



Kirui v Metet & 12 others (Environment and Land Appeal E007 of 2024) [2026] KEELC 134 (KLR) (22 January 2026) (Judgment)

Neutral citation: [2026] KEELC 134 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT AND LAND APPEAL E007 OF 2024
LA OMOLLO, J
JANUARY 22, 2026**

BETWEEN

JOSIAH KIPKOSKE KIRUI APPELLANT

AND

MICHAEL METET 1ST RESPONDENT

JOSEPH KIPRONO KOECH 2ND RESPONDENT

FREDRICK KIPKURUI LANGAT 3RD RESPONDENT

GEOFFREY KIPLANGAT MUTAI 4TH RESPONDENT

KIPROTICH WILLY MUTAI 5TH RESPONDENT

JOSEPH CHERUIYOT KORIR 6TH RESPONDENT

PETER KIPTARUS KERICH 7TH RESPONDENT

GRACE CHEPKOSKE LANGOI (SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF WILSON KIPCHIRCHIR LANGOI - DECEASED) 8TH RESPONDENT

STEPHET LABOSO 9TH RESPONDENT

SAMUEL MITEI 10TH RESPONDENT

RACHAEL RONO 11TH RESPONDENT

SHADRACK KORIR 12TH RESPONDENT

ALBINA CHEPKURUI 13TH RESPONDENT



JUDGMENT

Introduction.

1. By a Memorandum of Appeal dated 28th June, 2024 the Appellant challenges the decision of Hon. J. Bii SRM in Kericho CM ELC Case No. 5 of 2019.

Factual Background.

2. In the subordinate Court, the Respondents filed a suit vide a Complaint dated 9th January, 2019 which was amended on 18th March, 2020.
3. The suit was filed against the Appellant, one Rose Kirui and one Philip Kipng'etich Kirui. They were the 1st Defendant, 2nd Defendant and 3rd Defendant respectively. The Respondents sought the following orders;
 - a. A declaration that actions by the 1st and 2nd Defendants of failing to cause the subdivision of property land title No. Ker/Sorget/Kalyet Block 1/160 to pave way for the transfer of the resultant parcels to the Plaintiffs are illegal.
 - b. An order compelling the 1st and 2nd Defendant (sic) to cause the subdivision of property Land Title No. Ker/Sorget/Kalyet Block 1/160 according to the 1st to 13th Plaintiffs' claims to pave way for the transfer of the resultant parcels to the Plaintiffs' names within the timelines to be set by the Court. (sic)
 - c. Or in the alternative, an order compelling the Deputy Registrar to execute all necessary documents within stipulated timelines to subdivide property land title No. Ker/Sorget/Kalyet Block 1/160 according to the 1st to 13th Plaintiffs' claims to pave way for the transfer of the resultant parcels to the Plaintiffs' names.
 - d. Costs of the suit.
4. The Appellant and Rose Kirui filed their statement of defence and Counterclaim dated 8th March, 2019 which was amended on 22nd June, 2020.
5. In the Counterclaim, the Appellant sought the following orders;
 - a. Vacant possession of all that parcel of land known as Ker/Sorget/Kalyet Block 1/160 by the 1st and 2nd Plaintiffs.
 - b. Order of eviction.
 - c. A permanent injunction restraining the 1st and 2nd Plaintiffs either by themselves, their agents or servants from in (sic) whatsoever manner interfering with all that parcel of land known as Ker/Sorget/Kalyet Block 1/160.
 - d. Costs of the suit.
 - e. Interest (c) above at Court rates.
 - f. Any other relief this Court may deem fit to grant.
6. Philip Kiprotich Kirui (the 3rd Defendant before the trial Court) filed his statement of Defence dated 24th April, 2019 and sought that judgement be entered against the Appellant and Rose Kirui.



7. The Learned Trial Magistrate delivered his judgement on 13th June, 2024. It was as follows:
 - a. The 1st and 2nd Defendants' failure to cause the subdivision of land parcel No. Ker/Sorget/Kalyet Block 1/160 is unjustified.
 - b. The 1st and 2nd Defendants are hereby compelled to cause subdivision of land parcel No. Ker/Sorget/Kalyet Block 1/160 within 45 days of the date of this judgement.
 - c. Failure in 2. (sic) above, the Deputy Registrar is hereby directed to execute all necessary documents for the subdivision of land parcel No. Ker/Sorget/Kalyet Block 1/160 without further ado.
 - d. The 1st and 2nd Defendants shall pay to the Plaintiffs costs of the suit as well as of the Counterclaim.
8. The Appellant being aggrieved by the said judgement approached this Court by way of Appeal.
9. The Appeal was admitted for hearing on 26th March, 2025 and the Court issued directions that it be heard by way of written submissions.
10. The Appeal was mentioned severally to confirm filing of submissions and on 22nd July, 2025 it was reserved for judgement.

The Appeal.

11. The grounds of appeal are as follows;
 - a. The Learned Magistrate erred in law and in fact by failing to consider the issue of the *Limitation of Actions Act*, Cap 22 Laws of Kenya, as the suit herein against some of the Defendants (sic) was statute-barred at the time it was filed and thus could not be entertained.
 - b. The Learned Magistrate erred in law and in fact in granting the remedy of specific performance, despite the agreement in question being unenforceable as it had been overtaken by events in accordance with the *Limitation of Actions Act*.
 - c. The Learned Magistrate erred in law and in fact by failing to consider the provisions of Section 3(3) of the *Law of Contract Act*, which stipulates that contracts for the disposition of an interest in land must be in writing and signed by all parties thereto, and attested by a witness present when the contract was signed by such party. (sic)
 - d. The Learned Magistrate erred in law and fact by ignoring evidence presented by the Appellant which demonstrated that some of the agreements had already been rescinded and the money refunded to the Respondents.
 - e. The Learned Magistrate erred in law and in fact by failing to appreciate that some of the Plaintiffs/Respondents (sic) had no valid cause of action against the Appellant.
 - f. The Learned Magistrate erred in law and in fact by entertaining the suit in its entirety, despite lacking jurisdiction to do so.
12. The Appellant prays for orders that;
 - a. The appeal be allowed and the judgement and decree of the Learned Magistrate be set aside.



- b. This Honourable Court do find that the claim in the lower Court for the (sic) 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th and 13th Respondents/Plaintiffs (sic) was statute barred and thus could not be entertained.
- c. This Honourable Court do find that the agreements for the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th and 13th Respondents/Plaintiffs (sic) was unenforceable and specific performance should not have been granted.
- d. This Honourable Court do find that the Learned Magistrate had no jurisdiction to entertain the claim for the (sic) 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th and 13th Respondents/Plaintiffs (sic).
- e. The Counterclaim in the lower Court be allowed against the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th and 13th Respondents/Plaintiffs (sic).
- f. The Respondents do bear the costs of this appeal and costs in the lower Court.

Issues For Determination.

13. The Appellant filed submissions dated 10th June, 2025 while the Respondents filed submissions dated 19th July, 2025.
14. The Appellant submits on the following issues;
 - a. Whether the Learned Magistrate erred in law and in fact by failing to consider and apply the provisions of the *Limitation of Actions Act*, Cap 22, thereby entertaining time-barred claims against the Appellant.
 - b. Whether the Learned Magistrate erred in granting the remedy of specific performance in respect of agreements that were either rescinded, frustrated, or rendered unenforceable by operation of law.
 - c. Whether the Learned Magistrate failed to apply the mandatory provisions of Section 3(3) of the *Law of Contract Act* with regard to the formal requirements for contracts involving disposition of an interest in land.
 - d. Whether the trial Court erred in disregarding evidence demonstrating that the agreements forming the basis of the suit had been rescinded and any consideration paid had been refunded.
 - e. Whether the Respondents had any valid cause of action against the Appellant capable of sustaining a suit in law.
 - f. Whether the trial Court acted without jurisdiction by entertaining and determining a suit that was incompetent for being statute-barred and premised on defective and unenforceable agreements.
15. On the first issue, the Appellant relies on Section 4(1)(a) of the *Limitation of Actions Act* and submits that the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, and 13th Respondents filed the suit before the subordinate Court after a period of over six years had lapsed since the cause of action arose.
16. The Appellant relies on the judicial decisions of *Mea Ltd vs Attorney General & another* [2007] eKLR, *Bosire Ogero vs Royal Media Services* [2015]eKLR, *Divecon Ltd vs Samani* [1995-1998] 1EA 48, *Dhanesvar V. Mehta vs Manital M. Shah* [1965] EA 321, *Mary Osundwa vs Nzoia Sugar Co. Ltd* [2002] eKLR in support of his submissions.



17. The Appellant relies on Article 50 (1) of *the Constitution* of Kenya and submits that the right to a fair trial includes the protection from unjust imposition of liability based on stale and abandoned claims.
18. It is the Appellant's submissions that the Learned Trial Magistrate's failure to consider and apply the relevant provisions of the *Limitation of Actions Act* amounted to a jurisdictional error.
19. The Appellant relies on the judicial decisions of Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1, Samuel Kamau Macharia & Another v Kenya Commercial Bank Ltd & 2 Others [2012] eKLR and submits that the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th and 11th Respondents claims were statute barred.
20. On the second issue, the Appellant submits that specific performance is an equitable remedy which is only available if there is a valid and enforceable contract.
21. The Appellant also submits that Courts have held that equity cannot aid the enforcement of rights arising from contracts that have been extinguished by operation of the law particularly through statute limitation.
22. The Appellant reiterates that the contracts the Respondents were seeking to enforce were statute barred and submits that they were therefore incapable of enforcement through specific performance.
23. The Appellant relies on the judicial decisions of Reliable Electrical Engineers Ltd v Mantrac Kenya Ltd [2006] eKLR, Thrift Homes Ltd v Kays Investment Ltd [2015] eKLR, Kenya Commercial Bank Ltd v Popatlal Madhavji & Another [2019] eKLR, National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & Another [2001] eKLR, Shah v Guilders International Bank Ltd [2003] eKLR and submits that the Learned Trial Magistrate failed to apply the correct legal test and overlooked the principle that equity follows the law.
24. The Appellant also relies on the judicial decisions of Givan Okallo Ingari & another vs Housing Finance Co. of Kenya Ltd [2007] eKLR in support of his submissions.
25. On the third issue, the Appellant relies on Section 3(3) of the *Law of Contract Act* and submits that the agreements relied on by the Respondents did not satisfy statutory requirements.
26. It is the Appellant's submissions that he did not sign some of the agreements, while other agreements were not attested to by witnesses and others were oral agreements.
27. It is also the Appellant's submissions that the said defects rendered the contracts null and void and they could not therefore be enforced. The Appellant relies on the judicial decision of Peter Mbiri Michuki v Samuel Mugo Michuki [2014] eKLR in support of his submissions.
28. It is further the Appellant's submissions that the Learned Trial Magistrate erred in failing to assess each alleged agreement for sale of land against the mandatory provisions of Section 3(3) of the *Law of Contract Act*.
29. On the fourth issue, the Appellant submits that he adduced evidence before the trial Court which showed that the contracts involving the 1st and 2nd Respondents had been rescinded.
30. The Appellant also submits in some cases, the purchase price was refunded and that no subsequent conduct of the Respondents showed an intention to enforce and/or revive the said agreements.
31. The Appellant further submits that once a contract has been rescinded, no claim for specific performance can lie. The Appellant relies on the judicial decisions of Muturi Investments Ltd v



National Bank of Kenya Ltd [2006] eKLR, Thrift Homes Ltd v Kays Investment Ltd [2015] eKLR in support of his submissions.

32. The Appellant submits that equity cannot revive a contract that has been abandoned by the parties and neither can it compel its performance.
33. The Appellant also submits that the Learned Trial Magistrate erred in imposing obligations on him that had no basis in contract, statute or equity.
34. On the fifth issue, the Appellant submits that each Respondent ought to have demonstrated a binding contractual relationship with him (Appellant).
35. The Appellant also submits that the Learned Trial Magistrate erred in treating all the Respondents claims as viable without considering their distinct evidentiary and legal merits.
36. The Appellant further submits that the Respondents suit as pleaded did not meet the threshold of a valid cause of action as their claim was statute barred, the agreements they produced failed to comply with Section 3(3) of the Law of Contract Act and that some agreements had been rescinded.
37. It is the Appellant's submissions that the Respondents suit ought to have on that basis been dismissed.
38. On the sixth issue, the Appellant relies on the judicial decision of Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1 and reiterates that the Learned Trial Magistrate erred in failing to address the jurisdictional objections that had been raised.
39. The Appellant submits that the Learned Trial Magistrate did not have jurisdiction to hear the suit because the Respondents claim was statute barred.
40. The Appellant concludes his submissions by urging the Court to allow his appeal as prayed.
41. The Respondents in their submissions have addressed each ground of the Memorandum of Appeal.
42. On grounds 1 and 2, the Respondents rely on Sections 4(1)(a) & 7 of the Limitation of Actions Act and submit that the Appellant acknowledges the existence of the various land sale agreements that they entered into but gave various excuses for the delay in subdivision and transfer of the suit parcel of land.
43. The Respondents also submit that the Appellant has no issue with the subdivision and transfer of the suit parcel of land to the 3rd to 8th and 12th Respondents.
44. The Respondents further submit that the Appellant tried to cancel the land sale agreements he entered into with the 1st, 2nd, 9th, 10th, 11th and 13th Respondents.
45. It is the Respondents submissions that the Appellant wrote a letter in March, 2016 through S.M Omae & Co. Advocates seeking to rescind the said agreements on account of a familial dispute over the sale of the suit property.
46. It is also the Respondents submissions that thereafter the Appellant sought to refund the purchase price that had been paid to him.
47. It is further the Respondents submissions that the cause of action therefore arose in the year 2016 and since the suit was filed in 2020, their claim was not statute barred.
48. The Respondents submit that the Appellant does not challenge the fact that the delays in processing their (Respondents) titles emanated from his (Appellant) conduct.
49. The Respondents also submit that a continuing contract refers to the ongoing performance of obligations under a land sale agreement even after the expiry of the initial agreement period.



50. The Respondents further submit that if a party fails to fulfill their obligations under a continuing contract, legal remedies including specific performance can be pursued.
51. It is the Respondents submissions that from the evidence adduced before the trial Court, it was evident that they had paid the purchase price and taken possession of the various portions of the suit property that they had purchased.
52. It is also the Respondents submissions that the Appellant was given an opportunity to give reasons as to why he had delayed in transferring the land but he failed to do so.
53. The Respondents rely on the judicial decisions of Hassan Zubeidi vs Patrick Mwangangi Kibaya & another [2014]eKLR, Hanington Matingi Janji vs Katana Pekeshe and 7 Others [2013]eKLR and submit that they were bound by the terms of their contracts.
54. It is the Respondents submissions that since they took possession of portions of the suit parcel of land, then a constructive trust was created.
55. They rely on the judicial decisions of Willy Kimutai Kitilit vs Michael Kibet [2018]eKLR, Macharia Mwangi Maina & 87 Others vs Davidson Mwangi Kagiri [2014]eKLR, Soulous vs Korkontzilas [1997] 2 SCR 217 as was cited in Shah & 7 Others vs Mombasa Bricks & Tiles Limited & 5 Others (Petition No. 18 (E020) of 2022 [2023] KESC 106 in support of their submissions.
56. It is also the Respondents submissions that the Learned Trial Magistrate did not therefore err in finding that the Appellant sold portions of the suit parcel of land to them.
57. It is further the Respondents submissions that the Appellant is estopped from denying that he sold portions of the suit parcel of land to them.
58. The Respondents rely on Sections 120, 121, 122 & 123 of the *Evidence Act*, the judicial decisions of Doge vs Kenya Cannery Ltd [1989] KLR 127, Muti vs Kenya Finance Corporation & another [2004] 2EA 182 in support of their submissions.
59. With regard to ground 3 of the Appellant's Memorandum of Appeal, the Respondents rely on Section 3(3) of the *law of Contract Act*, the judicial decision of Lilian Mosonik & another vs Management Committee of AGC Riverside Church [2022] eKLR and submit that they produced handwritten land sale agreements that were signed by the parties and witnessed by Rose Kirui who was the 2nd Defendant in the suit before the trial Court.
60. The Respondents also submit that the Appellant did not challenge the said land sale agreements and he therefore effectively admitted to them being legitimate.
61. The Respondents further submit that the reasons the Appellant gave for failing to subdivide the suit parcel of land ranged from lack of the Land Control Board consent and that the suit parcel of land was family land and was therefore subject to succession proceedings.
62. It is the Respondents submissions that the said reasons were not supported by any evidence and they therefore urge this Court to uphold the decision of the trial Court.
63. On ground 4 of the Appellant's Memorandum of Appeal, the Respondents rely on Section 4(1) (a) of the *Limitation of Actions Act* and reiterate that the cause of action arose on 21st March, 2016.
64. The Respondents rely on the judicial decision of National bank of Kenya Ltd vs Pipeplastic Samkolit (K) Ltd & another [2002] EA 503 and submit that the Court should note that the Appellant filed



the present appeal against all of them (Respondents) and yet he had agreed to transfer the portions purchased by the 3rd, 4th, 5th, 6th, 7th, 8th and 11th Respondents.

65. It is the Respondents submissions that he who comes to equity must come with clean hands and that the Appellant's hands are soiled as he is attempting to mislead the Court.
66. The Respondents rely on the judicial decisions of The Owners of the Motor Vessel "Lilian S" vs Caltex Oil (Kenya) Ltd [1989] KECA 48 (KLR) and submit that the issue of jurisdiction was not raised before the trial Court and the Appellant cannot therefore raise it on appeal.
67. The Respondents submit that their suit was viable and reasonable in the circumstances and they urge the Court to dismiss the appeal.

Analysis And Determination.

68. The issues that arise for determination are as follows:
 - a. Whether the Learned Trial Magistrate erred in failing to consider and find that the suit was statute barred and therefore orders of specific performance could not be issued.
 - b. Whether the Learned Trial Magistrate erred in failing to consider Section 3(3) of the Law of Contract Act.
 - c. Whether the Learned Trial Magistrate erred in failing to consider that some of the agreements had been rescinded and money refunded to the Respondents.
 - d. Whether the Learned Trial Magistrate erred in failing to find that some of the Respondents did not have a valid cause of action against the Appellant.
 - e. Whether the Learned Trial Magistrate erred in hearing the matter and yet he had no jurisdiction.
 - f. Who should bear costs of the appeal.

A. Whether the Learned Trial Magistrate erred in failing to consider and find that the suit was statute barred and that orders of specific performance could not be issued.

69. The role of the Appellate Court was stated by the Court of Appeal in the judicial decision of Gitobu Imanyara & 2 others Vs Attorney General [2016] eKLR. It was held as follows;

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect.” (Emphasis mine)

70. In Abok James Odera T/A A.J Odera & Associates Vs John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR the Court held as follows;

“This being a first appeal, we are reminded of our primary role as a first Appellate Court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.” (Emphasis mine)



71. This issue will address grounds (1) and (2) of the Appellant’s Memorandum of Appeal. The said grounds have been set out in the preceding paragraphs but I will nonetheless replicate them as here under;
1. The Learned Magistrate erred in law and in fact by failing to consider the issue of the *Limitation of Actions Act*, Cap 22 Laws of Kenya, as the suit herein against some of the Defendants (sic) was statute-barred at the time it was filed and thus could not be entertained.
 2. The Learned Magistrate erred in law and in fact in granting the remedy of specific performance, despite the agreement (sic) in question being unenforceable as it had been overtaken by events in accordance with the *Limitation of Actions Act*.”
72. In ground (1) of the Appellant’s Memorandum of Appeal, the Appellant contends that the Learned Trial Magistrate erred in failing to consider that the suit against some of the Defendants (sic) was statute barred.
73. In ground two (2) of the Appellant’s Memorandum of Appeal, the Appellant contends that the Learned Trial Magistrate erred in issuing orders of specific performance and yet the agreements relied on were statute barred.
74. The Appellant submits that the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th and 13th Respondents filed their suits six years after the cause of action arose and their claim was therefore statute barred.
75. The Appellant also submits that since their claim was statute barred, the Learned Trial Magistrate erred in issuing orders of specific performance.
76. The Respondents submit that the cause of action arose in March, 2016 when the Appellant sought to cancel the land sale agreements he had entered into with the 1st, 2nd, 9th, 10th, 11th and 13th Respondents.
77. The Respondents submit, therefore, that their claim was not statute barred.
78. A perusal of the judgement delivered by the Learned Trial Magistrate shows that he did not address the issue of whether or not the Respondents suit was statute barred.
79. The Appellant at paragraph 3 of his Amended Statement of Defence and Counterclaim stated that the suit by the 1st, 2nd, 6th, 7th, 8th, 9th, 10th and 13th Respondents was statute barred.
80. It is important to note that the Appellant in his submissions contends that the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th and 13th Respondents suit was statute barred.
81. It is important to note that before the trial Court, the Appellant only contended that the suit by the 1st, 2nd, 6th, 7th, 8th, 9th, 10th and 13th Respondents was statute barred.
82. It is apparent that the Appellant is raising the issue of whether the 3rd, 4th and 5th Respondents suit was statute barred on appeal.
83. The Court of Appeal in the judicial decision of Republic v Tribunal of Inquiry to Investigate the Conduct of Tom Mbaluto & others Ex-Parte Tom Mbaluto [2018] eKLR held as follows;

“It is in the discretion of the Court to allow a party to raise a new point on appeal, depending on the circumstances of the case. (See also George Owen Nandy v. Ruth Watiri Kibe, CA No. 39 of 2015 and Openda v. Ahn [1983] KLR 165). In this case we have stated that the appellant never raised the issue in his judicial review application, neither party addressed the issue in the High Court, the learned judge, quite properly did not address the issue and, to



make the matters worse, the appellant did not raise the issue in his memorandum of appeal in this Court. The Attorney General is entitled to complain, as he does, that he has been taken by surprise and denied a fair opportunity to respond to the new issue. As has been stated time and again, there is a philosophy and logical reason behind our appellate system, which except in exceptional cases and upon proper adherence to the prescribed procedure, restricts the appellate Court to consideration of the issues that were canvassed before and decided by the trial Court. If that were not the case, the appellate Court would become a trial Court in disguise and make decisions without the benefit of the input of the Court of first instance. (See North Staffordshire Railway Co. v. Edge [1920] AC 254).” (Emphasis mine)

84. Since the Appellant did not raise the issue of whether or not the 3rd, 4th and 5th Respondents suit was statute barred before the trial Court, he is precluded from raising it on appeal.
85. Upon perusal of the proceedings before the trial Court, I have established that apart from the Appellant contending in his Amended Statement of Defence and Counterclaim that the 1st, 2nd, 6th, 7th, 8th, 9th, 10th and 13th Respondents suit was statute barred, he did not adduce any evidence in support of the said contention during the hearing.
86. In the judicial decision of Chepyegon & another v Kimwatan & 4 others [2025] KEELC 6774 (KLR) the Court held as follows;
- “It is trite that without any evidence, the allegations contained in a pleading are mere unsubstantiated claims with no proof and/or probative value.”
87. In Sichuan Huashi Enterprises Corp. Limited v Micheal Misiko Muhindi [2019] KEHC 2521 (KLR) the Court held as follows;
- “13. The law as I understand it is that the defence of limitation of time is a matter for determination at the trial; it cannot be dealt with in a summary manner or at preliminary stage or as a preliminary objection. The Court should formulate limitation as one of the issues for determination and decide it on evidence adduced at the trial. On this see the case of Oruta & Another vs. Nyamato [1998] KLR 590, where the Court held that limitation of action:-
- ”... could only be queried at the trial but not by... a preliminary objection... The appellant could raise the objection at the trial and the trial Judge would have to deal with the matter on the evidence to be adduced at the trial” (Emphasis mine)
88. Upon perusal of the proceedings contained in the record of appeal, I have established that the Appellant failed to adduce any evidence in support of his contention that the 1st, 2nd, 6th, 7th, 8th, 9th, 10th and 13th Respondents suit was statute barred. My view is that said assertions remained to be unsubstantiated claims with no probative value.
89. In ground two (2) of the Memorandum of Appeal, the Appellant contends that the Learned Trial Magistrate erred in issuing orders of specific performance and yet the Respondents suit was statute barred.
90. The Appellant has anchored his contention that the Learned Trial Magistrate erred in issuing orders of specific performance on grounds that the Respondents suit should have been found to be statute barred.



91. Having found that that no evidence was led on the contention that the Respondents suit was statute barred, it follows that Ground (2) of the Memorandum of Appeal lacks merit.
92. Taking the foregoing into consideration, Grounds one (1) and two (2) of the Memorandum of Appeal fail.

B. Whether the Learned Trial Magistrate erred in failing to consider Section 3(3) of the Law of Contract Act.

93. This question for determination addresses ground three (3) of the Appellant's Memorandum of Appeal.
94. The Appellant submits that many of the agreements that were relied upon by the Respondents failed to satisfy the requirements set out in Section 3(3) of the Law of Contract Act.
95. The Appellant also submits that the Learned Trial Magistrate erred in failing to interrogate those deficiencies and he instead presumed that there existed valid enforceable contracts across the board.
96. The Respondents on the other hand submit that they produced their respective handwritten land sale agreements which were witnessed and had been signed by all the parties.
97. The Respondents further submit that the Appellant admitted before the trial Court that he had entered into the said land sale agreements and they were therefore enforceable.
98. The Learned Trial Magistrate at page 10 of the judgement held as follows;

“ 1. Are the contracts valid and enforceable?

Section 3(3) of the Law of Contract Act provides as follows;

3(3) No suit shall be brought upon a contract for the disposition of an interest in land unless-

- a. The contract upon which the suit is founded-
 - i. Is in writing;
 - ii. Is signed by all the parties thereto; and
- b. The signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

I have thus considered the Agreements between the 1st Defendant and each of the 13 Plaintiffs which were produced, and which agreements, the 1st Defendant admits to. The sale agreements are handwritten and do not assume a specific format. The agreements are clearly signed by the parties who are specifically designated, and are attested to by witnesses.

I find that the sale agreements between the 1st Defendant and all the Plaintiffs conformed to the above requirements and are valid and enforceable contracts of sale of land.”

99. It is evident that the Learned Trial Magistrate addressed the issue of whether or not the agreements produced by the Respondents complied with Section 3(3) of the Law of Contract Act.



100. It is important to note that the Appellant has not specifically set out the agreements that did not comply with Section 3(3) of the Law of Contract Act. He instead submits that many of the agreements did not meet statutory requirements.
101. It is my view that nothing would have been easier than the Appellant setting out with specificity the alleged agreements for sale of land that did not meet the requirements of Section 3(3) of the Law of Contract Act.
102. Given the said circumstances, ground three (3) of the appeal fails.

C. Whether the Learned Trial Magistrate erred in failing to consider that some of the agreements had been rescinded and money refunded to the Respondents.

103. This question for determination addresses ground four (4) of the Appellant's Memorandum of Appeal.
104. The Appellant submits that he rescinded the land sale agreements he had entered into with the 1st and 2nd Respondents. He also submits that he refunded the purchase price.
105. The Appellant further submits that once a contract has been rescinded, no claim of specific performance can be upheld.
106. It is the Appellant's submissions that the Learned Trial Magistrate erred in failing to evaluate the evidence on rescission and instead proceeded on the assumption that enforceable contractual obligations continued to subsist.
107. The Respondents on the other hand submit that on 21st March, 2016, the Appellant purported to rescind some of their sale agreements on the ground that the suit parcel of land was subject of a family dispute.
108. The Respondents also submit that no evidence was adduced before the trial Court to show that there was any such dispute and the Appellant's former wife did not testify as to the said dispute.
109. The Learned Trial Magistrate at the last paragraph of page 13 of the judgement and at the first paragraph of page 14 of the judgement held as follows;

“I have considered the prayers being sought by the 1st Defendant in the Counterclaim. The major ground for the counterclaim as brought is that the 1st and 2nd Plaintiffs asked for a refund of their money which the 1st Defendant complied with and refunded the said money and rescinded the agreements, however, the 1st and 2nd Plaintiffs declined to take back their money.

In the case of *Ann Mumbi Hinga vs William Mwangi Gathuma & another* [2017] eKLR the Court had the following to say;

“Rescission arises where one party in a contract is in default. The party which is not in default gives notice to the party in default to perform the contract. On the failure to so perform the contract is then rescinded.”

In this case, the 1st Defendant has not shown the Court that the 1st and 2nd Plaintiffs were in default in (sic) their contract for the 1st Defendant to initiate rescission of the contracts. I find that the contracts in respect to the 1st and 2nd Defendants were not rescinded and therefore the prayers being sought in the Counterclaim are not available to the 1st Defendant. For



that reason, the Counterclaim is hereby dismissed with costs to the Plaintiffs.” [Emphasis is mine]

110. It is apparent that the Learned Trial Magistrate addressed the issue of whether or not the agreements entered into between the Appellant and the 1st and 2nd Respondents were rescinded.
111. The Learned Trial Magistrate found that the Appellant did not demonstrate that the 1st and 2nd Respondents were in default in order for him (Appellant) to rescind their agreements.
112. A perusal of the Court record shows that the 1st Respondent testified as PW1. It was his evidence that he purchased a portion of land parcel No. Kericho/Sorget/Kalyet Block 160 measuring 3 ¼ acres at a consideration of Kshs. 360,000/= from the Appellant.
113. The 1st Respondent also testified that the Appellant later alleged that his family had refused (sic) the said transaction and on 21st March, 2016, he received a letter from S.M. Omae Advocates stating that the Appellant wanted to refund him the purchase price.
114. The 1st Respondent further testified that on 17th December, 2018, he received another letter with an attached cheque. It was cheque No. 284829 issued by Kenya Commercial Bank for Kshs. 372,000/=.
115. It was the 1st Respondent’s evidence that he instructed an advocate to return the said cheque to the Appellant.
116. It was also the 1st Respondent’s evidence that the Appellant then tried to take possession of the land and that is when he filed the suit.
117. The 2nd Respondent testified as PW2. It was his evidence that he purchased portions of the suit parcel of land. It was also his evidence that vide a land sale agreement dated 29th March, 1999, he purchased a three-acre portion of the suit parcel of land. He later purchased an additional half an acre vide an agreement dated 27th June, 2000 at a consideration of Kshs. 20,000/=.
118. It was further his evidence that vide an agreement dated 10th March, 2005, he purchased another half an acre portion of the suit parcel of land for Kshs. 60,000/=.
119. He testified that in the year 2005, the Appellant refused to transfer the said portions of land to him.
120. He also testified that he received letters dated 29th May, 2009, 6th June, 2009 and 21st March, 2016 which letters stated that the Appellant’s family had objected to the sale.
121. He further testified that on 17th April, 2017 he received a letter from S.M Omae advocates. Attached to the said letter was a cheque of Kshs. 70,000/= that was alleged to be a refund of the purchase price.
122. It was his evidence that the sum of Kshs. 70,000/= was a refund of the sum of money he paid for the purchase of half an acre of the suit parcel of land in the year 2005.
123. It was also his evidence that he reported the said issue to the area Chief and the Assistant County Commissioner and they had a meeting with the Appellant.
124. It was further his evidence that after the said meeting, it was agreed that the Appellant would take back his money and effect transfer of the portions of land they had purchased.
125. He testified that he then returned the cheque.
126. The Appellant testified as DW1. It was his evidence that he sold a 3 ¼ acre portion of the suit parcel of land to the 1st Respondent at a consideration of Kshs. 260,000/=.



127. He also testified that between the years 1999 and 2005, he sold portions of the suit parcel of land measuring 4 acres at a consideration of Kshs. 400,000/= to the 2nd Respondent.
128. He further testified that in the year 2006, the 1st Respondent requested for a refund of the purchase price.
129. It was his evidence that as he was looking for the money, the 1st Respondent continued to till the land.
130. It was also his evidence that the 2nd Respondent also later requested for a refund of the purchase price.
131. It was further his evidence that he issued a cheque to the 1st Respondent of kshs. 372,000/= and then issued the 2nd Respondent a bankers cheque of kshs. 70,000/=.
132. He testified that both the 1st and 2nd Respondents returned the said cheques to him.
133. Upon cross examination, he admitted that the 1st and 2nd Respondents refused to accept a refund of the purchase price. He also admitted that in their agreements for sale of land, there was “no condition of refunding the money.”
134. From the evidence adduced before the trial Court, it is not disputed that the Appellant vide the letters dated 17th December, 2018 and 17th April, 2017 sent cheques to the 1st and 2nd Respondents respectively seeking to refund them the purchase price.
135. It is also not disputed that the said cheques were returned to the Appellant.
136. What is in dispute is whether this constituted a rescission of the agreements the Appellant and the 1st and 2nd Respondents had entered into.
137. In the judicial decision of Ngugi (Suing as the Legal and Personal Administrator to Ngugi Njogu) v Muriithi [2022] KEELC 2860 (KLR) the Court held as follows;

“Rescission arises where one party in a contract is in default. The party which (sic) is not in default gives notice to the party in default to perform the contract. On the failure to perform the contract is then rescinded. In this case for the plaintiff to rescind this contract she must show that the defendant was in default. Secondly, that she gave notice of default and the defendant were unable to remedy the default by performing their part of their contract.” (Emphasis mine)
138. In the above cited judicial decision, the Court held that for a contract to be rescinded, a party to the contract has to be in default, the party who is not in default gives notice to the party who is in default to perform the contract failure to which the contract is rescinded.
139. In the present case, it is not disputed that the 1st and 2nd Respondents paid the entire purchase price. It is also not disputed that the 1st and 2nd Respondents were in possession of portions of the suit parcel of land.
140. It is further not disputed that the 1st and 2nd Respondents were not in default of the terms of the various agreements for sale of land.
141. That being the case, I concur with the finding of the Learned Trial Magistrate that the Appellant failed to demonstrate that the 1st and 2nd Respondents failed to perform the contract, that he served them with a notice to perform and that they failed to perform which then meant that the contract stood rescinded.
142. Consequently, this ground of appeal fails.



D. Whether the Learned Trial Magistrate erred in failing to find that some of the Respondents did not have a valid cause of action against the Appellant.

143. This issue addresses ground five (5) of the Memorandum of Appeal.
144. The Appellant submits that the Respondents suit was statute barred and that the alleged land sale agreements they entered into did not comply with Section 3(3) of the Law of Contract Act.
145. The Appellant also submits that some of the contracts he entered into with the Respondents were rescinded.
146. The Appellant further submits that for the above reasons, the Respondents did not have a viable cause of action and the Learned Trial Magistrate therefore erred in treating all claims as equally viable without regard to their distinct merits.
147. The Respondents on the other hand reiterate that the cause of action arose on 21st March, 2016 and therefore their suit was not statute barred.
148. It is important to note that the Appellant has based his contention that the Respondents had no valid cause of action on the grounds that the suit was statute barred, that the agreements produced by the Respondents did not comply with Section 3(3) of the Law of Contract Act and that some of the agreements were rescinded.
149. I have addressed the said grounds under issues (a), (b) and (c) above and found that they lack merit.
150. Having already addressed the said issues in the preceding paragraphs, it is my view that this ground of appeal fails.

E. Whether the Learned Trial Magistrate erred in hearing the matter and yet he had no jurisdiction.

151. This issue addresses ground (6) of the Memorandum of Appeal.
152. The Appellant submits that the Respondents claim was statute barred and therefore the Learned Trial Magistrate did not have jurisdiction to hear and determine it.
153. The Respondents submit that the Appellant did not raise the issue of jurisdiction before the trial Court and he cannot therefore raise it on appeal.
154. The Learned Trial Magistrate did not address the issue of jurisdiction in the judgement.
155. In the judicial decision of *Adero & another v Ulinzi Sacco Society Ltd* [2002] KEHC 1174 (KLR) the Court held as follows;
- “...it is trite law that jurisdiction cannot be conferred by the consent of the parties. Much less can it be assumed on the grounds that parties have acquiesced in actions which presume the existence of such jurisdiction. And jurisdiction is such an important matter that it can be raised at any stage of the proceedings and even on appeal.” (Emphasis mine)
156. In the above cited judicial decision, the Court held that the issue of jurisdiction can be raised at any stage of the proceedings including on appeal.
157. It is important to note that the Appellant’s contention that the trial Court lacked jurisdiction is premised on the ground that the Respondents suit was statute barred.



158. Under issue (a) above, I have found that the Appellant did not lead and/or adduce any evidence in support of his contention that the Respondents suit was statute barred.

159. That being the case, this ground of appeal fails.

F. Who should bear costs of the appeal.

160. The general rule is that costs shall follow the event. This is in accordance with the Provisions of Section 27 of the Civil Procedure Act (Cap. 21). A successful party should ordinarily be awarded costs of an action unless the Court, for good reason, directs otherwise.

Disposition.

161. In the result, I find that this appeal lacks merit. It is hereby dismissed with costs.

162. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO THIS 22ND DAY OF JANUARY, 2026.

L. A. OMOLLO

JUDGE.

In the presence of: -

Mr. Mwenda for Miss Soi for the Respondents

Mr. Josiah Kirui (Appellant present and acting in person)

Court Assistant; Mr. Joseph Makori.

