Mukatha v Ouko (Administrator of the Estate of Jason Atinda Ouko- Deceased) & 4 others (Civil Appeal E211 of 2020) [2023] KECA 962 (KLR) (28 July 2023) (Judgment)

Neutral citation: [2023] KECA 962 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL E211 OF 2020

DK MUSINGA, F SICHALE & HA OMONDI, JJA

JULY 28, 2023

BETWEEN

GEOFFREY NJERU REUBEN MUKATHA ..... APPELLANT

AND

ROSELYNE DOLA OUKO (ADMINISTRATOR OF THE ESTATE OF JASON ATINDA OUKO- DECEASED) ..... 1ST RESPONDENT

AARON TAYARI OUKO (ADMINISTRATOR OF THE ESTATE OF JASON ATINDA OUKO- DECEASED) ..... 2ND RESPONDENT

JOSEPH C. WAMBUGU ..... 3RD RESPONDENT

A. W. MATHENGE ..... 4TH RESPONDENT

REGISTRAR OF TITLES ..... 5TH RESPONDENT

(Being an appeal from the Judgment and Decree of the Environment and Land Court at Nairobi (Mutungi, J.) dated 7th July 2020 in ELC Suit No. 20 of 2009) Consolidated with CIVIL APPEAL NO. E325 OF 2020)

JUDGMENT

1. Before this Court are two related appeals both emanating from the judgment and decree of the Environment and Land Court at Nairobi (Mutungi, J.) dated 7th July 2020 in ELC Suit No. 20 of 2009. The first in time was Civil Appeal No. E211 of 2020 which was filed by Geoffrey Njeru Reuben Mukatha, who was the plaintiff in the suit before the trial court, while the other appeal, *viz*, Civil Appeal No. E325 of 2020 was filed by Joseph C. Wambugu and A.W. Mathenge who were the 3rd and 4th defendants in the suit before the trial court. The two appeals were consolidated by an order of this Court made on 27th September 2021.

2. The two appeals share a common background which relates to the ownership of a parcel of land known as Plot No. C (hereinafter referred to as the "suit property"), which was to be a subdivision of LR No. 3589/6 Lang'ata, (the main plot). Geoffrey Njeru Reuben Mukatha (hereinafter referred to as "the appellant") contended in his plaint dated 14th January 2011 and which he subsequently amended on 31st January 2011 that the main plot was at all times registered in the name of Jason Atinda Ouko (deceased).

3. On 28th September 1976, the appellant and the deceased executed a sale agreement in respect of the suit property, said to measure about 5 acres. The consideration was Kshs.130,000/=. The appellant paid a deposit of Kshs.26,000/= on the understanding that the balance of the purchase price would be paid to the deceased once he completed subdivision of the main plot and transfer of the suit property to the appellant.

4. The appellant contended that upon payment of the deposit, he took possession of the suit property and built a temporary structure thereon and also planted trees demarcating the suit property. However, sometime in February 1996, the said Jason Atinda Ouko died before the subdivision exercise was completed and before transfer of title in respect of the suit property was made to the appellant.

5. The event that precipitated the filing of suit by the appellant was the purported sale of the suit property by the deceased to one Rapahel Nderitu Mathenge, the deceased husband to A. W. Mathenge (hereinafter referred to as "the 4th respondent"). The appellant contended that after the death of Jason Atinda Ouko, he discovered that the deceased had wrongfully and unlawfully sold the suit property to the 4th respondent's husband. The appellant contended that at all times the sale agreement between himself and the deceased had not been rescinded and therefore the deceased was precluded from executing a fresh sale agreement with a new party over the same subject matter. The 4th respondent, purporting to exercise powers of an administrator over the estate of her late husband, authorized Joseph C. Wambugu (hereinafter referred to as "the 3rd respondent") to move into the suit property and develop the same. The 3rd respondent built a semi-permanent structure thereon, which action, according to the appellant, constituted trespass and occasioned him loss and damage.

6. The prayers by the appellant against Roselyne Dola Ouko and Aaron Tayari Ouko (hereinafter referred to as "the 1st and 2nd respondents" respectively), who were sued in their capacity as the personal representatives of the deceased and the 3rd and 4th respondents, were a permanent injunction to restrain the 3rd and 4th respondents by themselves, their agents, servants and employees from trespassing into the suit property; a permanent injunction to restrain the 1st, 2nd and 3rd respondents by themselves, through their servants, agents and employees from selling, disposing of, alienating or dealing with the suit property; an order as against the 1st and 2nd respondents for specific performance of the sale agreement; an order declaring the appellant the legal owner of the suit property; damages; costs and interests as the court would deem fit; and any further or better relief as the court would deem fit.

7. The 1st and 2nd respondents, through their Statement of Defence dated 6th October 2018, admitted the sale agreement entered into between the deceased and the appellant. They however contended that the appellant had only paid a deposit of Kshs.26,000/= and failed and/or neglected to pay the balance of the purchase price, Kshs.104,000/=. They contended that the failure by the appellant to abide by the terms of the sale agreement led to the rescinding of the sale agreement by the deceased. They further contended that the suit by the appellant against them was statute time barred and ought to be dismissed in limine.

8. The 3rd and 4th respondents, through their joint Statement of Defence and Counterclaim dated 21st February 2011 denied that the appellant had been in possession of the suit property as alleged.

They stated that on 29th April 1979, the deceased and the 4th respondent's husband entered into a sale agreement over the suit property at a consideration of Kshs.260,000/=. The deceased and the 4th respondent's husband executed a supplementary agreement on 20th February 1991 wherein the deceased acknowledged having received the full purchase price and agreed to transfer the suit property to the 4th respondent's husband. However, as at the time of filing of the suit by the appellant, the suit property was yet to be transferred to the 4th respondent's husband as agreed, owing to caveats placed on the main plot's title by purchasers of various subdivisions, including the appellant herein.

9. The 4th respondent stated that on 5th August 1994, she entered into a sale agreement with the 3rd respondent for sale of 1 acre portion of the suit property; that upon payment of the full purchase price the 3rd respondent took possession of the 1 acre; that the 4th respondent had been in occupation of the suit property from 29th April 1979, while the 3rd respondent had been in occupation of the 1-acre portion from 5th August 1994; and that neither of them was a trespasser as alleged by the appellant.

10. In their counterclaim, the 3rd and 4th respondents sought a declaration that the estate of the late Raphael Nderitu Mathenge was the legal owner of the suit property; an order to direct the 1st and 2nd respondents to execute a transfer instrument in respect of the suit property in their favour of the 4th respondent and all other documents necessary to effect the transfer; in the alternative, an order to the Deputy Registrar, High Court, to execute the transfer documents as aforesaid; a permanent order of injunction to restrain the appellant, his agents and employees from trespassing, occupying, claiming, dealing or interfering with their quiet possession or in other way howsoever dealing with the suit property; damages for trespass, costs and interest.

11. In response to the counterclaim, the 1st and 2nd respondents contended that indeed a sale agreement was executed between the deceased and the 4th respondent's husband over the suit property; that the purchase price thereof was Kshs. 260,000/= but the 4th respondent's husband only paid a deposit of Kshs.114,000/= leaving the balance of Kshs.146,000/= unpaid; that under Clause 7 of the sale agreement, the 4th respondent's husband was not to sell, transfer, lease, charge, or part with possession of any part of the suit property until the balance had been paid. However, on 20th February 1991, parties executed a subsequent agreement, primarily on the issue of the pending balance of the purchase price. They stated that one of the terms of the subsequent agreement was that the balance of the purchase price would be offset through provision of legal services by the 4th respondent's husband to the deceased generally, and to the attendance of several matters pertaining to the subdivision of the main plot. The 4th respondent's husband was to provide these services through his law firm, R.N. Mathenge & Co. Advocates. However, the 4th respondent's husband died on 12th April 1991, barely two months after the execution of the supplementary sale agreement and before the consideration offered by him *in lieu* of actual monetary payment of the balance of the purchase price could crystalize.

12. They contended that the sale of the portion of the suit property by the 4th respondent to the 3rd respondent was in breach of the terms of the agreement executed between the deceased and the 4th respondent's husband.

13. The appellant testified before the trial court as PW1 and presented other witnesses who testified that the appellant had been in possession of the suit property from the year 1982 to the year 2018. The 4th respondent testified as DW1, while the 3rd respondent testified as DW2, and the 2nd respondent testified on behalf of the deceased's estate as DW3. All the witnesses presented their cases as contained in their respective pleadings.

14. After a full trial, the trial court delivered judgment on 7th July 2020 making, *inter alia*, the following key findings:

i. "The sale agreement dated 28th September 1976 between the deceased and the appellant met the threshold of what amounts to a valid agreement as envisaged under section 3(3) of the *Law of Contract Act*, Cap 23 Laws of Kenya. The land, the subject of the sale, was aptly described and the consideration was set out, amongst other terms. The agreement was signed by the purchasers and was signed by the vendor and/or by his duly authorized agents. The agreement was thus valid and enforceable agreement.

ii. There was no evidence adduced that the appellant was served with a notice to rescind the agreement between himself and the deceased for any reason; that the correspondence produced in evidence illustrated that all along the vendor treated the agreement with the appellant as being alive; that the correspondence clearly showed that the vendor was intent on having the sale transaction completed; and that the agreement was not lawfully rescinded by the vendor.

iii. Having held that the appellant's agreement with the deceased had not been lawfully rescinded, it follows that the deceased could not validly have entered into an agreement of sale relating to the same parcel of land that was the subject of the earlier agreement. The 4th respondent's husband had notice of the agreement the appellant had with the deceased, and he either failed to do appropriate due diligence to ascertain the status of the agreement or did not care. Had he done due diligence, he would have discovered that the agreement was still in force. He did not, and the result was that he entered into an agreement that was invalid as there was in existence a valid agreement over the same subject property. The agreement dated 29th April 1979 was null and void *ab initio*. If the agreement of 29th April 1979 was null and void, it follows that the supplementary agreement entered into in February 1991 between the deceased and 4th respondent's husband equally could not be valid.

iv. The sale agreement between the 4th and 3rd respondents over the sale of 1 acre portion of land from the suit property could not pass any proprietary interests over the said portion of land to the 3rd respondent. The 4th respondent had not obtained letters of administration over her late husband's estate and pursuant to the provisions of Section 82 of the *Law of Succession Act*, Cap 160 Laws of Kenya, she did not have power and/or authority to deal with the assets of the estate of her deceased husband.

v. The evidence on record showed that the appellant was in occupation and possession of the land from 1976 to 2018 save that the 3rd respondent from 2001 occupied a small portion of the land where he built his structures. The 4th respondent did not personally occupy and/or possess the suit land and/or any portion of the same.

vi. The appellant's cause of action on the sale agreement firstly arose when the contract ought to have been completed by 28th January 1977 and it was not. Further when the Vendor offered to make a refund of the deposit paid on 26th July 1979, that was an indication he did not intend to proceed with the transaction. This would constitute a fresh cause of action within the agreement for sale. In both instances, the appellant's advocates acknowledged a cause of action had arisen and properly gave notice of intention to sue. The appellant did not initiate any action within six years for either of the causes of actions. The present suit was filed on 16th January 2009, well over 28 years after the cause of action accrued. The appellant's suit against the respondent was statute barred on account of section 4(1) of the *Limitation of Actions Act*.

vii. No action would be maintainable against the deceased's estate by the 3rd and 4th respondents on the basis of the agreements dated 29th April 1979 and 20th February 1991. The 3rd and 4th

respondents' counterclaim dated 21st February 2011 and subsequently amended in 2015 was barred by limitation and was not sustainable.

viii. Both the appellant's suit and the 3rd and 4th respondents' counter claim were statute barred on account of the *Limitation of Actions Act*, Cap 22 Laws of Kenya. The court is without the jurisdiction to entertain the suit as jurisdiction is taken away by statute.

ix. Payment of the balance of the purchase price was an essential condition of the agreement which the appellant ought to have fulfilled before he could approach the court for the equitable remedy of specific performance. He could not insist that the vendor performs his obligations, yet he had not on his part performed his obligations under the agreement. The 4th respondent's husband had also not paid the balance of the purchase price by the time he died on 12th April 1991 so as to be entitled to the relief of specific performance.

15. The trial court proceeded to dismiss the suit by the appellant as well as the counterclaim by the 3rd and 4th respondents with an order that each party bears its own costs.

16. Being dissatisfied with the trial court's decision, the appellant lodged an appeal (Civil Appeal E220 of 2020) before this Court. In his Memorandum of Appeal, the appellant states that the learned judge erred in law and fact, *inter alia*, by finding that despite extensive evidence to the contrary, that his suit was statute barred on account of the *Limitation of Actions Act*; failing to take into account the extensive evidence provided by the appellant to illustrate that the claim was not stale and the cause of action was alive and continuously extended by the 1st and 2nd respondents up until 8th February 2001 when the 1st and 2nd respondents through their initial administrator, Scott Ongosi, and their respective advocates engaged the appellant on the validity of the contract and the purchase therein; holding that the appellant's cause of action arose in the years 1977 and 1979 respectively and would thus be time barred, while applying section 4(1)(a) of the Act which provides for a six year period, thus failing to take into account the discovery of fraud by the appellant on the part of the Vendor, 1st and 2nd respondents, in the year 1998; failing to recognize that the appellant's claim constituted also an action to recover land, thus calling the court to apply section 7 of the *Limitation of Actions Act* wherein the Limitation period to recover land is twelve years; by finding that the remedy of specific performance was not readily available to the appellant; by wholly dismissing the appellant's suit therefore dispossessing the appellant of the suit property.

17. The 3rd and the 4th respondents, through Civil Appeal No. E325 of 2020, fault the learned judge for, *inter alia*, finding

> that the sale agreement dated 28th September 1976 between the deceased and the appellant over the suit property was valid and enforceable; in finding that the 1976 sale agreement was not lawfully rescinded by the deceased when he entered into the sale agreement dated 29th April 1979; in holding that the deceased had not validly entered into the sale agreement dated 29th April 1979 thus arrived at an erroneous conclusion that the said sale agreement was invalid, null and void; in holding that the supplementary agreement entered into on 20th February 1991 between the deceased and the 4th respondent's husband was invalid; in finding that the sale agreement between the 3rd and the 4th respondents was not valid and enforceable; in finding that the appellant had been in possession of the suit property from 1976 to 2018; in holding that there was no proof of payment of the balance of the purchase price amounting to Kshs. 146,000 under the agreement dated 29th April 1979 and the supplementary agreement dated 20th February 1991; in finding that their counterclaim

was statute barred under the *Limitation of Actions Act*; and in finding that the remedy of specific performance was not available to the 3rd and 4th respondents.

18. At the hearing of the consolidated appeals, learned counsel Mrs. Ligunya appeared for the appellant, while learned counsel Ms. Lukoye appeared for the 1st and 2nd respondents. Learned counsel Mr. Thuku appeared for the 3rd and 4th respondents, while Mr. Njagi, learned counsel, was present for the 5th respondent.

19. Highlighting the appellant's written submissions, Mrs. Ligunya contended that the trial judge erred by relying on the provisions of section 4 (1)(a) of the *Limitation of Actions Act* instead of relying of sections 7 and 26 of the same Act, which were applicable in the circumstances of the case. She submitted that the appellant's suit did not emanate from a breach of contract as presupposed by the trial court, but from a delay, variation of the terms of the contract and eventual failure by the deceased in performing his part of the covenant to enable the actualization of the contract. It was further contended that save for claiming enforcement of the sale agreement, the suit by the appellant was equally for the recovery of land that he was in possession of since the year 1982 with the knowledge and consent of the deceased. The appellant asserted that the doctrine of adverse possession would have applied to him and that in any event, the 1st and 2nd respondents did not make any claim for the recovery of the suit property from him.

20. It was further contended that the appellant discovered the fraud in August 1998 on the part of the deceased as well as the 1st and 2nd respondents and that he was within his right to institute a claim as against the deceased or his estate within 12 years as envisaged under the provisions of section 26 of the *Limitation of Actions Act*. According to the appellant, the cause of action accrued in the year 1998 when he discovered the said fraud and not as per the period described by the trial court. On the period of the contract, it was submitted that the contract was continuously renewed by the deceased by inference and by his actions, and that at no time did he rescind the contract, neither did he refund the deposit paid by the appellant. The appellant placed reliance on the case of *Pickering Square Inc v Trillium College Inc.* 2016 ONCA 179 where it was held that failure by a party to perform its part of the obligation under the contract or covenant would give rise to a new cause of action every day, and the same amounted to a continuing breach.

21. Regarding the remedy of specific performance, it was submitted that although payment of the deposit was an essential condition of the sale agreement, there was no specified time for payment of the balance. The appellant contended that the completion date for the transaction envisaged both parties performing their respective obligations under the contract, and as such, the deceased's estate could not rely on the alleged non-performance on the part of the appellant to run away from the deceased's non-performance. It was further submitted that the remedy of specific performance was and remained available to the appellant as time was not of essence, neither was it made of the essence of the contract in writing by the deceased or his representatives, and as such the sale agreement remained open until the deceased or his representatives made time of the essence.

22. The appellant's submissions in respect of Civil Appeal No E325 of 2020 were to a large extent a reiteration of his submissions in respect of Civil Appeal No. E211 of 2020. It shall serve no useful purpose regurgitating the said submissions.

23. The 1st and 2nd respondents submitted that the learned judge made correct findings that the appellant's suit was statutorily time barred. They relied on this Court's decision in *Gathoni v Kenya Co-operative Creameries Ltd* [1982] KLR 104 where the rationale of the law of limitation was discussed thus:

> "The law of limitation of actions is intended to protect defendants against unreasonable delay in bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest."

24. They contend that the appellant's argument that he was entitled to 12 years from 1998 by virtue of section 7 and section 26 (a)(b) of the *Limitation of Actions Act* is highly misconceived; that the suit by the appellant was founded on the sale agreement dated 28th September 1976 and was not for recovery of the suit land; It is their contention that no claim for adverse possession of the suit property was ever pleaded and is only raised in this appeal; that at all times parties are bound by their pleadings and any evidence adduced in a matter must be in consonance with the pleadings. They cited this Court's decisions in *Joseph Mbuta Nziu v Kenya Orient Insurance Company Ltd* [2015] eKLR and *Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 Others* [2014] eKLR to buttress this line of submissions.

25. Regarding the claim for specific performance, they submitted that it is a discretionary equitable remedy which requires a party approaching the court to do so with clean hands. The appellant had an obligation to complete payment of the purchase price, which he did not, and therefore the trial court was right in declining to grant the said remedy to him.

26. In their written submissions in respect of the two appeals, the 3rd and 4th respondents contend that the learned judge erred by holding that the 1976 sale agreement was valid and enforceable and that it had not been rescinded by the deceased. It is their argument that the said agreement was entered into by three parties, namely the deceased, the appellant and his wife, yet the appellant did not produce any document to show that he had authority to enforce the said agreement on behalf of his wife. They argued that the doctrine of privity of contract demands that a contract can only be enforced by the parties thereto, and as such, the suit filed by the appellant was incompetent for leaving out the appellant's wife who was a necessary party.

27. It is further contended that the 1976 agreement was a nullity in law and unenforceable for breach thereof by the appellant, owing to his failure to pay the balance of the purchase price. Reliance was placed on the decision of this Court in *Housing Company of East Africa Limited v Board of Trustees, National Social Security Fund & 2 others* [2018] eKLR, where the Court held that failure to pay the balance of the purchase price as agreed constituted a breach going to the root of the contract and would be construed as conduct repudiating the contract on the part of the purchaser.

28. On the appellant's suit being statute time barred, it was submitted that the learned judge made the correct findings on the issue pursuant to the provisions of section 4 of the *Limitation of Actions Act*, but the learned judge erred by holding, on the one hand that the agreement was valid and enforceable, and on the other hand, that the claim was statute time barred. It is submitted that both positions cannot exist at the same time.

29. On whether the 1976 agreement had been rescinded by the deceased, it was submitted that the learned judge erred by holding that it had not been rescinded, whereas evidence was tendered to show that in the 1979 agreement entered into by the deceased and the 4th respondent's husband, the deceased had expressly revoked and rescinded the 1976 agreement. It was submitted that the deceased expressed his intention in writing to rescind the 1976 contract and that had the court applied the "intention

test" while construing the agreement, it could not have arrived at the wrong decision that there was no evidence of rescission of the said agreement. For the argument that the intention of parties to a contract was paramount in interpreting the contract, counsel cited this Court's decisions in *Samuel Ngige Kiarie v Njowamu Construction Limited & Another* [2019] eKLR, *Adopt A Light Limited v Ochieng, Onyango, Kibet & Ohaga Advocates* [2016] eKLR; *Sun Sand Dunes Limited v Raiya Construction Limited* [2018] eKLR and *Fidelity Commercial Bank Limited v Kenya Grange Vehicle Industries Limited* [2017] eKLR.

30. The 3rd and 4th respondents further contended that the learned judge erred by treating the death of the 4th respondent's husband as a cause of action. They argued that the death of one party to a contract is not a cause of action, and that as per the holding of this Court in *Diana Katumbi Kiio v Reuben Musyoki Muli* [2018] eKLR, a cause of action arises from breach of contract and not at the time it is executed. It is contended that the counterclaim by the 3rd and 4th respondents was not based on breach of contract by the estate of the deceased so as to give rise to a cause of action. The learned judge therefore ought not to have invoked the provisions of section 4(1) of the *Limitation of Actions Act* in respect of the counterclaim.

31. Regarding the remedy of specific performance, it was submitted that the same was available to the 3rd and 4th respondents as they had met all the necessary requirements for the grant of the said relief. Further, that having proved before the trial court that the 4th respondent's husband had entered into a valid and enforceable agreement with the deceased and that he paid the full purchase price, the 4th respondent was entitled to a declaration that her deceased husband was the legal owner of the suit property.

32. We have considered the consolidated appeals, the submissions by the different parties as well as the applicable law. Our mandate on a first appeal as set out in rule 31 (1)(a) of the Rules of this Court is to reappraise the evidence and to draw our own conclusions. In *Peters v Sunday Post Limited* [1958] EA 424, the predecessor of this Court, the Court of Appeal for Eastern Africa, stated that:

> "Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate so to decide."

33. Although there are various issues raised in the consolidated appeals for our determination, the consolidated appeals, in our view, turn principally on the issue of jurisdiction. Put differently, the appeal turns on the determination of the question whether the suit as well as the counterclaim were brought within the applicable statutory timeline so as to give the trial court the requisite jurisdiction to hear and determine the same on merits and award the reliefs sought.

34. Courts of law have in a plethora of decisions held that jurisdiction is what empowers a court to determine a matter on its merits; that, without jurisdiction, a court's finding is null and void. In the celebrated decision of this Court in *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] KLR 1, Nyarangi, JJA., citing Words and Phrases Legally Defined – Vol. 3: I-N page 13 held thus:

> "By jurisdiction is meant the authority which a court has to decide matters that are before it or take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is

constituted and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake both of these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where the court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given."

35. In the same decision, it was further held that:

> " Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

36. In *Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others* [2012] eKLR, the Supreme Court held that:

> " A court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred by law." [Emphasis added]

37. It cannot be gainsaid that jurisdiction is the hallmark of a court's exercise of its judicial authority. Any judicial decision made by a court of law devoid of the requisite jurisdiction amounts to nullity ab initio, and liable to being set aside *ex debito justitiae*.

38. The trial court returned a finding that the suit by the appellant was not brought within the stipulated statutory timeline under the *Limitation of Actions Act*, Cap 22 Laws of Kenya. For this reason, the appellant's suit could not be sustained as the trial court was, by dint of the provisions of section 4 (1) (a) of the *Limitation of Actions Act* denied jurisdiction.

39. Section 4 (1)(a) of the *Limitations of Actions Act* provides that:

> " (1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued-
>
> (a) actions founded on contract."

40. The suit by the appellant was premised on the specific performance of the sale agreement between the deceased and the appellant dated 28th September 1976. The trial court addressed itself to the legitimacy of the said sale agreement and returned the finding that it was, for all intents and purposes, valid and enforceable, and that it had satisfied the valid requirements under section 3(3) of the *Law of Contract Act*, Cap 23 Laws of Kenya. We have had sight of the said sale agreement and agree with the findings of the trial court that it was, by virtue of the provisions of section 3(3) of the *Law of Contract Act*, a valid contract. The 3rd and 4th respondents have alleged that the said agreement was rescinded by the deceased prior to him entering into a sale agreement over the suit property with the 4th respondent's husband. There was no evidence availed before the trial court in support of this argument, or the fact

that notification of the rescission was ever made to the appellant. This Court in *Gatere Njamunyu v Joseck Njue Nyaga* [1983] eKLR observed thus:

> " Ordinarily before an agreement such as this can be rescinded, the party in default should be notified of the default and given reasonable time within which to rectify it. Once notice of default has been given, failure to rectify will result in rescission of the contract."

41. Having held that the sale agreement between the deceased and the appellant was valid, what we are then called upon to determine is when the cause of action giving rise to the suit by the appellant arose. Our finding on this issue will undoubtedly inform the question whether the suit by the appellant was filed within the required statutory timeline.

42. The sale agreement between the deceased and the appellant had a completion period of 4 months from the date of execution, *viz*, 28th September 1976. The completion period was on or before end of January 1977. It is a fact that the sale transaction was not completed within this period. The failure to complete was complained of by the appellant through several letters written by his advocates (B.R. Patel & Co. Advocates) to the deceased and/or his then advocates, M/S Daly & Figgis Advocates. Indeed, on 26th August 1977, 18th January 1979 and on 3rd September 1979, the appellant, through his advocates, threatened to institute suit against the deceased for specific performance of the sale agreement. On 19th July 1979, M/S Daly & Figgis wrote to the appellant informing him that the deceased intended to refund the Kshs.26,000/= deposit on the purchase price. Despite that unequivocal notification, the appellant did not institute legal proceedings against the deceased.

43. We are in full agreement with the finding of the trial court that the appellant's cause of action on the sale agreement firstly arose towards the end of January 1977 when the deceased failed to complete the transaction. A fresh cause of action arose when the deceased through his advocate's letter dated 19th July 1979 offered to make a refund of the deposit paid on the purchase price. The interpretation to be made from the said letter was that the deceased was longer interested in completing the sale transaction, thus giving rise to a cause of action at the instance of the appellant.

44. The findings of the trial court are supported by a letter from the appellant's advocate dated 5th October 1982. The advocate wrote to the appellant advising him on the cause of action available to him owing to the deceased's failure to complete the transaction. One of them was to sue the deceased for refund of the purchase price. The cause of action listed as number 4 in the said letter read as follows:

> " You can sit back and wait for any developments from the Vendor's side. However, in this case you will have to watch out for the limitation period which will expire on 18th July 1985 (the original period of limitation was due to expire on 28th September 1982. However, it was automatically extended by the vendor's Advocate, Daly & Figgis in their letter of 19th July 1979)." [Emphasis added]

45. Despite the advice, the appellant did not institute the necessary legal action against the respondents within the 6 years' period contemplated under section 4 (1)(a) of the *Limitation of Actions Act*. Instead, he sought to have a caveat registered against the title to LR. No. 3589/6 Lang'ata. The suit by the appellant which was instituted on 16th January 2009 was brought way outside the 6-year period contemplated under the provisions of section 4 (1)(a) of the *Limitation of Actions Act*. The suit was, for all intent and purposes, statutorily time barred.

46. The appellant has in his grounds of appeal raised the issue of discovery of fraud on the part of the deceased as well as on the 1st and 2nd respondents, which the trial court should have taken into account

in the computation of time for purposes of the relevant provisions of the *Limitation of Actions Act*. It is argued that the applicable provision was section 26 and not section 4 of the said Act. Another argument advanced by the appellant was that his suit constituted both an action to enforce a land sale transaction and equally an action to recover land under section 7 of the *Limitation of Actions Act*. It is a well settled principle of law that parties are bound by their pleadings. The Supreme Court in *Raila Amolo Odinga & Another v IEBC & 2 others* [2017] eKLR cited with approval the holding of the Supreme Court of India in *Arikala Narasa Reddy v Venkata Ram Reddy Reddygari & Anr*, Civil Appeal Nos. 5710-5711 of 2012; [2014] 2 S.C.R wherein it was held thus:

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

47. It is trite law that any allegations of fraud must be specifically pleaded, and that particulars of the fraud alleged must be stated on the face of the pleading. In addition, the alleged fraud must be strictly proved. See *Vijay Morjaria v Nansingh Madhusingh Darbar & Another* [2000] eKLR.

48. The appellant did not plead the alleged fraud against the deceased or his personal representatives in the plaint and the amended plaint. The appellant also did not lay any claim over the suit property on the basis of adverse possession. What is evident from the appellant's pleadings was that his suit was at all times based on specific performance. He therefore cannot be heard to argue that the trial court erred by not making a finding on these two issues, or that the applicable provisions of the *Limitation of Actions Act* was section 26 and not section 4.

49. Turning to the counterclaim by the 3rd and 4th respondents, it is a fact that the sale of the suit property between the deceased and the 4th respondent's husband was captured in a sale agreement dated 29th April 1979. On 20th February 1991, the deceased and the 4th respondent's husband executed a supplementary agreement primarily on the issue of the pending balance of the purchase price, which stood at Kshs.146,000/=. The 4th respondent's husband however died on 12th April 1991 before the terms of the supplementary agreement could be implemented in full and before transfer of the suit property could be made to him. There is no evidence that the terms of the supplementary agreement between the deceased and the 4th respondent's husband were varied or altered.

50. The 4th respondent indicated her intention to complete the sale transaction with the legal representatives of the deceased's estate. One of the orders sought in the counterclaim was an order directing the 1st and 2nd respondents to execute a transfer instrument and all other necessary documents in favour of the 4th respondent, failing which the Deputy Registrar of the trial court be directed to execute the same in her favour. What in essence the 3rd and 4th respondents were seeking in the counterclaim was the completion of the sale of the suit property under the agreements dated 24th April 1979 and 20th February 1991. We agree with the finding of the trial court that no action was brought by the 4th respondent's husband or his estate for the specific performance of the two contracts. It follows, therefore, that the action brought by the 3rd and 4th respondents through their counterclaim could not be maintained against the deceased as it was also filed out of the statutory period.

51. Having found that the suit by the appellant as well the counterclaim by the 3rd and 4th respondents were filed well outside the 6 years contemplated under section 4 (1)(a) of the *Limitation of Actions Act*, and being alive to the fact that as per the Supreme Court decision in *Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others* (*supra*) "a court's jurisdiction flows from either *the Constitution* or legislation or both", it is our finding that the trial court made the correct finding that by operation of statute law it did not have the requisite jurisdiction to entertain the suit or the counterclaim. Upon making this finding, the trial court ought to have, in our respectful view, downed its tools and struck out the suit and the counterclaim for want of jurisdiction. It matters not that the issue of limitation or jurisdiction was not raised by any of the parties as a preliminary issue. In *Anadet Kalia Musau v Attorney General & 2 Others* [2020] eKLR, this Court in determining a jurisdictional issue that was never raised by the parties to the suit stated as follows:

> " The solitary issue in this appeal is, whether the suit before the High Court was statutorily time barred. To demonstrate that time limitation is a jurisdictional question and that if a matter is statute-barred a court has no jurisdiction to entertain it, we cite the decision of the Supreme Court in the case of *Nasra Ibrahim Ibren v Independent Electoral and Boundaries Commission & 2 others*, Supreme Court Petition No. 19 of 2018, where that court stressed the fact that jurisdiction is everything and that a court may even raise a jurisdictional issue suo moto. It said:
>
> "40 A jurisdictional issue is fundamental and can even be raised by the court *suo motu* as was persuasively and aptly stated by Odunga, J. in *Political Parties Dispute Tribunal & another v Musalia Mudavadi & 6 others Ex Parte Petronila Were* [2014] eKLR. The learned Judge drawing from the Court of Appeal precedent in *Owners and Masters of The Motor Vessel "Joey" v Owners and Masters of The Motor Tugs "Barbara" and "Steve B"* [2008] 1 EA 367 stated thus:
>
> 25. What I understand the Court to have been saying is that it is not mandatory that an issue of jurisdiction must be raised by the parties. The Court on its own motion can take up the issue and make a determination thereon without the same being pleaded..." (Emphasis supplied)"

52. We decline the invitation made in the consolidated appeals for us to make our findings on the issue of specific performance. Having returned the finding that the appellant's suit and the counterclaim were statutorily time barred as to deny the trial court competent jurisdiction, it is our view that addressing our minds to the issue of specific performance and any other issue raised in the consolidated appeals will be a nullity and an otiose exercise altogether.

53. The upshot is that the consolidated appeals are without any merit and are hereby dismissed. We order that each party bears its costs.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY JULY, 2023.

D. K. MUSINGA, (P.)

JUDGE OF APPEAL

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F. SICHALE

JUDGE OF APPEAL

.....

H. A. OMONDI

JUDGE OF APPEAL

.....

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR