REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

CIVIL APPEAL NO E108 OF 2022

MUTHOKI BROTHERS LIMITED……..……APPELLANT

= VERSUS =

PAUL MASIUKI WASANGA …….. RESPONDENT

(Being an Appeal from the decision of the Chief Magistrate's Court at Milimani, Hon G.M Gitonga, P.M delivered on 11th October, 2022 in case no. 993 of 2020; Paul Masiuki Wasanga vs Muthoki Brothers Ltd)

J U D G E M E N T

1. The Appellant unhappy with the decision of the Honourable G. M Gitonga, PM delivered on the 11th October, 2022 filed the memo of appeal dated 9th June 2023 containing seven grounds of appeal. The grounds are as follows:

    i) The learned trial Magistrate erred in law and in fact in finding that the sale agreement dated 10th March 2009 and the amended sale agreement dated 10th November 2009 valid and enforceable when the agreement was concluded in

violation of an interlocutory injunction issued by the High Court in Civil case No. 379 of 2008

ii) The learned trial Magistrate erred in law and in fact in finding that the sale agreement dated 10th March 2009 and amended on 10th November 2009 valid and enforceable as the Plaintiff failed to demonstrate the formalities followed for the of the suit property and the direct interaction with the Defendant a ltd company with regard to the sale of the property.

iii) The learned trial Magistrate erred in law and in fact in finding that the sale agreement dated 10th March 2009 and amended on 10th November 2009 valid and enforceable as the Plaintiff failed to provide evidence of the consideration paid to the Defendant as purchase price.

iv) The learned trial Magistrate erred in law and in fact in awarding the Plaintiff orders of specific performance as the completion for the sale of the suit property has been overtaken by events because it ought to have happened more than a decade ago on 8th June 2009.

v) The learned trial Magistrate erred in law and in fact in awarding the Plaintiff orders of specific performance as the

Plaintiff's claim to enforce the sale agreement was Statute barred by the Limitation of Actions Act.

vi) The learned trial Magistrate erred in law and in fact in awarding the Plaintiff orders of specific performance as the Plaintiff knowingly entered into an illegal sale agreement in contravention of the injunction orders issued in HCCC 379 of 2008.

vii) The learned trial Magistrate erred in law and in fact in awarding the Plaintiff orders of specific performance as the Plaintiff was undeserving of the equitable remedy for approaching the Court with unclean hands because he was aware of the illegalities tainting the alleged sale.

2. The Appellant prays for reliefs and judgment as follows:

a) That the appeal be allowed

b) The entire judgement of the subordinate Court dated 11th October, 2022 be set aside and, in its place, a varied judgment be entered.

c) Alternatively, and without prejudice to prayers (a) and (b) above, the impugned judgement be set aside and varied in favour of the Appellant.

d) Costs of the appeal to the Appellant.

3. The appeal was argued by way of written submissions which were highlighted by learned counsels on 6th November, 2025. The Appellant's submissions was dated 12th June 2025.

4. The Appellant submits that at the time of entering into the sale agreement dated 10th March 2009, both parties had full knowledge that there were orders in HCCC 379 of 2008 dated 8th July 2008 and registered against the title to the parcel L.R No 7583/66 barring any dealings including sale and purchase pending determination of that suit. It adds that the orders were only vacated on 18th January, 2022.

5. The Appellant framed three issues for determination of the appeal thus:

    a) **Whether the learned trial magistrate erred in finding that the sale agreements were valid and enforceable.**

    b) **Whether the learned magistrate erred in fact and law in finding that the Respondent's claim was time-barred**

    c) **Whether the trial Court erred in granting the equitable remedy of specific performance.**

6. The Appellant submits that since both parties had full knowledge of the injunction order, the interlocutory injunction rendered the sale agreements null and void and incapable of enforcement. It cited the case of **Standard Chartered Bank Kenya Ltd vs Intercom Services Ltd & 4 Others (2014) eKLR** where the Court of Appeal held thus;

> **"Ex turpi causa non oritur action. This old and well known legal maxim is founded in good sense, and expresses a clear and well recognized principle which is not confined to indictable offences. No Court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal. If that illegality is duly brought to the notice of the Court, and if the person invoking the aid of the Court is himself implicated in the illeagality. It matters not whether the Defendant has pleaded the illegality or whether he has not. If the evidence adduced by the Plaintiff proves the illegality, the Court ought not to assist him"**

7. In arguing that the claim was time barred, the Appellant made reference to the provisions of section 4(1)(e) of the Limitation of Actions Act which caps the period to enforce land sale agreements at six (6) years. That in this case, the six year period lapsed on 10th November 2015 but the suit was filed in the magistrate's Court on 18th February, 2020.

8. The appellant relied in the case of **Gathoni vs Kenya Co-operative Creameries Ltd (1982) KLR 104** which held that,

> **"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."

9. The Appellant submits that the delay in waiting from the year 2009 to the year 2020 to institute a matter in Court to enforce an otherwise illegal contract of sale of land amounts to indolence and should not be entertained by this Court.

10. On the last question, the Appellant submits that he who comes to equity must come with clean hands. The respondent in this case was aware of the illegalities tainting the alleged sale agreement. Therefore, the trial magistrate erred in granting the relief of specific performance to a Respondent who had already soiled his hand. That the Respondent should not be allowed to take advantage of this Court to sanitise his conduct and extricate himself from the consequences of his own actions.

11. The Appellant urged the Court to allow its appeal and grant the reliefs prayed for.

12. The Respondent via their submissions dated 8th July 2025 started by giving a background of the case before the Chief Magistrate's Court. He raised three questions for determination, to wit;

    i) **Whether the learned judge erred in fact and in law in finding that the Sale Agreement dated 10th March 2009 and the arnended Sale Agreement dated 10th November 2009 were valid and enforceable contracts?**

ii) **Whether the learned trial magistrate erred in law and in fact in finding that the Respondent's claim was not statute barred under the Limitations ofActions Act?**

iii) **Whether the Learned trial Magistrate erred in law in granting the equitable remedy of specific performance to the Respondent?**

13. He submits that the Sale Agreement dated 10th March 2009 and the amended Sale Agreement dated 10th November 2009 were valid and enforceable contracts, having been voluntarily entered into by the parties therein with clear terms and mutual obligations.

14. In support of this argument, he relied on the case of **Omar Gorhan v Municipal Council of Malindi (Council Government of Kilifi) v Overlook Management Kenya Ltd [2020] eKLR** where it was held that:

> **"The essential components of a contract as was observed by Harris JA in Garvey v Richards (2011) JMCA 16 ought to ordinarily reflect the following principles:**
>
> **It is a well-settled rule that an agreement is not binding as a contract unless it shows an intention by the parties to create a legal relationship. Generally, three basic rules underpin the formation of a contract, namely, an agreement, an intention to enter into contractual relationships and consideration. For**

a contract to be valid and enforceable an essential term governing the relationship of the parties must be incorporated therein. The subject matter must be certain. There must be positive evidence that a contractual obligation, born out of an oral or written agreement, is in existence."

15. The Respondent contends that since he was not a party to the proceedings in HCCC 379 of 2008, the injunctive order could not be enforced against him. He cited the case of **CW v BC [2019] KEHC 2841 (KLR)** where it was held that:

"It is a principle ofnatural justice that no order can be made or enforced against any person who is not a party to the proceedings in which the order was made and has not been given an opportunity to be heard - simply stated no person should be condemned unheard. The order sought by the applicant will affect persons who have not been made parties to the suit. It would be an injustice to allow the application without giving all those affected an opportunity to be heard."

16. He avers that all the payments due under the sale agreements were duly made by him, some of which were effected through the mutual advocate representing both parties. That the Appellant has not adduced any evidence to demonstrate that as at the time of execution of the sale

agreements the injunctive orders in question had been registered against the title to the suit property.

17. Further, the Respondent submits that at the time of entering into the said contracts, the Appellant was fully aware of the injunctive orders issued by this Honourable Court and is clearly coming to this Honourable Court with unclean hands and it cannot now seek to rely on orders it knowingly disregarded to defeat a transaction it willingly participated in.

18. Additionally, Respondent having acted in good faith cannot be penalised for the Appellant's failure to comply with or obtain the requisite leave of Court prior to entering into the said transaction as the responsibility to observe and honour the injunctive orders lay squarely with the Appellant and it cannot shift the burden of that non-compliance onto the Respondent.

19. He cited the case of in the case of **Sonko & Another vs Patel & Another (1955) 22 EACA 23** as cited in the case of **Muturi Mwaniki & Wamiti Advocates v Edward Mukundi Karanja & 2 others [2012] KEHC 9551 (KLR)** it was held: -

> **"For we hold that the 1st Respondent is estopped by his conduct from now questioning the form or substance of the decree...<u>It was as we have said submitted to his advocate and app_roved without reservation. That was an express representation that he accepted the decree as being correct in</u>**

<u>form and substance</u>. ...In these circumstances it would be unjust to allow the 1st Respondent to approbate and reprobate and this objection fails"

20. On the second question, the Respondent submits that the limitation of time was not raised as a defence before the trial Court. He argues that the sale transaction was put in abeyance for over 10 years pending the outcome of HCCC 379 of 2008 which was concluded on 25th September 2019.

21. That it was on the I I th of November 2019 that the Appellant through its then advocates informed the advocate who was representing both parties at the time Naomi Njeri Kariuki T/A Kiarie, Kariuki Associates Advocates that the Appellant's priorities had shifted over the past ten (10) years thus it was no longer interested in selling the suit property. In turn, the Respondent issued the Appellant with a completion notice dated 25th November 2019.

22. He relies on the case of **Osienyo v Omondi (Civil Appeal E16Z of 2023) [2025] KEHC ZZI (KLR) (Civ) (31 January 2025) (Judgment)** where it was held that: -

"According to Black's Law Dictionary (10th Edition) the word "accrue" means "to come into existence as an enforceable claim or right." Therefore, in interpreting the word accrued as per the Statute, the cause of action on breach of contract can

only be brought at the time the actual breach occurred. This is when it can be said the time started running. See South Nyanza Sugar Company Limited v Charles M. Nyantahe [2022] eKLR wherein the Court pronounced thus: -"<u>Therefore, in interpreting the word accrued as per the Statute, the cause of</u> action on breach of contract can only be brought at the time the actual breach occurred. This is when it can be said the time started running."

23. Lastly, the Respondent stated that he was entitled to the relief of specific performance granted to him by the trial Court. In support of this submission, he cited several case law inter alia, the case of **GHÄRIB SULEMÆN GHÄRIB V ABDULRÄHMÄN MOHAMED AGIL LLR NO. 750 (CAR) Civil Appeal No. 112** of **1998** as cited in **Edward Gitahi Kihia v Thomas Caron [2020] eKLR** as follows;

"The jurisdiction to order specific performance is based on the existence of a valid and enforceable contract and being an equitable relief, such relief is more often than not granted where the party seeking it cannot obtain sufficient remedy by an award of damages the focus being whether or not specific performance will do more perfect and complete justice than an award of damages."

<u>Analysis and Determination</u>:

24. I have taken time to read through the record of appeal (amended) and the supplementary record of appeal together with the submissions rendered. I agree and adopt the three issues raised by both the Appellant and the Respondents for determination of the appeal. These are;

a) **Whether or not the sale agreement and the amended sale agreement was enforceable in light of the existence of the orders of injunction issued in HCCC 379 of 2008.**

b) **Whether or not the case filed before the trial Court was Statute barred.**

c) **Whether the trial Court erred in granting orders of specific performance.**

a. Whether the sale agreement was illegal, null and void:

25. The Appellant has extensively argued that there was an order of injunction issued on 8th July 2008, restraining any dealings with the suit property and which order was in the full knowledge of the Respondent as at the time he negotiated and signed the sale agreement on 10th March 2009. The Appellant went further to argue that this order was registered on the suit title at the Ministry of Lands.

26. The Appellant filed copies of the pleadings in HCCC 379 of 2008, inter alia, a plaint which discloses the parties to that suit as Francis Mwaura Njinu versus Hanna Wanjiku Mburu & 3 Others, with the Appellant sued as the 5th Defendant. The Respondent was not one of the parties in this

case, and this is the ground he relied on in his defence, that he cannot be punished for disobeying an order he was not part of.

27. I have perused a copy of the order dated 8th July 2008, which formed part of this record, and the orders granted read as follows;

> ***"1. The application is certified as urgent and heard exparte in the first instance.***
>
> ***2. The 3rd to 5th Defendants by themselves, their agents be restrained from accessing, taking possession, selling, transferring, charging and or in any other manner whatsoever dealing with L.R No. 7583/66-Karen or any subdivision thereof pending the hearing and determination of this application.***
>
> ***3. That the application be served for inter parties hearing on the 22nd July 2008"***

28. The order as at 8th July 2008 restrained the Appellant (then sued as the 5th Defendant in 379 of 2008) from selling the land until the application upon which the orders were anchored was determined. It is not clear when the said application was determined but the interpretation of the order if it was still in force as at 10th March 2009, restrained the Appellant from entering into the impugned sale agreement with the Respondent.

30. From the record, it is not clear whether the order was extended or when that application was determined. Further, the Appellant has enclosed a consent order dated 16th October, 2009 and issued on 17th November, 2009. This consent confirmed the orders of 8th July 2008 to remain in force pending determination of the suit. This consent was reached before the subsequent amendment of the sale agreement dated 10th November, 2009.

31. The other point relied upon to prove the illegality (as per the witness statement) was that no meeting of directors was held to approve and authorize the sale of any portion of the suit property. In addition, the Appellant stated that the documents presented by the Respondent were not duly signed and sealed by the Appellant company.

32. The Appellant further averred that it never received any monies from the purchase of the suit property. That the evidence of payments provided by the Respondent were monies paid to Fidel Jimi Mumina who was not a director under the guise of purchasing the suit property. The Appellant Company also denied issuing any instructions to the firm of Kiarie Kariuki and Associates for purported representation in the impugned transaction.

33. It is in light of these arguments that the Appellant wants their contract of sale with the Respondent rendered null and void for having been

executed in contravention of a Court order and without board resolution approving and or authorising the sale.

34. The trial Court held the sale agreements were valid and enforceable despite the Court order although he did not give reasons for his findings. It is therefore my duty as the first appellate Court to review the evidence to ascertain whether the honorable magistrate reached to a wrong conclusion.

35. Order 40 of the Civil Procedure Rules and section 5 of the Judicature Act give the High Court powers to punish for contempt, including making any appropriate declarations as the circumstances may demand. With regard to disobedience of the orders of 8th July 2008, the High Court was duly moved by the Plaintiff in that case vide an application dated 18th January 2012. In that application, the Plaintiff sought to have five people inter alia the Respondent and Naomi Njeri Mungai advocate who acted for the parties herein in the sale transaction, punished for contempt.

36. The said application was determined via a ruling dated 29th January 2013 by Justice E.K.O. Ogola. At page 7 and 8 of the said ruling, the judge noted that the Plaintiff instead of filing a further affidavit in response to the replying affidavit of Naomi Njeri, he chose to withdraw the case against Ms Njeri and Paul Masiuki Wasanga (the present Respondent).

37. The judge recorded at paragraph 12 of that ruling thus; "*in my view, if the Applicants have decided to remove the only nexus the contemnors have*

with this Court order, and since that nexus also totally denies having acted for the contemnors at the relevant period, there is no legal nexus to connect the contemnors with the Court order." Consequently, the judge dismissed the contempt application.

38. The suit the subject of this appeal was filed in the year 2020, some seven (7) years after the decision on the contempt of Court application. The Appellant did not challenge the ruling by Justice E.K.O. Ogola. It confirmed that the Respondent's application for joinder in HCCC No. 379 of 2008 was dismissed. The suit HCCC 379 of 2008 was concluded in September, 2019 with the dismissal favouring the Appellant.

39. In support of its appeal, the Appellant cited the case of **Standard Bank Kenya Ltd versus Intercom Services Ltd** *supra* for the proposition that Courts should not enforce obligations arising from illegal transactions. First, I wish to point out that the Appellant by urging that the sale transaction was in contravention of the Court order is an attempt to re-litigate the subject of contempt in the wrong forum. This Court has no jurisdiction to determine whether or not the Appellant breached the orders of 8th July 2008 made in a separate cause of action.

40. Further, the issue of the alleged contempt had been determined by a Court of competent jurisdiction and therefore, it is res judicata. In any case, the magistrate's Court lacked jurisdiction to punish for contempt of a High Court order. Thirdly, there was no evidence presented to the trial

Court or this Court by the Appellant, which declared the sale agreement dated March 2009 and amended in November 2009 to be illegal.

41. In the Appellant's list of documents produced in the Magistrate's Court comprised only of the orders of 8th July 2008 and extended on 16th October, 2009. The statement that there was no board resolution authorising the sale transaction remained assertions that were not corroborated. In the execution page of both agreements, its indicated signed and sealed.

42. There is a signature although the seal stamp is not visible in the copy filed. Below it is a certificate that the directors of Muthoki Brothers company ltd appeared before the witness or of their signature who also signed. The Appellant has not denied the signature appearing in the sale agreement did not belong to their director.

43. Further, the Appellant stated that no payment was made to its known bank accounts. This may be so since the evidence of some of the payments exhibited by the Respondent were in favour of Irene Kamene Mumina and Fidel Jimi Mumina. However, the amended sale agreement dated 10th November, 2009, the Appellant acknowledges receipt of payment from the Respondent amounting to Kshs.9,750,000. In essence, the appellant is acknowledged all the monies received by Fidel and Irene reached its accounts.

44. Whether there was a board resolution and authority to sell a portion of the suit property was the Appellant's internal matter on how they conduct their affairs. The Appellant did not produce its memorandum and articles of association to demonstrate that it was a requirement for disposing of their proper, the directors must hold a meeting and approve the transaction. It wanted the Court to proceed on a presumption merely because it is a limited liability company.

45. In light of the foregoing, I find no basis to hold that the sale transaction between the parties was unenforceable as argued by the Appellant. Hence, there is no ground to set aside the finding of the learned trial magistrate on this point.

b. Whether the original suit was time-barred

46. The second ground is whether or not the Respondent's suit was time-barred, premised on section 4(1) of the Limitation of Actions Act, setting the time limit for contracts at six years. According to the Appellant, the time lapsed in February 2015 while according to the Respondent, the cause of action arose when the Appellant change its mind in 2019.

47. In determining the question of time-bar, it is imperative to define the meaning of cause of action. Black's law dictionary 10th ed defines it as,

> ***"A group of operative facts giving rise to one or more bases for suing; a factual situation that entitles one person to obtain a***

remedy in Court from another person e.g. after the crash, Aronson had a cause of action."

48. It is my considered opinion that the execution of the agreement per se does not constitute a cause of action. Rather, in contracts such as this, time is considered to run when a party fails in its obligations within the set time and or when a notice is served. In this instance, the Appellant merely relied on the expiry of the six years from the date of execution of the sale agreement.

49. The Respondent pleaded in paragraph 9 of the plaint that on 11th November 2019, the Appellant through its advocate informed their mutual advocate in the transaction (Kiarie Kariuki & Associates) that the its priorities had shifted over the past 10 years thus it was nolonger interested in selling the suit property and expressed willingness to refund the monies paid together with an agreed amount of interest.

50. The email of 11th November 2019 read in part thus,

> ***"As you are aware the High Court dismissed the suit filed by Francis Njinu against Muthoki Brother Ltd in case number 379 of 2008 thus paving way for our client to deal with the property, a portion which was the subject of sale and purchase transaction with your client. Our client has instructed us to inform you that their priorities as a company has shifted and they are nolonger interested in selling the property."***

51. The Appellant in its statement of defence denied issuing instructions to Kiarie Kamau & Associates advocates to represent it in the sale transaction. It denied even entering into a sale agreement with the Respondent. However, the appellant's defence does not disown this email of 11th November 2019. It pleaded that it cannot be bound by an invalid agreement.

52. On receipt of this email, the Respondent through their advocates on record issued a 21 day completion notice to the Appellant. Upon failing to comply with the notice, they filed the suit in the Chief magistrate's Court. It is the Respondent's argument that the cause of action arose in November of 2019.

53. From the pleadings in paragraph 5 of the Statement of defence, the Appellant while denying paragraph 5 of the plaint stated that around November 2009, the property could not have a clean title because there

was an injunction registered on the title barring any dealings pertaining to the suit property as from July 2008. Thus, making their contention that the sale agreement having been a nullity ab initio, the cause of action ran from March and November of 2009.

54. I have stated herein above that there was no conviction of contempt against the Appellant and or the Respondent and there was no evidence adduced of a Court order declaring the sale agreement a nullity. Therefore, it is my holding that time could only run from the date of the cause of action which is November, 2019 when the Appellant expressly stated they were not keen to complete the transaction.

55. Furthermore, the delay was occasioned by the Appellant on the basis of pendency of a suit against it. It is they who are guilty of unclean hands. Why wait to cancel the deal ten years later and only after obtaining favourable orders in HCCC 379 of 2008?

c. Grant of orders of Specific Performance:

56. The Appellant raised a ground that the trial magistrate erred in law by granting orders of specific performance premised on an illegal sale agreement which was in contravention of the Court order in HCCC 379 of 2008. It added that the Respondent was undeserving of the equitable remedy since he approached the Court with unclean hands (being aware of the illegalities tainting the sale agreement).

57. The Appellant repeatedly stated in its defence and submissions that the Respondent had full knowledge of this order that it argues nullifies the transaction. It went on to state that the order of 8th July was registered on the title of the suit property. However, a copy of the title contained in the supplementary record of appeal does not reflect any entry registering the order on the title. Additionally, the order was directed at the Appellant not to sell and or deal with the suit property. If it disobeyed the terms of this order (no finding of guilt is on record), how does this soil the hands of a Respondent who was not a party and disentitle him from any equitable remedy? It is therefore superfluous to submit that the equitable remedy is unable to the Respondent on this ground only.

58. Other than clinging on the illegality of the contract, the Appellant does not accuse the Respondent of any other breach. Probably because in the amended sale agreement as of 10th November, the Appellant acknowledged receipt of payment of Kshs.9,750,000 out of the Kshs.10,500,000 (purchase price). This left a balance of Kshs.750,000 which was to be paid only after successful registration of transfer in favour of the Respondent. Thus, the obligation shifted to the doorstep of the Appellant to have the transaction it is now contesting completed.

59. The outstanding balance was so negligible and the duty rested upon the Appellant to perform. Justice of the case would be to compel it to perform its obligations hence the grant of the order of specific

performance which was indeed prayed for. The trial magistrate applied his mind correctly in entering judgment in favour of the Respondent that would facilitate his acquisition of the land he had been waiting for its transfer.

d. What appropriate orders should issue

60. After considering the evidence on record in its entirety, this Court concludes that all the grounds raised in the memorandum of appeal dated 9th June 2023 are without merit. Accordingly, I uphold the decision of the learned Hon Gitonga, P.M., delivered on 11th October, 2022. The appeal is hereby dismissed with costs to the Respondent.

Dated, signed and delivered by upload on CTS this 29th day of January 2026

A. OMOLLO

JUDGE