IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, NAMBUYE & SICHALE JJA)

CIVIL APPEAL NO. 38 OF 2014

BETWEEN

JACK KAGUU GITHAE.....APPELLANT

VERSUS

JAMES MUGO KINGA, DANIEL NGATIA KINGA,

HENRY WAITHAKA KINGA, CRISPIN MUCHERU KINGA

MICHAEL MAINA KINGA, STANLEY KINGA MWENDIA,

MOSES KANYUTU MWENDIA, JOSEPH MWENDIA KINGA

DIASPROPERTY LIMITED & SAMUEL THUITA

MWANGI.....RESPONDENT

(Appeal from the Ruling and /or the decision of the High Court of Kenya at Nyeri ELC (J.A. Ombwayo, J.) Dated 28th March, 2014

in

Nyeri ELC No. 58 of 2012)

****

JUDGMENT OF THE COURT

The appeal arises from the ruling of the Environment & Land Court at Nyeri (ELC) **A. Ombwayo, J**. dated 28th March, 2014.

The background to the appeal is that, the appellant filed a plaint dated 12th March, 2010, subsequently amended at Nairobi on 7th November, 2012, claiming *inter alia*, that, on 3rd July, 1986, he purchased 200 acres (the suit property), out of the 264 acres then comprised in LR. No. 11306/2 Ex-Moller Farm situated South West of Rumuruti Town (the mother title), from the late **Kinga wa Mwenda** (the deceased). According to him, he paid the full purchase price of Kshs. 600,000.00 out of which Kshs. 315,539.10 went to pay off the deceased's indebtedness to the Settlement Fund Trustees (SFT). The deceased excised the suit property from the mother title and put him in immediate possession and occupation. The deceased subsequently obtained land control board consent for subdivision but passed on before the process for consent for transfer was completed. The appellant commenced use of the suit property in the exercise of his rights as a beneficial owner until the 1st -8th respondents interrupted the said use due to their illegal and unlawful harassment and wanton destruction of his developments thereon. Without the knowledge and consent of the appellant and without disclosure of the appellant's interest in the suit property, the 1st -8th respondents in HCC Succession Cause No. 1711 of 2006, caused the whole of the mother title to be registered in their respective names as beneficiaries to the estate of the deceased to the exclusion of the appellant. They subsequently, illegally and unlawfully transferred the entire mother title to the 9th and 10th respondents, all to the detriment of the appellant's beneficial interest in the suit property.

On account of the above averments, the appellant sought a declaration that he was the legal, beneficial and bonafide owner of the suit property; that the assent registered on the 15th July, 2008, vesting and transferring the entire mother title into the names of the 1st -8th respondents and endorsed as entry No.8 on grant No. I.R.20579 and all other subsequent entries made thereafter on the mother title inclusive

of the 1st -8th respondents sale of the entire mother title to the 9th and 10th respondents be declared illegal, null and void and cancelled; that the land register be restored to its original position prior to the registration of the said entry; that the 9th and 10th respondents be ordered to deliver up vacant possession of the suit property and surrender to the court the original grant No. I.R 20579 for the mother title for purposes of cancellation of all the illegal and unlawful entries made thereon after the death of the deceased; and that an order for the rectification of the land register and subsequent transfer to the appellant of his interest in the suit property be made accordingly.

In the alternative, the appellant prayed for an order compelling the 1st respondent to specifically perform the agreement of sale dated the 3rd July, 1986; an order of a permanent injunction to issue restraining the respondents whether by themselves, their authorized agents, servants, employees, workers or otherwise howsoever from encumbering, trespassing, wasting, alienating, selling transferring and/or in any other manner whatsoever dealing with or interfering with the appellant's ownership, use and quiet possession of the suit property and from evicting or harassing the appellant or any other person claiming through him.

In rebuttal, the 1st to 8th respondents denied, that the appellant had ever been the legal and or a *bonafide* beneficial owner of the suit property as at no time did the appellant ever take possession and occupation of the suit property before the demise of the deceased. The sale agreement entered into between the deceased and the appellant on 3rd July, 1986, became frustrated due to the expiry of time within which it was supposed to be completed in terms of clause 4 thereof and by operation of the provisions of the Land Control Act Cap 302 Laws of Kenya. The only recourse the appellant had in law was for him to seek for the refund of any purchase price he may have paid to the deceased towards the said transaction from the administrator of the estate of the deceased, of which the 1st respondent as the administrator of the estate of the deceased was ready and willing to refund.

The 1st -8th respondents conceded that part of the purchase price was paid to the SFT to offset a loan balance owed to SFT by the deceased, but denied that the total purchase price of Kshs. 600,000/= was paid as according to them a balance of Kshs. 61,450.90 was still outstanding. They conceded a consent for subdivision was obtained by the deceased before his demise but asserted that the process of transfer of the suit property in favour of the appellant was never completed before the demise of the deceased. It was also their contention that the deceased never executed an application to the Land Control Board dated 21st December, 1995, seeking to transfer the suit property to the appellant, as confirmed by the report filed in court by the CID on the 23rd July, 2012 at the request of the court which indicated clearly, that the signature of the applicant on the said transfer form purportedly attributed to the deceased was a forgery; that the contents of the CID report were also confirmed by a letter from the Secretary of the area Land Control Board dated 18th July, 2012, confirming that no land control Board meeting took place on the 20th August, 1997 as there were no supportive minutes for the said meeting. Entry number 487/97 was therefore a fabrication inserted for purposes of defeating justice during the pendence of the suit. They also denied that the deceased signed any transfer of land documents in favour of the appellant before Lucy Mwai Advocates.

With regard to Nairobi High Court Succession Cause Number 1711 of 2006, the 1st - 8th respondents contended that proceedings therein were conducted openly, procedurally and lawfully. They were therefore properly vested with title to the mother title and were therefore entitled to pass the same to the 9th and 10th respondents on a willing buyer/willing seller basis, especially when there was no doubt that any claim appellant may have had over the suit property had been defeated by the doctrine of laches.

The 9th and 10th respondents on the other hand contended that they were the bonafide legal owners of the suit property having purchased it legally and lawfully from the 1st -8th respondents who were the legally registered owners vide a sale agreement dated 22nd September, 2011; that the sale agreement was executed after the 9th -10th respondents had conducted an official search at the Lands Registry and confirmed that the 1st -8th respondents had a good title to pass to them.

The 1s -8th respondents raised two preliminary objections to the appellant suit dated 5th October, 2012, contending that:

> ***"(1) The whole suit is in competent, as it has been caught up by the limitation of Actions Act (cap 22) laws of Kenya. The suit is based on a contract of sale of land which contract cannot be enforced as it is time barred.***
>
> ***(2) The plaintiff /applicant cannot claim any right or interest on the subject parcel of land in view of the provisions of the Land Control Act (Cap 302 laws of Kenya."***

The preliminary objections were canvassed by way of written submissions filed by consent of the respective parties. The trial court analyzed the record in light of the respective parties written submissions, identified issues for determination and made findings thereon.

With regard to the nature of the appellant's cause of action, the trial court made findings that the appellant' claim was founded on an agreement of sale dated the 3rd July, 1986, which in the trial court's view, was a contract and therefore governed by the Law of Contract Act; that **section 4 (1) (a**) of the Limitation of Actions Act Cap 22 Laws of Kenya prohibits actions based on contract from being commenced after the expiry of six (6) years from the date of the transaction. That the appellant's cause of action accrued on 3rd July, 1986 when he executed the sale agreement between himself and the deceased.

In light of the above findings, the trial court rejected the appellant's contention that the suit had been brought to redress transgressions and inequities, fraudulently and illegally committed against him by the 1st -8th respondents and was therefore not caught up by the Limitation of Actions Act provisions; and instead, upheld the respondents' contention that the appellants claim founded on contract was time barred.

On consent of the area Land Control Board, the trial court made findings that no land control board consent for the transfer of the suit property to the appellant was granted by the Land Control Board and therefore the sale agreement of 3rd July, 1986 stood vitiated for noncompliance with the mandatory provisions of the Land Control Act.

On the facts, the trial court made observations on the respective party's averments in their respective pleadings as already highlighted above.

On the law, the trial court made observations that the suit land was Agricultural land; that pursuant to **section 6(1) (a**) of the Land Control Act Cap 302 Laws of Kenya, transactions in Agricultural land involving among others sale and transfer of Agricultural land are void for all intends and purposes unless the area land control Board sanctions such transactions within six months of the date of the transaction. That although **section 8(1)** of the Act donates jurisdiction to the High Court to extend time within which to obtain a Land Control Board consent for sale and transfer of Agricultural land, the appellant never invoked that provision to validate the sale/purchase transaction of the suit property executed between him and the deceased.

Applying the above threshold to the rival positions before the court, the trial court held as follows:

> "***This Court notes the use of mandatory and directory words and holds that, the language used in a statute alone is not decisive as to whether the word is mandatory or directory. Regard must be had to the context, subject matter and object of the statutory provision in question, in determining whether the same is mandatory. Enactments shall be considered directory only or obligatory. It is the duty of the court to get the real intention of the legislature, by carefully attending to the whole scope of the statute considered.***
>
> ***However, when it comes to formalities prescribed for making contracts or transfers the use of the word "shall" is imperative.***
>
> ***This Court holds that the use of the word "shall" in section 8(1) of the Land of Control Act Cap 302 Laws of Kenya is mandatory and imperative and therefore failure to make the application within 6 months is serious breach of the provisions of the law and therefore any transaction undertaken under the said provision will be a nullity. It is clear from the record that the application to the land control Board by Kinga Wamwendia was made on the 21/12/1995 approximately 8 years after the execution of the sale agreement. The court finds this to have been in breach of the mandatory provisions of section 8(1) of the Act. The reasons given by the plaintiff for this delay could have been good reasons for extension of time before the death of Kinga Wamwendia. The plaintiff slept on his right by failing to move the court for extension of time pursuant to the proviso to section 8(1) of the said Act.***
>
> ***Moreover, the late Kinga Wamwendia, did not partition his land into two parcels of land as the plaintiff attempts to state. The claim by the plaintiff is ambiguous as he is claiming a 200 acres parcel of land which was to be excised from title No. 11306 Ex-Moller Farm South West of Rumuruti. The plaintiff has not shown that there was an application for consent granted by the board. One would ask, for which parcel of land was the board purporting to give consent and yet the farm had not been partitioned to enable the vendor transfer 200 acres to the plaintiff. The administrator of the estate of the late Kinga Wamwendia cannot be compelled to specifically perform the agreement of sale dated the 3rd July, 1986 in terms of clause 6 of the same as the application for consent of the Board was made after the expiry of the stipulated period.***
>
> ***The upshot of the above is that this Court finds there was no valid consent to transfer the 200 acres to the plaintiff, the application having been made more than 6 months' after the agreement. The delay of approximately 8 years is in excusable and failure to apply for extension of time has not been explained.***
>
> ***Since there is no application before court to be considered for extension of time, the preliminary objections by the defendants are upheld and the plaint is hereby struck out for having been filed out of time and that there being no valid consent of the Land Control Board, the suit is dismissed with costs."***

The appellant was aggrieved and filed this appeal raising a litany of seventeen

17. grounds of appeal, subsequently condensed into two thematic issues as indicated in the written submissions dated 28th June, 2016 and filed on 29th June, 2016. These are:

> ***(1) Whether the appellant's suit in Nyeri HCCC No. 58 of 2012 was incompetent due to Limitation of Action Act (Cap 22) Laws of Kenya.***
>
> ***(2) Whether the Agreement for sale dated the 3rd July, 1986 entered into between the Appellant and the deceased was voidable and unenforceable due to application of the provisions of the Land Control Act (Cap 302) Laws of Kenya.***

The appeal was canvased by way of written submissions fully adopted and orally highlighted by learned counsel for the respective parties. Learned counsel **Mr. Anthony Gikaria** appeared for the appellant, **Mr. Jessee Kariuki** for the 1st, 5th, 6th and 7th respondents and **Mr. Kariuki Mwangi** for the 9th and 10th respondents. There was no appearance for the 2nd, 3rd, 4th and 8th respondents who were served through advertisement pursuant to a Court order. The Court being satisfied that the 2nd, 3rd, 4th and 8th respondents had due notice of the hearing of the appeal through service by way of advertisement pursuant to a Court order, allowed learned counsel for the respective parties present to prosecute the appeal.

Supporting ground 1 of the appeal, **Mr. Gikaria,** faulted the trial court for erroneously sustaining the 1st – 8th respondent's preliminary objections against the appellant's suit as supported by the 9th to 10th respondents. According to **Mr. Gikaria**, the appellant's claim against the respondents was founded on allegations of fraud, illegality, misrepresentation and concealment of material facts and was therefore not statute barred as erroneously held by the trial court. It was therefore competent and warranted a merit trial as it sought to redress the transgressions and inequities, fraudulently and illegally committed against him by the 1st to 8th respondents as alluded to in his pleadings.

On fraud and illegality, **Mr. Gikaria** submitted that the 1st -8th respondents conduct of vesting the entire mother title in their favour and

subsequently transferring it wholly to the 9th and 10th respondents without any regard to the appellants' beneficial overriding interests in the suit property was both fraudulent and illegal.

On concealment of material information, **Mr. Gikaria** submitted that the 1st - 8th respondents' failure to disclose in the Succession Cause Number 1711 of 2006 that the estate of the deceased was only entitled to sixty-four (64) acres out of the 264 acres comprised in the mother title and that the rest of the acreage belonged to the appellant who had rightfully, legally, procedurally and lawfully purchased it from the deceased before his demise amounted to concealment of material information from the court.

To buttress the above submissions, counsel relied on the letters dated: 7th January, 1983 on instructions for subdivision of the mother title; 12th January, 1987 vide which the deceased submitted 10 prints of the proposed subdivision to the relevant Authority for necessary approval; 30th November, 1987 vide which the clerk to the Laikipia County Council wrote to the Commissioner of lands giving no objection to the proposed subdivisions; 7th February, 1990 vide which the Director of surveys sanctioned the subdivision subject to confirmation of existence on the ground for provision of an access road leading to the resulting subdivisions.

On applicable principle of law**, Mr. Gikaria** relied on the case of **Mwangi & Another versus Mwangi [1986] KLR 328; Mutsonga versus Nyati [1984] KLR 425**, and **Kanyi versus Muthiora [1984] KLR 712** for the holding *inter alia,* that the right of a person in possession or occupation of land are equitable rights which are binding on the land and any subsequent dealings in the land is subject to such right. In light of the above principle, **Mr. Gikaria** submitted that the deceased's conduct of granting the appellant immediate possession/occupation of the suit property upon the execution of the sale agreement of 3rd July, 1986, created a beneficial overriding interest over the suit property in favour of the appellant; that the said action also created a presumptive/implied or constructive trust in favour of the appellant which was not subject to the provisions of the limitation of Actions Act nor the Land Control Act and, was therefore enforceable in law.

On specific performance, **Mr. Gikaria** submitted that specific performance of the agreement of sale dated 3rd July, 1986 was only prayed for as an alternative prayer and was therefore mutually exclusive to the other prayers sought in the amended plaint.

With regard to the 2nd ground of appeal, **Mr. Gikaria** submitted that the sale of the suit land to the appellant was subject firstly, to the payment of the full purchase price paid for in instalments but more importantly, subject to the SFT discharging its charge over the mother title upon satisfaction of the deceased's indebtedness to the SFT which in **Mr. Gikaria's** view, was a condition precedent to the deceased initiating the process of seeking to obtain the requisite consents both for subdivision and transfer of the suit property to the appellant. That it was not until the SFT discharged its charge over the mother title and the appellat's completion of the payment of the purchase price, that the deceased applied for and obtained consent for subdivision as already alluded to above; that on 21st December, 1995, the deceased executed a transfer of the suit property in favour of the appellant which was subsequently sanctioned by the Laikipia Land Control Board on the 20th August, 1997, and captured as Entry No. 487/97 in the said Land's office Records; that the authenticity of the said entry was confirmed by a duly certified extract of the Land Board's records annexed to a letter dated 28th July, 2012 issued by the Laikipia District Land Registrar **Mrs. Beatrice W. Mwai,** controverting the contents of the letter dated 17th July, 2012 by the Secretary to the area Land Control Board erroneously stating that there were no minutes or records of the Board Meeting held on the 20th August, 1997.

Relying on the cases of **Chase International Investment Corporation & another versus Lax Man Keshra & others [1978] eKLR 143**; **LIYODS Bank PLC Versus Russet [1991] 1AC 107, 132; *Steadman versus Steadman [1976] AC 536,540*** and the case of **Hussey versus Palmer [1972] 3 ALLER 744, Mr. Gikaria** submitted that the doctrines of proprietary estoppel and constructive trust both of which were relied upon by the appellant in support of his claim called for a merit inquiry to establish the veracity of those assertions. The appellant's claim should not therefore have been prematurely terminated by the trial court.

On the application of the principle, in Article 159(2) (d) of the Kenya Constitution 2010, **Mr. Gikaria** submitted that the appellant's claim based on a beneficial interest in the suit property being a land claim which in law are very sensitive in nature called for a merit determination.

Mr. Gikaria also relied on the cases of **Mitchell MP versus New Group Newspaper Limited [2013] EWCA CW1537,** on the threshold for granting extension of time under **section 8(1)** of the Land Control Act in support of his submissions that in his view, had the appellant's suit not been prematurely terminated, the appellant could still have applied to extend time within which to comply with the above provisions pending the determination of his lawful claim against the respondents; **Chemwolo versus Kubende [1986] KLR 492,** for the principle that the primary concern of a court of law is to do substantive justice, in support of Mr. **Gikaria's** submissions that the appellant was denied justice by the trial court's conduct of prematurely terminating his legitimate and lawful claim against the respondents; **Githere versus Kirungu [1976-1985] EA 101** for the proposition that rules of practice are hand maids in the administration of justice rather than mistresses, in support of his submissions that the preliminary objections were improperly invoked by the respondents and erroneously sustained by the trial court to defeat the appellant's legitimate claim against the respondents; and lastly **Macharia Maina & others versus Davidson Mwangi Kagiri [2014] eKLR** for the threshold on statutory interpretation.

On the totality of the above submissions, **Mr. Gikaria** urged us to allow the appeal and reverse the trial court's decision, which according to **Mr. Gikaria** not only denied the appellant justice but was also highly oppressive and unjust. Secondly, it shielded the 1st- 8th respondents from their responsibility to be compelled to transfer the suit property to the appellant. Thirdly, it resulted in aiding the 1st -8th respondents to obtain an unconscionable bargain against the appellant by sanctioning their illegal and unlawful sale and transfer of the suit property to the 9th and 10th respondents with their full knowledge that the appellant had a superior beneficial and overriding claim over the suit property. Fourthly, interests of justice and fairness to all the parties involved in the litigation before the trial court called for a merit determination of the suit especially when those issues touched on land which in law are issues of a very sensitive nature.

Opposing the appeal, **Mr. Jessee Kariuki**, submitted that the appellant's claim was based on specific performance of a contract devoid of any particulars of fraud given either in the body of the amended plaint or as a substantive relief prayed for based on fraud. The trial court cannot therefore be faulted for holding that the appellant's claim was statute barred pursuant to both the provisions of the Limitation of Actions and the Land control Acts notwithstanding the appellant's inclusion of a claim for an injunction. According to **Mr. Kariuki**, the 1st -

8th respondents procedurally acquired title through Succession proceedings in High Court Succession Cause No. 1711 of 2006 and therefore lawfully passed a good title to the 9th and 10th respondents on a willing seller/willing buyer basis. It is their contention that although the deceased obtained consent for subdivision of the mother title with the intention of transferring the suit property to the appellant, its existence is inconsequential to the appellant's claim as the deceased passed on before consent for transfer was given. The contract of sale between the appellant and the deceased was therefore frustrated rendering it unenforceable in law both for noncompliance with the mandatory provisions of the Land Control Act. They also claim that the appellant's claim of an overriding interest over the suit property in his favour did not rank in priority over the1st - 8th respondents' proprietary rights as beneficiaries to the estate of the deceased and their entitlement to pass title to the 9th and 10th respondents as of right on a willing buyer/willing seller basis.

On case law, **Mr. Kariuki** submitted that the case of **Mwangi & another versus Mwangi [1986] KLR 328,** is distinguishable from the circumstances obtaining in this appeal, as it concerned existence of a presumptive or constructive trust in favour of a person in occupation of land, a position not obtaining in this appeal as appellant's assertion of entitlement to a beneficial interest in the suit property resulting from a presumptive trust based on alleged possession and occupation of the suit property was highly contested by the 1st -8th respondents.

Mr. Kariuki therefore urged us to distinguish the threshhold set by the decision in the case of **Mutsonga versus Nyati [1984] KLR 425** and **Kanyi versus Muthiora [1984] KLR 712**, from the circumstances prevailing in this appeal as the appellant's alleged occupation of the suit property was highly contested. Secondly, to apply the threshold set by the case of **David Sironga ole Tukai versus Francis Arap Muge & 2 others [2014] eKLR** in which the Court of Appel stated that noncompliance with the mandatory provision of the Land Control Act is fatal to any sale of Agricultural land transaction.

Opposing the second ground of appeal, **Mr. Kariuki** submitted that both the doctrines of Equity, constructive trust and proprietary estoppel as well as the non-technicality principle in **Article 159 (2) (d)** of the Kenya Constitution 2010, relied upon by the appellant in support of his claim cannot apply as what the trial court determined were not matters based on technicalities but on substantive issues touching on the appellant's noncompliance with clear and concise substantive provisions of both the limitation of Actions and Land Control Act. On that account **Mr. Kariuki** urged us to dismiss the appeal.

Learned counsel, **Kariuki Mwangi** for the 9th and 10th respondents also opposed the appeal. **Mr. Mwangi** relied on the case of **Mukisa Biscuits Manufacturing Co. Limited versus West end Distributors Ltd [1969] EA 696**, on the threshold for sustaining a preliminary objection; the case of **Peters versus Sunday Post Limited [1958] EA424,** on the role of a first appellate Court; **Thuranira Kariuki versus Agnes Ncheche** Nyeri Civil Appeal No. 192 of 1996, **Mr. Mwangi**, for the submission that **section 4** of the Limitation of Actions Act Cap 22 of the laws of Kenya prohibits actions based on contract from being commenced after the expiry of six years from the date on which the cause of action accrued; the cases of **Stanley Mbugua Gachie versus Lakeli Waithera & 2 others [1997] eKLR;** and **Githu versus Katibi [1990] eKLR**, **Mr. Mwangi,** in support of the submission that both the purported application made on 21st December, 1995 attributed to the deceased and the consent purportedly granted on 20th August, 1997 contravened both the agreed period of 3 months' as set out in clause 4 of the sale agreement dated 3rd July, 1986 and the six (6) months period within which to obtain a transfer as provided for in section 6(1) of Land Control Act. Secondly, the existence of the said documents do not operate to aid the appellant's claim as they were found to be forgeries by a report filed in court on 23rd May, 2012 by the Criminal Investigation Department. Thirdly, the Secretary to the Land Control Board confirmed in a letter dated 17th July, 2012 that there were no minutes of the Laikipia Land Control Board confirming that any meeting of the Land Control Board was held on that date.

Mr. Mwangi also relied on the cases of **Beatrice Nyambura Mucheru versus Joyce Wanjiru Mucheru [2000] eKLR; Macharia Mwangi Maina & 87 others versus Davidson Mwangi Kagiri [2014] eKLR** and **David Sironga ole Tukai versus Francis Arap Muge & 2 others [2014] eKLR,** and submitted that reversing the trial court would be tantamount to allowing the appellant to flaut clear provisions of both the Limitation of Actions Act and the Land Control Act contrary to public policy requirement that the law should be obeyed, respected and observed.

On equitable rights, **Mr. Mwangi** submitted that the holding in the case of **Macharia Mwangi & 87 others versus Davidson Mwangi Kagiri [2014] eKLR,** decided on 22nd January, 2014, is no longer good law as the said decision was superceded by the later decision in the case of **David Sironga ole Tukai versus Francis Arap Muge & 2 others [2014] eKLR** delivered on 18th December, 2014, in which the Court of Appeal carried out an in in-depth analysis of various cases decided on the issue of consent of Land Control Board and came to the conclusion that the decisions before the **Macharia Mwangi Maina and 87 others versus Davidson Mwangi Kagiri** case (supra) were good law.

Mr. Mwangi also submitted that the appellant had no legitimate claim against the 9th and 10th respondents who are bonafide purchasers of the suit property from the 1st -8th respondents for value without notice. They are therefore entitled to the full enjoyment of all rights apertenent to the title acquired; that the 9th and 10th respondents carried out due diligence prior to the execution of the agreement of sale between them and the 1st -8th respondents which established that as at 15th July, 2008, the 1st -8th respondents were the rightful proprietors of the mother title with no inhibitions registered against the said mother title in favour of the appellant.

On technicalities, **Mr. Kariuki** associated himself fully with the submissions of **Mr**. **Jessee Kariuki** that **Article 159(2) (d)** of the Kenya Constitution 2010 refers to procedural technicalities, whereas what the trial court dealt with were not procedural technicalities but substantive issues of law touching on the appellant's noncompliance with the mandatory provisions of both the Land Control and the limitation of Actions Acts.

This is a first appeal. Our role as a first appellate Court is donated by **Rule 29(1)** of the Court of Appeal Rules (CAR). We take guidance on the precise nature of my mandate from numerous decisions of this Court. Among these is the case of **Sumaria & another versus Allied Industries Limited [2007] KLR1**, where this Court expressed itself as follows:

"Being a first appeal, the Court was obliged to consider the evidence re-evaluate it and make its own conclusion in mind that a

Court of Appeal would not normally interfere with a finding of fact by the trial court unless, it was based on a misapprehension of the evidence or that the Judge was shown demonstrated to have acted on a wrong principle in reaching the finding we did."

The appeal arises from the ruling of the trial court dated 28th March, 2014 sustaining the 1st -8th respondents' preliminary objections as supported by the 9th and 10th respondents, against the appellant's amended plaint. Ingredients for sustaining a preliminary objection are those enunciated by the predecessor of the Court in the **Locus Classicus** case of **Mukisa BiscuitS Manufacturers Co. Limited versus**

West End Distributors Limited [1969] EA696. At page 700, **Law, JA**: had this to say:

"So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of the pleading, and which is argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court, or plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."

Sir Charles NewBold, P. On the other hand, at age 701 had this to say:

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

We have considered the above threshold in light of the rival submissions as well as principles of law relied upon by the respective parties in support of their opposing positions on appeal as highlighted above. It is our observation that the above submissions went beyond the threshold for sustaining a preliminary objection as highlighted above as in our view, they touched on the merits of the respective parties' pleadings as filed before the trial court. We remind ourselves that since the merits of the respective parties' pleadings were not interrogated by the trial court, we shall steer clear of the same and confine ourselves to the determination as to whether the 1st -8th respondents' preliminary objections sustained by the trial court met the threshold for sustaining a preliminary objection as enunciated in the **Mukisa Biscuits Manufacturers** case (supra).

Bearing the above in mind the issues that commend themselves for our determination in the disposal of this appeal are as follows: -

(1) What are the ingredients for sustaining a preliminary objection?

(2) Did the trial court identify, properly appreciate and apply those ingredients to the rival positions before arriving at the impugned conclusions?

(3) What order commends itself to be made in the determination of this appeal?

With regard to issue number 1, **t**he ingredients for sustaining a preliminary objection are those set out by **Sir Charles Newbold, P:** in the M**ukisa Biscuits case** (supra). That is, there must be demonstration that, **firstly;** the preliminary objection raises pure points of law. **Secondly,** that all the facts pleaded by the opposite party are correct. **Thirdly,** that there is no fact that needs to be ascertained.

We have revisited the record and appraised it on our own, in light of the above threshold for sustaining a preliminary objection. It is our finding that nowhere in the written submissions filed by the respective opposing parties before the trial court, and on the basis of which the 1st -8th respondents' preliminary objections were canvased, addressed the trial court on the threshold for sustaining a preliminary objection. Likewise, the trial court in the impugned ruling made no reference to the threshold for sustaining a preliminary objection before arriving at the impugned decision. We find the same trend on appeal. In fact, **Mr. Gikaria** for the appellant and **Mr. Kariuki** for the 1st -8th respondents respectively, made no mention of the threshold for sustaining a preliminary objection in their entire respective submissions on appeal. It is only **Mr. Kariuki** for the 9th and 10th respondents who besides submitting that the threshold for sustaining a preliminary objection is as set out in the **Mukisa Biscuits Manufacturing** case (supra) did not go further to elaborate on how that threshold was satisfied by the 1st -8th respondents' preliminary objection to warrant their being sustained by the trial court in the impugned ruling which he urged us to affirm.

Our understanding of the threshold set by **Sir. Charles Newbold P.:** in the **Mukisa Biscuits case** (supra) is that, all the three ingredients identified above must be satisfied before a preliminary objection can be sustained. Bearing the above principle in mind, it is our finding that issue of want of both a sustainable cause of action and want of jurisdiction in the Court to entertain a claim for the said cause of action for the reason of noncompliance with the provisions of the limitation of Actions Act (Cap 22) of the Laws of Kenya on the one hand and the land Control Act Cap 302 of the Laws of Kenya on the other hand as raised in both preliminary objections were both issues of pure points of law. We therefore find that the 1st -8th respondents' preliminary objections satisfied the 1st ingredient for sustaining a preliminary objection.

With regard to the satisfaction of the 2nd ingredient, we find this threshold was not satisfied. Our reasons for finding so is that, the thread running through the submissions of learned counsel for the respective parties both before the trial court and now on appeal is that, there is serious contest by all the respondents of certain aspect of facts as pleaded by the appellant who is the opposite party to the 1st -8th respondent's preliminary objection as supported by the 9th -10th respondents. We identified numerous of such contested factual factors in the course of our assessment of the record. We however, find it prudent to highlight a few by way of illustration. These related to contentions as to whether: payment of the purchase price in instalments and the need to pay off the deceased's indebtedness to the SFT, to facilitate the SFT to discharge its charge over the mother title before the deceased could initiate the process of Land Control Board consent for both the subdivision and transfer of the suit property to the appellant operated to arrest the completion period as stipulated for both in clause 4 of the contract of sale dated 3rd July, 1986 on the one hand and the mandatory statutory six (6) month limitation period as provided for in section 6

(1) of the Land Control Act, from running against the appellant; appellant took vacant possession/occupation of the suit property from the deceased upon execution of the sale agreement, dealt with it as his own and therefore acquired a beneficial interest resulting in the creation of a presumptive/implied trust not subject to the limitation of Actions Act and therefore enforceable in law; the 1st -8th respondents were guilty of concealment of material particulars before the Succession Court; registration of an assent on 15th July,2008 in favour of the 1st -8th respondents and subsequent entries made on the said mother title are all illegal, null and void and are therefore amenable for cancellation; specific performance can issue to compel the 1st respondent in his capacity as the administrator/legal representative of the estate of the deceased to specifically perform the agreement of sale dated 3rd July, 1986; the deceased executed Land Control Board consent application form dated 21st December, 1995 intending to transfer the suit property in favour of the appellant; the deceased's signatures on the aforesaid form is a forgery; a Land Control Board meeting was held on 20th August, 1997 sanctioning the transfer of the suit property from the deceased to the appellant; minutes of the Land Control Board meeting held on 20th August, 1997 exist/do not exist; entry number 487/97 on the mother title at the Laikipia Lands Registry was a fabrication intended for purposes of defeating justice; the deceased signed any transfer instrument for the transfer of the suit property in favour of the appellant before **Lucy Mwai** Advocate; the letter of the area Land Registrar **Mrs. Beatrice W. Mwai** dated 28th July, 2012 indicating that entry No. 487/97 exists in their records held at the Laikipia Lands Registry and therefore authentic, vitiated the earlier letter dated 17th July, 2012 issued by the Secretary to the Land Control Board indicating that no minutes of the land control board meeting held on 20th August, 1997 exists in their records.

Besides the above contested factual factors, it is also our observation that the applicable principles of law as borne out by the case law relied upon by the respective parties in their respective opposing submissions highlighted above are also in dispute. It is however our finding that since conflict over applicable principles of law is not one of the ingredients for sustaining a preliminary objection, we shall confine ourselves to the application of the above identified threshold for sustaining a preliminary objection to the factual factors identified as contested by the opposite party in determining as to whether the impugned decision of the trial court met the threshold for sustaining a preliminary objection or not.

Bearing all the above in mind, our take with regard to satisfaction of ingredient number 2 of the threshold for sustaining a preliminary objection is that no number of factors is required to prove non-satisfaction of this ingredient. Even one contested factor would suffice to prove none satisfaction of this ingredient. Herein, we have identified numerous contested factors as set out above, which leads us to the only logical conclusion that ingredient 2 of the threshold for sustaining a preliminary objection was not satisfied.

Turning to satisfaction of ingredient number 3, it is also our finding that this threshold too was also not satisfied. Our reasons for saying so is that all the contested factual factors we have identified above as basis for finding that ingredient number 2 for sustaining a preliminary objection was not satisfied also operate as basis for finding non satisfaction of ingredient number 3 for sustaining a preliminary objection. Our reason for taking the above stands is that, the fact of existence of contested factors in itself called for a merit determination to ascertain the veracity or otherwise of those contested facts.

The above finding now brings us to the disposal of the last issue. Having stated above that the correct position in law is that, all the three ingredients forming the threshold for sustaining a preliminary objection must be satisfied before a preliminary objection can be sustained, it therefore follows that since only one of the three ingredients was satisfied by the 1st-8th respondents' preliminary objection, the trial court fell into error when it sustained the 1st -8th respondents' preliminary objections for the reasons given above.

The upshot of all the above assessment and reasoning is that the appeal therefore has merit. It is accordingly allowed on the following terms:

(1) The order of the trial court dated 28th March, 2012 be and is hereby set aside and substituted with an order dismissing the 1st -8th respondents' preliminary objections dated 5th October 2012, as supported by the 9th -10th respondents.

(2) The suit is restored and remitted back to the ELC court Nyeri for hearing and disposal on its merits by a Judge other than, **A.O. Obwayo, J.**

(3) In view of the length of time the litigation has taken, we direct that the matter be expeditiously processed through pretrial procedures and be set down for hearing within ninety (90) days of the date of the Judgment.

(4) Costs of the appeal to abide the outcome of the trial at the ELC.

The Judgment is signed under **Rule 32(3)** of the Court of Appeal Rules (CAR), since the Hon. Mr. Justice **P.N. Waki, JA** ceased to hold office of Judge of Appeal upon retirement from service.

Dated and Delivered at Nairobi this 22nd day of November, 2019.

R.N. NAMBUYE

….....….....……

JUDGE OF APPEAL

F. SICHALE

……

JUDGE OF APPEAL

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

DEPUTY REGISTRAR