Munga & 9 others v Nyamawi & 5 others (Civil Appeal E014 of 2021) [2023] KECA 1321 (KLR) (10 November 2023) (Judgment)

Neutral citation: [2023] KECA 1321 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CIVIL APPEAL E014 OF 2021

SG KAIRU, JW LESSIT & GV ODUNGA, JJA

NOVEMBER 10, 2023

BETWEEN

LUCAS MWANGANGI MUNGA ..... 1ST APPELLANT

LAWRENCE MTENZI MUNGA ..... 2ND APPELLANT

MUKOMU MUNGA ..... 3RD APPELLANT

JANJI MUNGA ..... 4TH APPELLANT

THOYA GAMBO ..... 5TH APPELLANT

JANJI ABDALLA ..... 6TH APPELLANT

DECHE GAMBO ..... 7TH APPELLANT

MBURA MWELE GEORGE ..... 8TH APPELLANT

THOMAS NGUZO MWELE ..... 9TH APPELLANT

GAMBO GONA ..... 10TH APPELLANT

AND

LAWRENCE NYAMAWI ..... 1ST RESPONDENT

NYAMAWI MWAKUNI ..... 2ND RESPONDENT

RAYMOND KAI MWANGOLO ..... 3RD RESPONDENT

MWANDONGA PEKESHE ..... 4TH RESPONDENT

NYAMAWI MWAMUYE CHIMWAGA ..... 5TH RESPONDENT

MWACHIRO LEWA ..... 6TH RESPONDENT

(Being an appeal against the judgement of the Environment & Land Court delivered on the 2nd October 2020 by Hon Justice J.O. Olola in Malindi ELC Land Case 32 of 2014)

JUDGMENT

1. This is an appeal from the judgement/decree of the Environment and Land Court at Malindi delivered by Justice J.O. Olola on 2nd October 2020 in Malindi ELC Land Case 32 of 2014. In that case, the appellants, as plaintiffs, filed a case against the respondents seeking rectification of the Register relating to the Title Numbers Chonyi/Mwakaraya/325 and Kilifi/Chilulu/213 by cancelling the registration of the respondents as the proprietors of the said Titles and instead registering the appellants as the proprietors; costs of this suit; interest thereon at court rates; and any other relief that the court may deem just to grant.

2. The appellants' claim was based on the fact that at all times material to the suit, they had been residing on the said parcels of land having settled thereon and built their homes many years before the land was registered; that they had been using the same openly and continuously without interruption from any quarter; that during the demarcation and adjudication of claims to the suit properties in the year 1972 and 1986, the respondents, without any colour of right, were fraudulently allocated the property thereby denying the appellants their rights thereto; that the appellants objected to the said properties being allocated to the respondents but their objection was not heard and determined in the manner provided under the *Land Adjudication Act*, Cap 284 of the Laws of Kenya; and that the respondents were subsequently wrongfully and illegally issued with title deeds on 15th February 1995.

3. According to the appellants, their efforts to resolve the matter through a Council of Elders in 1982 failed on the ground of jurisdiction; that they eventually filed a boundary complaint at the Lands Office the same year which dispute was later on in 1986 resolved in their favour; that that resolution was later confirmed by the court in Award No 14 of 1996; that though the respondents were granted 30 days to appeal, they never did so hence the orders sought herein.

4. In their Amended Statement of Defence and Counterclaim dated and filed herein on 10th September 2014, the six respondents jointly denied that the appellants had been residing on the suit properties as alleged or at all; that if indeed the appellants had been residing on the land as claimed, then they did so without the consent or authority of the respondents who are the rightful owners of the land; that the respondents inherited the suit properties from their fathers who are the registered owners thereof; that the appellants did not raise any objection during the allocation, adjudication and or registration thereof; that they have always peacefully resided in, developed and carried out farming activities on the land; and that they hold legitimate title deeds.

5. The respondents disclosed that the appellants lodged a dispute against the respondents at the Land Disputes Tribunal; that the Land Disputes Tribunal had no jurisdiction to deal with the matter as the appellants claimed ownership of the properties instead of a boundary dispute; and that therefore contend that the resulting award was null and void.

6. By way of their Counterclaim, the respondents accused the appellants of encroaching upon their properties and seeking to forcefully take possession thereof. Accordingly, the respondents sought judgment to be entered against the appellants jointly and severally for a declaration that the respondents were the rightful and lawful owners of all that parcel of land known as Kilifi/Chilulu/215 and Chonyi/Mwarakaya/325; a declaration that the respondents had the right to continue occupying and owning the suit properties; a declaration that the consequential judgment in Kaloleni RM Land Award No 14 of 1996; *Lucas M. Munga & Others v Mwakuni Mwakititi & 3 others* dated 8th October 1996 is null and void; a permanent injunction restraining the appellants or their agents, servants,

workers from encroaching upon and/or remaining on or taking possession of or continuing fencing off, the respondents' referenced land known as Kilifi Chilulu/325; and for costs and interest of this suit.

7. In the meantime, the appellants by way of Originating Summons filed, as Miscellaneous Civil Suit No. 20 of 2016 (OS), sought extension of the period of execution of the Decree issued on 3rd December 2001 in the said Kaloleni Magistrates Court Land Award Case No. 14 of 19, an application which was opposed by the respondents. On 7th September 2016 the said Originating Summons was consolidated with the suit by the consent of the parties with the suit being the lead file.

8. At the hearing of the case, the appellants called, as their sole witness, Lucas Mwamgandi Munga, the 1st appellant. According to him, the suit properties were first inhabited by their forefather Bezungu Runya; that one Bongo Mwadzayo, a grandfather to the respondents and his family members sought refuge on the land from Mzee Rangome Shume which request was acceded to; that during the registration of the land, the said Bongo Mwadzayo and his family fraudulently presented themselves as the owners of the land and hurriedly and clandestinely brought in surveyors to the land without consulting the appellants who were the resident owners; that when the appellants went to the Land Settlement Office to stop what was going on, the Settlement Officer refused to listen to them; that they then proceeded to the District officer (D.O) Kaloleni who in turn directed them to the Land Registry at Kilifi; that at the Land Registry, they were given a document referring them to the Kaloleni Law Courts; that at the Kaloleni Court, they were given yet another document to present at the Mombasa Law Courts where the Judge told them that the matter was supposed to be handled by the elders under the Chairmanship of the D.O

9. According to the 1st appellant, the D.O, requested each side to present two elders who were then given some blank papers to sign before the papers were taken to the Mombasa Court; that at the Court, they were told the parties did not come to any written conclusion so the matter should be heard in the High Court; that upon consulting their advocates, they referred the matter to the Land Disputes Tribunal which heard the matter and returned a verdict favourable to the appellants; that upon that verdict being presented to the Kaloleni Court, the respondents were given time to appeal, but they did not do so; and that though the appellants were later granted an eviction order against the respondents, the respondents did not move out.

10. According to the 1st appellant, aged 73 years, the registered owners of both plot numbers 213 Chilulu and 325 Mwarakaya were all dead and only their children were on the land; that by the time he moved from Plot No. 213 where he was born to Plot No. 325 in 1975, the said land had been registered in the names of the respondents; that in 1972 when land adjudication was being done, he was then already an adult; and that though his father had passed on in 1955, three of his uncles were present but the adjudication officers refused to listen to their representations.

11. On their part, the respondents called a total of six witnesses at the trial. Apart from reiterating the respondents' case as pleaded, the 1st respondent, Lawrence Nyamawi Mwajanjihe, testified that he was residing on Plot No. 325 Mwarakaya which is registered in the names of Elisha Mwajanji Shibanda, Paulo Nyamawi and Mwamuye Mwang'ombe. It was his evidence that all the families were there when the land adjudication was done in the area; that the 1st appellant's family was given Plot No. 939; that none of his family members attended the Land Disputes Tribunal proceedings in 1996 as all the registered owners of the land were dead by then; and that he was unaware of any court decision confirming that the land belonged to the appellants. His evidence was reinforced by the 3rd respondent, Raymond Kaye Mwangolo, who testified as DW2 and denied that the appellants were the ones who welcomed the respondents to the suit property. Apart from stating that he was residing on Plot 213, the 4th respondent, Mwandonga Pekeshe, DW3,affirmed the evidence adduced by the DW1 and DW2.

DW4, Keya Kabunda, a neighbour to the appellants and respondents informed the court that he was residing on Plot No. 472 and that he attended the cases before the elders as a witness. He also supported the respondents' case that the appellants' contention that the respondents' forefathers sought refuge from the appellants'' forefathers was not true.

12. On his part, DW5, Wellington Kai Mwakumbi, a brother to the 3rd Defendant who was deceased, gave the history of the land and told the court the appellants had in 1982 filed a land dispute before the Panel of Elders; that the Panel declined to hear the dispute due to lack of jurisdiction to hear a dispute concerning ownership of registered land; that the Panel of Elders told them to go file a case in the High Court; that the decision which was registered as Mombasa RM's Award Case No. 32 of 1985 was ignored by the appellants who filed another case before another elder's tribunal in which the respondents did not participate.

13. In his judgement the learned trial Judge found that the parcels of land known as Kilifi/Chilulu/213 and Chonyi/Mwarakaya/325 were registered in the names of various relatives of the six respondents herein on 5th July 1977 and 14th February 1983 respectively; that at the time of the institution of the suit, all the registered proprietors were deceased; that the appellants did not adduce any evidence before the adjudication officers in support of their contention that it is their forefathers that had welcomed the respondents to the suit properties prior to the adjudication exercise; that as a result, both parties were allocated the land they were occupying prior to the commencement of the exercise; that by the time the land adjudication was done in the area, both parties to the dispute had been on the land for a relatively long period of time; that the only witness who alluded to the allegation of the welcome was the 1st appellant; and that since the 1st appellant was born the same year of the alleged welcome, he relied on the information received from other people.

14. According to the learned Judge, the appellants did not commence any objection proceedings until some ten years later when they lodged a Land Dispute Case before a Panel of Elders at the Kaloleni District Officer's Office being Case No. LND/KAL/16 of 1982; *Lucas Mwagandi & Others v Mwakuni Mwakiti & 3 Others*; that the said case was rightfully found inappropriate for lack of jurisdiction to deal with the complaint on registered land; that the decision of the Panel of Elders was subsequently adopted as an order of the Court in Mombasa SRMCC Land Award No. 32 of 1985; that rather than proceed to the High Court as advised by the Panel, the appellants found their way back to the Kaloleni District Officer's office some ten years later whereat they again now purported to have a boundary dispute lodged against the relatives of the Defendants; that in this second round, reflected as Kaloleni Land Award Case No. 14 of 1996, the appellants were awarded the land; that it is not clear from the record if the Panel sitting as Kaloleni Land Award Case No. 14 of 1996 were made aware of the proceedings of the previous tribunal and the fact that its decision had been adopted as an award of the Court in the said Mombasa SRMCC No. 32 of 1985; that the parcels in dispute had in 1977 and 1983 been registered in the names of the respondents' now deceased relatives and that to the appellant's knowledge, the title deeds had been issued therefore in February 1995.

15. It was the finding of the learned Judge that the respondents called their neighbours who were present during the exercise and that it was the respondents' forefathers who had occupied the land prior to the adjudication thereof; that the registration of the respondents' relatives as proprietors of the suit properties was done pursuant to an adjudication exercise conducted in the area; and that any objection to the ascertainment of interests on the land ought to have been made in accordance with the mechanism set out in the *Land Adjudication Act*, Cap 284.

16. According to the learned Judge, the dispute in Land Award Case No.14 of 1996 did not relate to division or determination of boundaries to land and it was not about a claim to occupy or work land or that of trespass as set out under Section 3(1) of the *Land Disputes Tribunal Act* as set out above.

However, the Tribunal purported to award the suit properties to the appellants and it was this decision that gave rise to the decree that the appellants sought to execute in the Originating Summons being Miscellaneous Civil Suit No. 20 of 2016 in which they sought to cancel the said titles as issued and to have themselves registered as the owners of the two properties. The learned Judge however opined that the appellants took the wrong path when they disregarded the advise given to them by the first Panel of Elders. In his view, Land Disputes Tribunal had no jurisdiction to entertain the dispute and it clearly acted ultra vires its mandate when it proceeded to award the suit properties to the appellants. He therefore found that the appellants' case had no merit and that the respondents' forefathers were lawfully adjudicated as the rightful owners of the land more than 40 years ago. He dismissed the appellants' case and entered judgement for the respondent as prayed in the counterclaim. He also awarded the respondents both the costs of the suit and of the counterclaim.

17. It was this decision that provoked the instant appeal.

18. On 27th June, 2023, we heard this appeal on this Court's virtual platform. Learned Counsel Mr Nyange appeared for the appellant while Mr Shujaa appeared for the respondents. Both counsel relied on their written submissions which they briefly highlighted.

19. According to the appellants, the learned Judge erred in not finding that the counterclaim was fatally defective. They noted that the verifying affidavit to the counterclaim was sworn before Mr Patrick Shujaa Wara, advocate who appeared for the respondents before the trial court and before this Court. Based on section 4 of the *Oaths and Statutory Declarations Act* and the decision in *James Francis Kariuki & another v United Insurance Co. Ltd* Civil Appeal No. 1450 of 2000, it was submitted that it does not matter whether the advocate comes on record before or after commissioning the affidavit.

20. It was submitted on behalf of the appellants that the learned Judged erred in finding that there was no evidence that the appellants' forefathers welcomed the respondents onto the suit property; that the findings in Land Case No Land/Kal/16 of 1982 was sufficient evidence of this fact; that the learned Judge erred in not considering the judgement in Malindi Civil Appeal No. 14 of 2002 (*Lucas M. Munga & Another v Mwakuni Mwakiti & 3 Others*); that in the said decision the High Court set aside the order of the magistrate who had set aside the proceedings in Land Award No. 14 of 1996; that the learned Judge erred in finding that the Panel of Elders had no jurisdiction in making Land Award Kaloleni Civil Land Award No. 14 of 1996; that this issue having been dealt with in Malindi Civil Appeal No. 14 of 2002 (*Lucas M. Munga & Another vs. Mwakuni Mwakiti & 3 Others*) the proper procedure for challenging the jurisdiction of the Land Disputes Tribunal would have been by way of judicial review; that the issue of the validity of the decision in Land Award Kaloleni Civil Land Award No. 14 of 1996 was *res judicata*; that the learned Judge erred in failing to find that the counterclaim was time barred; and that 19 years had lapsed between the time the titles to the respondents were issued in 1995 to 2014 when the counterclaim was filed contrary to section 7 of the *Limitation of Actions Act*.

21. On behalf of the respondents, it was submitted that as at the time the verifying affidavit to the counterclaim was sworn on 10th September, 2014, the advocate before whom it was commissioned was not acting for the respondents till 5th April, 2016; that there was no direct evidence that the appellants' grandfathers welcomed the respondents' grandfathers onto the suit parcels of land since the only evidence on that fact was from the 1st appellant whose evidence was hearsay; that the learned Judge evaluated the evidence and rightly found that there was no evidence to support that allegation; that the decision in Malindi Civil Appeal No. 14 of 2002 only dealt with the issue whether learned magistrate in Kaloleni Land Award Case No 14 of 1996 had jurisdiction to set aside the decision of the Land Disputes Tribunal and it was found that there was no such jurisdiction; that that decision was not germane to the suit before the learned Judge; that the issue was not framed for determination by the learned Judge and that the issue is being raised for the first time in this appeal.

22. According to the respondents, the learned Judge did not err in finding that the court in Land Award No. 14 of 1996 had no jurisdiction to entertain the dispute; that Land Award No. 14 of 1996 was commenced against dead people; that the learned Judge did not err in failing to make a determination that the counterclaim was time barred; that the evidence was that the respondents" relatives had been in occupation of the land even before the adjudication exercise; that their claim was that they were the rightful owners as opposed to the appellants; that the appellants did not seek for adverse possession of the suit properties; that the statute of limitation was not pleaded in the plaint and was being raised for the first time on appeal; that the appellants failed to prove that the registration of the respondents' was by fraud or misrepresentation; and that the appellants did not give any reason to account for the delay in proceeding with execution of the decree of the Land Disputes Tribunal.

Analysis and Determination

23. This being the first appeal, in *Selle v Associated Motor Boat Co.* [1968] EA 123 that:

> " The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

24. Therefore, this Court is under a duty to delve at some length into factual details and revisit the facts as presented in the trial Court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering, and giving allowance for it, that the trial Court had the advantage of hearing the parties. The Court's mandate as re-affirmed in *Abok James Odera t/a A. J. Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR is:

> "...to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

25. On the issue of verifying affidavit to the counterclaim, the proviso to section 4 of the *Oaths and Statutory Declarations Act*, Cap 15 Laws of Kenya provides that:

> Provided that a Commissioner for Oaths shall not exercise any of the powers given by this Section in any proceedings or matter in which he is the advocate for any of the parties to the proceedings or concerned in the matter, or clerk to any such advocate or in which he is interested

26. A reading of the said provison clearly reveals that the bar to an advocate commissioning an affidavit stems from the fact of the representation or interest in a matter at the time of the commissioning the affidavit. It does not apply where the advocate is instructed in the matter later in the proceedings. In other words, the bar to an advocate commissioning an affidavit sworn by his client only applies to situations where the advocate is on record for the client at the time the affidavit is being sworn. A pleading sworn before an advocate who was not on record at the time of its filing cannot be rendered defective by the mere fact that the commissioning advocate subsequent comes on record for the

deponent. Without the advantage of divine omniscience, an advocate cannot foretell that in future he might be retained to act for the deponent if at the time the affidavit is taken to him for commissioning, he has not been instructed in the matter.

27. As regards the issue whether the matter before the learned Judge was caught up by res judicata in light of the decision in Land Award Kaloleni Civil Land Award No. 14 of 1996, our view is that, having found, and rightly so in our view, that the Award was issued by a tribunal that had no jurisdiction, the doctrine of res judicata was not applicable to the case before him. In *Florence Maritime Services Ltd v Cabinet Secretary Transport, Infrastructure & 3 others* [2021] eKLR, the Supreme Court of Kenya extensively examined the doctrine of res judicata stating that:

> " That the doctrine of res judicata is based on the principle of finality which is a matter of public policy. The principle of finality is one of the pillars upon which our judicial system is founded and the doctrine of res judicata prevents a multiplicity of suits, which would ordinarily clog the Courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively."

28. In that decision, the Supreme Court cited with approval the words of Justice Russell of the Federal Court of Canada in the case *Sami v. Canada* (Citizenship and Immigration), 2012 FC 539 (CanLII) that the "preconditions for *res judicata*" are that, firstly, "the same question was decided in earlier proceedings. Secondly, that "the judicial decision which is said to create the estoppel was final" and third, that "the parties to the judicial decision were the same persons as the parties to the proceedings in which the estoppel was raised."

29. The Supreme Court of Kenya then pronounced that:

> " For *res judicata* to be invoked in a civil matter the following elements must be demonstrated:
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> a. There is a former Judgment or order which was final;
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> b. The Judgment or order was on merit;
>
> c. The Judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and
>
> d. There must be between the first and the second action identical parties, subject matter and cause of action."

30. Therefore, *res judicata*, it is trite, only applies in cases where the earlier decision was made by a court or tribunal of competent jurisdiction, which was not the case in this matter.

31. Regarding the submission that the learned Judge erred in ignoring the decision of the Land Disputes Tribunal when the same had not been set aside by judicial review proceedings, it is our view while a court of law cannot set aside a decision whose challenge is not properly before it, nothing bars a court from observing that the proceedings relied upon by a party are not binding on it particularly where the said proceedings are those of an inferior tribunal. The law is clear that an order made without jurisdiction is void and if an act is void, then it is in law a nullity as it is not only bad but incurably bad and there is no need for an order of the Court to set it aside, though sometimes it is convenient to have the Court declare it to be so. You cannot put something on nothing and expect it to stay there, as it will collapse. But if an act is only voidable, then it is not automatically void as is only an irregularity, which may be waived and is not to be avoided unless something is done to avoid it.

In those circumstances, there must be an order of the Court setting it aside and the Court has the discretion whether to set it aside or not and it will do so if the justice of the court demands and not otherwise meanwhile it remains good and a support for all that has been done under it. See Macfoy v United Africa Co. Ltd [1961] 2 All ER 1169 at 1172, *Andrew Kamau Mucuha v The Ripples Limited* Civil Appeal No. 19 of 1998 [2001] KLR 75 & *Omega Enterprises (Kenya) Ltd. v KTDC & 2 Others* Civil Appeal No. 59 of 1993.

32. In this case the order by the tribunal was issued without jurisdiction. It was null and void ab initio. No express order was required in order for the learned Judge to decline to adhere to it since any actions taken in pursuance of the same were also bound to be null and void. There was nothing wrong in the learned Judge after finding that it was issued without jurisdiction not giving it legal recognition and effect.

33. Regarding the issue whether the appellants' forefathers welcomed the respondents' forefathers onto the suit land, it is correct as found by the learned Judge that the only evidence in that regard was from the 1st appellant who stated that:

> "I know Bongo Mwazoya. I saw him long time ago before he died. He was living in 213. He came around 1945 asking for land. I was born that year 1945. I was only told by my grandfather Ngoma about the story as I was too young then."

34. In those premises, the learned Judge cannot be faulted for finding that there was no proper evidence to support the allegation that the appellants' forefathers welcomed the respondents' forefathers onto the suit parcels of land.

35. As regards the issue of Malindi Civil Appeal No. 14 of 2002, it is true that the issue was not taken up before the trial court and the learned Judge did not deal with it as an issue. We cannot, in these proceedings, fault the learned Judge based on an issue that was not placed before him and on which no determination was made. The predecessor to this Court in *Alwi Abdulrehman Saggaf v Abed Ali Algeredi* [1961] EA 767 held that the course of taking a point of law, which has not been argued in the court below, on appeal ought not to be followed unless the court is satisfied that the evidence upon which they are asked to decide established beyond doubt that the facts, if fully investigated, would have supported the new plea.

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

> "It is common ground in this appeal that the issue intended to be raised did not form any ground stated in the memorandum of appeal and did not arise before the superior court. Indeed, for a period of eight years it did not form part of the appellant's case. There are good reasons for the existence of the rule and some of them appear in the authorities cited before us by Mr. Karori. Apart from considerations of fairness, delay and prejudice that may be occasioned, the predecessor of this Court in the *Alwi A. Saggaf Case* (*Supra*) agreed with Lord Birkenhead L.C. in *North Staffordshire Railways Co. v Edge* [1920] A.C.254 at p. 263, on the guiding principle, when he stated:
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> > "The appellate system in this country is conducted in relation to certain well-known principles and by familiar methods. The issues of fact and law are orally presented by counsel. In the course of the arguments it is the invariable practice of appellate tribunals to require that the judgments of the judges in the courts below

shall be read. The efficiency and the authority of a Court of Appeal, and especially of a final court of Appeal, are increased and strengthened by the opinions of learned judges who have considered these matters below. To acquiesce in such an attempt as the appellants have made in this case, is in effect to undertake decisions which may be of the highest importance without having received any assistance at all from the judges in the courts below."

The Privy Council also, in an appeal emanating from the supreme court of Kenya, The United Marketing Company Case (*Supra*), held: -

"

"(ii) their Lordships would not depart from their practice of refusing to allow a point not taken in the courts below to be argued unless they were satisfied that the evidence upon which they were asked to decide established beyond doubt that the facts, if fully investigated, would support the new plea; even if the facts were beyond dispute and no further investigation of facts were required, their Lordships would not readily allow a fresh point of law to be argued without the benefit of the judgments of the judges in the courts below, accordingly;

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

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

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

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

> "Unless upon very strong grounds, and under very special circumstances, we should hesitate to permit a party at such a stage of his suit, as the present suit now is, to set up a case which was not set up for him in the Court of first instance or of primary appeal, where his professional representative must have been perfectly well aware whether such a case as this alleged special custom could be legitimately set up, and abstained from any attempt to set it up. To yield to such an application as the present, would be to make an evil precedent, and to hold out a premium to perjury and interminable litigation." We have said enough, we think, to underscore our reluctance to accede to the arguments sought to be put forth by the appellant in this matter and we reject that attempt."

37. In any case the issue for determination in Malindi Civil Appeal No. 14 of 2002 (*Lucas M. Munga & Another vs. Mwakuni Mwakiti & 3 Others*) was whether the learned magistrate had the jurisdiction to set aside the proceedings in Land Award No. 14 of 1996, and the learned Judge in Malindi Civil Appeal No. 14 of 2002 rightly in our view found that there was no such jurisdiction. The Court in Malindi Civil Appeal No. 14 of 2002 did not deal with the issue whether the decision in Land Award No. 14 of 1996 was correct and that decision did not dispose of the issues that were before the learned Judge in the matter giving rise to the present appeal. In any case, we have found that the learned Judge in this case correctly addressed himself to the validity of the decision in Land Award No. 14 of 1996.

38. Regarding limitation, the appellants, in their defence to counterclaim did not plead limitation contrary to Order 2 rule 4(1) of the *Civil Procedure Rules* provides that:

> A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant Statute of limitation or any fact showing illegality—
>
> a. which he alleges makes any claim or defence of the opposite party not maintainable;
>
> b. which, if not specifically pleaded, might take the opposite party by surprise; or
>
> c. which raises issues of fact not arising out of the preceding pleading.

39. It is therefore clear that the defence of limitation ought to be specifically pleaded by a party relying on it. Pleadings, do operate to define and delimit with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases. See *Dakianga Distributors (K) Ltd v Kenya Seed Company Limited* [2015] eKLR.

40. In *Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others* [2014] eKLR this court cited an article by Sir Jack Jacob entitled

> " The Present Importance of Pleadings" and was stated that: -
>
> > " As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings...for the sake of certainty

> and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice...In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice."

41. The law, as we understand it is that to condemn a party on a ground of which no fair notice has been given may be as great a denial of justice as to condemn him on a ground on which his evidence has been improperly excluded. See *Esso Petroleum Co. Ltd v Southport Corporation* [1956] AC 218 at 238 and *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR.

42. In this case, limitation is expressly identified under Order 2 rule 4(1) of the *Civil Procedure Rules* as a defence that must be pleaded. Even if that defence was not expressly set out in that rule, the rule requires that any fact showing illegality which makes any claim or defence of the opposite party not maintainable; or which, if not specifically pleaded, might take the opposite party by surprise; or which raises issues of fact not arising out of the preceding pleading must be pleaded.

43. It must be noted that limitation is a defence, which a party may waive by making an acknowledgement of the debt, unlike other defences where the Court is absolutely and expressly barred from dealing with a matter hence lacking jurisdiction. Section 23(3) of the *Limitation of Actions Act*, provides that:

> Where a right of action has accrued to recover a debt or other liquidated pecuniary claim, or a claim to movable property of a deceased person, and the person liable or accountable therefor acknowledges the claim or makes any payment in respect of it, the right accrues on and not before the date of the acknowledgement or the last payment."

44. A right to action which would otherwise be barred on account of limitation, can therefore be revived upon its acknowledgement by the person liable therein. Therefore, to raise a defence of limitation at the tail end of the hearing and in submissions or at the appellate stage has the effect of depriving the Appellants of the opportunity of adducing evidence, assuming they had it, of showing that there were facts that revived the cause of action or excepted the case from being statute barred. It would also be wrong for a court on own motion to raise the matter in the judgement without affording an opportunity to the parties to address it on the matter.

45. The issue was dealt with by this Court in *Stephen Onyango Achola & another v Edward Hongo Sule & another* [2004] eKLR where this Court held that Order 6 Rule 4(1) and (2) [now Order 2 rule 4(1)] of the *Civil Procedure Rules* requires a person relying on the provision of a statute such as limitation to specifically plead the statute on whose provisions he relies to defeat the claim and that a plaintiff is not bound to plead in his plaint issues which would negate possible defences such as limitation, fraud,

mistake long before such issues are raised. The Court further held that a party who has not specifically pleaded limitation is not entitled to rely on that issue and base his preliminary objection on it; nor is he entitled to rely on that defence during the trial as cases must be decided on the issues pleaded since a party who is entitled to rely on the defence of limitation is perfectly entitled to waive such defence and thus let the suit proceed to trial on its merit.

46. It follows that it was not open to the trial court to deal with the defence of limitation and the learned Judge committed no error in not addressing the issue.

47. We have said enough to show that this appeal has no merit. Accordingly, we dismiss it with costs to the respondents.

48. Judgement accordingly.

DATED AND DELIVERED AT MOMBASA THIS 10TH DAY OF NOVEMBER,2023.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is the true copy of the original

DEPUTY REGISTRAR