**Kabogo v Gitau (Civil Appeal 82 of 2019) [2025] KECA 193 (KLR) (7 February 2025) (Judgment)**

Neutral citation: [2025] KECA 193 (KLR)

**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT NAIROBI**

**CIVIL APPEAL 82 OF 2019**

**A ALI-ARONI, AO MUCHELULE & GV ODUNGA, JJA**

**FEBRUARY 7, 2025**

**BETWEEN**

**KIMANI KABOGO ..... APPELLANT**

**AND**

**WILLIAM KABOGO GITAU ..... RESPONDENT**

***(An Appeal from the ruling of the Environment and Land Court of Kenya at Nairobi (L. Gacheru, J) delivered on the 10th day of December 2018 in ELC Case No. 1620 of 2016)***

## JUDGMENT

1. The appellant, Kimani Kabogo, by a suit filed on 22nd December 2016, sued the respondent, William Kabogo Gitau (apparently the appellant's nephew), seeking judgement for:

    a. Indemnity against all liability arising out of breaches by the respondent on his duties to the appellant arising out of his position as proprietor in trust for himself, the appellant and his family of LR.Nos.12825/27, 12825/33 and 12825/34.

    b. Kshs.387,875,000/= in damages.

    c. Punitive damages

    d. Interest

    e. Any other or further relief as this Honourable Court may deem fit and just to grant.

2. The suit, as pleaded, was based on the fact: that on or about 3rd March 1998, the appellant was registered as the owner of LR.No.12825/27 and 12825/34, which he used as collateral to borrow Kshs.10million from NIC Bank and LR.No.12825/33, which he also used as collateral to borrow Kshs.5million from ICDC; that sometime in September 2000 as the appellant was unable to service the facilities due to exorbitant interest rates, he sought the help of the respondent who paid off the loan due to NIC Bank to avert the sale of LR.No.12825/27 and 12825/34 by public auction; that the understanding was for

the respondent to hold the suit properties in trust for himself and the appellant until such time when the properties would be sold at market value and/or developed and the proceeds be shared equally between the two parties; that the appellant also sought the assistance of the respondent in the year 2003 to salvage LR.No.12825/33, which was on the verge of being auctioned by ICDC, for recovery of the aforesaid loan; and that it was agreed that the respondent was to recover the principal sum paid to offset the loan together with 20% interest and the balance of sale was to be shared equally.

3. According to the appellant when in 2006, he sought to find out the status of the said properties from the respondent so that they could reduce the oral agreement between them into writing, the respondent avoided him after the appellant discovered that the respondent had alienated the said properties contrary to and in breach of their oral agreement. It was pleaded that the respondent then evicted the respondent from the suit properties and demolished his houses, coffee factory and the workers' camp leaving him and his siblings who were residing on the suit properties homeless and destitute.

4. The appellant claimed that the respondent's conduct amounted to fraud and a breach of trust and as a result of which he suffered loss and damage to the tune of Kshs.387,875,000/=.

5. In his statement of defence filed on 17th March 2017, the respondent denied the allegations made against him by the appellant and in particular denied the existence of any agreement to have the suit properties registered in his name to hold in trust for himself and the appellant as alleged. It was the respondent's position: that LR. Nos.12825/27 and 12825/34, were registered in his favour after NIC Bank sold them by Private Treaty in exercise of its Statutory Power of Sale to recover a loan owed by Kenya Modern Digitals Ltd which was guaranteed by the appellant; that the appellant consented to the said sale and signed the transfer at the request of NIC Bank; that LR.No.12825/33, was sold by ICDC in exercise of its Statutory Power of Sale to Arcoverde (K) Ltd; that since the respondent had no proprietary interest in LR.No.12825/33, he did not owe the appellant any proceeds of sale therefrom; and that the appellant had no claims over LR.No.12825/27 and LR.No.12825/34 as alleged by him.

6. Further, the respondent alleged that the suit is statute barred under section 4 of the *Limitation of Actions Act*, Cap 22 Laws of Kenya and that the appellant's suit offended the mandatory provisions of section 3(3) of the *Law of Contract Act*, Cap 23 Laws of Kenya, as the appellant's claim over the suit property was hinged on an alleged oral agreement. The respondent urged the court to strike out and/or dismiss the appellant's suit with costs.

7. On 19th October 2017, the appellant filed a Notice of Motion application seeking prohibitory and injunctive orders against the respondent restraining the respondent from trespassing or developing or in any manner dealing with LR.Nos.12825/27, 33 and 34 pending the determination of the suit or an order for maintenance of status quo. Apart from the grounds of opposition filed by the respondent on 14th December 2017, challenging the jurisdiction of the trial court to hear and determine the matter on the basis of limitation barrier and locus standi, the respondent also filed a Notice of Preliminary Objection of even date in which he averred: that the Court had no jurisdiction to hear and determine the matter as the same was statute barred under the provisions of section 4 of the Limitation of Actions Act; and that the suit offended the mandatory provisions of section 3(3) of the *Law of Contract Act* as the appellant's claim over the suit property was premised on an alleged oral agreement. Consequently, the court had no jurisdiction to hear the suit.

8. The trial court directed that both the Preliminary Objection and the Notice of Motion application be heard together and by its ruling dated 10th December 2018, the trial court, decided to deal with the preliminary objection first since a determination thereof was capable of determining the matter, should it be upheld.

9. In the ruling, the learned Judge found: that that both the issues of jurisdiction based on limitation and the allegation that the suit offended against the mandatory provisions of section 3(3) of the *Law of Contract Act*, were properly taken as preliminary objections as they raised pure points of law and stemmed from the pleadings; that the appellant's claim as pleaded was based on fraud and breach of trust on the part of the respondent which the appellant discovered in the year 2006; that the appellant did not take any action until 2016, when the respondent allegedly started to develop the suit properties which, according to the appellant, were purchased by the respondent in the year 2000 and 2003; that based on the case of Elijah Ntaiya v Lekinini Kulale & 3 Others (2008) eKLR limitation period for an action founded on fraud is three years which begins to run when the fraud is discovered; that the appellant did not take any action within a period of 3 years and therefore by the end of 2009, the action was time barred; that the suit properties were purchased by the respondent from NIC Bank and ICDC who were exercising their Statutory Power of Sale but opted for a private treaty with the consent of the appellant; that there was no indication in the said transactions that any trust existed between the appellant and the respondent; that furthermore LR.No.12825/33, was sold to Arcovede Co. Ltd and not the respondent herein hence section 20(1) of the *Limitation of Actions Act* did not apply; that the appellant's suit was filed 10 years after discovery of the alleged fraud and was hence statute barred under section 4 of the *Limitation of Actions Act*; that the said alleged oral contract which formed the basis of the appellant's cause of action contravened the mandatory provisions of Section 3(3) of the *Law of Contract Act* and ousted the court's jurisdiction to deal with the matter; and that since the sale was done by the Bank and there was no evidence of any trust created, section 3(3)(b) of the *Law of Contract Act* was not applicable; that based on the authority in the case of Silver Kenya Ltd v Junction Ltd & 3 Others (2013) eKLR and Kangatta Properties Co. Ltd v Charity Njeri t/a Winacom Crossline Supplies & 4 Others [2014] eKLR a contract over land that does not satisfy the requirement of the said provision.

10. Based on the foregoing findings the learned Judge struck out the appellant's suit with costs to the respondent.

11. Dissatisfied with the said decision, the appellant appeals to this Court challenging the said decision on the grounds that the learned Judge erred: in finding that the court had no jurisdiction to hear and determine the suit when the appellant's cause of action arose in 2017 and not 2006 as claimed; in failing to find that the respondent unjustly enriched himself by taking advantage of the appellant's plight and breaching the resulting, implied and constructive trust as provided under section 3 of the *Law of Contract Act*; by failing to appreciate that the respondent was barred under the doctrine of adverse possession pursuant to section 7 of the *Limitation of Actions Act*; by failing to appreciate the fact that the respondent breached the trust that he had with the appellant just before the suit was filed and not earlier; and by failing to appreciate the fact that the respondent had been abusing the court process by refusing to file his statement and list of authorities as required by Order 11 of the Civil Procedure Rules.

12. When the appeal was called out for hearing on the Court's virtual platform on 8th October 2024, learned counsel, Mr Kirui, appeared for the appellant while learned counsel, Mr Issa, appeared for the respondent. Both learned counsel informed us that they had filed their submissions which they highlighted briefly.

13. Regrettably, some of the appellant's submissions digressed from the issues the subject of the appeal by introducing new issues and not directly addressing the grounds of appeal. We have said time without number that an appeal should be directed at the decision being challenged. The court below can only be faulted in respect of the decision being appealed against. In his submissions, the appellant raised issues such as the failure by the respondent to file his statements, adverse possession and unjust enrichment

which were not the issues upon which the impugned decision was arrived at. We reiterate that it was not open to the appellant to raise these issues before us when they were not raised at the hearing and in determination of the decision being appealed against. Similarly, rule 107 enjoins parties to an appeal to restrict themselves within the four corners of the grounds of appeal and should not, under the guise of submissions, expand the grounds outside those that were, under 88 of the Court of Appeal Rules, 2022, "... concisely set forth under distinct heads".

14. This Court (in the words of Platt, JA.) in Wachira v Ndanjeru [1987], KLR 252 observed that:

> "…. the discretion to allow a point of law to be taken for the first time on appeal will not be exercised unless full justice can be done between the parties. It will not usually be allowed when to do so would involve disputed facts which were not investigated or tested at the trial. Nor will a party be allowed to raise on appeal, a case totally inconsistent with that which he raised in the trial court, even though evidence taken in that court supports the new case."

15. The predecessor to this Court in Alwi Abdulrehman Saggaf v Abed Ali Algeredi [1961] EA 767 held that the course of taking a point of law, which has not been argued in the court below, on appeal ought not to be followed unless the court is satisfied that the evidence upon which they are asked to decide established beyond doubt that the facts, if fully investigated, would have supported the new plea.

16. This Court in Stallion Insurance Company Limited vs. Ignazzio Messina & C S.P.A [2007] eKLR expressed itself on the question of raising issues for the first time on an appeal as follows:

> "It is common ground in this appeal that the issue intended to be raised did not form any ground stated in the memorandum of appeal and did not arise before the superior court. Indeed for a period of eight years it did not form part of the appellant's case. There are good reasons for the existence of the rule and some of them appear in the authorities cited before us by Mr. Karori. Apart from considerations of fairness, delay and prejudice that may be occasioned, the predecessor of this Court in the Alwi A. Saggaf Case (Supra) agreed with Lord Birkenhead L.C. in North Staffordshire Railways Co. v. Edge [1920] A.C. 254 at p. 263, on the guiding principle, when he stated:
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> > 'The appellate system in this country is conducted in relation to certain well-known principles and by familiar methods. The issues of fact and law are orally presented by counsel. In the course of the arguments it is the invariable practice of appellate tribunals to require that the judgments of the judges in the courts below shall be read. The efficiency and the authority of a Court of Appeal, and especially of a final court of Appeal, are increased and strengthened by the opinions of learned judges who have considered these matters below. To acquiesce in such an attempt as the appellants have made in this case, is in effect to undertake decisions which may be of the highest importance without having received any assistance at all from the judges in the courts below.'
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> The Privy Council also, in an appeal emanating from the supreme court of Kenya, The United Marketing Company Case (Supra), held: -
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> > '
> >
> > (ii) their Lordships would not depart from their practice of refusing to allow a point not taken in the courts below to be argued unless they were satisfied that the evidence upon which they were asked to decide established beyond doubt that the facts, if fully investigated,

would support the new plea; even if the facts were beyond dispute and no further investigation of facts were required, their Lordships would not readily allow a fresh point of law to be argued without the benefit of the judgments of the judges in the courts below, accordingly;

(iii) their Lordships would not, even if the question were a bare question of law, entertain the submission that the respondent's claim was to be defeated by reason of his breach of a condition in his contract of insurance. North Staffordshire Railway Company v. Edge, [1920] A.C. 254, applied.'

We are of the further view that the appellant's case as put and argued before the superior court was specific. The intention to alter it at this appellate stage would be grossly prejudicial to the respondent and it ought not to be allowed. The persuasive speech of Sir Raymond Evershed M.R. in United Dominion Trust Case (Supra) may illustrate the point: -

'I rest my conclusion perhaps most strongly on this consideration, that the judgment, extracts from which I have read, seems to me to be in no way whatever related to it. Indeed, it seems to me to have proceeded on a basis which was absolutely inconsistent with the way in which counsel for the plaintiff now puts his case. As a matter of principle the Court of Appeal has always been strict in applying the rule that an appellant from a county court, unless the other party consents, cannot be allowed in this court to raise a new point of law not raised below. After all, the county court is intended to serve litigants of relatively small means. It is not in accordance with the public interest that a party who has fought a case in a county court and been defeated should then raise in this court a new point and put his case in an entirely different way as a matter of law and so make the other party, hitherto successful, litigate the matter again at the risk of having to pay the costs not only below, but in this court.'

The same approach appears to obtain in India where, in a case where the new issue of law was raised for the first time on appeal eighteen months after the lower court's decision, the court stated: -

'Unless upon very strong grounds, and under very special circumstances, we should hesitate to permit a party at such a stage of his suit, as the present suit now is, to set up a case which was not set up for him in the Court of first instance or of primary appeal, where his professional representative must have been perfectly well aware whether such a case as this alleged special custom could be legitimately set up, and abstained from any attempt to set it up. To yield to such an application as the present, would be to make an evil precedent, and to hold out a premium to perjury and interminable litigation.'

We have said enough, we think, to underscore our reluctance to accede to the arguments sought to be put forth by the appellant in this matter and we reject that attempt."

17. We are also mindful of this Court's observation in Kenya Hotels Limited vs. Oriental Commercial Bank Limited [2018] eKLR that:

> "Where the applicant seeks to introduce an entirely new point, there are well known strictures that seek to ensure firstly, that an appellate court does not, in disguise, metamorphose into a trial court and make first- instance determinations without the benefit of the input of the court from which the appeal arises...Due to these fundamental concerns, the Courts have developed fairly elaborate principles that guide it in determining whether or not to allow a new point on appeal. In Openda v. Ahn, (ca 42/1981) this Court identified some of the principles to include that all grounds of appeal must arise from issues that were sufficiently pleaded, canvassed, raised or succinctly made issues at the trial; that the point sought to be introduced must be consistent with the applicant's case as conducted in the trial court, not changing it into a totally different case; the matter must have been properly pleaded and the facts in support of the new point must have come out in the trial court."

18. Accordingly, a party cannot be permitted to raise a new point for the first time on appeal, and to urge the Court to allow his appeal based on the same point, when the trial court had no opportunity to consider it and pronounce itself thereon.

19. The impugned decision only dealt with preliminary objections challenging the jurisdiction of the court on the grounds of limitation and the court's jurisdiction to entertain a suit based on an oral contract. We therefore intend to deal only with the submissions relating to these issues.

20. On behalf of the appellant, it was submitted: that section 4 of the *Limitation of Actions Act* is countered by section 20(1) of the same Act and that the respondent had all along held the property in trust for the appellant hence section 4 aforesaid was inapplicable; that in any case the appellant had been continually following up the matter for years; and that section 3(3) of the *Law of Contract Act* is counteracted by section 3(3)(b) of the same Act.

21. For the respondent, it was submitted: that contrary to the appellant's contention that the cause of action arose in 2017, the appellant pleaded the tort of fraud and breach of trust arising in 2006 hence the suit which was filed on 22nd December 2016 was filed 10 years after the cause of action arose; that on the authority of the authorities of the cases of Elijah Ntaiya v Lekinini Kulale & 3 Others [2008] eKLR and Julius Njuguna Mwangi v Kariuki Kamau Mbuki & 4 Others [2018] eKLR, the limitation period for an action founded on fraud is three years; that based on the decisions in the cases of Nitin Coffee Estates Ltd v United Engineering Works Ltd & Another [1986-1989] EA 410, Kukal Properties Development v Maloo & Others [1990-1994] EA 281, Silverbird Kenya Limiyted & 3 Others [2013] eKLR and Kangatta Properties Company Ltd v Charity Njeri T/A Winacom Crossline Supplies & 4 Others [2014] eKLR, in the absence of a contract in writing signed by both parties, there can be no valid disposition of an interest in land and the court properly held it had no jurisdiction to hear and determine the suit; that on the authority of IEBC & Anor v Stephen Mutinda Mule & 3 Others [2014] eKLR, the issues of adverse possession and the failure to comply with Order 11 of the Civil Procedure Rules were not raised in the appellant's Notice of Motion; and that in any case a perusal of the plaint confirms that the claim was not for adverse possession but for breach of trust and fraud. We were therefore urged to dismiss the appeal with costs.

22. We have considered the submissions made on behalf of the parties as well as the record as placed before us. The issue that falls for determination before us in this appeal is simply whether the learned trial Judge was right in striking out the suit for lack of jurisdiction based on limitation of actions and the failure to comply with section 3(3) of the *Law of Contract Act*.

23. At paragraph 7 of the plaint, it was pleaded:

> " That sometime in 2006 the Plaintiff sought to find out from the Defendant the status of his property secured to ICDC with a view of putting it to commercial use and reduce the oral agreement between them in writing but the Defendant has been avoiding the Plaintiff leading the Plaintiff to believe that the Defendant has alienated his properties contrary to and in breach of their oral agreement and now the Defendant has evicted us and demolished our houses, the coffee factory and the workers camp leaving me and my siblings who were residing on the suit properties homeless and destitute."

24. In his own statement at paragraph *32*, the appellant stated that in 2012 he visited ICDC and found that the respondent had arranged not to secure the property as agreed but wanted to buy it through auction. It is clear from the foregoing that the appellant knew, at the latest, in 2012 that the respondent had fraudulently acquired LR No. 12825/33 for himself and not on behalf of the appellant. Section 4 of the *Limitation of Actions Act* provides that:

> " An action founded on tort may not be brought after the end of three (3) years from the date on which the cause of action accrued".

25. Section 26 of the same Act provides that:

> Where, in the case of an action for which a period of limitation is prescribed, either -
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> a. the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or
>
> b. the right of action is concealed by the fraud of any such person as aforesaid; or
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> c. the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it

26. From the appellant's own pleadings and witness statement, he knew or ought to have discovered the fraud, at the latest, in 2012. No action was taken by him until 2016 when, according to him, the respondent evicted him. To our mind, it matters not that he was following up the matter with the respondent unless he can show that the respondent acknowledged his claims during the three years prior to his filing the suit. This Court (Kneller, JA) in Kenya Cargo Handling Services Ltd v David Ugwang [1985] KLR 593; [1976-1985] EA 196 stated the objective of the limitation statute when it held that:

> " The Act (Limitation)...relates only to procedure. It does not divest any person of rights recognised by law; it limits the period within which a person can obtain remedy from the courts for the infringement of them. The mischief against which all Limitation Acts are directed are delay in commencing legal proceedings for delay may lead to injustice, particularly where the ascertainment of the relevant facts depend on oral testimony."

27. This Court in the case of Javed Iqbal Abdul Rahman & Another v Bernard Alfred Wekesa Sambu & Another Civil Appeal No. 11 of 2001, held that in a claim for land, on the basis that the registration was done by way of fraud, the time starts running when the said registration is discovered and the limitation period is three years.

28. It would follow that, based on the pleadings as they were before the trial court, the cause of action, based on fraud, would have been unsustainable. That, however, is not the end of the matter.

29. The appellant submitted that section 4 of the *Limitation of Actions Act* is countered by section 20(1) of the same Act and that the respondent had all along held the property in trust for the appellant hence section 4 aforesaid was inapplicable. Section 20(1) of the *Limitation of Actions Act* provides that:

> None of the periods of limitation prescribed by this Act apply to an action by a beneficiary under a trust, which is an action-
>
> a. in respect of a fraud or fraudulent breach of trust to which the trustee was a party or privy; or
>
> b. to recover from the trustee trust property or the proceeds thereof in the possession of the trustee or previously received by the trustee and converted to his use.

30. At paragraphs 4 and 5 of the plaint, the appellant pleaded:

> 4. That sometime in September 2000 the Plaintiff sought the help of the Defendant who p[aid off the loan due to NIC Bank to avert LR No. 12825/27 and 12825/34 from being auctioned to recover the outstanding loan and in exchange the Plaintiff registered as proprietor the Defendant to hold in trust for himself and the Plaintiff the two properties until such a time when the properties would be sold at market value or developed and the proceeds shared equally between both the Plaintiff and the Defendant after recovery of the Defendant's money previously paid to offset the Plaintiff's loans.
>
> 5. That sometime in 2003 against the Plaintiff sought the help of the Defendant to salvage LR No. 12825/55 from being auctioned by ICDC to recover their loan to the plaintiff on the same terms as the other two properties.

31. The particulars of fraud were set out in paragraph 7 of the plaint one of which was that the respondent sold and transferred LR No. 12825/33 without the appellant's consent in breach of their oral agreement. Our understanding of the appellant's case was, to paraphrase section 20(1) of the *Limitation of Actions Act*, that he was a beneficiary under a trust, in respect of a fraud or fraudulent breach of trust to which the trustee (the respondent) was a party or privy and he intended to recover from the trustee (the respondent) trust property (suit properties) or the proceeds thereof in the possession of the trustee (the respondent) or previously received by the trustee (respondent) and converted to his use.

32. In our view, the appellant, having pleaded and particularised trust, pursuant to section 20(1) of the *Limitation of Actions Act*, the issue ought to have gone to full hearing since section 4 of the same Act became irrelevant and inapplicable. This is our understanding of the well settled legal position in the celebrated case of Mukisa Biscuits Manufacturing Ltd. v West End Distributors Ltd. [1969] EA 696 where Newbold, P held that:

> "A preliminary objection is in the nature of what used to be called a demurrer. It raises a pure point of law, which is argued on the assumption that all the facts pleaded are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."

33. The Tanzanian Court of Appeal sitting in Dar es Salaam, in Karata Ernest *& others vs Attorney General (Civil Revision No 10 of 2020*) [2010] TZCA 30 (29 December 2010), (Luanda, JA, Ramadhani, CJ, Rutakangwa, JJA), succinctly discussed preliminary objections thus:

> "... where a taken point of objection is premised on issues of mixed facts and law that point does not deserve consideration at all as a preliminary point of objection. It ought to be argued in the "normal manner" when deliberating on the merits or otherwise of the concerned legal proceedings."

34. The Supreme Court in the case of Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 Others [2015] eKLR made the following observation as relates to preliminary objections:

> " ... The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits."

35. In this case, if facts as pleaded by the appellant are taken to be correct (which is the presumption when a preliminary objection is taken), then it would follow that the limitation period of 3 years would not apply. We therefore find that the trial court erred when it struck out the suit on the ground that the claim was barred by the prescribed limitation period of three year.

36. Regarding the second objection that the trial court had no jurisdiction to entertain the matter in light of the provisions of section 3(3) of the *Law of Contract Act*, the said section provides that:

> No suit shall be brought upon a contract for the disposition of an interest in land unless—
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> a. the contract upon which the suit is founded—
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> i. is in writing;
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> ii. is signed by all the parties thereto; and
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> b. the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:
>
> Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the *Auctioneers Act* (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.

37. It is clear that all contracts for disposition of interest in land must be in writing, signed by the parties thereto which signatures are to be attested by a witness at the time of their execution. Unless these requirements are complied with, the contract is unenforceable by a court, as was stated in Kukal Properties Development Ltd v Tafazzal H. Maloo & 3 others [1993] eKLR. However, as we have stated above the appellant's case was based on fraudulent breach of trust. The plea of trust, unless successfully

challenged, would bring the transaction within the proviso to section 3(3) of the *Law of Contract Act*. The learned Judge in the impugned judgement stated that:

> " However, the oral contract alleged herein by the plaintiff is not made by an auctioneer in the course of public auction as auctioneers were never involved at all. Infact the sale herein was by Private Treaty, which the lender allowed with the consent of the Plaintiff. The Plaintiff is alleging an oral contract between himself and the Defendant to assist him salvage the suit properties. The said oral contract forms the basis of the Plaintiff's cause of action and it is not in writing though the said alleged contract dealt with disposition of land. The sale was done by the Bank and there is no evidence of any trust created. Therefore Section 3(3)(b) is not applicable herein."

38. The learned Judge failed to appreciate that the proviso imported two separate scenarios. The first scenario is where the contract is made in the course of a public auction by an auctioneer while the second scenario is where it is alleged that the transaction created a resulting, implied or constructive trust. The trial court only considered the first scenario without considering the second one and in so doing misapprehended the law. That misapprehension warrants our interference with the decision

39. Having considered the two preliminary objections which formed the basis for the learned Judge's decision, we find that, in the circumstances of this case, the preliminary objections were not properly taken and ought not to have been sustained. Before arriving at the findings, there was a primary factual issue of the existence of trust that had to be determined.

40. In arriving at the decision, the learned Judge found that:

> " The suit properties were purchased by the Defendant from NIC Bank and ICDC who were exercising their Statutory Power of Sale but opted for a private treaty with the consent of the Plaintiff. There is no indication in the said transactions that any trust existed between the Plaintiff and the Defendant."

41. As Law, JA. in the Mukisa Biscuits case (supra) held:

> "A 'Preliminary Objection' correctly understood is now well defined as and declared to be a point of law which must not be blurred by factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be a Preliminary Objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true Preliminary Objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a Preliminary Objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence..."

42. With due respect to the learned Judge the findings of fact above could only have been determined with finality after hearing the evidence of the parties in the usual manner. They could not be determined by way of summary proceedings in the form of preliminary objections.

43. Having considered the issues raised before us, we find merit in this appeal which we hereby allow. We set aside the decision of the learned Judge made allowing the preliminary objections and substitute therefor a decision dismissing the preliminary objections. We direct that the matter be heard and determined in the usual manner before a Judge other than Gacheru, J. The costs of this appeal are awarded to the appellant.

44. Those shall be our orders.

**DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF FEBRUARY, 2025.**

**ALI-ARONI**

**.....**

**JUDGE OF APPEAL**

**A.O. MUCHELULE**

**.....**

**JUDGE OF APPEAL**

**G. V. ODUNGA**

**.....**

**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR.**