statement dated 2/6/2016 on 7/6/2016. I wish this Court to adopt it as my examination-in-chief. I filed a bundle of documents dated 2/6/2016 on 7/6/2016. I wish to rely on the said bundle of documents in support of my case. The list of bundles of documents to be marked as Plaintiff's exhibit "1". I pray the judgment be entered in my favor against the defendant as prayed in my plaint dated 7/1/ 12 filed on even date."

18. The appellant's witness statement reiterated his claim as summarised in the foregoing, and stated that the representations made by the respondent were made orally to him and contained in various documents given to him by the respondent which were in pages 1 to 15 of his bundle of documents. These documents were various letters, documents and cheques namely: a letter dated 6th December 2014 from the CBK which was addressed to the appellant and purported to enclose a cheque of Kenya shillings 210,000,000/= indicating that the Treasury had authorized release of this cheque to the appellant; a letter dated 13th July 2004 from an entity known as Meshuu Enterprises and addressed to the respondent advising that on 16th July 2004 they would issue a banker's cheque in favor of Fidelity Commercial Bank for 5 million as payment to the respondent; and a letter dated 1st September 2005 written by the appellant and addressed to Central Bank of Kenya authorizing the respondent to obtain amounts payable to him of Kshs 210,000,000/= and 140,000,000/=, and to bank it in the appellant's account.

19. Also exhibited were an internal memorandum dated 2nd September 2005 from the Governor of CBK addressed to the Director, Banking Supervision of CBK referring to the letter from the appellant dated 1st September 2005 and granting authority to credit the said payments to the appellant's accounts; a letter dated 25th January 2006 from the Governor of CBK addressed to their appellant apologizing for the delay in making the said payment and authorizing the payment to the appellant of the said amounts of 350,530,940/= and interest of Kshs 42,063,713/= by way of two cheques; and a letter dated 12th October 2008 from the Permanent Secretary, Treasury addressed to the Managing Director Commercial Bank of Kenya authorizing it to credit the sum of Kenya shillings 371,562,796/= to the appellant's accounts. The appellant also exhibited copies of cheques drawn by the CBK on 17th January 2006, 30th June 2006, 18th July 2006 for the sum of Kshs 42,063,713/= and Kshs 350,530,940/=, and of a dollar cheque dated 20th April 2007 and a banker's cheque dated 6th August 2007 drawn in his favour for the sum of US dollars 153,846.00 and Kshs 220,000,000/= respectively.

20. It is notable in this respect that the misrepresentations which were particularised by the appellant and which he needed to prove were that the respondent was owed the sum of two hundred and ten million Kenya Shilling (Kshs 210,000,000/-) by CBK which he would utilise to repay the sum advanced; he would obtain and forward the requisite bankers' cheques from CBK that would replace the said sums; and that he was a businessman and a civil servant with unimpeachable credentials. The fact that these representations were made orally to the appellant was not controverted by the respondent, and the appellant also produced the documents enumerated hereinabove that evidenced the said representations.

21. As regards the falsity of the representations, we are persuaded that since the testimony of the appellant that the cheques he was given by the respondent were worthless was not controverted, and he exhibited

copies of the said cheques, this particular representation was proved to the required standard. In addition, the appellant also exhibited copies of a charge sheet dated 18th December 2003 indicating the respondent was arrested on 15th December 2003 and various criminal charges for forgery of cheques, stealing and handling stolen property being leaves of cheques books had been brought against him, to prove the falsity of the representation that the respondent was a businessman and a civil servant with unimpeachable credentials.

22. However, we find that the appellant did not adduce evidence to prove the falsity of the representations that the respondent was owed sums of money by Central Bank. As correctly pointed out by the learned trial Judge, the falsity of these representations and the letters relied upon to this effect could only be proved by the alleged debtors and authors of the letters acknowledging indebtedness, and in particular by witnesses from the Central Bank of Kenya or an expert witness to show that the letters presented were forgeries. This Court stated as follows in this respect in Kuria Kiarie & 2 Others vs Sammy Magera [2018] eKLR :

> " Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases, in cases where fraud is alleged, it is not enough to simply infer fraud from the facts."

23. This finding notwithstanding, the rest of the documents produced by the appellant sufficiently demonstrated the payments he made to the respondent. In particular, the appellant produced a letter dated 9th September 2008 from Fidelity Bank which was addressed to him, enclosing a schedule of the cheques drawn on different dates between 6th April 2004 to 22nd December 2004 of various payments made to the respondent totalling Kshs 27,565,000/=. Another similar letter from Fidelity Bank dated 31st August 2012 enclosing a statement showing payments totally Kshs 121,465,000/= made from the appellant's accounts by cash and cheques to the respondent on various dates between 1st March 2005 to 29th December 2005, and payments totalling 57,896,300/= made between 30th January 2006 and 18th December 2006 was also exhibited by the appellant. The appellant also exhibited copies of some of the cheques drawn by him in favour of the respondent

24. It is notable the respondent did not object to the production by the appellant of the letters written by Fidelity Bank, and having been addressed to the appellant, the letters were admissible to show their receipt by the appellant as opposed to the truth of their contents. In addition, even if the letters may not have been produced by the maker, the exhibited copies of the cheques and the statements, which were issued by the appellant and were of the appellant's accounts respectively, were admissible. Any inadmissibility of the letters written by Fidelity Bank is therefore cured under section 175 of the *Evidence Act*, which provides that improper admission or rejection of evidence shall not of itself be ground for a new trial or for reversal of any decision in a case if appears to the court before which an objection is taken that, independently of the evidence objected to, there is sufficient evidence to justify the decision, or that the rejected evidence will not vary the decision. In other words, the cheques and statements being admissible and being independent of the letters from Fidelity Bank, were sufficient to prove the amounts paid by the appellant to the respondent. We accordingly find that the total amount that the appellant proved he paid to the respondent between 2004 and 2006 was therefore Kshs 206,926,300/= as evidenced by the statements of his account.

25. Lastly, it is notable that the copy of the appellant's letter dated 1st September 2005 addressed to Central Bank of Kenya, authorizing the respondent to obtain amounts payable to him of Kshs 210,000,000/

= and 140,000,000/= and to bank it in the appellant's account, was also evidence of the appellant's reliance on the respondent's misrepresentations and of the inducement to pay the said sums.

26. Consequently, our conclusion on the issue whether the evidence adduced by the appellant proved his claim is that the appellant did adduce evidence to prove that he did pay the respondent Kshs 206,926,300/=; that the respondent misrepresented that he would obtain and forward to the appellant banker's cheques from CBK that would replace the sums paid to him; and that the respondent misrepresented that he was a businessman and civil servant of impeccable character. The appellant is therefore entitled to rescind the contract and to be restored to the position before the contract took place. The appellant did not bring any evidence of the other particulars of loss and damage he pleaded of loss of investments, poo health and loss of interest and future earnings arising of the payment of the said sum to the respondent, and there is therefore no basis to award any damages on this account.

27. On the second limb as regards whether the suit was time barred, the High Court, while citing sections 4 and 23 of the *Limitation of Actions Act* held as follows:

> " 22. The onus was also on the Plaintiff to demonstrate that his claim was not time barred. This was because the agreement between him and the Defendant was in 2004 and he filed his suit eight (8) years later in 2012. He ought to have demonstrated that there were acknowledgments of the debt by the Defendant at least by 2006 so as to have brought his claim within the limitation of suits founded on contract."

28. Ms Koki's submissions on this finding were as follows: the trial Judge shifted the onus of proving that the agreement was not time barred whereas there was no agreement; the cause of action on breach of contract could only be brought at the time the breach actual occurred, since this is when time started running; upon receiving the money, the respondent at all material times kept promising that he would pay back immediately until 2007 when the appellant realized that the letter from CBK were fake and the cheques were forged and worthless; the respondent issued cheques from various institutions between 2006 to 2008 in promise of payment and was estopped by section 120 of the *Evidence Act* from denying that he did not make such representation or issue the letters and cheques. Reliance was placed on the case of Justus Tureti Obara vs Peter Koipeitai Nengisol [2014] eKLR where the Court held that the period of limitation does not begin to run until the Plaintiff had discovered the fraud or could with reasonable diligence have discovered it.

29. Therefore, that the cause of action could not arise at the time of entering the contract, and the appellant's documents showed that he was defrauded and lied to by the respondent as late as 23rd December 2008 when he received false cheques, which is when time started running, and the appellant was thus within statutory time to file and prosecute the suit. Mr. Macharia on the other hand submitted that the appellant stated that the agreement between him and the respondent was entered into sometimes in the year 2004, yet he filed the suit at the High Court eight years later by way of the plaint dated 7th December 2012.

30. We agree with the appellant that the suit was not time barred for two reasons. It is notable that the appellant pleaded fraudulent misrepresentation in his claim, and section 26 of the Limitation of Actions in this regard provides for the extension of time in cases of fraud or mistake as follows:

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

31. From the evidence adduced by the appellant, he started receiving the worthless cheques from June 2006 and as late as 6th August 2007, and time therefore could not have started to run in 2004 as found by the learned trial Judge . More fundamentally though, is the fact that the respondent cannot rely on the defence of limitation for the reason that Order 2 Rule 4(1) of the Civil Procedure Rules expressly requires the said defence to be specifically pleaded. This Court in the case of Stephen Onyango Achola & another vs Edward Hongo Sule & another [2004] eKLR held that Order 6 Rule 4(1) and (2) (now Order 2 rule 4(1)) of the Civil Procedure Rules requires a person relying on the provision of a statute such as limitation to specifically plead the statute on whose provisions he relies to defeat the claim and that a plaintiff is not bound to plead in his plaint issues which would negate possible defences such as limitation, fraud, mistake long before such issues are raised.

32. The Court further held that a party who has not specifically pleaded limitation is not entitled to rely on that issue and base his preliminary objection on it; nor is he entitled to rely on that defence during the trial as cases must be decided on the issues pleaded. See also the decision of this Court in the case of Mwangi & another (Suing as the Legal Representatives of the Estate of the Late Richard Mwangi Gathoni Deceased) vs Ngure & Another [2023] KECA 448 (KLR). The statement of defence dated 22nd July 2015 filed by the respondent did not plead any limitation of actions or that the appellant's suit was statute barred.

33. We accordingly set aside the judgment of the High Court at Nairobi (J. Kamau J.) delivered on18th October 2018 in HCCC No. 582 of 2012, save for the one finding that we have upheld in this judgment. We in addition order the respondent to pay the appellant the sum he was advanced of Kshs 206,926,300/=, together with interest at Court rates from the date of this judgment until payment in full.

34. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF OCTOBER, 2025.

P. NYAMWEYA

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JUDGE OF APPEAL

A. O. MUCHELULE

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.