Sambo & another v Mwakio & another (Civil Appeal E082 of 2022) [2025] KECA 913 (KLR) (23 May 2025) (Judgment)

Neutral citation: [2025] KECA 913 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL E082 OF 2022

AK MURGOR, KI LAIBUTA & GWN MACHARIA, JJA

MAY 23, 2025

BETWEEN

JIMMY NATHAN SAMBO ..... 1ST APPELLANT

SYLVIA SAMBO ZIDHERI ..... 2ND APPELLANT

AND

LUCY MAYANKA MWAKIO ..... 1ST RESPONDENT

EDMOND MWAKIO AUGOSTINE ..... 2ND RESPONDENT

(Being an appeal from the Judgment and Decree of the Environment and Land Court of Kenya at Mombasa (Mwangi Njoroge, J.) delivered on 26th February 2021 in E.L.C Suit No. 76 of 2018)

JUDGMENT

1. This is an appeal from the judgment and decree of the Environment and Land Court at Mombasa (Mwangi Njoroge, J.) dated 26th February 2021 and delivered on 23rd March 2021 in Mombasa ELC Case No. 76 of 2018.

2. By a plaint dated 5th April 2018, the appellants, Jimmy Nathan Sambo and Sylvia Sambo Zidheri, filed suit against the 1st respondent, Edmond Mwakio Augostine, seeking the following orders:

    (a) A declaration that the purported Agreement of Sale entered into on the 9th January, 2003, between the Defendant [the 1st respondent herein] and one Frazer Sambo relating to a portion of land described as property within the Sale Agreement aforesaid in Sub-division Number 11162 (Original Number 441/3) Section 1 Mainland North, within Mombasa Municipality was and is illegal, null and void.

b. An order of injunction restraining the Defendant by himself, Servant, employee, and/or any other person [claiming] under him from entering upon, developing, selling, leasing, wasting and/or dealing with the suit portion of land described as property within the Sale Agreement aforesaid in Sub-division Number 1162 (Original Number 441/3) Section 1 Mainland North, within Mombasa Municipality in any manner whatsoever.

c. Costs of the suit.

d. Any other relief this Honourable court may deem fit to grant."

3. The appellants' case was that, at all material times, the appellants and other relatives named in their plaint were the registered proprietors of the property known as Subdivision No. 1162 (Original No. 441/3) Section 1 Mainland North (the suit property) situate within Mombasa Municipality; that the certificate of title for the suit property was registered in the names of 11 persons namely Emmy Muteti Nzai, Sylvia Sambo Zidehri (the 2nd appellant), Frazer Juma Sambo, and 8 other deceased persons (Margaret E. Mbotela, Nathan Sambo, Oliver Sambo, Samuel Sambo, Victor Sambo, Robert Sambo, William Sambo and Harry Sambo); and that they all along owned the land jointly and that, therefore, any transaction relating thereto had to be in consultation and with the consent of all the parties.

4. It was the appellants' further case that, sometime in March 2018, the 1st respondent approached the appellants with a Sale Agreement dated 9th January 2003 allegedly entered into between the 1st respondent and one Frazer Sambo in respect of a portion of parcel No. 441/3 Section 1, Mainland North; and that the purported Sale Agreement was fraudulently entered into and the entire transaction tainted and characterised by misrepresentation of facts. The appellants set out the particulars of fraud and misrepresentation as: entering into an Agreement without the consent of all the registered owners and of other members of their family; convincing one of the proprietors of the land to sell, yet the land was registered in the names of several people; fraudulently causing a portion of the land to be sold to the 1st respondent; and the fact that, at the time of execution of the Sale Agreement, most of the registered proprietors were deceased.

5. The appellants further averred that the 1st respondent knowingly or otherwise aided the fraud and proceeded to enter into the Sale Agreement without due regard to the law; that the 1st respondent did not complete the transaction as the purchase price had never been paid in full since the year 2003; that failure to settle the balance for a period of 15 years after the Agreement was in bad faith and could not be explained; that the contested portion purported to have been sold had already been alienated as the family cemetery and that, therefore, was not available for sale.

6. The 1st and 2nd respondents (Edmond Mwakio Augostine and Lucy Mayanka Mwakio) filed a Statement of Defence and Counterclaim dated 10th May 2018. The 1st respondent sought to have the 2nd respondent joined in the suit because she was party to the sale of the suit property. They denied the allegations contained in the appellants plaint.

7. As pleaded in their defence and counterclaim, the respondents' case was that, in 2003, Frazer Juma Sambo was one of the registered proprietors of the suit property originally known as Plot No. 441/3; that the 1st respondent entered into a sale agreement dated 9th January 2003 with the said Frazer Sambo to purchase a subdivision thereof (the contested portion) for a consideration of Kshs. 300,000 out of which he paid a sum of Kshs. 200,000 leaving a balance of Kshs. 100,000 payable upon procurement and surrender to the purchaser of the title deed in respect of the contested portion; and that Saba Sambo, Harry Sambo and Gideon Sambo (sons of Frazer Sambo) witnessed the execution of the sale

agreement between their father and the 1st respondent and received the purchase moneys from the Advocate.

8. The respondents further averred that, in view of the then ongoing subdivisions, it was agreed that each purchaser, including the 1st respondent, contributes to the survey fees of Kshs. 6,000 in order to carve out Frazer Sambo's portion from the original Plot No. 441/3, and that the titles be issued to the respective purchasers; that the 1st respondent's portion was clearly marked and demarcated in the survey plan; that the 1st respondent was to be issued with a title deed in terms of the agreement; that, upon completion of the sale, the 1st respondent immediately took possession of his portion, fenced the property, cut down trees, built a caretaker's house and laid a foundation for a storey building at a cost of Kshs. 1,500,000; and that the development was witnessed by their neighbours, including Frazer Sambo, who assisted him in putting up the foundation.

9. In addition to the foregoing, the respondents averred that, on 12th March 2018, the 1st respondent learnt that the 1st appellant and other members of his family were trying to sell the contested portion aforesaid to third parties; that the 1st respondent held a meeting with the 1st appellant, Wilberforce Ramoya, one Saul Mwandhegu, Gideon Sambo, the 1st appellant's Sister, Mwanamisi, and his sister-in-law, Jamila Wangari; that the 2nd appellant was not present at that meeting; that those at the meeting conceded that the respondents were the lawful owners of the contested portion of the original plot, which was clearly marked and distinguished from the larger sub- division No. 1162 carved out of the original parcel No. 441/3; that, after the subdivision in 2009, the operating title to their larger portion was re-registered as No. 11162 (Original No. 441/3); that the larger portion registered in the title number aforesaid was distinct from the 1st respondent's contested portion; and that it was agreed in writing at the meeting that the 1st appellant ceases all attempts to repossess or sell the contested portion, and that the 1st respondent do pay the balance of the purchase price together with an additional Kshs. 90,000 allegedly incurred on account of land rates to the County Government of Mombasa.

10. According to the respondents, time was not of the essence of the contract of sale between the 1st respondent and Frazer Sambo; that the balance of Kshs. 100,000/= was to be paid in exchange for the newly subdivided title, which the vendor failed or neglected to procure; that the contested portion was at no time a cemetery; that the respondents built the foundation on the contested portion with Frazer Sambo's assistance, and which had not been disturbed; and that the appellants had offered the 1st respondent Kshs. 200,000/= as restitution to retain the contested portion, which offer was rejected.

11. In their counterclaim, the respondents averred, inter alia, that the 1st appellant was not one of the beneficiaries, assigns or successors in title of the late Frazer Sambo; and that the appellants' action was based on greed, false representation and fraud. According to them, the particulars of fraud on the part of the appellants were: purporting to resell the contested portion knowing well that the 1st respondent was the beneficial owner thereof, and that he had taken possession thereof and developed it; purporting to feign minutes of an alleged family meeting where they purportedly declared the respondents' portion as a family cemetery in full knowledge of the fact that the plot previously set aside for the cemetery was intact; informing prospective buyers that the 1st respondent would easily accept refund of the amount paid in 2003; failing to process the title to the contested portion in the name of the 1st respondent since 2003;

> failing to inform the 1st respondent when the sub-division scheme was completed to enable him obtain his title deed; and by purporting to sell a property already sold to the 1st respondent.

12. By reason of the matters aforesaid, the respondents sought orders that the appellant's suit be dismissed with costs; that an injunction be issued to restrain the appellants from interfering with the respondents' portion; a mandatory injunction directed at the administrators of the estate of Frazer Sambo to transfer the contested portion as described in the sale agreement dated 9th January 2003 in the name of the 1st respondent or, in the alternative, an order that the portion clearly marked in the survey plan for the original parcel be excised therefrom and registered in the names of the respondents; costs of the counterclaim; and such damages as the court may find fair and just to award.

13. In their Reply to the Defence and Defence to Counterclaim dated 20th June 2018, the appellants denied the allegations of greed, fraud and false representation set out in the counterclaim. They averred that the general consensus and family tradition was and still remained that any dealing with the suit property was by consultation and consensus of all the registered owners or, in their absence, of their beneficiaries; that the contested portion was part of the larger plot set aside as a family cemetery and was not available for sale to the respondents; that the respondents did not pay the survey fee of Kshs. 6,000; that the land remained intact and no transactions had been carried out thereon; that a substantial part thereof was occupied by family members; that any purported transaction by the respondents was tainted with fraud and thus void ab initio; that the respondents had admitted that there was inordinate delay and inaction on their part in payment of the alleged balance of the purchase price; that the 1st appellant was a beneficiary by virtue of being a son to one Nathan Sambo (deceased), who was one of the registered proprietors; that Harry Sambo was a brother and not a son to Frazer Sambo and, in any event, he died on 14th May 1992 and, therefore, could not have been alive to transact the alleged sale in 2003; that the respondents did not erect any fence or put up a foundation on the contested portion; that the entire parcel of land (the disputed premises included) was still intact and jointly owned in undivided shares by the registered proprietors; and that the allegation that Frazer Sambo disposed of his share was misleading and an attempt to intermeddle in the estate. They prayed that the respondents' counterclaim be dismissed with costs.

14. In the judgment of Mwangi Njoroge, J. dated 26th February 2021 and delivered by Munyao Sila, J. on 23rd March 2021, the learned Judge held that, although the appellants contended in their submissions that neither the vendor nor the purchaser signed the sale agreement, and that there was no evidence that they had allowed the signatories to act as agents in the execution thereof, none of those issues were raised by the appellants in their pleadings; that it had not been demonstrated that there was any requirement of the owner's consent as at 2003; and that there was no dispute between the 1st respondent and the witness John Mwangi (DW3) that the latter executed the agreement on the former's behalf.

15. The learned Judge also found that, although the appellants submitted that the sale to the 1st respondent could not stand for lack of grant of letters of administration over the estate of the late David Samuel Sambo, this issue was likewise not pleaded; that, nevertheless, the appellants had not demonstrated that the land initially belonged to the estate of David Samuel Sambo as the title document produced did not show that the persons registered appeared on the title as administrators of the said estate, or that they were registered by way of transmission after distribution of the said estate; and that inclusion of Frazer as a registered owner after the sale showed that he had a disposable interest in the land even before registration.

16. In view of the foregoing, the learned Judge concluded that the appellants had failed to demonstrate who the registered owner of the entire parcel was before registration in the names of the eleven children of the late David Sambo; that the appellants had therefore failed to demonstrate that Frazer Sambo did not have capacity to sell the disputed portion to the 1st respondent and, therefore, the sale could not be termed as fraudulent as it preceded registration of the current registered owners of the larger portion;

that the respondents had given a good account of how they obtained the plot, took possession thereof and developed it; that the appellants' own evidence showed that they were aware of the sale of a portion of the land to the respondents even before 2018 when the dispute arose; and that the area was not a cemetery at the time of sale to the 1st respondent or at any time thereafter.

17. Finally, the learned Judge was not persuaded by the appellants' claim that the respondents' counterclaim was statute barred under and by virtue of section 7 of the *Limitation of Actions Act*. The learned Judge held that the appellants were the first to sue; that the appellants had not conclusively shown that the respondents lost possession of the plot in issue; and that the appellants had not disclosed the date from which the period of limitation was to be computed in order to establish limitation as a defence. He found that the appellants had failed to prove their case on a balance of probabilities while the respondents had proved their counterclaim to the required standard. Accordingly, he dismissed the appellants' suit with costs and allowed the respondent's counterclaim as prayed in (a), (b), (c) and (d) with orders that the transfer of the contested sub- plot to the respondents would be subject to payment of the outstanding balance of the purchase price in the sum of Kshs. 100,000 within 30 days next following; and that no damages would be awarded as none were proved.

18. Aggrieved by the learned Judge's decision, the appellants moved to this Court on appeal on a whopping 17 grounds set out in their Memorandum of Appeal dated 30th August 2022 against the grain of rule 88 of the Court of appeal Rules, 2022 which enjoins appellants to ensure that their memorandum of appeal concisely sets forth under distinct heads, without argument or narrative, the grounds of objection to the decision appealed against.

19. Be that as it may, we take the liberty to replicate those grounds as hereunder:

> " 1. The Honourable Court erred in law when it held that the Sale Agreement dated 9th January, 2003 was legal and valid despite finding that the purported vendor Frazer Sambo never executed the same contrary to section 3 (3) of the *Law of Contract Act* and section 38 (1) of the *Land Act*.
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> 2. The Honourable Court erred in law when it held that the Sale Agreement dated 9th January, 2003 was signed by agents of the purported vendor Frazer Sambo without any proof of their signatures or their authorization as required by section 3(4) of the *Law of Contract Act*.
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> 3. The Honourable Court erred in law and fact by finding that the property referred to in the subject Agreement of Sale dated 9th January, 2003 namely a sub-plot of Plot 441/1/MN was identifiable and a portion of the Subdivision registered as Plot 11162/1/MN (Originally 441/3) (hereinafter referred to as the 'subject land').
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> 4. The Honourable Court erred in law and fact when it held that the Late Frazer Sambo had capacity or authority to sell any portion of the subject land which was part of the Estate of the Late David Samuel Sambo in 2003.
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> 5. The Honourable Court erred in law when it held that the subject land which is owned by the eleven children of the Late David Samuel Sambo in common could unilaterally be alienated by one of the co-owners without the consent or involvement of the other co-owners.

6. The Honourable Court erred in law and fact by failing to uphold and safeguard the absolute indefeasible interest of registered owners of land contrary to section 25 of the *Land Registration Act* No. 3 of 2016.

7. The Honourable Court erred in law and fact by being biased against the Plaintiff by holding on one hand that the registered owner's interest in the subject land as at 2003 when the Sale Agreement was entered into had not been established whilst at the same time holding that the inclusion of Frazer Sambo as a registered owner after the sale 'shows that he had a disposable interest in the land even before the registration.'

8. The Honourable Court erred in law and fact when it held that the Respondents were in possession of the subject property despite clear evidence from both parties that there is no fence or structures on the subject property, which is a vacant property in the possession of the Appellants and serving as their family cemetery.

9. The Honourable Court erred in law when it held that the Defendants' Counterclaim which was for the enforcement of the Sale Agreement dated 9th January, 2003, which was executed more than twelve years prior to the filing of the suit, was not time barred.

10. The Honourable Court erred in law when it held that the laches for a claim based on the enforcement of a contract is computable from the date of loss of possession or breach and not the date of execution.

11. The Honourable Court erred in fact by claiming that laches was not pleaded and was an ambush when it is clearly referred to in the Defence itself.

12. The Honourable Court exceeded its jurisdiction by delving into succession issues regarding the Estate of the Late David Samuel Sambo and the Late Frazer Sambo.

13. The Honourable Court erred in law and fact by finding that the Plaintiffs had no capacity to institute the suit when the 2nd Appellant is a registered owner of the subject land.

14. The Honourable Court erred in law and fact by finding that the Plaintiffs had no capacity to institute the suit and yet it allowed the Counterclaim against them.

15. The Honourable Court erred in law when it granted a mandatory injunction against the administrators of the estate of the Late Frazer Sambo when they were not parties to the suit and there was no evidence that the said Estate had been administered.

16. The Honourable Court erred in law by granting an order of specific performance without due regard to the legal principles attendant to such an order.

17. The Honourable Court erred in fact by finding that the Defendant had paid Kshs 6,000 for survey without any evidence being produced."

20. In support of the appeal, learned counsel for the appellants, M/s. Njoroge & Katisya, filed written submissions and a list of authorities dated 8th June 2023 and, in rebuttal, learned counsel for the respondents, M/s. J.S. Kaburu & Co., filed written submission and a list of authorities dated 10th July 2023, all of which we have carefully considered.

21. This Court's mandate on 1st appeal was espoused in Ng'ati Farmers' Co-Operative Society Ltd v Ledidi & 15 Others [2009] KLR 331 as follows:

> " On a first appeal from the High Court, the Court of Appeal should 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 that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."

22. However, we are conscious as cautioned by the predecessor to this Court in Peters v Sunday Post Ltd [1958] EA 424 that:

> " It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion."

23. In our considered view, seven main issues commend themselves for our determination, namely: (i) whether the learned Judge erred in finding that the appellants had no capacity to institute the suit; (ii) whether the learned Judge erred in failing to find that the sale agreement dated 9th January 2003 was invalid; (iii) whether the learned Judge erred in failing to find that Frazer Sambo lacked legal capacity to sell a portion of the suit property; (iv) whether the learned Judge erred in finding that the respondents had possession of a portion of the suit property; (v) whether the learned Judge erred in holding that the respondents were deserving of an order of specific performance in discharge of the sale agreement; (vi) whether the learned Judge erred in failing to find that the respondents' counterclaim was statute barred; and (vii) whether the learned Judge erred by granting any relief(s) not prayed for and against persons not party to the suit.

24. On the issue as to whether the appellants had capacity to institute the suit, the learned Judge held that:

> " 30. First, the capacity of the plaintiffs to bring this suit is challenged by the defendants. The defendants, citing the cases of Julian Adoyo Ongunga v Francis Kiberenge Abano Migori Civil Appeal No. 119 of 2015 and Barnes Muema V Francis Masuni Kyangangu Nbi Appeal Case No. 87 of 2016 state that no letters of administration are demonstrated to have been obtained by the plaintiffs in respect of the registered owners whom they admit to be all deceased except one. I find that to be the correct position in the matter and the plaintiff's claim is liable to be dismissed on this ground alone."

25. Taking issue with the learned Judge's finding, counsel for the appellants submitted: that the 2nd appellant was listed in the plaint as one of the 11 registered proprietors of the suit property; that the plaint further states that all the registered proprietors except for Emmy Muteti Nzai and the 2nd appellant are deceased; that the 2nd appellant's name appears on the certificate of title for the subject

property; that, as a registered absolute proprietor of the subject land, the 2nd appellant has locus standi to institute the suit and the appeal herein; and that the 2nd appellant issued a Letter of Authority to the 1st appellant to institute the suit on her behalf in accordance with Order 1 rules 8 and 13 of the Civil Procedure Rules.

26. Counsel cited the case of Chief Land Registrar & 4 others v Nathan Tirop Koech & 4 others [2018] eKLR for the proposition that the fact that a co-owner, co-proprietor or other beneficiaries are not party to a suit does not non-suit or prevent other co-owners from filing suit.

27. In rebuttal, counsel for the respondents submitted: that the 1st appellant is said to have brought the suit on behalf of the Estate of his late father, one Harry Sambo, who is one of the registered owner in the title issued in 2009; that the 2nd appellant is one of the registered owners and, therefore, had capacity to sue; that, despite having capacity, she did not testify, but authorised the 1st appellant to prosecute the claim; that the 1st appellant had no capacity to bring the suit or represent the 2nd appellant as a co-plaintiff and, therefore, the case could not stand and ought to have been struck out on that ground without going into the merits; and that the 1st appellant had no letters of administration or grant ad litem and, therefore, lacked locus standi and, consequently, his evidence and that of his witnesses ought to have been disregarded.

28. Counsel cited the case of Daniel Njuguna Mbugua v Peter Kiarie Njuguna & 2 others [2021] eKLR, in highlighting the principle that locus standi is so cardinal in civil cases that, without it, a party lacks the right to institute or maintain a suit.

29. We call to mind the fact that the 1st appellant filed suit as "a beneficiary by virtue of being a son to one Nathan Sambo (Deceased) and one of the registered proprietors" of the original plot No. 441/3 Section 1 Mainland North out of which the contested plot and the appellants' sub-division No. 11162 were carved. While the 1st appellant exhibited a Certificate of Title demonstrating that his late father was one of the registered proprietors of the suit property, he did not exhibit a grant of letters of administration giving him the requisite legal standing to file suit on behalf of his deceased father's estate. Consequently, the 1st appellant had no locus standi to file the suit.

30. In the persuasive decision of the High Court in Julian Adoyo Ongunga & another v Francis Kiberenge Bondeva (Suing as the Administrator of the Estate of Fanuel Evans Amudavi, Deceased) [2016] KEHC 4186 (KLR), Mrima, J. correctly held that:

> " 28. ... the issue of locus standi is so cardinal in a civil matter since it runs through to the heart of the case. Simply put, a party without locus standi in a civil suit lacks the right to institute and/or maintain that suit even where a valid cause of action subsists. Locus standi relates mainly to the legal capacity of a party. The impact of a party in a suit without locus standi can be equated to that of a court acting without jurisdiction since it all amounts to null and void proceedings. It is also worth-noting that the issue of locus standi becomes such a serious one where the matter involves the estate of a deceased person since in most cases the estate involves several other beneficiaries or interested parties."

31. Addressing itself to the fundamental issue of locus standi in succession causes, this Court had this to say in Rajesh Pranjivan Chudasama v Sailesh Pranjivan Chudasama [2014] KECA 250 (KLR):

> " ... in our view the position in law as regards locus standi in succession matters is well settled. A litigant is clothed with locus standi upon obtaining a limited or a full grant of letters

of administration in cases of intestate succession. In Otieno v Ougo (supra) this Court differently constituted rendered itself thus:

> " ... an administrator is not entitled to bring any action as administrator before he has taken out letters of administration. If he does, the action is incompetent as of the date of inception.'

Besides, the respondent seemed to have confused the issue of locus standi and a cause of action. In Alfred Njau & Others v City Council of Nairobi (supra) this Court had occasion to discuss the two. They stated:

> " Lack of locus standi and a cause of action are two different things. Cause of action is the fact or combination of facts which give rise to a right to sue whereas locus standi is the right to appear or be heard, in court or other proceedings; ...'

The court proceeded to state:

> " To say that a person has no cause of action is not necessarily tantamount to shutting the person out of the court but to say he has no locus standi means he cannot be heard, even on whether or not he has a case worth listening to.'"

32. In view of the foregoing, we find that the 1st appellant had no locus standi to sue on behalf of, or lay any claim under, the estate of his deceased father. Accordingly, we agree with the learned Judge that, on that score alone, his suit stood to be struck out, but no formal application was made in that regard, and hence the trial court's determination of the claims in the suit and counterclaim on their merit. However, there is more to this suit than a claim in the succession dispute.

33. With regard to the 1st appellant's contention that he sued on behalf of the 2nd appellant, he contends that the 2nd appellant filed a written authority pursuant to Order 1 rules 8 and 13 of the Civil Procedure Rules authorising him to sue and sign any affidavits or documents, and liaise with her advocates in prosecuting or pursuing her claim as a registered proprietor of the suit property; and that he had the 2nd appellant's authority to file the verifying affidavit accompanying the plaint.

34. The relevant provision of the Civil Procedure Rules applicable to representative suits is Order 1 rule 13, which reads:

> 13. Appearance of one of several plaintiffs or defendants for others [Order 1, rule 13]
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> 1. Where there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding, and in like manner, where there are more defendants than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding.
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> 2. The authority shall be in writing signed by the party giving it and shall be filed in the case.

35. The only pertinent question that arises is whether a plaintiff who has no locus standi can properly institute or maintain a suit on the strength of such a written authority of a co-plaintiff or co- plaintiffs with the requisite locus standi. To our mind, the written authority to represent a party to a suit pursuant to Order 1 rule 13 does not of itself vest locus standi in a person who, by himself, has no right to institute or maintain the suit in which he is authorised to appear, plead or act for a co-plaintiff(s).

The provision only applies where all the parties concerned have the requisite legal standing to sue or defend the suit.

36. In view of the foregoing, we find that the 2nd appellant's written authority could not come to the 1st appellant's aid and breathe life to a suit that was dead on arrival. Accordingly, the learned Judge was not at fault in concluding that this was sufficient reason to have the appellants' suit dismissed or struck out for want of locus standi.

37. Turning to the 2nd issue as to whether the sale agreement dated 9th January 2003 was invalid, the learned Judge had this to say:

> " 21. In their submissions the plaintiffs cite Section 3(3) of the *Law of Contract Act* and Section 38(1) of the *Land Act* and posit that neither the vendor, Frazer nor the defendants who were purchasers were present at the signing of the agreement. It is stated that PW2 and PW3 denied having been involved in the execution of the agreement, contrary to the defendant's allegations and that their names and identity card numbers do not appear on the agreement. It is also urged that DW3 signed on behalf of the purchasers while he had no power of attorney from them ....
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> 22. Further the plaintiffs cite Section 3(4) of the *Law of Contract Act* and urge that there was no evidence of authorization in writing allowing the signatories to act as agents in the execution of the agreement.
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> 23. It is noteworthy that this was not specifically raised by the plaintiffs in their pleadings and may correctly be deemed an ambush of the defendants which practice is highly discouraged.
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> 24. This court will nevertheless address the issue.
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> 25. Regarding the consent from the seller, I must state that the title in the names of the present registered owners was registered in 2009 and the agreement was executed in the year 2003 and any requirement of the registered owner's consent as at the year 2003 has not been demonstrated. A history of the registration status of the main parcel is missing. This court cannot be expected to fill in the gaps in the plaintiff's evidence. Therefore, the particular of fraud couched as "convincing one of the registered proprietors of the land to sell yet the land was registered in the names of several people" cannot stand. However, concerning the submission that there was no written authorization on the part of DW3 to execute the agreement, that may be so, but in addition to the failure to specifically plead that claim, it must be observed that there is no dispute between DW1 and PW3 that the latter executed the agreement on behalf of the former. Whereas the lack of such written authorization could have mattered had the evidence of the two not concurred, it is now of no consequence in this suit."

38. Faulting the learned Judge for his decision, counsel for the appellants submitted: that the trial court conflated two distinct arguments, the first being that the alleged vendor mentioned in the said Agreement, namely Frazer Sambo, did not execute the Agreement and, secondly, that it was not signed by his agents; that the learned Judge disregarded clear and uncontroverted evidence that the Sale Agreement dated 9th January 2003 was not signed by Frazer Sambo or the respondent; that, without

a validly signed sale agreement, no interest or rights passed to the respondents; that the 1st respondent gave evidence that he was not present when the agreement was signed; and that Frazer Sambo was ailing at home and did not sign the agreement.

39. Counsel further submitted that the learned Judge misapprehended section 3(3) of the *Law of Contract Act* and section 38(1) of the *Land Act*, which state that no suit shall be brought upon a contract for the disposition of an interest in land unless the contract upon which the suit is founded is in writing and signed by all the parties thereto; that the learned Judge misapprehended the applicability of the authority of Leo Investment Ltd v Estuarine Estate Ltd [2017] eKLR, relied on by the appellants, which states that a suit founded on an unsigned contract is a nullity ab initio and was therefore on all fours with the present case.

40. On the authority of Wagichiengo v Gerald [1988] eKLR, counsel submitted that it was not enough that a party to a contract for the disposition of an interest in land is identified; that he was required to have signed the contract by appending his name thereto or by some other act intended to signify his assent, such as a mark made by a person who could not write; that the learned Judge did not cite the evidence relied on to reach the conclusion that the agreement was executed by agents of both parties; and that the agreement does not state that it was signed on behalf of Frazer Sambo or otherwise disclose the identity of the person who purportedly signed it on his behalf, or whether they were authorised by Frazer Sambo in writing.

41. Counsel further submitted that the respondents' credibility was brought to question when they claimed that Harry Sambo participated in the sale, but that the appellants were able to produce a death certificate to show that he had allegedly died in 1992; that, the 1st respondent having admitted that he was not in Mombasa when the agreement was purportedly signed, his evidence as to who was present to signed the sale agreement was hearsay; that the claim by Jamila Wangari (DW2) and John Mwangi (DW3) to the effect that Gideon Sambo and Saba Sambo signed and placed a thumb print on the sale agreement are not borne out of the face of the said document; and that Gideon Sambo and Saba Sambo gave evidence as PW2 and PW3 denying having signed the agreement.

42. In response, counsel for the respondents submitted that the issue as to the validity of the sale agreement in light of section 3(3) of the *Law of Contract Act* was raised in the appellants' submissions thereby ambushing the Respondents without giving them an opportunity for rebuttal; that counsel agreed with the findings and the reason given by the trial court on the validity of the subject sale agreement; that the subject agreement was entered into on 9th January 2003; and that the law cited by the appellants was not then in operation and did not apply in the circumstances of the instant case.

43. Counsel further submitted that, prior to the amendment of section 3(3) of the *Law of Contract Act*, the statutory requirement was that a contract for the disposition of an interest in land be in writing and signed by the party or other person authorized by him; that, considering the statute law then in force, the Agreement was properly executed; that, even though Gideon Sambo, Saba Sambo and Harry Sambo denied having signed the Agreement, no expert evidence was called to prove that the signatures appended on the Agreement were not theirs; that the vendor had sold some portions of the land in issue to other persons without the consent of the other registered proprietors; and that, therefore, the allegation that such consent was mandatory did not hold.

44. The 1st respondent's evidence was that, neither he nor the vendor (Fraser Sambo, who was said to be unwell) signed the Agreement; that he (the 1st respondent) was not in Mombasa at the time; and that Gideon Sambo signed the sale agreement on his behalf.

45. According to Jamila Wangari (DW2), the 1st respondent viewed the plot and gave her Kshs. 200,000 for the transaction; that she was present when the sale agreement was executed at the vendor's advocates' office by Gideon Sambo and Saba Sambo for Frazer Sambo while John Mwangi (DW3) signed on behalf of the 1st respondent; and that she gave the sum of Kshs. 200,000 to Gideon and Saba, who were to take the money to their father.

46. John Mwangi testified that, together with Jamila Wangari, he took the consideration for the plot to the advocate; that he signed the Agreement on behalf of the purchaser while Gideon signed, and Saba affixed a thumbprint for the vendor; and that Jamila Wangari then gave the money to Gideon.

47. It is not lost on us that the appellants contend that the sale agreement between Frazer Sambo and the 1st respondent was invalid as it was not compliant with section 3(3) of the *Law of Contract Act* in that the sale agreement was not signed by Frazer Sambo. However, the applicable provision of section 3(3) of the Act was introduced by an amendment vide the Statute Law (Miscellaneous Amendments) Act, 2002 which came into force on 1st June 2003. Section 3 (7) of the Act further provides that the "provisions of subsection (3) shall not apply to any agreement or contract made or entered into before the commencement of that subsection." In effect, the provision did not apply in retrospect.

48. When the sale agreement was executed on 9th January 2003, section 3(3) of the Act required that such a contract be executed by the party or some person authorized by him to sign on his behalf. The very fact that money changed hands and the 1st respondent took possession of the contested portion is equally instructive and signified part performance, save for payment of the balance of Kshs. 100,000 on delivery of the title document in respect of the portion sold.

49. In Peter Mbiri Michuki v Samuel Mugo Michuki [2014] KECA 342 (KLR), this Court confirmed the position before the commencement of the current provisions of section 3(3) of the act as follows:

> "24. Section 3(3) of the *Law of Contract Act* provides that no suit based on a contract of disposition of interest in land can be entertained unless the contract is in writing, executed by the parties and attested. Section 3(7) of the *Law of Contract Act* excludes the application of Section 3(3) of the said Act to contracts made before the commencement of the subsection. Section 3(3) of the *Law of Contract Act*, came into effect on 1st June, 2003 ... Prior to the amendment of Section 3(3) of the *Law of Contract Act* in 2003, the subsection read as follows:
>
> 3. No suit shall be brought upon a contract for disposition of an interest in land unless the agreement upon which, the suit is founded, or some memorandum or note thereof, is in writing and is signed by the party to be charged or by some person authorized by him to sign it;
>
> "Provided that such a suit shall not be prevented by reason only of the absence of writing, where an intending purchaser or lessee who has performed or is willing to perform his part of a contract-
>
> i. Has in part performance of the contract taken possession of the property or any part thereof; or

ii. Being already in possession, continues in possession in part performance of the contract and has done some other act in furtherance of the contract."

50. We also take to mind the appellants' further contention that there was no evidence that the sale agreement was signed by the parties' agents; that Gideon Sambo (PW2) and Saba Sambo (PW3) denied signing the agreement; and that the respondents' credibility was impeached when they claimed that Harry Sambo participated in the sale, and yet the appellants produced a death certificate to dispel the respondents' evidence in that regard.

51. Section 107(1) of the *Evidence Act* provides that "whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist." Section 109 and 112 of the *Evidence Act* further provide that:

> 109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
>
> ... .
>
> 112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.

52. This Court summarised the foregoing provisions in Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another [2004] KECA 65 (KLR) thus:

> " As a general proposition, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (1) of the *Evidence Act* Cap 80
>
> .... There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in sections 109 and 112 of the Act ...."

53. Jamila Wangari (DW2), a third party, corroborated the account of John Mwangi (DW3) that Gideon Sambo and Saba Sambo respectively signed and affixed a thumbprint on the sale agreement for Frazer Sambo and further received the consideration of Kshs. 200,000 on Frazer Sambo's behalf, a fact that was not denied.

54. The respondents having produced the sale agreement in evidence, and having laid sufficient ground as to the persons who signed it, it was upon the appellants to go beyond the mere denial by Gideon Sambo and Saba Sambo that they had signed the sale agreement, which would have included calling J. C. Gatonye Esq., the advocate said to have acted for the vendor in the transaction, and whose stamp attested to the signatures thereon, to give evidence as to whether he actually attested to the execution of the sale agreement and the identity of the persons who signed the sale agreement. The appellants having failed to do so, it can only be concluded that, on a balance of probabilities, Gideon Sambo and Saba Sambo indeed executed the sale agreement and received the deposit of the purchase price on behalf of Frazer Sambo.

55. Furthermore, the fact that Harry Sambo was named as one of the registered proprietors of the suit property in the Certificate of Title issued in 2003, yet the appellants were adamant that Harry

Sambo died in 1992 and produced a death certificate to that effect is an inconsistency that remains unreconciled.

56. The 1st respondent also produced in court minutes of his meeting with the Sambo family led by Jimmy Sambo. The minutes dated 12th March 2018, which were not challenged by the appellants, indicated that the parties reached a compromise thereby recognising the sale and placing an additional condition to pay a sum of Kshs. 190,000 to the appellants' family on account of the outstanding balance of the purchase price together with the amount said to have been paid on account of land rates for the property. The meeting resolution reads as follows:

> " Resolution
>
> Since the family had reached an option of returning the parcel to the family, but then the deal has been reached that Ksh. 190,000 to be paid and [the 1st respondent] continue with his project. Edy has pledged to so complete by mid-April."

57. Having expressly admitted the sale of the contested portion to the 1st appellant and imposed additional conditions for its completion, and having relinquished possession thereof, the appellants could not turn around and claim that the sale agreement was invalid. Likewise, this ground of appeal fails.

58. On the 3rd issue as to whether the learned Judge erred in failing to find that Frazer Sambo lacked capacity to sell the contested portion of the suit property, the learned Judge held thus:

> " 31. Other than the plaintiffs' mere assertion that the land belonged to the estate of David Samuel Sambo, there is no other proof that that was so. The title document produced at the hearing does not show that at the registration stage the persons registered appear on the title as administrators of the estate of the late David Samuel Sambu, or that they were registered by way of transmission after distribution of the estate of David Samuel Sambu. In the premises, this court cannot therefore find that the sale by Frazer to the defendants was null and void for want of a grant of letters of administration to the estate of the late David Samuel Sambo.
>
> 32. However, it is evident that the plaintiffs have not established that the land was registered in the names of the children of the late David Sambo by the date 9/1/2003 when the 1st defendant bought the land from Frazer. The inclusion of Frazer as a registered owner after the sale shows that he had a disposable interest in the land even before the registration.
>
> 33. It is correct as the 1st defendant's evidence states that the plaintiffs have failed to demonstrate who the registered owner of the entire parcel was before it was registered in the names of the eleven children of the late David Sambo.
>
> 34. In this court's view, it was necessary for the plaintiffs to demonstrate the ownership by the time of sale so as to establish that the late Frazer Sambo did not therefore have capacity to sell the suit land. As they failed to discharge that burden, it therefore follows that the sale of the disputed land to the 1st Defendant by Frazer Sambo cannot be said to have been fraudulent as it preceded the registration of the current registered owners of the land. No evidence was adduced to show that either Frazer Sambo or the defendants were

party to any fraud or misrepresentation and the 1st defendant were innocent purchasers for value."

59. On this issue, counsel for the appellants submitted that the suit property was jointly owned by the 11 children of the late David Samuel Sambo; that the learned Judge erred in law by upholding that Frazer Sambo had the capacity to sell a portion of the suit property without the consent or the other co-owners, yet section 91(4) and (6) of the *Land Registration Act* requires consensus for any disposition of co-owned land.

60. Counsel cited the case of John Mbogua Getao v Simon Parkoiyet Mokare & 4 others [2021] eKLR for the proposition that, at common law, each co-owner is as much entitled to possession of any part of the land as the others; and that tenants in common held undivided shares in the property.

61. According to counsel, the learned Judge ignored the appellants' witnesses' evidence that the family was not consulted on the purported sale; and that a family resolution to that effect was also produced. Counsel further contended that the learned Judge ignored that this fact was admitted by the 1st respondent; that the court placed undue regard to the documentary proof of the history of ownership and ignored the aforesaid oral evidence admission and a Certificate of Title issued in 2009 in the names of the children of the late David Sambo which, in the ordinary course of things, would have taken several years for the succession cause and transmission to be concluded; and that the learned Judge misapprehended the law in failing to find that it was the respondents' burden to prove that the portion of the subject land they claimed in the Counterclaim belonged to Frazer Sambo, and that he had the capacity to sell, which they allegedly failed to prove.

62. Counsel further argued that the second limb of this issue was that Frazer Sambo was not an administrator of the estate of the late David Sambo and, without letters of administration, he had no capacity to dispose of any portion thereof.

63. In rebuttal, counsel for the respondents submitted that, despite alleging that the suit property was part of the estate of David Samuel Sambo (the father to the vendor, Frazer Sambo), and that Frazer Sambo had no capacity to dispose of the said property, the appellants brought no evidence to prove that the suit property and the contested portion was in the name of David Sambo at the time of sale, or at any particular time before the current title for the subdivision No. 11162 was obtained.

64. According to counsel, the appellants failed to demonstrate the history of registration of the contested portion and, therefore, the issue as to the requirement of a consent fails in view of the fact that there was no such requirement in 2003.

65. Counsel further submitted that the sale agreement preceded the current title, which was obtained in the year 2009 and, therefore, the sale agreement in respect of the contested portion could not be nullified for want of authorization by the other registered owners in the absence of any evidence that they had an interest therein.

66. It is noteworthy that, apart from the Certificate of Title issued on 26th May 2009 in respect of the subdivision No. 11162, the appellants did not give evidence on the nature and status of registration and ownership of the original title as at 9th January 2003 when the 1st appellant and Frazer Sambo entered into the disputed agreement for sale of the contested portion. To our mind, the Certificate of Title could not of itself serve as prima facie evidence of absolute and indefeasible ownership of the parent suit property as at 2003 by the persons registered as joint proprietors thereof.

67. In addition to the foregoing, the appellants failed to demonstrate that the late David Sambo had all along been the registered proprietor or owner of the suit property before subdivision and transmission

of the larger portion to his children. The appellants also failed to demonstrate that the persons named as proprietors in the Certificate of Title had any interest in the original title, or in the contested portion as at 9th January 2003 so that their consent was indispensable for any valid transaction relating to the contested portion.

68. We note that the appellants merely imply that the issuance of the Certificate of Title in parcel No. 11162 was as a result of succession and transmission to the late David Sambo's children, but failed to produce any evidence of succession proceedings or any letters of administration with respect to the estate of David Sambo to corroborate their claim. It is also notable that Gideon Sambo's testimony was to the effect that each registered owner had an identifiable share of the suit property. According to Gideon Sambo:

> " Frazer is my uncle. He followed my father. We have not taken out letters of administration to his estate. Every registered owner has a share in the land. The land was plot no 441. My father never sold. Frazer has sold part of his land to other people. The portion he sold to Edmond is part of the cemetery."

69. All in all, the evidence leads to the conclusion that, on a balance of probabilities, Frazer Sambo had an identifiable interest in a portion of the suit property, namely Parcel Number 441/3 Section 1 Mainland North, which he sold to the 1st appellant.

70. We now turn to the 4th question as to whether the learned Judge erred in finding that the respondents had possession of the contested portion. In the impugned judgment, the learned Judge held that:

> " 35. ... I find that the defendants have given a good account of how they obtained the land; they have demonstrated that they not only paid a substantive portion of the purchase price but also obtained possession from the late Frazer and developed the plot by commencing the erection of a building which was thwarted by the financial difficulties arising after they purchased the plot. The plaintiffs have not demonstrated that the portion purchased by the defendants has been or is in the possession of any other person. Consequently, the taking up of possession by the defendants is effective to date.
>
> ... .
>
> 40. The plaintiff's evidence also shows that the area referred to was not a cemetery at the time it was sold to him. According to the photographic evidence produced by the defendants and which was not objected to or challenged as untrue by the plaintiffs, the land was vacant at the time of purchase and some neighbours used it as a garbage dump.
>
> 41. It is also apparent that the labelling of the portion purchased by the defendants as a cemetery was only geared at denying them the land they have purchased. PW1 stated in his evidence that:
>
> > " The portion and the cemetery are one parcel. There is no fence between them.'

42. PW2 stated as follows:

> " The portion he (Frazer) sold is part of the cemetery. Many deceased people were buried there. We began burying from one end.'

43. In this court's view, there is recognition apparent in the evidence of the plaintiffs that some land was sold long ago and the owners may one day resurface just as they have.

44. The plaintiffs' evidence did not effectively controvert the allegation that there was the taking of possession by the defendants and the construction of the foundation on the purchased land. The defendants' photographic evidence of the progress of the construction works was not challenged by the plaintiffs."

71. In his submissions, counsel for the appellants argued: that the learned Judge disregarded evidence by the appellants that the portion claimed by the 1st respondent was a family cemetery in use as shown in the photographic evidence; that the portion allegedly purchased by the respondents was not clearly demarcated, ascertained or fenced; that the respondents failed to produce evidence of the location of the contested portion; that the learned Judge erred in finding that the respondents had possession on the basis of photographic evidence of a construction site while the defence witnesses confirmed that there were no visible structures; that the respondents reside in Nairobi; and that no one resided on the portion claimed by the respondents. According to the appellants, the learned Judge ignored the indefeasibility of title held by the 2nd appellant and others, and that the respondents did not challenge the legality of the Certificate of Title for the subject property.

72. Counsel cited the case of Pankajkumar Hemraj Shah & another v Abbas Lali Ahmed & 5 others [2019] KECA 152 (KLR), submitting that it is the burden of the person challenging the ownership of a registered proprietor in possession of the land to prove that the title was acquired fraudulently or illegally.

73. According to counsel for the respondents, the respondents demonstrated that they had been in possession of the contested portion; that the appellants have been aware of the respondents' interest therein, and that the appellants were aware that the vendor, Frazer Sambo, had successfully sold to other people various portions of the same property from which the respondents' portion was carved; that the other purchasers settled on their respective portions without any dispute over ownership; that the respondents have been in continuous possession of their portion since execution of the Agreement and started construction thereon; and that the photographic evidence attested thereto.

74. Counsel cited the case of Anne Jepkemboi Ngeny v Joseph Tireito & another [2021] KECA 464 (KLR) where this Court upheld a purchaser's ownership of property which he purchased without a written sale agreement, and which he subsequently occupied and remained in possession of throughout the proceedings.

75. Counsel finally submitted that the 1st respondent testified that the transaction was done openly; that it was followed by a ceremony which members of the vendor's family attended; that the ceremony was followed by surrender of possession to the 1st respondent and construction thereon; that the dispute arose in 2018 while the respondents were in possession of the portion since 2003; and that, therefore, the allegation by the appellants were made in bad faith with the malicious intention of depriving them of what was rightfully theirs.

76. In Benja Properties Limited v Syedna Mohammed Burhannudin Sahed & 4 others [2015] KECA 457 (KLR), this Court held that:

> " 26. .... It is trite law that all titles to land are ultimately based upon possession in the sense that the title of the man seised prevails against all who can show no better right to seisin. Seisin is a root of title. The 1st, 2nd and 3rd respondents being in possession of the suit land have a better right to the same as against the appellant. The maxim is that possession is nine-tenths ownership. As was stated by the Privy Council in Ghana of Wuta-Ofei -v- Danquah [1961] All ER 596 at 600, the slightest amount of possession would be sufficient."

77. In his testimony, the 1st respondent recounted how he took possession of the plot after the sale agreement was executed, and how he constructed a foundation thereon in the presence of Jimmy Sambo (PW1) and Gideon Sambo. To corroborate his testimony, the 1st respondent produced a bundle of photographs showing construction of the foundation by workers and the present state of the plot as vacant and used by the neighbour as a dumping site. In our considered view, the 1st respondent's evidence dislodges the narrative by Jimmy Sambo and Gideon Sambo that the contested portion was a family cemetery. The uncontroverted minutes of the meeting of 12th March 2018 produced by the 1st respondent indicated that the Sambo family had imposed a condition that the 1st respondent be bound to pay the balance of the purchase price together with the land rates allegedly paid over a period of 15 years so that they could give the 1st respondent the go-ahead to "... continue with his project".

78. No doubt, this was evidence that the 1st respondent had taken possession of the plot and had commenced development thereon thereby cementing the consequential application of the seisin doctrine (see: Mbarak v Freedom Limited [2024] KECA 160 (KLR)). Accordingly, the learned Judge cannot be faulted for concluding that the respondents had possession of the contested portion; that the 1st respondent's ownership was beyond challenge; and that the appellants were merely capitalizing on its proximity to their family cemetery to claim that it was part thereof and, therefore, not available for sale.

76. On the 5th issue as to whether the respondents were entitled to specific performance of the contract of sale, the learned Judge held that they did. Taking issue with the learned Judge's decision, counsel for the appellant submitted that the learned Judge erred in law by granting an order for specific performance whilst the respondents had not paid the purchase price in full; and that specific performance is an equitable relief, and that equity must follow the law. According to counsel, the subject transaction was riddled with irregularities, and was not deserving of the Court's discretion.

79. Counsel cited the case of Ngaira v Cheng'oli [2022] KECA 80 (KLR) for the proposition that the remedy of specific performance, like any other equitable remedy, is discretionary; that

the jurisdiction to grant the relief of specific performance is based on the existence of a valid and enforceable contract; and that specific performance will not be ordered if the contract suffers from some defect, such as mistake or illegality or if there is an alternative effective remedy.

80. In addition, counsel cited the case of Nabro Properties Ltd v Sky Structures Ltd & 2 others [2002] KECA 296 (KLR), submitting that a transaction arising from an improperly executed Sale Agreement cannot be specifically performed; that, in this case, the sale agreement was not valid or enforceable and, therefore, could not benefit from a decree of specific performance; that the portion allegedly purchased by the respondents was not clearly demarcated, ascertained or fenced; that no sketch or deed plan was produced; and that the property referred to in the sale agreement was located in the mother title Plot

No. 441/I/MN and was not identifiable after the subdivision that led to the creation of the contested portion.

81. We take note of the fact that counsel for the respondents did not address themselves on this particular issue.

82. Having found that the appellants failed to demonstrate that the sale agreement was invalid or tainted by fraud and/or illegality, we find no reason to interfere with the learned Judge's order for specific performance. Moreover, the sale agreement specified the actual area of the plot sold to the 1st respondent as measuring 23.02m by 22.46m by 18.44 m by 68.98m, and was known to the parties as the site being used by neighbours as a garbage dump. The claim that the land was not identifiable does not hold. Moreover, the 1st respondent had taken possession and commenced construction on the subject land. All that remained was payment of the outstanding balance of the purchase price in exchange for the title document in full performance of the contract of sale.

83. Turning to the 6th issue as to whether the respondents' counterclaim was statute barred, we take to mind the learned Judge's following observation:

> " 48. The plaintiff's claim that the counterclaim was brought 17 long years after the sale agreement was executed in 2003 and that this exceeds the statutory 12 years provided for in Section 7 of the *Limitation of Actions Act*. However, in this court's view, the plaintiffs have not conclusively shown that the defendants lost possession of the plot to any person. The plaintiffs are the ones who sued first in these proceedings. The defendants' evidence has shown that the plot they purchased is a distinct and identifiable portion of the main land parcel. Secondly, the plaintiffs have not given the date from which the period of laches ought to be computed to enable them adopt the issue of laches as an effective defence. If anything, the computation should not be deemed to be from the date of execution of the agreement, but it may be computable from the date of loss of possession or breach. Furthermore, this is not an issue arising directly from the pleadings in respect of which the defendants were supposed to have answered by way of reciprocation or by evidence at the trial. Suffice it to state here that there is no conclusive evidence that possession by the defendants was ever lost. The defendants have indicated that all along that they took possession and they were only awaiting the issuance of title which never came."

84. In disregard of the fact that the proceedings in the trial court were commenced by the appellants in the face of the respondents' vacant possession of the contested portion, counsel for the appellants submitted that the learned Judge ignored the maxim that equity does not aid the indolent; that the respondents slept on their rights for 15 years; that the respondents' counterclaim was founded on the sale agreement dated 9th January 2003; that the delay had prejudiced the appellants as the alleged vendor had passed on; and that the subject land was registered in the names of third parties without notice of the alleged sale.

85. On their part, counsel for the respondents submitted that the appellants were first to approached the Court, and that the respondents' Counterclaim was made in response to the Appellants' claim against them; that the respondents were in continuous possession of the contested portion of the suit property; that the period of limitation under section 7 of the *Limitation of Actions Act* had not accrued; and that the doctrine of laches was not applicable to the circumstances of the case. In conclusion, counsel submitted that the learned Judge was right to grant the counterclaim.

86. It is not lost on us that, until the appellants made an attempt to dispossess the respondents of the contested portion and sell it to third parties, the cause of action had not arisen. We take to mind the fact that, from the respondents' pleadings in the Counterclaim, their cause of action arose on 12th March 2018 when the 1st respondent learnt that there were plans by the appellants and their family to sell the contested portion; and that, after the 1st respondent's meeting with the Sambo family on the same day where it was agreed that the 1st respondent would pay the balance of the purchase price and an additional Kshs. 90,000 on account of rates allegedly paid to the County Government of Mombasa, time stopped to run. The Counterclaim having been filed on 11th May 2018, it cannot be said that it was time-barred in respect of any of the orders thereby sought. Likewise, that ground of appeal fails.

87. Finally, we turn to the 7th issue as to whether the learned Judge erred by granting reliefs not prayed for and against persons not party to the suit. In this regard, counsel for the appellants contended that the learned Judge erred by declaring that the contested portion sold to the respondents was the entitlement of Frazer Sambo, a declaratory relief not sought in their counterclaim; that a mandatory injunction was also granted against the administrators of the estate of Frazer Sambo in breach of constitutional safeguards in Articles 47, 48 and 50 of the *Constitution*; and that the effect of the mandatory injunction was to arbitrarily deprive the beneficiaries of the estate of the late Frazer Sambo and other registered proprietors of the contested portion contrary to Article 40(3) of the *Constitution*.

88. In response, counsel for the respondents submitted that, having upheld the terms of the sale agreement in issue, the trial court had to grant appropriate orders capable of enforcement in line with its findings; that, in particular, the trial court made a declaratory order to the effect that the contested portion sold to the respondents by Frazer Sambo was a subdivision of the original parcel from which the larger portion registered as plot No. 11162 in the appellants' names and their family members was also carved out; and that the contested portion belonged to Frazer.

89. As for the agreed terms of sale, counsel for the respondents further submitted that the outstanding balance of the purchase price became due and payable upon issuance and exchange of the title in favour of the Respondents; and that, since Frazer Sambo had died, the only people who could finalize the Agreement were the beneficiaries of his Estate, who had refused, failed or neglected to do so. Hence, the enforcement orders of the trial court, including injunctive relief to restrain interference, as well as mandatory injunction to enforce transfer of the contested portion to the respondents. Moreover, the Court does not issue orders in vain, and every order made therein was meant to give effect to the trial court's findings, and in the circumstances of the case.

90. In Kinyanjui Kamau v George Kamau Njoroge [2015] eKLR, this Court elucidated on the circumstances where a court can make a determination on an unpleaded issue as follows:

> " Parties are indeed bound by their own pleadings .... Of course, if an issue arises in the course of hearing, and the same is fully canvassed by the parties, then even if that issue was not pleaded, then the court will make a determination on the matter. As was held in Odd Jobs v Mubia [1970] EA 476, 'a court may base its decision on an unpleaded issue if it appears from the course followed at the trial that the issue has been left to the court for decision.'"

91. In Lamba v National Social Security Fund & another [2023] KECA 124 (KLR), this Court held that:

> " 28. .... It is trite law that courts can only grant orders that have been prayed for in the pleadings, or make appropriate orders as it deems fit if need arises in the cause of a trial. Indeed, where a court has proceeded to grant a relief not contained in prayers in the pleading or not regularly sought by a party expressly

or by implication, appellate courts have had no hesitation in annulling or overturning orders granting such reliefs."

92. The additional orders granted by the learned Judge, save for the order directing the payment by the respondents of the balance of the purchase price upon transfer of the plot to the 1st respondent as evinced in the sale agreement and subsequent minutes of the meeting between the 1st respondent and the Sambu family, though not specifically prayed, were appropriate enforcement orders intended to breathe life to the learned Judge's findings. To our mind, they were made pursuant to the court's inherent jurisdiction to make any orders as may be necessary for the ends of justice, and for good reason as enunciated by this Court as hereunder.

93. In Kenya Power & Lighting Company Limited v Benzene Holdings Limited t/a Wyco Paints [2016] KECA 73 (KLR), this Court observed that:

> "Section 3A of the *Civil Procedure Act* appears to have been introduced to augment the provisions of section 3, vesting in the courts inherent power to make any orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. Of course this power has now been broadened by the introduction in 2009 of overriding objective in sections 1A & 1B and in 2010 by Article 159 of the *Constitution*.
>
> The extent of inherent powers of the court was eloquently explained by the authors of the Halsbury's Laws of England, 4th Edn. Vol. 37 Para. 14 as follows;
>
> > "The jurisdiction of the court which is comprised within the term "inherent" is that which enables it to fulfil itself, properly and effectively, as a court of law. The overriding feature of the inherent jurisdiction of the court is that it is part of procedural law, both civil and criminal, and not part of substantive law; it is exercisable by summary process, without plenary trial; it may be invoked not only in relation to the parties in pending proceedings, but in relation to anyone, whether a party or not, and in relation to matters not raised in litigation between the parties; it must be distinguished from the exercise of judicial discretion; it may be exercised even in circumstances governed by rules of court. The inherent jurisdiction of the court enables it to exercise control over process by regulating its proceedings, by preventing the abuse of the process and by compelling the observance of the process ... In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.' See also Meshallum Waweru Wanguku (supra).
>
> This inherent jurisdiction is a residual intrinsic authority which the court may resort to in order to put right that which would otherwise be an injustice."

94. While the enforcement orders aforesaid did not spring directly from any of the issues raised in the course of the trial, they were necessary in giving effect to the findings of the learned Judge. Accordingly, they cannot be set aside as urged by counsel for the appellants.

95. Thus far, we have reached the conclusion that:

a. the learned Judge was not at fault in concluding that there was sufficient reason to dismiss the appellants' suit for want of locus standi;

b. the sale agreement dated 9th January 2003 was by no means invalid;

c. the learned Judge was not at fault in holding that Frazer Sambo was the beneficial owner of, and had capacity to sell, the contested portion;

d. the learned Judge was not at fault in finding that, at all material times, the respondents had vacant possession of the contested portion;

e. the respondents were entitled to specific performance of the contract of sale of the contested portion;

f. the respondents' counterclaim was by no means statute barred; and

g. other than appropriate enforcement orders intended to breathe life to the learned Judge's findings, the trial court did not grant any substantive relief(s) not sought or against persons not party to the suit.

96. Having carefully considered the record of appeal, the grounds on which it was anchored, the impugned judgment, the respective submissions of learned counsel, the cited authorities and the law, we find that the appeal has no merit and is hereby dismissed in its entirety.

97. Consequently, the Judgment and Decree of the ELC at Mombasa (Mwangi Njoroge, J.) delivered on 26th February 2021 is hereby upheld.

98. The appellants shall bear the respondents' costs of the appeal.

Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 23RD DAY OF MAY, 2025.

A. K. MURGOR

JUDGE OF APPEAL

DR. K. I. LAIBUTA CArb, FCIArb.

JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR