



**Muhia v Beige Investments Ltd (Environment & Land Case
219 of 2019) [2024] KEELC 165 (KLR) (25 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 165 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 219 OF 2019**

**JO MBOYA, J
JANUARY 25, 2024**

BETWEEN

DANIEL KIMEU MUHIA PLAINTIFF

AND

BEIGE INVESTMENTS LTD DEFENDANT

RULING

1. The Plaintiff herein has approached the Jurisdiction of the Honourable court vide Originating Summons dated the 20th June 2019, pursuant to the provisions of Article 40 of *the Constitution* 2010 and (sic) Order XXVII of Civil Procedure Rules and Section 3A of the *Civil Procedure Act*, Chapter 21, Laws of Kenya, and in respect of which the Plaintiff has sought various reliefs inter-alia [verbatim];
 - i. That it be declared that the Plaintiff and the 1st Defendant are the registered proprietor(s) of the suit premises known as LR. No. Nairobi/ Block 27/114.
 - ii. That the Title to the suit property bearing the name of the 1st Defendant be revoked and replaced with another one be issued bearing the name of the Plaintiff and the 1st Defendant as the registered proprietors.
 - iii. That the costs of [sic] this Application be provided for.
2. Suffice it to state that the Originating summons herein does not allude to and/or contain any grounds on the face thereof. Nevertheless, the originating summons is supported by an affidavit sworn by the Plaintiff sworn on the 20th June 2019; and in respect of which the Deponent has attached a total of five (5) documents.
3. Upon being served with the Originating summons, the Defendant herein together with Martin Mugi Mamicha T/a Mamicha & Company Advocates, who had hitherto been sued as the 2nd Defendant,



took out and filed a Notice of preliminary objection dated on the 1st August 2019, raising a plethora of legal issues.

4. Be that as it may, the Notice of preliminary objection was thereafter canvassed and disposed of by the Honourable court (differently constituted) vide ruling rendered on the 17th September 2020, wherein the court proceeded to and dismissed the preliminary objection.
5. Subsequently, the suit as against the 2nd Defendant, namely, Martin Mugi Mamicha T/a Mamicha & Company Advocates was withdrawn vide order of the court made on the 17th October 2022.
6. Other than the foregoing, the current Defendant sought for and obtained Leave of the court to file a substantive Replying affidavit, which was subsequently filed on the 21st February 2023. For good measure, the Replying affidavit under reference (sic) included what the Defendant adverted [sic] to be a counterclaim.
7. Moreover, the Plaintiff herein also proceeded to and filed a Further/Supplementary affidavit sworn on the 13th March 2023, in furtherance of the originating summons dated the 20th June 2019.
8. On the 17th October 2022, the court proceeded to and issued directions as pertains to the hearing and disposal of the originating summons. Instructively, the court directed inter-alia, that the originating summons shall proceed vide viva voce evidence and the Parties were granted liberty to file witness statements and bundle of documents, where appropriate.

Evidence by the Parties:

a. Plaintiff's Case:

9. The Plaintiff's case revolves and gravitates around the testimony of one witness, namely, Daniel Kimeu Muhia. Same testified as PW1.
10. The witness herein testified that same is the Plaintiff in respect of the instant matter. Furthermore, the witness pointed out that the Defendant herein and himself (witness) engaged an advocate, namely, Martin Mugi Mamicha T/a Mamicha & Company Advocates, to act for same in respect of a transaction relating to the purchase and acquisition of a property known as L.R No. 27/114, from one, namely, Paul Kang'ethe Waruhu.
11. It was the further testimony of the witness that pursuant to and arising from the instructions, a sale agreement was duly crafted and thereafter executed by both the vendor and the purchasers, respectively.
12. Furthermore, the witness averred that prior to and or before entering into and execution of the sale agreement pertaining to the suit property, same (witness) carried out and undertook due diligence over and in respect of the suit property. In any event, the witness added that after the due diligence, same (witness) agreed with the vendor on a purchase price/consideration of Kes.15, 000, 000/= only.
13. Other than the foregoing, it was the testimony of the witness that the suit property was being purchased and/or acquired by himself (witness) and the Defendant jointly and that thereafter the suit property was to be sub-divided into two [2] portions, with the witness being entitled to One and a quarter acres.
14. Nevertheless, the witness testified that on or about the 10th February 2009, same (witness) established and/or discovered that the transaction advocate, namely, Martine Mugi Mamicha had proceeded to and prepared a transfer document which only reflected the name of the Defendant herein as the purchaser of the suit property.



15. Further and in addition, the witness testified that thereafter the suit property was transferred and registered in the name of the Defendant only. However, it was the further testimony of the witness that the transfer and registration of the suit property in the name of the Defendant only was contrary of the terms of the sale agreement and essentially deprived him (witness) of his right to and in respect of the suit property.
16. Other than the foregoing, it was the testimony of the witness that later on, same conducted and undertook a search over and in respect of the suit property and established that the Defendant herein had proceeded to and pledged the suit property as security in favor of M/s Equity Bank Ltd. In any event, the witness averred that the suit property was charged to Equity bank Ltd for the sum of Kes.10, 000, 000/= only.
17. It was the further testimony of the witness that upon discovering that the suit property had been transferred and registered in the name of the Defendant only, same (witness) reached to one Mr. Simon Thuo Kagwanja, a Director of the Defendant and sought to address the issue of the registration of the suit property in the name of the Defendant only.
18. However, it was the testimony of the witness that when he (witness) reached out to the Director of the Defendant, the said Director was casual; and in any event, informed the witness that the issue would be sorted out.
19. Notwithstanding the foregoing, the witness proceeded to and testified that same performed his part of the bargain towards and in respect of the acquisition of the suit property, inter-alia, ensuring that the suit property was free of encumbrance. For good measure, the witness reiterated that same was/is entitled to one and a quarters acres of the suit property.
20. On the other hand, it was the testimony of the witness that on or about the 7th January 2014; same engaged and/or retained an advocate, namely, Mr. J M Kimani to generate and issue a Demand Notice to the Defendant Company, wherein same (witness) demanded to be granted his (witness) share of land or in the alternative compensation.
21. However, the witness averred that upon the issuance of the Demand Notice by his advocates, the transaction advocate, namely, Mamicha & Company Advocates wrote back and contended that his (witness) rights and/or interests over and in respect of the suit property have been bought/purchased by the Defendant and hence same (witness) had no further interests in the suit property.
22. Be that as it may, the witness added that the contention by and on behalf of the transaction advocate, were not backed by any iota of evidence. Furthermore, the witness testified that subsequently same proceeded to and lodged a complaint against the transaction advocate with the Advocate Disciplinary Tribunal.
23. Nevertheless, it was the testimony of the witness that the Complaint which was lodged with the Advocate Disciplinary Tribunal and which touched on the conduct of the advocate was thereafter disposed of vide Judgment rendered on the 14th March 2022, wherein the Advocate Disciplinary Tribunal dismissed his Complaint.
24. Moreover, it was the testimony of the witness that the Defendant herein knew that it was him (witness) who undertook various activities towards the purchase of the suit property including due diligence as well as negotiating the price with the vendor. In this respect, the witness averred that same [Witness], is entitled to a share of the suit property.



25. Other than the foregoing, the witness thereafter proceeded to and adopted the contents of the witness statement dated the 31st January 2023. Instructively, the contents of the said witness statement, whose details have been elaborated upon in the preceding paragraphs, was thereafter adopted and constituted as the Evidence in chief of the witness.
26. Additionally, the witness alluded to the original supporting affidavit sworn on the 20th June 2019; and also sought to adopt the contents thereof. For good measure, the contents of the said supporting affidavit were also adopted and constituted as further Evidence in chief of the witness.
27. Other than the foregoing, the witness alluded to a Further/supplementary affidavit sworn on the 13th March 2023; and similarly sought to adopt and rely on same. Suffice it to state that the contents of the Further/Supplementary supporting affidavit were also admitted and adopted as further evidence in chief of the witness.
28. Furthermore, the witness herein alluded to the List and Bundle of documents dated the 31st January 2023; and sought to have the documents thereunder admitted as Exhibits on his behalf. In the absence of any objection to the documents, the documents at the foot of the List dated the 31st January 2023; were duly admitted and constituted as Exhibits P1 to P33, respectively.
29. Additionally, the witness also invited the Honourable court to take cognizance of the two [2] sets of documents annexed to the Further/Supplementary affidavit sworn on the 13th March 2023; and thereafter sought to adopt and rely on same.
30. Similarly, the two [2] annexures alluded to in terms of the preceding paragraphs, were admitted and adopted as Exhibits P34 and P35, respectively.
31. On cross examination by Learned counsel for the Defendant, the witness herein averred that same is entitled to a portion of the suit property measuring 1 ¼ acres. In any event, the witness averred that same paid a total of Kes.7, 500, 000/= only which constitutes half of the purchase price over and in respect of the suit property.
32. Whilst and further cross examination, the witness averred that same has tendered before the Honourable court a summary of how the sum of Kes.7, 500, 000/= only was paid. In this respect, the witness has alluded to the summary at the foot of Exhibit P35, which is the second annexure attached to the Further/Supplementary supporting affidavit sworn on the 13th March 2023.
33. Be that as it may, the witness admitted and acknowledged that though same has tendered before the Honourable court Exhibit P35, he (witness) has however not tendered before the court a copy of the cheque alluded to and mentioned in exhibit P35.
34. Other than the foregoing, it was the testimony of the witness that same has also availed Evidence of various payments that were made by him (witness) towards the purchase of the suit property. In any event, the witness has invited the court to take cognizance of clauses 1, 8 and 9 of the sale agreement.
35. Besides, it was the testimony of the witness that same has tabulated and provided to the court the details of the monies that were paid to and on account of the purchase of the suit property. Nevertheless, the witness has submitted that the sum total of the monies appearing at the foot of Exhibit P35 amounts to Kes.7, 072, 000/= only.
36. On the other hand, it was also the testimony of the witness that same was the one who paid the sum of Kes.530, 000/= only, which is contained and reflected at the foot of the sale agreement.



37. Furthermore, it was the testimony of the witness that the document at page 44 of the Defendant's bundle of documents, which shows that same (witness) was receiving Kes.300, 000/- only, relates to a different transaction.
38. Additionally, it was the testimony of the witness that on the 29th February 2008; same paid further monies on account of the purchase of the suit property, which monies were received and acknowledged by Paul Waruhiu. At any rate, the witness added that there is an acknowledgement which confirms that the monies in question were received from him.
39. Other than the foregoing, the witness avers that the monies in question were paid on the 29th February 2008; before same (witness) departed/left for Eldoret.
40. On the other hand, the witness stated that the sale agreement was executed on the 17th March 2008; and that clause 1.1 of the said agreement confirms that the deposit of Kes.530, 000/= only, was paid out to the vendor. Furthermore, the witness added that the sale agreement attests to the fact that he (witness) is the one who paid out the deposit.
41. Additionally, the witness testified that though there are some other agreement/transactions, which have been captured in the Bundle of documents by the Defendant herein at pages 29, 36 and 44, however, the said transactions are separate and distinct from the suit property.
42. Other than the foregoing, it was also the further testimony of the witness that the sale agreement which was entered into and executed on the 17th March 2008; confirms that he (witness) is one of the vendors.
43. On further cross examination by Learned Counsel for the Defendant as pertains to whether same (witness) executed the documents at page 75 of the Defendant's bundle of documents, the witness denied the signature and contended that the purported signature was a copy and paste.
44. Nevertheless, when pressed further by Learned counsel for the Defendant, the witness made an about turn and contended that he was now not keen to respond to the question relating to whether or not he executed/ signed the document at page 75 of the Defendant bundle of document.
45. Further and in addition, the witness averred that same would be relying of the contents of paragraph 14 of the Supplementary affidavit sworn on the 13th March 2023, in answer to the document at page 75 of the Defendant's bundle of documents.
46. With the foregoing testimony, the Plaintiff's case was duly closed.

b. Defendant's Case:

47. Similarly, the Defendant's case revolves around the testimony of one witness, namely Simon Kagwanja Thuo. Same testified as DW1.
48. It was the testimony of the witness that same is a Director of the Defendant company and furthermore, that same (witness) is conversant with and privy to the facts pertaining to the instant matter.
49. On the other hand, the witness averred that same has since sworn and filed a Replying Affidavit, which is sworn on the 21st February 2023. For coherence, the witness herein has thereafter sought to adopt and rely on the contents of the Replying Affidavit sworn on the 21st February 2023.
50. Suffice it to point out that the contents of the Replying affidavit sworn on the 21st February 2023; were thereafter adopted and constituted as Evidence- in- chief of the witness.



51. Other than the foregoing, the witness alluded to a plethora of attachment/Exhibits attached to the Replying affidavit; and thereafter invited the Honourable court to adopt and admits same has Exhibits on behalf of the Defendant.
52. In the absence of any objection by/on behalf of the Plaintiff, the various annexures attached to the Replying affidavit and serialized as SKT 1 to SKT 16, were adopted and admitted as Exhibits D1 to D16 on behalf of the Defendant.
53. Furthermore, the witness herein also adverted to the witness statement dated the 21st February 2023; and similarly, sought to adopt and rely on same as further Evidence in chief. Instructively, the contents of the witness statement alluded to were duly admitted and constituted as further evidence in chief on behalf of the witness.
54. On cross examination by Learned counsel for the Plaintiff, the witness herein confirmed and acknowledged that the Defendant and the Plaintiff entered into and executed a sale agreement pertaining to and concerning then purchase of the suit property. Furthermore, the witness averred that the sale agreement which was executed by both the Plaintiff and the Defendant is the one which has been tendered and produced before the court.
55. It was the further testimony of the witness that even though the sale agreement has been produced before the Honourable court, same (witness), has however stated in his witness statement that the Plaintiff herein was only an agent. In any event, the witness has averred that same has tendered and produced a document at page 16 of the Bundle of documents, which shows that the Plaintiff herein was merely an agent as pertains to the transaction in respect of the suit property.
56. Whilst under further cross examination, the witness admitted that the contents of the documents at page 16, namely, the Letter dated the 8th February 2008, do not confirm the role of the Plaintiff as an agent.
57. Be that as it may, it was the further testimony of the witness that the Plaintiff herein was paid the agency fees. In this respect, the witness averred that same has explained the manner in which the agency fees was paid to and in favor of the Plaintiff.
58. However, when pressed further the witness admitted that same has however, not tendered any evidence to show that the Plaintiff was to be paid by way of entitlement to an ½ acre of the suit property.
59. On the other hand, upon being referred to the Document at page 43 of the Defendant's Bundle of document, the witness stated/averred that same relates to the monies that were paid to the Plaintiff. However, the witness added that same (witness) has not provided to the Honourable court the documents to show how the balance of the purchase price was paid.
60. Furthermore, when referred to page 76 of the Defendant's Bundle of Documents, the witness averred that the documents thereunder constitute the Evidence of the balance of the purchase price, which was payable to the vendor. However, the witness added that same has not availed or supplied to court Evidence as to how the balance of the purchase price was paid.
61. In respect of the Sale Agreement dated the 6th November 2007, the witness herein averred that the said agreement was between Momres Trading Company Ltd, as the vendor and the Defendant company, as the Purchaser. Nevertheless, the witness averred that the Plaintiff herein was not a Party to the said sale agreement.
62. Whilst under further cross examination, the witness herein admitted and acknowledged that the Plaintiff herein is not one of the Directors of Momres Trading Company Ltd. Moreover, the witness



herein testified that the Defendant has also filed a counterclaim and that same (witness) implores the Honourable court to grant the reliefs in terms of the counterclaim.

63. Additionally, the witness testified that the Plaintiff herein was paid the sum of Kes.1, 000, 000/=; Kes.2, 300, 000/=; and a further sum of Kes.2, 600, 000/= only. However, the witness stated that the payment of the sum of Kes.1, 000, 000/= only, is vindicated vide cheque contained at page 14 of the Defendant's bundle of documents.
64. Be that as it may, when pressed further, the witness admitted and acknowledged that the cheque at page 14 of the Defendant's bundle of document is indicated to have been drawn in the name of M/s Chepkutwai & Company Advocates; and not the Plaintiff herein.
65. With the foregoing testimony, the Defendant's case was closed.

Parties' Submissions:

a. Plaintiff's Submissions:

66. The Plaintiff herein filed written submissions dated the 14th November 2023; and in respect of which same has highlighted, amplified and canvassed three [3] salient issues for due consideration and determination by the Honourable court.
67. Firstly, Learned counsel for the Plaintiff has submitted that the Plaintiff and the Defendant herein entered into and executed a sale agreement dated the 17th March 2008, which shows that both the Plaintiff and the Defendant were purchasers in respect of the suit property. Furthermore, Learned counsel has ventured on and contended that the terms of the sale agreement were clear and explicit.
68. It was the further submissions by Learned counsel for the Plaintiff that insofar as the contents of the sale agreement are unequivocal, it is not part of the duty of the court to re-write a contract between the Parties. Simply put, counsel has posited that the court only needs to interpret and apply the terms of the contract.
69. In support of the foregoing submissions, Learned counsel for the Plaintiff has cited and quoted the holding in the case of National Bank Ltd vs Pipeplastic Samkolit Kenya Ltd & Another (2001)eKLR.
70. Other than the foregoing, Learned counsel for the Plaintiff has also submitted that the contention by the Defendant that the Plaintiff herein was an agent as pertains to the transaction leading to the purchase/acquisition of the suit property, is not only misconceived but erroneous. Nevertheless, Learned counsel has pointed out that the contents of the sale agreement can only be interpreted from within the agreement and not by importing extrinsic evidence.
71. In support of the submissions that extrinsic evidence cannot be adduced and/or tendered to explain the meaning of a sale agreement/contract, Learned counsel for the Plaintiff has cited and quoted the holding in the case of Speaker Kisii County Assembly & 2 Others vs James Omariba Nyaoga (2015)eKLR and Toshike Construction company Ltd vs Harambee Cooperative Savings Society Ltd (2021)eKLR, respectively.
72. Thirdly, Learned counsel for the Plaintiff has also submitted that the transfer of the suit property to and in favor of the Defendant herein, was informed by fraud and thus the impugned transfer ought to be revoked and/or nullified.
73. Furthermore, Learned counsel for the Plaintiff has invited the court to take cognizance of the provisions of clause 3.2 and 12.1 of the sale agreement, which clearly illustrate the manner in which the sale agreement could be amended and/or varied. For good measure, Learned counsel has submitted



that the sale agreement which was duly executed by both the Plaintiff and the Defendant, could only be varied vide a memorandum in writing and duly signed by both the vendor and the purchaser or their respective advocates.

74. Be that as it may, Learned counsel for the Plaintiff has submitted that despite the clear terms of the agreement that was entered into and executed by both the Plaintiff and the Defendant, the Defendant proceeded to and caused the suit property to be transferred and registered in her name, albeit to the detriment of the Plaintiff.
75. Premised on the foregoing, Learned counsel for the Plaintiff has implored the Honourable court to adopt and apply the ratio decidendi in the case of *Macharia Mwangi Maina & 87 Others vs Davidson Mwangi Kagiri (2017)eKLR* and *Chase International Development Corporation & Another vs Laximan Keshra & others (1978)eKLR* respectively; and thereafter, to revoke the offensive transfer and registration of the suit property in favor of the Defendant.
76. Other than the foregoing, Learned counsel for the Plaintiff has also implored the Honourable court to find and hold that the impugned transfer of the suit property to and in favor of the Defendant was contrary to and in contravention of the provisions of Section 26 of the *Land Registration Act, 2012*.
77. In a nutshell, Learned counsel for the Plaintiff has submitted that the Plaintiff herein has tendered and/or placed before the Honorable court sufficient evidence to demonstrate that the impugned transaction was fraudulent and thus the reliefs sought at the foot of the Originating summons ought to be granted.

b. Defendant's Submissions:

78. The Defendant herein filed very elaborate, albeit prolix written submissions dated the 3rd December 2023; and in respect of which same has however highlighted, amplified and canvassed three [3] issues for determination.
79. Firstly, Learned counsel for the Defendant has submitted that the Plaintiff herein was privy to and knowledgeable of the fact that the suit property had been transferred and registered in the name of the Defendant from the 10th February 2009, but same chose to remain silent up to and including the 7th January 2014, when same (Plaintiff) generated a Demand Notice addressed to M/s Mamicha & Company Advocates.
80. Furthermore, Learned counsel for the Defendant has contended that even after the issuance of the Demand letter dated the 7th January 2014, wherein the Plaintiff raised the claim of his [Plaintiff's], entitlement to a share of the suit property, the Plaintiff herein did not take any precipitate action to ventilate his claim or at all up to and including the 20th June 2019, when the current suit was mounted.
81. On the other hand, Learned counsel for the Defendant has also submitted that during the intervening period the Plaintiff herein swore and executed an affidavit which was sworn on the 13th September 2010; and which was filed vide ELC Case No 424 of 2010 (OS), wherein the Plaintiff confirmed and acknowledged that the suit property had been transferred and registered in the name of the Defendant herein.
82. Arising from the foregoing, Learned counsel for the Defendant has therefore contended that the amount of time that was taken by the Plaintiff herein before moving the court in terms of the instant suit, was not only unreasonable but inordinate and hence the Plaintiff's suit is defeated by the Doctrine of Laches.



83. Consequently and in view of the foregoing, the counsel for the Defendant has implored the Honourable court to find and hold that the claim by and on behalf of the Plaintiff is stale and hence ought not to be allowed.
84. In support of the proposition that the Plaintiff's claim is defeated by the Doctrine of Laches, Learned counsel for the Defendant has cited and relied on the decision in the case of *Benjoh Amalgamated Ltd & Another vs Kenya Commercial Bank Ltd (2014)eKLR* and in particular, paragraphs 63 and 64 thereof.
85. Secondly, Learned counsel for the Defendant has submitted that the Plaintiff's rights and/or interests at the foot of the Sale agreement (sic) dated the 12th March 2008; (but which should be 17th March 2008), are not enforceable.
86. In any event, Learned counsel for the Defendant has submitted that the provisions of Section 3 of the Law of Contract Chapter 23 Laws of Kenya, which have been cited and relied upon by the Plaintiff herein do not favor the Plaintiff before the Honourable court, insofar as there is no written expression showing the Plaintiff's stake in respect of the suit property.
87. In any event, Learned counsel for the Defendant has cited and quoted the decision in the case of *Muhamud Sheik Hussein vs Gulf African Bank Ltd (2019)eKLR* to vindicate the submissions that in the absence of a clear expression pertaining to the Plaintiff's stake in the suit property, the Plaintiff herein cannot purport to rely on and/or anchor his claim on (sic) the sale agreement dated the 17th March 2008.
88. Thirdly, Learned counsel for the Defendant has submitted that even though the Plaintiff has now adverted to and anchored his claim on fraud, no fraud was ever impleaded in the Originating summons dated the 20th June 2019 or at all.
89. Further and in addition, Learned counsel for the Defendant has similarly submitted that where a claimant, the Plaintiff herein not excepted, seeks to implead fraud, then it behooves the Claimant to not only plead fraud, but also to venture forward and supply particulars underpinning the circumstances leading to the fraud in question.
90. Notwithstanding the foregoing, Learned counsel for the Defendant has submitted that the Plaintiff herein has neither impleaded fraud nor supplied particulars and hence the Plaintiff cannot be allowed to now propagate a cause of action founded on fraud or at all.
91. Furthermore, Learned counsel for the Defendant has ventured forward and invited the Honourable Court to take cognizance of Order 2 Rule 4 and 10 of the Civil Procedure Rules, 2010; which underpin the claim founded on, inter-alia, fraud.
92. Additionally, Learned counsel for the Defendant has also cited and relied on the decisions in the case of *Ardhi Highway Developers Ltd vs Westend Butchery & 6 Others (2016)eKLR* and *Vijay Morjaria vs Nansigh Madhusigh Dabar (2000)eKLR* respectively, to ventilate the position that in the absence of a plea of fraud, coupled with the particulars thereof, the Plaintiff herein cannot be allowed to propagate a claim on fraud.
93. Other than the foregoing, Learned counsel for the Defendant has also adverted to the counterclaim at the foot of the Replying affidavit and contended that the said counterclaim is lawful and legitimate and hence same ought not to be dismissed on account of want of procedure.
94. In support of the contention that a Party can introduce a counterclaim at the foot of a Replying affidavit, Learned counsel for the Defendant has cited and relied on inter-alia the case of *Wachira*



Githinji and Another vs Kanothi Githinji (2014)eKLR, Wilfred Kegony'e Babu vs Henry Mose Omuko (2017)eKLR and Ahad vs CJE (2019)eKLR, respectively, to propagate a position that a counterclaim can lawfully be mounted at the foot of a Replying affidavit.

95. Furthermore, Learned counsel for the Defendant has also submitted that the Defendant herein was at liberty to file and/or mount the counterclaim at the foot of the Replying affidavit, in respect of such other claims, between the same Parties, irrespective of whether the causes of actions are distinct from each other.
96. In support of the proposition that a counterclaim ought not to be limited to the same cause of action between the same parties, Learned counsel for the Defendant has cited and relied on the case of County Government of Kilifi vs Mombasa Cement Ltd (2017)eKLR; as well as Halsbury's Laws of England, 4th Edition Vol 42, respectively.
97. Premised on the foregoing positions, Learned counsel for the Defendant has thus implored the Honourable court to find and hold that the Plaintiff has not demonstrated and proved his case to the requisite standard, whilst on the other hand the Defendant has duly proved the counterclaim.
98. Consequently and in view of the foregoing, Learned counsel for the Defendant has invited the Honourable court to dismiss the Plaintiff's claim with costs; whilst granting the counterclaim with costs.

Issues for Determination:

99. Having reviewed the Originating summons dated the 20th June 2019; the supporting affidavit and the Further/Supplementary affidavit filed by the Plaintiff, respectively and upon taking into account the Replying affidavit and the witness statements filed on behalf of the Defendant and upon considering the evidence [both oral and documentary]; and finally upon appraising the written submissions filed, the following issues do emerge and are thus worthy of determination.
 - i. Whether the Originating Summons dated the 20th June 2019; and upon which the Plaintiff's claim is premised, raises and or discloses a reasonable cause of action known to law.
 - ii. Whether the Plaintiff herein or such other Litigant is at liberty to Introduce new issues and (sic) causes of action vide evidence [whether affidavit or otherwise]; and whether such endeavors contravene the Doctrine of Departure.
 - iii. Whether in any event, the Plaintiff's claim premised on fraud [which has been introduced through the Submissions] is statute barred or otherwise.
 - iv. Without prejudice, whether the Plaintiff herein has established and/or proved his plea of fraud or at all.
 - v. Whether the counterclaim at the foot of the Replying affidavit, is Legally tenable or otherwise.

Analysis and Determination:

Issue Number 1

Whether the Originating Summons dated the 20th June 2019; and upon which the Plaintiff's claim is premised, raises and or discloses a reasonable cause of action known to law.

100. At the onset of this Judgment, the court pointed out that the claim beforehand is premised and or predicated on the basis of the originating summons dated the 20th June 2019. Furthermore, there is no



gainsaying that the originating summons under reference was not premised on any ground alluded to and/or enumerated at the foot thereof. Nevertheless, it is evident that the originating summons was predicated upon (sic) the averments contained and/or alluded to in the body of the supporting affidavit sworn on the 20th June 2019.

101. Additionally, it is worthy to point out that the originating summons under reference has merely captured and reproduced the reliefs that are being sought by and on behalf of the Plaintiff herein, albeit without enumerating the factual background underpinning the reliefs sought.
102. It is important to mention the foregoing situation because any litigant who approaches a court of law, the Plaintiff not excepted, is called upon to implead before the court the relevant facts and thus the cause of action, which the court is called upon to interrogate and thereafter to adjudicate upon, one way or the other.
103. Furthermore, it is not lost on the Honourable court that there are several causes of actions, some which are founded on tort, breach of contract, breach of trust, breach of fiduciary obligation/relationship or better still breach of statutory duty. In any event, each cause of action has a timeline provided for under law, which underpin the time frame within which the jurisdiction of the court can be invoked or otherwise.
104. Back to the instant matter. It is not lost on the court that other than seeking the two pertinent reliefs, which have been enumerated at the foot of the originating summons, the Plaintiff herein has not made any specific allegation as against the current Defendant, who was hitherto the 1st Defendant, at the time of the originating summons was filed.
105. Instructively, even proceeding on the basis of the supporting affidavit which was annexed to the originating summons, it is imperative to underscore that the only paragraphs which advert to and/or touches upon the current Defendant are paragraphs 14 and 15 thereof.
106. For good measure, it is imperative to reproduce the contents of the said paragraphs so as to appreciate and comprehend the terms and tenor thereof.
107. Same are reproduced as hereunder;
 - “ 14 That since the 1st Defendant/Respondent has already obtained the title document of the suit property in its name, I am apprehensive that unless restrained by an order of this court, the 1st Defendant will transfer the suit property to third parties any time to my detriment as I stand to suffer irreparable loss and damages.
[
 - 15 That I am advised by my advocate on record whose advise a verily belief to be true that the legal effect of the agreement of sale is the joint registration of myself and the 1st Defendant as the registered owners of the suit property.”
108. From the two paragraphs, [whose details has been reproduced in terms of the preceding paragraphs], there is no averments and/or allegation which (sic) suggests that the 1st Defendant (now the only Defendant) has done and/or failed to do any act, which has imperiled the rights and/or interest of the Plaintiffs.



109. To the contrary, various allegations, inter-alia, breach of trust, breach of professional obligation, professional negligence and professional misconduct, were raised and alluded to against the 2nd Defendant, namely, Martin Mugi Mamicha T/a Mamicha & Company Advocates.
110. Be that as it may, it is not lost on this court that the Plaintiff herein thereafter proceeded to and filed a complaint against Martine Mugi Mamicha, who was hitherto the 2nd Defendant, with the Advocate Disciplinary tribunal and which complaint was ultimately disposed of vide Judgment dated the 14th March 2022.
111. Instructively, the Advocate Disciplinary Tribunal found and held that the complaint against the advocate, who was hitherto the 2nd Defendant was not proved. Consequently, the complaint was dismissed.
112. Furthermore, it is worth recalling that on the 17th October 2022, the Plaintiff herein proceeded to and withdrew the entirety of his claims and thus allegations as against the advocate, hitherto the 2nd Defendant.
113. To my mind, the withdrawal of the Plaintiff's allegations against the advocate who was hitherto the 2nd Defendant, renders redundant the contents of paragraphs 4 to 13 of the supporting affidavit, which was attached to the originating summons.
114. In view of the foregoing, this court must now endeavor to extricate the cause of action, if any, from the pleadings filed by the Plaintiff herein. For coherence, the only pleading before the court is the originating summons dated the 20th June 2019.
115. Barring repetition, the court has outlined the contents of the Originating summons and furthermore has pointed out that the entire body of the originating summons is devoid of any factual averments and/or deposition demonstrative of a cause of action.
116. Given the manner in which the originating summons beforehand was crafted, this court is at pains to discern and/or decipher the substratum/cause of action that the court is called upon to interrogate and thereafter adjudicate upon.
117. Surely, Learned counsel or the Plaintiff herein should appreciate that the pleadings that originate a claim before the court must contain the requisite facts, comprehensive enough to display and disclose the cause of action. Short of that, a court of law will be left to grope in darkness which does not portend well with the Rule of law and the general administration of justice.
118. For brevity and to be able to demonstrate the salient facts to be pleaded, the provisions of Order 2 Rules 4 and 10 of the Civil Procedure Rules, 2010 as read together with Order 37 of the Civil Procedure Rules, will suffice.
119. Before departing from this particular issue, and more particularly the question as to whether the originating summons beforehand discloses a reasonable cause of action, it suffices to discern and appreciate what then does a cause of action denotes.
120. The parameters that delineate what constitutes a cause of action and thus what must be impleaded by a litigant, the Plaintiff herein not excepted, were elaborated upon by the Court of Appeal in the case of Pius Kimaiyo Langat versus Co-operative Bank of Kenya Limited [2017] eKLR, where the court held and observed as hereunder;

25. A cause of action is a factual situation the existence of which entitles one person to obtain from the court a remedy against another person. See *Letang vs Cooper* [1964] 2 All ER 929



at 934, per Lord Diplock. Lord Esher, M. R. in the case of *Read vs Brown* (1888), 22 QBD 128, defined a cause of action as:-

“Every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court”.

121. More recently, what constitutes a cause of action was re-visited by the Court of Appeal in the case of *Kigwor Company Ltd vs Samedy Trading Ltd* (2021)eKLR, where the court stated and observed as hereunder;

“36. In the Court of Appeal case of *Attorney General & another v Andrew Maina Githinji & Another* [2016] eKLR Justice Waki held that:-

“A cause of action is an act on the part of the defendant, which gives the plaintiff his cause of complaint.”

That definition was given by Pearson J. in the case of *Drummond Jackson vs. Britain Medical Association* (1970) 2 WLR 688 at pg 616. In an earlier case, *Read vs. Brown* (1889), 22 QBD 128, Lord Esher, M.R. had defined it as:-

“Every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court.”

Lord Diplock, for his part in *Letang vs. Cooper* [1964] 2 All ER 929 at 934 rendered the following definition:-

“A cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person.”

When did the cause of action in this case arise? Put another way, when did the respondents become entitled to complain or obtain a remedy ...”

122. Arising from the foregoing, there is no gainsaying that every litigant, the Plaintiff herein not excepted is under a duty and obligation to implead the relevant facts and/or issues, upon which (sic) the reliefs are sought. For good measure, it is the factual situation impleaded in the body of the operative pleading that constitutes the cause of action, whether in tort, contract or otherwise.
123. Without belaboring the point, I must point out that it has not been easy to discern, decipher and/or appreciate the sine quo non [foundation], of the Plaintiff's claim, looking at the originating summons, which was never amended or at all.
124. In a nutshell, my answer to issue number one [1] is to the effect that the Originating Summons dated the 20th June 2019, which is Ex-facie devoid of the requisite facts (read flesh), does not disclose any reasonable cause of action known to law or at all.

Issue Number 2

Whether the Plaintiff herein or such other litigant is at liberty to introduce new issues and (sic) causes of action vide evidence [whether affidavit or otherwise]; and whether such endeavors contravene the Doctrine of Departure.

125. Having pointed out that the Originating Summons dated the 20th June 2019, did not espouse and/or disclose any reasonable cause of action, the next question to be interrogated relates to whether the



Plaintiff herein or such other litigant can cure the lacuna and/or defect in the pleading either by filing additional affidavit or production of evidence.

126. Instructively, the Plaintiff herein proceeded to and filed a Further/Supplementary affidavit sworn on the 13th March 2023; and in respect of which same sought to introduce additional facts and/or evidence in furtherance to the originating summons beforehand.
127. At the foot of the Further/Supplementary affidavit sworn on the 13th March 2023; the Plaintiff herein has now made the averments, inter-alia

Paragraph 4 (c)

That it is now manifest from the response by the Defendant that the Defendant in collusion with the advocate Martine Mugi Mamicha conspired to dispose of my interests in L.R No. 27/114 as the Defendant has not placed any supporting document to show that I waived my right on the suit property contrary to his averment he made before the Advocates Disciplinary Tribunal

128. My reading of the averment, which has been reproduced herein before drives me to the conclusion that the Plaintiff is now advertent to a cause of action premised on (sic) collusion between the Defendant and Martine Mugi Mamicha, advocate, who was hitherto the 2nd Defendant.
129. Whereas the purported collusion between the Defendant and Martine Mugi Mamicha Advocate, may not be answered by Martine Mugi Mamicha, insofar as the claim against him had been withdrawn, the concern that the court have however relates to whether the claim of collusion which is now being adverted to in the affidavit can be ventilated before the court.
130. Firstly, I hold the firm view that wherever a Party, the Plaintiff not excepted is desirous to bring forth and canvass a new issue, which was hitherto not contained in his/her pleadings, then it behooves such a Party to seek for and obtain the requisite Leave to amend the pleadings beforehand.
131. Additionally, I hold the firm position that where the pleadings; and in this case, the Originating summons have not been amended, then the Party (read the Plaintiff) cannot ventilate and/or espouse a factual position that is at variance with the pleadings. To do so would be tantamount to contravening the hackneyed Doctrine of Departure. See Order 2 Rule 6 of the Civil Procedure Rules 2010.
132. Other than the foregoing, it is common ground that Parties are bound by their pleadings and hence a Party cannot be allowed to venture and go outside the four [4] Corners of the pleadings filed. Further and in any event, the rule of law as pertains to pleadings does not admit of an agenda known as A.O.B, or at all.
133. To buttress the foregoing exposition of the law, it suffices to adopt, restate and reiterate the position captured vide the decision of the Court of Appeal in the case of Independent Electoral Boundaries Commission versus Stephen Mutinda Mule (2013)eKLR, where the court stated and held as hereunder;

“...it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.”



Other judges on the case expressed themselves in similar terms, with Judge Christopher Mitchell J.S.C. rendering himself thus;

“In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”

134. Moreover, the important role played by pleadings in defining the parameters of the issues to be canvassed before the court was also highlighted, elaborated upon and amplified by the Court of Appeal in the case of *Dakianga Distributors versus Kenya Seed Company Ltd (2015)eKLR*, where the Court of Appeal stated thus;

“A useful discussion on the importance of pleadings is to be found in *Bullen and Leake and Jacob's Precedents of Pleadings*, 12th Edition, London, Sweet & Maxwell (The Common Law Library No. 5) where the learned authors declare:-

“The system of pleadings operates to define and delimit with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases and upon which the court will be called upon to adjudicate between them. It thus serves the two-fold purposes of informing each party what is the case of the opposite party which he will have to meet before and at the trial, and at the same time informing the court what are the issues between the parties which will govern the interlocutory proceedings before the trial and which the court will have to determine at the trial.”

135. Besides, the Supreme Court of Kenya has also had an occasion to speak to the Doctrine of Departure and the role played by pleadings towards the efficacious and effective determination of issues raised before the court.

136. Additionally, the Supreme court of Kenya in the case of *Raila Amolo Odinga & Others versus IEBC & Others (2017)eKLR*, stated and held thus;

“In the absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have the opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other. Therefore it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings...”

137. Arising from the foregoing dicta, it is crystal clear that the Plaintiff herein cannot seek to espouse and canvass the plea of collusion in terms of the Further supporting affidavit, albeit without endeavoring to procure Leave to amend the originating summons, which is the only pleading beforehand.

138. To my mind, the contents of the Further supporting affidavit, [which constitutes evidence], cannot surpland and/or overtake the Originating summons which is the driving/operative pleading filed by and on behalf of the Plaintiff.



139. Other than the endeavor to introduce new issues and causes of action vide the Further/Supplementary affidavit, it is worthy to recall that the Plaintiff has also sought to introduce issue through the written submissions.
140. Firstly, the Plaintiff has sought to canvass the issue pertaining to whether the sale agreement dated the 17th March 2008; is valid and enforceable; whether the transfer of the suit property to the Defendant was fraudulent, whether the transfer amounts to unjust enrichment and [sic] whether the transfer and registration of the suit property in favor of the Defendant is illegal and un-procedural and thus contrary to the provisions of Section 26 of the [Land Registration Act, 2012](#).
141. Elsewhere herein before, this Honourable court has opined that the only way to bring forth and introduce new/ additional issues is by amendment of pleadings and not otherwise.
142. Quiet clearly, if the Plaintiff herein discerned any inadequacy or defect in the originating summons, same ought to seek for amendment. Nevertheless, it does not legally fall within the purview and/or mandate of the Plaintiff and/or legal counsel to sneak in new issues through submissions.
143. Be that as it may, the Plaintiff and his legal counsel endeavored to sneak in issues through the Written submissions and it is therefore opportune to draw the attention of both the Plaintiff and his legal counsel to the dictum in the case of Daniel Toroitich Arap Moi vs Mwangi Stephen Mureithi (2014)eKLR, where the court stated and held thus;
- “Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties’ “marketing language”, each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented.”
144. Invariably, submissions cannot take the place of evidence and neither can same take the place of the requisite pleadings, which a Party is by law required to file.
145. Furthermore, there is also no gainsaying that a defective and/or deficient claim (read pleading) which is the foundation (sine quo non) of a suit, cannot be remedied by effective submissions or at all.
146. In a nutshell, what the Plaintiff and his learned counsel were endeavoring to achieve is to dupe the Honorable court into interrogating and adjudicating upon issues, which had neither been impleaded nor canvassed in the conventional way.
147. In my humble view, the scheme by and on behalf of Learned counsel for the Plaintiff of endeavoring to sneak in foreign/new issues, albeit through the backdoor, cannot be countenanced.
148. To surmise, my answer to issue number two [2] is three-fold. Firstly, a Party is bound by his pleadings and the only way to introduce a new issue is by amendment and not otherwise. [See the provisions of Order 8 of the Civil Procedure Rules, 2010].
149. Secondly, a Party, the Plaintiff not excepted cannot endeavor to and/or sneak in a factual situation or issue, which are at variance with the pleadings, vide evidence [whether viva voce or affidavit].
150. Thirdly, submissions cannot take the place of pleadings and hence where there is a deficiency or a lacuna in the pleadings, same cannot be remedied (sic) by excellent and comprehensive submissions or at all.



Issue Number 3

Whether in any event, the Plaintiff's claim premised on fraud (which has been introduced through the Submissions) is statute barred or otherwise.

151. Whilst addressing and/or dealing with issue number two [2] herein before, this court has found and held that the Plaintiff cannot introduce, smuggle and/or sneak in, inter-alia, the issue of fraud through the submissions.
152. Nevertheless, because the Plaintiff has canvassed the question of fraud elaborately in his submissions and thereafter invited the Honourable court to find and hold that the impugned transfer in favor of the Defendant was fraudulent, it is therefore appropriate and mete to interrogate the cause of action as pertains to fraud.
153. To start with, there is no gainsaying that a cause of action and/or plea of fraud is one founded on tort and hence same must be mounted and/or lodged with the court with the circumscribed timelines.
154. To this end, it is imperative to recall and take cognizance of the provisions of Section 4(2) of the Limitation of Actions of Act, Chapter 22 Laws of Kenya.
155. For brevity and ease of reference, same are reproduced as hereunder;

4. Actions of contract and tort and certain other actions

- (1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued—
 - (a) actions founded on contract;
 - (b) actions to enforce a recognizance;
 - (c) actions to enforce an award;
 - (d) actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture;
 - (e) actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.
- (2) An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued:

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

156. Having taken cognizance of the provisions (supra), it is now imperative to venture forward and to ascertain when the fraud attendant to the impugned transfer occurred and by extension when the Plaintiff became aware of (sic) the impugned fraud.
157. To start with, the Plaintiff herein has averred at the foot of paragraph 5 of the supporting affidavit sworn on the 20th June 2019; as hereunder;

“That on the 10th February 2009 the advocate prepared the transfer documents (conveyance) as between the vendor and Beige Investment Ltd and in breach trust omitted to include my



name in the conveyance. Annexed herewith and marked DKM 2 is a copy of the transfer document.”

158. From the contents of the said paragraph, it is evident and apparent that the preparation of the transfer instrument and essentially the exclusion of the name of the Plaintiff therefrom, occurred on the 10th February 2009.

159. Similarly, it is also discernable that the Plaintiff became aware of and/or privy to the exclusion of his name from the transfer instrument on even date, namely, when the transfer instrument was prepared.

160. For coherence, if the exclusion of the Plaintiff’s name from the transfer instrument, is what constitutes fraud, which has been canvassed vide the submissions, then the Plaintiff ought to have moved the Honourable court within three [3] years from the said date.

161. Other than the foregoing averments alluding to the date of preparation of the transfer instrument, the Plaintiff herein has ventured forward and deponed as hereunder in terms of paragraph 9 of the supporting affidavit.

162. For ease of reference, paragraph 9 is reproduced as hereunder;

“That immediately on the 24th June 2009, the 2nd Defendant mortgaged the property and obtained Kes.10, 000, 000/= . This was meant to dispose any interest that I had in the land”

163. Yet again, it is common knowledge that the actions and/or omissions which are relied upon to espouse the plea of fraud were within the knowledge of the Plaintiff. Moreover, the Plaintiff himself venture forward and also avers at the foot of paragraph 10 of the supporting affidavit as hereunder;

“That on the 7th January 2014 I raised the issue vide a demand letter through J M Kimani Advocate for rectification by Beige Investment Ltd which demand yielded no response. Annexed herewith and marked DKM 3 is a copy of the demand letter”

164. Suffice it to point out that the acts/omissions complained of and which are being relied upon to anchor the plea of fraud were well within the knowledge of the Plaintiff. Consequently, it behooves the Plaintiff to approach the Jurisdiction of the court at the earliest, albeit taking into account the prescribed limitation period.

165. As pertains to what the Plaintiff needed to know before approaching the court with a plea of fraud, it suffices to take cognizance of the decision in the case of *Elijah Ntaiyia V Lekinini Kulale & 3 Others* [2008] eKLR, where the court stated thus;

“Even assuming the defendants could have challenged the decision by showing that the plaintiff had fraudulently acquired the suit land, the limitation period for an action founded on fraud is three years, see *Javed Iqbal Abdul Rahman & Another Vs Alfred Wekesa Sambu & Another* (supra). The limitation period begins to run when the fraud is discovered. The allegations of fraud made in the statement of defence that was filed on 29th March, 2007 cannot salvage the defendants’ case at all. Apart from the allegation of fraud in the statement of defence, the rest of the contents therein consist of mere denials.”

166. Without belaboring the point, the allegations which are being relied upon to propagate the claim on fraud and or fraudulent transfer in favor of the defendant arose on the 10th February 2009; and hence it was incumbent upon the Plaintiff, if so advised, to approach the court within three years henceforth.



167. However, despite being aware of and privy to and what is touted as fraud, the Plaintiff adopted a laissez-faire approach and countenanced and or acquiesced to (sic) the fraud for more than 10 years, before ultimately filing the instant suit on the 20th June 2019.
168. Sadly, by the time the Plaintiff was approaching the court with the plea of fraud, the requisite timeline prescribed under the law had long lapsed and the Plaintiff's cause of action, stood extinguished. Consequently, the Plaintiff is permanently non-suited.
169. To underscore the legal effect and implication of the statute of limitation, it suffices to adopt, restate and reiterate the succinct position espoused by the Court of Appeal in the case of Gathoni versus Kenya Co-operative Creameries Ltd[1982] eKLR, where the court held thus;

“In view of those provisions of the law, I do not see how the learned judge could have held that the applicant had taken all reasonable steps to ascertain whether before November, 1979, she had a cause of action. She consulted an advocate in September, 1980, but no explanation is given, except that she was waiting to hear something from the police, as to why she did not consult an advocate a year or more earlier. The law of limitation of actions is intended to protect defendants against unreasonable delay in the bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest. Special provision is made for infants and for the mentally unsound. But, rightly or wrongly, the Act does not help persons like the applicant who, whether through dilatoriness or ignorance, do not do what the informed citizen would reasonably have done.”

170. Before departing from the issue beforehand, it is also worthy to recall that the Plaintiff herein swore an affidavit on the 13th September 2010; and which was utilized in the proceedings vide Nairobi ELC 424 of 2010(OS). For good measure, the said affidavit has been annexed to and constitutes part of the documents which were produced by the Plaintiff. [See exhibit P18].
171. Pursuant to and vide the said affidavit, the Plaintiff herein reiterated the position that the impugned transfer instrument was prepared and executed on the 10th February 2009; and that in any event, the instrument of transfer was in favor of the Defendant and not otherwise.
172. Irrespective of the perspective and/or angle adopted, whilst discerning the question of limitation, it is obvious and there is no debate, that the instant suit was filed long outside the circumscribed period by dint of Section 4(2) of the *Limitation of Actions Act*.

Issue Number 4

Without prejudice, whether the Plaintiff herein has established and/or proved his plea of fraud or at all.

173. Assuming for the sake of arguments that the Plaintiff herein could be at liberty to introduce the plea of fraud vide submissions and that the court was at liberty to consider same, there would still be a question as to the nature/manner of impleading fraud and thereafter the quality of evidence to be tendered in proof thereof.
174. To start with, there is no contest that the originating summons beforehand did not implead fraud or at all. Furthermore, there is also no debate that no particulars of fraud or otherwise were pleaded or availed, either as required by dint of Order 2 Rule 10 of the Civil Procedure Rules, 2010.
175. To my mind, whoever desires to canvass and propagate a cause of action founded on fraud and/or fraudulent transfer, like the one adverted to by the Plaintiff herein, must plead fraud and thereafter



- supply definite particulars underpinning the circumstances culminating into (sic) the fraud in question.
176. Additionally, it is worth noting that it is only after one has impleaded fraud and availed the requisite particulars thereof, that same (litigant) can thus be at liberty to tender evidence towards proving the pleaded and particularized fraud.
177. In the absence of the requisite pleadings and the particulars, it suffices to underscore that no amount of evidence can thus be allowed in an endeavor to prove fraud. In any event, it is trite that Evidence which does not relates to a pleaded Issue, is tendered in vain.
178. Without belaboring the point beforehand, it suffices to highlight the succinct position propounded by the Court of Appeal in the case of Kuria Kiarie & 2 others versus Sammy Magera [2018] eKLR, where the court of appeal held as hereunder;
25. The next and only other issue is fraud. The law is clear and we take it from the case of Vijay Morjaria vs Nansingh Madhusingh Darbar & Another [2000] eKLR, where Tunoi, JA. (as he then was) stated as follows:
- “It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.” [Emphasis added].
- The same procedure goes for allegations of misrepresentation and illegality. See Order 2 Rule 4 of the Civil Procedure Rules.
26. As regards the standard of proof, this Court in the case of Kinyanjui Kamau vs George Kamau [2015] eKLR expressed itself as follows;-
- “...It is trite law that any allegations of fraud must be pleaded and strictly proved. See Ndolo vs Ndolo (2008) 1 KLR (G & F) 742 wherein the Court stated that: “...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him.
- 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.”
27. We have examined the appellants' amended defence for any pleading on particulars of fraud or illegality but there is none. The claims were therefore stillborn and no evidence could be tendered.
179. Other than the foregoing decision, the necessity to implead fraud and avail the requisite particulars with some degree of precision (devoid of vagueness) was also amplified by the Court of Appeal in the case of Ardhi Highway Developers vs Westend Butchery & 6 others (2015)eKLR, where the court held as hereunder;



52. According to Black's Law Dictionary,

Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. As applied to contracts, it is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. Fraud, in the sense of a court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another”.

Section 2 of RTA also defines “Fraud” as follows:-

“Fraud” shall on the part of a person obtaining registration include a proved knowledge of the existence of an unregistered interest on the part of some other person, whose interest he knowingly and wrongfully defeats by that registration.”

53. It is common ground that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. One of the authorities produced before us has this passage from Bullen & Leake & Jacobs, Precedent of pleadings 13th Edition at page 427:

“Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged (Wallingford v Mutual Society (1880) 5 App. Cas. 685 at 697, 701, 709, Garden Neptune V Occident [1989] 1 Lloyd's Rep. 305, 308).

The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of (see Lawrence V Lord Norreys (1880) 15 App. Cas. 210 at 221). It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved (Davy V Garrett (1878) 7 ch.D. 473 at 489). “General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any court ought to take notice”.

see Insurance Company of East Africa vs. The Attorney General & 3 Others Hccc135/1998.

Whether there was fraud is, however, a matter of evidence.

180. In the case of Fanikiwa Limited & 3 others v Sirikwa Squatters Group & 17 others (Petition 32 (E036), 35 (E038) & 36 (E039) of 2022 (Consolidated)) [2023] KESC 105 (KLR) (15 December 2023) (Judgment), the Supreme Court of Kenya similarly held that a litigant desirous to ventilate a cause of action of fraud, must not only implead fraud, but must also supply precise and definite particulars of the circumstances underpinning the fraud in question.

181. For coherence, the court stated and held thus;

82. We are unconvinced that such vague particulars of fraud were proved to the required standard going by the absence of any serious attempt to table concrete evidence to prove the subject allegations to the required degree. Our appellate court has over the years developed settled



jurisprudence on the requisite standard of proof for allegations of fraud which we endorse. In *Central Kenya Ltd v Trust Bank Limited & 4 others*, Civil Appeal No 215 of 1996; [1996] eKLR the appellate court determined: “The appellant has made vague and very general allegations of fraud against the respondents. Fraud and conspiracy to defraud are very serious allegations. The onus of prima face proof was much heavier on the appellant in this case than in an ordinary civil case.” [Emphasis added]

83. Further, in *Vivo Energy Kenya Limited v Maloba Petrol Station Limited & 3 others*, Civil Appeal No 21 of 2014; [2015] eKLR, the appellate court delivered itself thus: “Where fraud is alleged, it must be specially pleaded and particulars thereof given. That is what is required by order 2 rule 10 of the Civil Procedure Rules, 2010. Way back in the 19th Century, Lord Penzance stated the principle thus, in *Marriner v Bishop Of Bath And Wells* [1893] P. 146: ‘The court will require of him who makes the charge that he shall state that charge with as much definiteness and particularity as may be done, both as regards time and place.’ Even where a plaintiff has properly pleaded fraud, he or she is required in addition to prove it beyond a mere balance of probabilities.

In *R G Patel vs Lalji Makanji* [1957] EA 314, at page 317 the former Court of Appeal for Eastern Africa stated that: ‘Allegations of fraud must be strictly proved; 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.’ And in *Richard Akwesera Onditi v Kenya Commercial Finance Co Ltd*, CA No 329 of 2009 this Court expressed itself on the issue as follows: ‘Needless to say, fraud and collusion are serious accusations and require a very high standard of proof, certainly above mere balance of probability, and the bare allegations put forward by the appellant do not therefore avail him.’ (See also *Gudka v Dodhia*, CA No 21 of 1980 and *Koinange & 13 others v Koinange* (1996) KLR 23).

Regarding prima facie proof of fraud, this Court stated thus in *Central Kenya Ltd v Trust Bank Ltd & 4 others*, CA No 215 of 1996: ‘The appellant has made vague and very general allegations of fraud against the respondents. Fraud and conspiracy to defraud are very serious allegations. The onus of prima face proof was much heavier on the appellant in this case than in an ordinary civil case.

’We would also wish to point out, as this Court stated in *Westmontpower Kenya Ltd v Frederick & another t/a Continental Traders & Marketing* [2003] KLR 357, albeit in the context of an application for summary judgment, that issues of alleged fraud can only be determined with finality during a proper trial and not on conflicting affidavit evidence.”

182. In my humble view, (the lesson) derivable from the case law cited (supra), is three-fold. Firstly, it is imperative that fraud be impleaded and thereafter the particulars underpinning the fraud be supplied.
183. Secondly, that the particulars of fraud which must be availed and/or supplied in compliance with the provisions of Order 2 Rule 10 of the Civil Procedure Rules 2010, must be definite, precise and devoid of vagueness.
184. Thirdly, that where there is no plea of fraud and no particulars supplied, the concerned litigant cannot purport to tender and/or adduce (sic) any evidence towards establishing a plea of fraud. For coherence, such an endeavor would be in vacuum and thus futile.
185. Having made the foregoing observations, it must now be crystal clear that the Plaintiff herein who neither impleaded fraud nor endeavored to avail any particulars thereof cannot propagate a plea of fraud.



186. For good measure, the simple answer to what the Plaintiff was endeavoring to do is discernable from paragraph 27 of the decision in *Kuria Kiarie vs Sammy Magera* [supra].
187. From the foregoing exposition, the answer to issue number four is certainly to the negative. Simply put, the Plaintiff has neither tendered nor adduced any plausible and/or cogent evidence to establish fraud, if at all.

Issue Number 5

Whether the counterclaim at the foot of the Replying Affidavit, is Legally tenable or otherwise.

188. The Defendant on her part filed a Replying affidavit in answer/response to the various allegations which were raised by and on behalf of the Plaintiff herein. Furthermore, the Defendant has ventured forward and impleaded (sic) a counterclaim at the foot of the Replying affidavit and wherein same sought for the lifting of the veil in respect a company known as Momres Trading Company Ltd; and an order for the Plaintiff to be deemed to one and the same with (sic) the named company.
189. Three [3] sub- issues do arise and are thus worthy of mention and short analysis.
190. Firstly, is the question as to whether one, the Defendant herein not excepted, can purport to plead what is deemed to be a counterclaim in the body of a Replying affidavit.
191. To my mind, a counterclaim is a specific kind of document/pleading that can only be impleaded on the body of a Statement of Defense and where such a counterclaim is pleaded, the law requires that same be verified by the requisite verifying affidavit.
192. To be able to appreciate and understand the relevant law attendant counterclaim, it suffices to cite and reproduce the provisions of Order 7 Rule 3 and 5 of the Civil Procedure Rules, 2010.
193. Same are reproduced as hereunder;

[Order 7, rule 3.] Set-off and counterclaim.

3. A defendant in a suit may set-off, or set-up by way of counterclaim against the claims of the plaintiff, any right or claim, whether such set-off or counterclaim sound in damages or not, and whether it is for a liquidated or unliquidated amount, and such setoff or counterclaim shall have the same effect as a cross-suit, so as to enable the court to pronounce a final judgment in the same suit, both on the original and on the cross-claim; but the Court may on the application of the plaintiff before trial, if in the opinion of the court such set-off or counterclaim cannot be conveniently disposed of in the pending suit, or ought not to be allowed, refuse permission to defendant to avail himself thereof. [Order 7, rule 4.] Set-off or counterclaim in proceedings by Government.
5. The defence and counterclaim filed under rule 1 and 2 shall be accompanied by— (a) an affidavit under Order 4 rule 1(2) where there is a counterclaim; (b) a list of witnesses to be called at the trial: (c) written statements signed by the witnesses except expert witnesses; and (d) copies of documents to be relied on at the trial. Provided that statements under sub-rule (c) may with leave of the court be furnished at least fifteen days prior to the trial conference under Order 11.



194. Premised on the import and tenor of the provisions of Order 7 Rule 5 of the Civil Procedure Rules, 2010, it is my finding and holding that a counterclaim cannot be impleaded at the foot of the Replying affidavit; and in any event, it would not be tenable to have a verifying affidavit verifying (sic) a Replying affidavit.
195. Secondly, the nature of reliefs being sought at the foot of the impugned counterclaim, namely, lifting of the veil as pertains to M/s Momres Trading Company Ltd, cannot also be gone into and/or adjudicated upon without the company whose veil is sought to be lifted/pierced, being impleaded and/or joined in the suit beforehand.
196. Suffice it to point out that the Company, whose veil is sought to be lifted or pierced, namely, Momres Trading company Ltd, is no doubt entitled to audience and cannot by any stretch of imagination, be condemned unheard.
197. As pertains to the importance of affording every Party, who is likely to be affected by the decision of a court, an opportunity to be heard, it is imperative to reiterate the dictum of the Court of Appeal in the case of the County Assembly of Kisumu & 2 others versus Kisumu County Assembly Service Board & 6 others [2015] eKLR, where the court held as hereunder;
72. Due process is a fundamental aspect of the rule of law. Due process is the right to a fair hearing. The right to a fair hearing encapsulated in the audi alteram partem rule (no person should be condemned unheard) and founded on the well-established principles of natural justice, is not a privilege to be graciously accorded by courts or any quasi-judicial body to parties before them. As is clear from Articles 47 and 50 of our Constitution, it is a constitutional imperative.
73. Whereas the right to a fair hearing varies from one case to another depending on the subject of the matter in issue, its irreducible minimum is now well settled. In granting that right, the court or the administrative body or person concerned should not make it a charade by taking perfunctory actions for the sake of running through the motions to be seen to have complied with it. The person charged is entitled to what, in legal parlance is referred to as the right to “notice and hearing.” That means he must be given written notice which must contain substantial information with sufficient details to enable him ascertain the nature of the allegations against him. The notice must also allow sufficient time to interrogate the allegations and seek legal counsel where necessary. In the epigram of the indomitable Lord Denning in *Kanda v. Government of Malaya*
- “If the right to be heard is to be a real right which is worthy anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them.”
74. What amounts to sufficient notice also varies from case to case. But as stated, the notice must contain substantial information with sufficient details to enable the person charged to ascertain the nature of the allegations made against him. The notice must also comply with any statutory requirements where the same are provided.
198. Thirdly, even assuming that the issues adverted to in the preceding paragraph, could still be surmounted, there is no gainsaying that the sale agreement, which was (sic) entered into between the Defendant and Momres Trading Company Ltd, which is the company in question, did not involve the Plaintiff herein.



199. Instructively, in the course of cross examination, DW1 herein testified and averred as hereunder;

“The parties to the sale agreement dated the 6th November 2007 were Beige Investment Ltd, as the purchaser and Momres Trading Ltd as the vendor/seller. I wish to confirm that the Plaintiff herein is not a party to the sale agreement. Referred to page 88 of the Defendant’s bundle of documents and the witness confirmed that the plaintiff is not one of the director of Momres Trading company Ltd”

200. Arising from the foregoing, it is evident and apparent that the Plaintiff herein was neither a party nor privy to the impugned transaction between the Defendant and Momres Trading Company Ltd, which is the basis of the intended lifting of the veil.

201. Further and in addition, it is duly admitted and acknowledged that the Plaintiff was neither a Director, shareholder and/or subscriber of the said company and thus the intended lifting/ piercing of the veil, if at all, would be academic.

202. Simply put, the purported counterclaim, which is contained at the foot of the Replying affidavit, is not only premature and misconceived; but same is also devoid of merits.

203. In a nutshell, my answer to issue number five [5], is to the effect that the Defendant herein has neither established nor demonstrated any basis to warrant the grant of the purported counterclaim.

Final Disposition:

204. Having analyzed the various issues that were outlined in the body of the Judgment and taking into account the various conclusion attendant thereto, it is now appropriate to bring the Judgment to a close; and by extension, render the final proclamations.

205. Consequently and in view of the foregoing, I come to the conclusion that neither the Plaintiff nor the Defendant, have proved their claims before the Honourable court, either as required under the law or at all.

206. In a nutshell, I am therefore minded to and Do hereby make the following orders;

- i. The Plaintiff’s suit be and is hereby Dismissed.
- ii. The Defendant’s Counter-claim, which was (sic) contained at the foot of the Replying affidavit, is not only premature and misconceived, but same is devoid of merits. Consequently, same be and is hereby Dismissed.
- iii. The scales are evenly balanced and consequently each Party shall bear own costs of the suit and the counterclaim, respectively.

207. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 25TH DAY OF JANUARY 2024.

OGUTTU MBOYA,

JUDGE.

In the Presence of;

Benson - Court Assistant.

Mr. Kirwa for the Plaintiff.



Mr. Odhiambo for the Defendant.

