



**Edco Africa Limited v Kirigia & another (Civil Appeal E730 of 2023)  
[2025] KECA 107 (KLR) (24 January 2025) (Judgment)**

Neutral citation: [2025] KECA 107 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL E730 OF 2023  
SG KAIRU, JM MATIVO & DK MUSINGA, JJA  
JANUARY 24, 2025**

**BETWEEN**

**EDCO AFRICA LIMITED ..... APPELLANT**

**AND**

**BONIFACE NDEGE KIRIGIA ..... 1<sup>ST</sup> RESPONDENT**

**SPERANZA MUTHONI NDEGE ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the Judgment of the Environment and Land Court of Kenya (Mboya, J.) dated 10th August, 2023 in ELC Case No. 704 of 2011)*

**JUDGMENT**

1. In this appeal, the appellant, Edco Africa Limited, is challenging the judgment delivered on 10<sup>th</sup> August 2023 by the Environment and Land Court (ELC) at Nairobi (Oguttu Mboya, J.) in which the appellant's suit against the respondents, Boniface Ndege Kirigia and Speranza Muthoni Ndege was dismissed on grounds that the suit was time barred under the *Limitation of Actions Act*, and that the appellant had failed to establish its case against the respondents to the required standard.
2. The background is that the appellant, as the 1<sup>st</sup> plaintiff, alongside its principal shareholder and director, Mwaniki Dinguri Nick, as the 2<sup>nd</sup> plaintiff, instituted suit before the High Court at Nairobi, being High Court Civil Suit No. 704 of 2011 (subsequently moved to ELC) in which the respondents, Boniface Ndege Kirigia and Speranza Muthoni Ndege, who are husband and wife, were named as the 1<sup>st</sup> and 2<sup>nd</sup> defendants and the Registrar of Titles named as the 3<sup>rd</sup> defendant. Mwaniki Dinguri Nick died during the pendency of the suit and his suit was marked as abated. Their claim as pleaded was that on 29<sup>th</sup> December 2006, the respondents fraudulently transferred to themselves, the appellant's properties known as L.R. No. 7741/ 348 and 349 (the properties) situated in Nairobi. In addition to seeking a permanent injunction to restrain the respondents from dealing with the properties, the appellant and Mwaniki Dinguri Nick (the deceased) sought: an order for the cancellation of the transfer



of the properties registered in favour of the respondents on 29<sup>th</sup> December 2006; a declaration that the appellant is the legal proprietor of the properties; an order for rectification of the register to restore the appellant as the registered proprietor of the properties; special damages being the market value of the properties, interest and costs.

3. In their separate Statements of Defence, the respondents denied the claim, denied the allegations of fraud on their part, asserting that the claim were spurious, baseless and without foundation and calculated to defame them, and maintained that the agreement for sale of the properties and the subsequent transfer of the properties in their favour was above board.
4. The hearing of the suit finally commenced before the learned trial Judge on 2<sup>nd</sup> November 2021 by which time the deceased had already died on 15<sup>th</sup> August 2016. His son, Kwame Mwaniki, a director of the appellant, testified as PW1. Gildine Karani Gatwiri, Land Registrar, testified as PW2. Julius Muvea Muhinde, a Certified Public Secretary and Certified Public Accountant testified as PW3. Jacob Gitonga Kithaka, a land valuer practicing with Gimco Limited which valued the properties testified as PW4, while Elizabeth Magondu, an employee of the appellant, testified as PW5. The respondents testified as DW1 and DW2 respectively. Kamotho Waiganjo Advocate, whose law firm handled the transaction, testified as DW3.
5. After considering the evidence and the submissions, the learned trial Judge delivered the impugned judgment dated 10<sup>th</sup> August 2023 in which, at paragraph 158, the Judge framed three issues for determination, namely, whether the suit was statute barred; whether the appellant had placed before the court, “credible and cogent evidence in proof of the plea of fraud”; and what reliefs, if any, ought to be granted.
6. On whether the suit was barred by the statute of limitation, the Judge concluded as follows:

“It is my finding and holding that by the time the instant suit was filed on the 13<sup>th</sup> December 2011, the timeline for filing the suit based and premised of fraud had long lapsed and hence the suit was/is statutorily time barred. In this regard, the entire suit, is a nullity and incapable of revival and resuscitation.”
7. In doing so, the learned Judge acknowledged in the judgment that “despite the elaborate submissions filed by and on behalf of the Parties, none of the advocates addressed this pertinent issue which certainly goes to the Jurisdiction of the Honourable Court”, and then proceeded to state:

“Nevertheless, even though none of the Parties addressed and/or canvassed the question of Limitation of Actions, it is not lost on the court that insofar as same is a question of Jurisdiction, the Honorable court is at liberty to address same and to make a determination thereof. For good measure, a court of law cannot gloss over a pertinent issue and let it go, merely because the advocates and the Parties thereto skirted the issue.”
8. On the question whether the appellant had established fraud on the part of the respondents, the learned Judge concluded that the appellant “has not been able to establish and demonstrate fraud, forgery or misrepresentation, to the requisite standard or at all.”
9. With those findings, the appellant’s suit was dismissed with costs to the respondents and hence this appeal, premised on the two main grounds. First, that the Judge erred in concluding that the suit was time barred, a matter which was not pleaded. Secondly, that the Judge erred in concluding that the appellant had not established its case to the required standard.



10. During the hearing of the appeal, Mr. Mududa Tollo, learned counsel, appeared for the appellant while Mr. Lawrence Mbabu, learned counsel, appeared for the respondents. Counsel orally highlighted their respective written submissions. Counsel are in agreement that the issues for determination in the appeal are whether the Judge erred in concluding that the suit was statute time barred, and whether the appellant established fraud on the part of the respondents to the required standard.
11. We have, in that regard, reviewed and re-appraised the evidence with a view to drawing our own conclusions in keeping with our mandate under rule 31(1)(a) of the Court of Appeal Rules. As was stated in the famous case of *Selle vs. Associated Motor Boat Company* [1968] EA 123:

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (*Abdul Hameed Saif vs. Ali Mohamed Sholan* (1955), 22 E. A. C. A. 270).”
12. Subsequently, in *Jabane vs. Olenja* [1986] KLR 664, it was held thus:

“More recently, however, this Court has held that it will not lightly differ from the findings of fact of a trial judge who had the benefit of seeing and hearing all the witnesses and will only interfere with them if they are based on no evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did.”
13. Alive to those principles, we start with the question whether the appellant’s suit was statute barred. Counsel for the appellant submitted that the appellant’s claim is an action to recover land, and that under Section 7 of the *Limitation of Actions Act*, the limitation period is 12 years. In support, the decision of this Court in *Richard Oduol Opole vs. Commissioner of Lands & 2 Others* [2015] eKLR was cited. It was submitted that the cause of action in the present case accrued on 29<sup>th</sup> December 2006 when the properties were transferred to the respondents; that by the time the suit was filed on 13<sup>th</sup> December 2011 only four years and eleven months had lapsed, well within the twelve years’ window.
14. Moreover, counsel submitted, limitation was neither pleaded and nor were the parties afforded an opportunity to address the court on it. It was urged on the strength of the decision in *Kenya Ports Authority vs. Modern Holdings (EA) Limited* [2017] eKLR that even though the court may itself raise a matter of jurisdiction, it should accord the parties an opportunity to be heard on the same.
15. Counsel for the respondents on the other hand submitted that the appellant’s suit, as the Judge found, is a suit in tort of fraud as opposed to an action for recovery of property; that under section 4(2) of the *Limitation of Actions Act*, 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; and that the suit in this case was instituted after the three year period had expired.
16. Counsel submitted further that limitation being a fundamental jurisdictional question, it was open to the trial court to raise it “suo motto upon perusal of the pleadings and need not be pleaded by parties”. The decision of the predecessor to this Court in *Iga vs. Makerere University* [1972] EA 62 and the decision of this Court in *Anaclet Kalia Musau vs. Attorney General & 2 others* [2020] eKLR were cited in support.



17. We have considered the rival arguments on the issue. What then is the nature of the appellant's claim as pleaded in the plaint? Its claim is that at all material times it was the registered owner of the properties until 29<sup>th</sup> December 2006 when the properties were fraudulently transferred to the respondents. It was averred that the respondents purportedly entered into a sale agreement for the purchase of the properties without authority, signified by resolution of the appellant; and that the signature of the deceased (the majority shareholder and director of the appellant) on the sale agreement and transfer, was forged as the deceased was at the time hospitalized overseas. To that end, and as already indicated, the appellant sought among other reliefs, an order for cancellation of the transfer in favour of the respondents and restoration of title to the appellant.
18. The learned Judge correctly captured the essence of the appellant's claim in the judgment at paragraphs 159 and 160 as follows:
- “It is common ground that the Plaintiff herein is contesting the validity, legality and propriety of the sale agreement which was entered into and executed on the 12<sup>th</sup> September 2006; and the resultant transfer which was undertaken on the 29<sup>th</sup> December 2006, respectively. For good measure, it is the Plaintiff's case that the sale agreement dated the 12<sup>th</sup> September 2006, which anchors the transfer and registration of the suit properties, to and in favor of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, was not signed and/or executed by the 2<sup>nd</sup> Plaintiff, now deceased, who was the director/shareholder in the Plaintiff company.”
19. The Judge then went on to state, and here we respectfully part company with the learned Judge, that it behoved the appellant “to commence and originate the suit premised on fraud, illegality and forgery, (which constitutes the tort of fraud), within three years from the date of accrual of the cause of action.”
20. In our view, the appellant's claim was not “an action founded on tort” for purposes of section 4 of the *Limitation of Actions Act*. A tort is loosely defined in Black's Law Dictionary as a civil wrong, other than breach of contract, for which a remedy may be obtained, usually in the form of damages; a breach of a duty that the law imposes on persons who stand in a particular relation to one another. See also *The Law of Tort*, W.V.H. Rogers, Sweet & Maxwell, 1989.
21. In this case, the grievance with which the ELC was concerned, as it is mandated to do under section 13 of the *Environment and Land Court Act*, was to determine the dispute relating to the title of the properties. Fraud was one of the grounds upon which the respondents' title to the properties was being impeached. It was/is not the cause of action. With respect, we think the Judge mischaracterised the principal nature of the appellant's claim as a tort for purposes of the *Limitation of Actions Act*. In our view, the nature of the appellant's action was/is for recovery of land.
22. There is a further related concern. Given the controversy that has emerged in this appeal as to the nature of the cause of action, namely, whether it is a claim for recovery of land or a tort, the Judge would, in hindsight, undoubtedly have benefitted from input by the parties had the Judge granted them an opportunity to address the court on the same. Whereas a jurisdictional issue may be taken at any stage of the proceedings, and the court may itself raise it, it is important that parties are accorded



an opportunity to be heard on the same. As this Court stated in *Kenya Ports Authority vs. Modern Holdings [EA] Limited* (above):

“We have stressed that jurisdiction is such a fundamental matter that it can be raised at any stage of the proceedings and even on appeal, though it is always prudent to raise it as soon as the occasion arises. It can be raised:

“...at any time, in any manner, even for the first time on appeal, or even *viva voce* and indeed, even by the Court itself - provided only that where the Court raises it *suo motu*, parties are to be accorded an opportunity to be heard.”

(See *All Progressive Grand Alliance (APGA) v. Senator Christiana N.D. Anyanwu & 2 others*, LER [2014] SC. 20/2013 Supreme Court of Nigeria.)”

23. We respectfully agree. A danger lurks when a court, of its own motion, raises an issue and proceeds to pronounce itself on the same without the benefit of any input whatsoever from the parties who are affected. It is a practice that should be avoided as it goes against the right to be heard. As this Court stated in *James Kanyiita Nderitu & Hellen Njeri Nderitu vs. Marios Philotas Ghikas & Mohammed Swaleh Athman* (Civil Appeal 6 of 2015) [2016] KECA 470 (KLR):

“The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system. (See *Onyango Oloo v. Attorney General* [1986-1989] EA 456). The Supreme Court of India forcefully underlined the importance of the right to be heard as follows in *Sangram Singh v. Election Tribunal, Kotah*, AIR 1955 SC 664, at 711:

“[T]here must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them.”

24. It is also instructive that under Order 2 Rule 4 of the Civil Procedure Rules “a party shall in any pleading subsequent to a plaint plead specifically any matter, for example...any relevant statute of limitation...” which he alleges makes any claim not maintainable. The respondents were therefore enjoined to plead limitation in their statements of defence, which they did not.
25. Concluding on the issue under consideration therefore, we hold that the learned Judge erred in finding that the appellant’s suit was statute barred.
26. We turn now to the second issue, namely, whether the appellant established its case to the required standard. In this regard, counsel for the appellant submitted that the basis upon which the transaction leading to the registration of the respondents as proprietors of the properties were clearly pleaded and particularized in the plaint; that it was established that the deceased, who was the principal shareholder and chairman of the appellant, did not sign the agreement for sale or the transfer; that on 12<sup>th</sup> September 2006 when the agreement for sale was purportedly executed and on 30<sup>th</sup> November 2006 when the transfer was purportedly executed, he was receiving medical treatment in the USA where he remained from March 2006 through to March 2007.
27. It was submitted that those facts were established by the uncontroverted testimony of PW1 and PW5 as well as extracts from the deceased’s passport, Dallas Transplant Institute communication, which was produced before the trial court; that the learned Judge failed to address or pronounce himself on this “serious assertion”; that on the strength of the decision of this Court in *Kinyanjui Kamau vs. George*



- Kamau [2015] eKLR, the burden of proof on the appellant was not beyond reasonable doubt as in criminal cases and fraud could be inferred from the facts presented.
28. It was urged further that based on the testimony of DW3, the advocate who handled the transaction, the agreement for sale and the transfer were already executed when they were presented to him and he did not witness the deceased sign them, and neither could DW3 confirm that there was a resolution of the appellant sanctioning the transaction, a pre-requisite, based on the decision of this Court in *Eliud Muya Kariuki & 2 Others vs. Mary Wanjiru Njenga & 4 Others* [2019] eKLR.
  29. It was submitted that having established that the deceased did not execute the agreement for sale and the transfer and having established that no company resolution of the appellant was produced sanctioning the transaction, the appellant discharged its burden of proof to the required standard. The persuasive decision of ELC in the case of *Fredrick Misuko Ongeru vs. Jackline Kwamboka Nyangwechi & 2 Others* [2021] eKLR was cited in support.
  30. Counsel for the respondents on the other hand submitted that the trial Judge was right that the appellant did not discharge its burden of proof to the required standard; that fraud must be pleaded and strictly proved, and that the standard of proof required in cases of fraud is higher than proof on a balance of probabilities. In support the decisions in *Vijay Morjaria vs. Nansingh Madhusingh Darbar & Another* [2000] eKLR and *Kinyanjui Kamau vs. George Kamau* [2015] eKLR and *Nyangate Guto alias Watson Mogere Mogoko vs. Maxwell Okemwa Mogoro & Another* [2015] eKLR were cited. It was submitted that no forensic evidence of a document examiner was tendered to support the claim of forgery of the deceased's signature; and that forgery is a serious offence under section 349 of the Penal Code and a mere allegation is not sufficient.
  31. It was submitted further that the appellant's conduct was inconsistent with its claim of having been defrauded; that the appellant took no action to report the alleged fraud to the police; that despite the denial by the appellant that PW5 (Elizabeth Magondu) was the company secretary, she executed most of the appellant's documents in that capacity, yet the appellant took no action against her in that regard and neither did the appellant take any action against the advocate (DW3) to whom it also paid legal fees for the transaction.
  32. It was urged that the sale and transfer of the properties to the respondents was regular, lawful and proper, and that the learned Judge did not err in dismissing the appellant's suit.
  33. We have considered the evidence and the rival arguments on this issue. In *Kinyanjui Kamau vs. George Kamau* (above) this Court stated that "to succeed in the claim for fraud, the appellant needed to not only plead and particularise it, but also lay a basis by way of evidence, upon which the court would make a finding." In *Vijay Morjaria v Nansingh Madhusingh Darbar & Another* [2000] eKLR (Civil Appeal No. 106 of 2000) 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 as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts."
  34. Earlier in *Ndolo vs. Ndolo* (2008) 1 KLR (G&F) 742 in emphasising that any allegations of fraud must be pleaded and strictly proved, the Court went on to state as follows:

"...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...”

35. With those principles in mind, the appellant averred in its plaint that the transfer of the properties “was obtained by fraud and misrepresentation on the part of the [respondents]”. The particulars pleaded in that regard included averments that the respondents: purported to enter into the agreement for sale dated 12<sup>th</sup> September 2006 knowing it to be a sham to deprive the appellant of its properties; knew there was no resolution of the appellant to sell the properties; knew the sale was unauthorised; forged the signature of the deceased who was at the time admitted in hospital in the United States of America with kidney failure; and presented no resolution of the appellant to discharge the properties from National Bank. It was also averred that the 1<sup>st</sup> respondent, as a director of the appellant, breached his fiduciary duties to the appellant and abused trust and confidence bestowed on him and manipulated his junior, PW5, who to his knowledge was neither a shareholder nor director of the appellant, into facilitating the transfer of the properties.
36. Alongside the plaint was filed a witness statement of Mwaniki Dinguri Nick, the deceased, dated 13<sup>th</sup> December 2011 in which he had stated that the appellant did not make a resolution to either sell the property or discharge it from the bank where it was charged, and that the respondents knew that he was admitted to the Dallas Transplant Institute with kidney failure and was therefore incapable of executing the purported sale agreement or making the decision to sell the property or doing all the things pertinent to the purported sale of the properties. He asserted that the respondents had harboured the intention of acquiring the properties for a long time and had even prepared a sale agreement way back on 20<sup>th</sup> December 2004. However, as already stated, the deceased died on 15<sup>th</sup> August 2016 prior to commencement of the trial and the opportunity for his testimony to be taken or tested was lost.
37. Kwame B. Mwaniki, PW1, the son of the deceased, who by then was a director of the appellant, testified on behalf of the appellant and produced documents in support of the appellant’s case. In his testimony, he gave a history of the appellant and reiterated the contents of the plaint. To demonstrate that the deceased was not in Kenya when the purported transaction took place and could not have executed the documents in that regard, PW1 produced medical reports showing that the deceased was admitted at the Dallas Transplant Institute, Texas, USA, where he underwent kidney transplant. He also produced extracts of the deceased’s passport showing that the deceased was outside Kenya between March 2006 and March 2007. Objections by the respondent’s advocate in a bid to exclude the admission into evidence of the implicating extracts from the deceased’s passport was overruled by the learned judge. PW1 maintained that the deceased’s purported signature on the agreement for sale and transfer was in the circumstances a forgery.
38. PW1 testified further that the 1<sup>st</sup> respondent was a long standing employee of the deceased and enjoyed his father’s trust and had been appointed as a director, with no shareholding, of the appellant. He maintained that the respondents knew that the deceased was incapable, by reason of his medical condition, having been admitted in hospital, of executing the purported sale agreement or even making decisions in that regard. He stated that the respondents for long had harboured intention to transfer the properties, and in that regard produced a copy of a sale agreement dated 20<sup>th</sup> December 2004.
39. Under cross examination, PW1 was referred to correspondence relating to instructions given to the advocates in connection with the transaction; he stated that he could identify the signature of Elizabeth Magondu (PW5) on the agreement for sale as well as on the transfer; that the other signature “looks



familiar to the signature of the director, namely, the 2<sup>nd</sup> plaintiff, now deceased”; that he was “familiar with the signature” on the transfer but “cannot confirm whether the said signature belongs to the 2<sup>nd</sup> plaintiff.” He maintained that between March 2006 and 3<sup>rd</sup> March 2007, he was with his father, the deceased, in the USA.

40. PW2, Gildine Karani Gatwiri, Land Registrar, confirmed in her testimony that the properties were registered in the names of the respondents following a discharge of charge in favour of National Bank of Kenya and registration of transfers in favour of the respondents.
41. PW3, Julius Muvea Muinde, Certified Company Secretary, stated that he is a partner at ALMS Registrars, Certified Public Secretaries; that since 1989, ALMS Registrars have been the company secretary for the appellant and executed all the roles as such on behalf of the appellant. Under cross examination, the witness stated that ALMS Registrars prepared and filed all company returns on behalf of the appellant.
42. PW4, Jacob Gitonga Kithaka, valuer at Gimco Limited, produced a valuation report and indicated that the properties were not developed.
43. PW5, Elizabeth Magondu’s testimony in support of the appellant’s case was that she was employed in 1984 as a Senior Accountant, but at the time of her testimony was the Administration Manager of the appellant. She stated that she became a director of the appellant after the death of the deceased. She stated that in December 2004, the 1<sup>st</sup> respondent, who she described as her senior, compelled her to execute a sale agreement in favour of the 2<sup>nd</sup> respondent based on mis-information that the deceased had agreed that she could do so; that again in 2006, the 1<sup>st</sup> respondent made her believe that there was consensus between him and the deceased that she could execute the agreement for sale dated 12<sup>th</sup> September 2006 between the appellant and the respondents; that although she signed the undated transfer of 2006, she did not witness the deceased sign the same, who at the time was out of the country seeking medical treatment; that the “Kshs. 6.5 million purported to be payment for sale of the properties was deposited into Coda and Partners (Africa) Account with National Bank of Kenya on 5<sup>th</sup> March 2007, after the deceased returned to Kenya from Texas USA for his kidney treatment.” She went on to state that the 1<sup>st</sup> respondent “single handedly managed” the deceased’s companies and that he intimidated her with his domineering personality. She stated further that ALMS Registrars were the company secretaries of the appellant “at the time of the fraudulent transfer of the two titles.”
44. Under cross examination, PW5 stated that the documents relating to the transaction indicated that she was the company secretary and signed documents in that capacity. She however maintained that she was not the company secretary but that she “signed as the person taking minutes of the meetings”. In reference to the sale agreement, she stated that “I am the one who executed the document and it shows that I signed as the company secretary of the plaintiff company.”; that she did not see the deceased sign the document; that the seal on the transfer was affixed in her presence and that she signed the cheque towards the payment of the advocates fees. She maintained that “during the period of execution of the transaction” the deceased was out of the country in the USA seeking medical treatment and only returned to the country on 3<sup>rd</sup> March 2007; that the “plaintiffs company received...Kshs.6,500,000 only” in a cheque made in favour of National Bank of Kenya Limited; that she did inform the deceased of the sale and when she did so “he was surprised and he informed me that he didn’t execute the transfer instrument”.
45. For the defence, DW1, the 1<sup>st</sup> respondent, in his evidence stated that together with his wife, the 2<sup>nd</sup> respondent, they became registered as proprietors of the properties on 29<sup>th</sup> December 2006 pursuant to a transfer dated 30<sup>th</sup> November 2006 which they executed as purchasers and which was executed by



- the appellant by affixing of its common seal; that the firm of Kamotho Maiyo & Mbatia Advocates were appointed by the appellant to handle the transaction, and Mr. Kamotho Waiganjo (DW3) authenticated the photographs of the deceased and of the appellant's company secretary, PW5, and also attested the signatures of the respondents on the transfer.
46. DW1 stated that the transfer was preceded by an agreement for sale signed by the deceased and Elizabeth Magondu and attested by Kamotho Waiganjo. He stated that the respondents paid the entire purchase price of Kshs. 6.5 million, which he noted from the appellant's bank statements was credited to the account of Coda & Partners (Africa) on 5<sup>th</sup> March 2007 at whose behest the appellant had charged the properties to the bank and that the appellant has enjoyed the benefit of the purchase price since then.
  47. He stated that contrary to claims by the appellant, the agreement for sale and the transfer were not forged. He stated that the respondents have been in occupation of the properties since becoming registered as owners in December 2006 with no objection being raised by the deceased, who resided next door to the properties; that since taking possession, they built a small house and have placed substantial building materials on the property with a view to commencing construction of two houses; that the allegations made by the appellant are untrue and wholly baseless.
  48. DW1 stated further that the deceased was a frequent traveller overseas and on many occasions documents that required his personal execution or attention were sent to him by courier such as DHL, but in as far as the execution of sale agreement and the transfer is concerned, he left everything to the advocates to handle.
  49. Under cross examination, DW1 stated that he did not witness the execution of the transfer instrument; that during the execution they were represented by the advocate; he stated that he is conversant with the signatures of the deceased and of PW5 and their signatures were on the agreement for sale. He denied that there was a conflict of interest in his purchasing the properties, having been a director of the appellant; that he was not sure there was a resolution of the appellant to sell and dispose of the properties. He stated that PW5, the company secretary, is the one who initiated the sale of the properties and had the authority to do so; that he resigned as a director of the appellant in 2007; that the balance of the purchase price was paid to the appellant's sister company, and that the properties were transferred before payment of the final purchase price.
  50. The testimony of DW2, the 2<sup>nd</sup> respondent Dr. Sparanze Muthoni, substantially echoed that of the husband, the 1<sup>st</sup> respondent, and we need not rehash it. Under cross examination, she stated that she got to know of the sale of the properties when her husband, who was a director of the appellant, informed her; that she did not know that the deceased was out of the country at the time or that he was in hospital.
  51. DW3, Kenneth Kamotho Waiganjo advocate, stated that his firm, Kamotho Maiyo & Mbatia Advocates, received instructions concerning the properties which were charged to National Bank of Kenya Limited to secure facilities to the appellant's "affiliate known as Coda and Partners"; that the instructions from the appellant were confirmed by the company secretary, PW5, who also confirmed the terms of the professional undertaking the advocates were to furnish to the Bank to secure the release of the titles to the properties; that on 1<sup>st</sup> November 2006, his firm forwarded the transfer documents to the deceased's office for execution and the same were returned by PW5 duly executed and thereafter the respondents executed the same in his presence and he attested the same; that the appellant's common seal was witnessed by the deceased as director and its company secretary, PW5; that he attested the photographs affixed to the transfer; that the National Bank of Kenya released the partial discharge and original title deeds to his firm and under cover of a letter dated 28<sup>th</sup> February 2007, the firm released the amount of Kshs. 6.5 million to the Bank in fulfilment of his law firm's professional undertaking



and thereafter, on 13<sup>th</sup> March 2007, the firm released copies the registered transfers of the properties to the appellant; that it was on 11<sup>th</sup> November 2019 that he then learnt that a suit had been filed.

52. Under cross examination, Mr. Kamotho stated that he acted for the sellers and the purchasers in the transaction and that he knew the directors of the appellant; that although the sale agreement was drawn by his firm there was no indication on the agreement to that effect; that although there were “some signatures on the document” he did not “know whose signatures they were.” He could not recall whether he requested for a resolution from the appellant “with a view to sell the suit property”; that he did not “attest and witness the parties signing the agreement for sale” and neither did he “attest to execution of the transfer instrument by the parties.” He added that he could not recall meeting the deceased but spoke to him several times during the sale transaction.

53. The learned Judge upon reviewing the evidence concluded that the appellant “has not been able to establish and demonstrate fraud, forgery or misrepresentation, to the requisite standard or at all.” In reaching that conclusion, the learned Judge considered, and stated that the appellant had, as confirmed by PW5, received the purchase price; that the deceased (who passed on 15<sup>th</sup> August 2016) did not lodge a criminal complaint after learning of the transaction. The Judge stated:

“It is important to point out that the 2<sup>nd</sup> Plaintiff herein only passed away on the 15<sup>th</sup> August 2016; in terms of the certificate of death contained at the foot of the List of documents dated the 8<sup>th</sup> October 2020. However, despite the fact that same was aware of the sale agreement and the transfer instrument, there is no evidence of lodgement of any criminal complaint pertaining to (sic) the forgery of his signature, if at all; or the fraudulent transfer of the suit properties in favor of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, respectively. Surely, a person of the status of the 2<sup>nd</sup> Plaintiff who was a holder of PHD and was variously referred to as Dr. Mwaniki Ndiguri Nick; would not fathom fraud and forgery and fail to report same for a duration of approximately 9 years; during his lifetime. In my humble view, the conduct of the 2<sup>nd</sup> Plaintiff during his lifetime, militates against a finding of fraud and forgery; either in the manner contended or at all.”

54. The Judge was not impressed by PW5, who he found was disclaiming her role as the company secretary of the appellant for convenience, despite having signed numerous documents in that capacity, and concluded that her testimony was fraught with “outright falsehoods and deliberate manipulation, to suite (sic) a pre-meditated scheme.”

55. The Judge was particularly impressed by the testimony of DW3, based on which he concluded that “the sale of the suit properties was indeed known and within the knowledge of the Plaintiffs, more particularly, the First Plaintiff, who was hitherto the registered owner of the Suit Properties.” And that “both the sale agreement dated the 12<sup>th</sup> September 2006; and the instrument of transfer dated the 30<sup>th</sup> November 2006, were duly attested by Mr. Kenneth Kamotho Waiganjo.”

56. That is all very well. However, and with respect to the learned Judge, the critical issue in our view, which the learned Judge does not appear to have addressed, is whether there was evidence that the agreement for sale and the subsequent transfer in favour of the respondents were duly signed by the deceased as a director of appellant. The execution page of the instrument of transfer produced as an exhibit bears the photographs that were said to be of the deceased and of PW5. There is contention that the signature on that instrument purporting to be that of the deceased, is in fact not his. Similarly, the signature, purportedly of the deceased, on the execution page of the sale agreement dated 12<sup>th</sup> September 2006, which was also produced, is contested.



57. In considering this question, the evidence, comprising in part of the annual returns of the appellant for 2006 shows that the directors of the appellant were the deceased, Coda Consulting Group Limited and the 1<sup>st</sup> respondent (DW1). Based on a Notification of Change of Directors, the 1<sup>st</sup> respondent ceased to be a director of the appellant with effect from December 31, 2007. Therefore, at all material times the 1<sup>st</sup> respondent was a director of the appellant.
58. In effect, during the currency of the transaction the 1<sup>st</sup> respondent, was, on the one hand, a director of the appellant, and on the other hand, a purchaser of the appellant's properties alongside his wife, the 2<sup>nd</sup> respondent. In that regard, the appellant pleaded in the plaint that the 1<sup>st</sup> respondent had a duty to safeguard the assets/properties of the appellant, "particularly at such a time when the [deceased] was hospitalized with such a serious organ failure." There was uncontroverted evidence, consisting of medical records and extracts of the deceased's passport, that during the period March 2006 to March 2007, the deceased was out of the country receiving medical treatment for kidney failure/kidney transplant.
59. As already noted, the 1<sup>st</sup> respondent stated in his testimony that he left the matter of execution of the agreement for sale and the transfer to the advocates. The testimony of the advocate, DW3, regarding execution of the agreement for sale and the transfer is instructive. He did not witness or attest the signature of the deceased in either the agreement for sale or the transfer. His evidence was that he attested that the photographs affixed were a true likeness of the deceased. He said he was in communication with the deceased, but the nature of that communication was not indicated.
60. As the Judge observed, PW5 testified that when she informed the deceased of the transaction, he stated that he was not aware of it. In that regard, the learned Judge stated in paragraphs 177 and 178 of the judgment thus:
- "Nevertheless, even assuming for the sake of arguments only, that the 2<sup>nd</sup> Plaintiff, now deceased, who was the director/shareholder of the 1<sup>st</sup> Plaintiff company, was not aware of (sic) the execution of the sale agreement and the instrument of transfer, pertaining to the sale and eventual transfer of the suit properties, same no doubt, was briefed and thus became aware of the transfer of the suit properties upon his return on the 3<sup>rd</sup> March 2007, if at all. At this juncture, it is important to recall the evidence tendered by Elizabeth Magondu, PW5 whilst under cross examination by Learned Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. Instructively, same testified as hereunder; "I did inform the 2<sup>nd</sup> Plaintiff of the sale of the suit properties. When I informed him of the sale, he was surprised and he informed me that he did not execute the transfer instrument. I don't know whether the 2<sup>nd</sup> Plaintiff reported the matter to any police station.....the 1<sup>st</sup> Defendant ceased to be a director of the Plaintiff company. The issue of the sale of the two properties was not raised during the meeting of the company held on the 1<sup>st</sup> February 2008 (see minutes at page 54 of the Plaintiff's bundle)".From the testimony of PW5, it is evident that the 2<sup>nd</sup> Plaintiff, now deceased (if same was no aware of the sale), became aware and/or was duly informed of the sale of the suit properties upon his return. In any event, the 2<sup>nd</sup> Plaintiff, now deceased was seized of the facts as at 1<sup>st</sup> February 2008, when the 1<sup>st</sup> Plaintiff held a Board meeting."
61. It appears that there was a tacit acknowledgment that the deceased neither signed the agreement for sale nor the transfer. Moreover, we do not think, with respect, that knowledge of the transaction on the part of the deceased, after the fact, was in effect a ratification of the transaction, and neither would it cure the absence of lawful execution.



62. A resolution of the appellant resolving to sell and transfer the properties to the respondents would have put the matter to bed. The 1<sup>st</sup> respondent, having been a director of the appellant, would have been able to speak to such resolution, if one was in place. As stated in *Eliud Muya Kariuki & 2 Others vs. Mary Wanjiru Njenga & 4 Others* [2019] eKLR, the proper procedure to be followed for the disposal of a property owned by a limited liability company is by way of resolution of the company by the board of directors.
63. Given that the 1<sup>st</sup> respondent wore two hats, as a director of the appellant on the one hand, and as a purchaser of the appellant's property on the other hand, it was incumbent on him, in as much as the appellant had a burden of proof to discharge, to demonstrate to the court that the agreement for sale and the subsequent transfer, of which he was a beneficiary, were duly signed, as they purported, by the deceased as a director of the appellant. All he did was to suggest or speculate that the agreement for sale and the transfer may have been transmitted by courier to the deceased in the USA for him to sign.
64. Based on our review and re-appraisal of the evidence, in accordance with rule 31(1)(a) of the Court of Appeal Rules, we draw the inference of fact that the agreement for sale and the transfer of the properties in favour of the respondents was not signed by the deceased, and consequently they were not duly executed by the appellant. The learned Judge therefore erred in concluding that the appellant had not proved its case to the required standard. Consequently, the appeal succeeds and is hereby allowed.
65. In reaching that decision, it occurs to us that the respondents asserted that they paid the 'purchase price' which discharged the properties from the Bank. However, as the matter of 'refund' was not pleaded and considering that this Court or the lower court was not addressed on the same, we say no more.
66. The judgment of the ELC delivered on 10<sup>th</sup> August 2023 is hereby set aside in its entirety. We substitute therefor judgment in favour of the appellant in terms of prayers (a) to(d) inclusive of the plaint dated 13<sup>th</sup> December 2011. In the result we order as follows:
- a. The respondents, whether by themselves, their servants, agents or employees, are restrained by permanent injunction from selling, alienating, transferring or in any manner whatsoever dealing in the properties known as LR. No. 7741/348 and LR. No. 7741/348.
  - b. The Transfer of the properties LR. No. 7741/348 and LR. No. 7741/348 registered in favour of the respondents is hereby cancelled.
  - c. Edco Africa Limited is declared as the proprietor of properties LR. No. 7741/348 and LR. No. 7741/348 and the Land Register shall be rectified to restore Edco Africa Limited as the proprietor thereof.
67. The claim for special damages is declined.
68. The appellant shall have the costs of this appeal and of the proceedings before the ELC.
69. Orders accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 24<sup>TH</sup> DAY OF JANUARY 2025.**

**D.K. MUSINGA, (PRESIDENT)**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**

**J. MATIVO**

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**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR.**

