Karanja v Mmachira (Environment & Land Case E054 of 2023)
[2024] KEELC 6930 (KLR) (22 October 2024) (Judgment)

Neutral citation: [2024] KEELC 6930 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE E054 OF 2023

JO MBOYA, J

OCTOBER 22, 2024

BETWEEN

AMINAH ABDILAHI KARANJA ..... APPELLANT

AND

JOHN PATRICK MMACHIRA ..... RESPONDENT

JUDGMENT

1. The Appellant herein filed an application dated the 2nd September 2022 before the Chief Magistrate's Court and wherein same [Appellant] sought to have the Respondent's suit struck out for inter-alia being time barred. The said application was heard and disposed of vide ruling rendered on the 24th November 2023.

2. Following the delivery of the ruling under reference, the Appellant herein felt aggrieved and/or dissatisfied and thereafter proceeded to and filed the memorandum of appeal dated the 29th November 2023.

3. The memorandum of appeal contains various grounds. For ease of reference and appreciation the grounds adverted to are as hereunder;

    i. The Honourable Magistrate erred in law and in fact in failing to consider and appreciate that the action herein is founded on the contract between the appellant and the respondent herein dated 2nd August 2008 which was executed on the same date.

    ii. The Honourable Magistrate erred in law and in fact in failing to appreciate that the completion date of the said agreement was 90 days from the date of execution

    iii. The Honourable Magistrate erred in law and in fact in failing to appreciate the fact that the consent of the Land Control Board was never sought and the balance of the purchase price

was never paid within the prescribed period, therefore the respondent was in breach of the said agreement.

iv. The Honourable Magistrate erred in law and in fact in failing to consider that the suit herein is time barred and that same was filed after the six years from the date on which the cause of action accrued.

v. The Honourable Magistrate erred in law and in fact in failing to appreciate the respondent had no capacity to bring any cause against the appellant regarding the contracts in the plaint as the right to sue [for a permanent injunction order, a specific performance of contract against the appellant and an alternative prayer of payment of the estimated market value of the suit property together with interest] had lapsed.

vi. The Honourable Magistrate erred in law and in fact in failing to consider the application by the appellant on its merits and stating that the suit was filed within the prescribed period

4. The appeal beforehand came up for directions on the 11th June 2024, whereupon the advocates for the respective parties confirmed that the record of appeal had been duly filed and served. Furthermore, the advocates covenanted to canvass and dispose of the appeal vide written submissions to be filed and exchanged.

5. Arising from the foregoing, the court proceeded to and certified the appeal as ready for hearing. In addition, the court adopted the agreement by the parties to have the appeal canvassed by way of written submissions. Thereafter, the court circumscribed the timelines for the filing and exchange of the written submissions.

6. Pursuant to the directions by the court, the Appellant filed written submissions dated the 25th July 2024, whereas the Respondent filed written submissions dated the 14th August 2024. Both sets of written submissions form part of the record of the court.

Parties' Submissions:

a. Appellant's Submissions:

7. The Appellant filed written submissions dated the 25th July 2024, and in respect of which same [Appellant] has argued the grounds of appeal seriatim. In this regard, the court shall proceed to highlight the submissions on behalf of the Appellant.

8. Firstly, learned counsel for the Appellant has submitted that the learned trial magistrate erred in law in finding and holding that the Respondent's claim before the court touched on and concerned recovery of land. Furthermore, learned counsel contended that the learned trial magistrate also erred in finding and holding that insofar as the suit by the Respondent concerned recovery of land, same [suit] was therefore filed within the timelines prescribed vide the provisions of Section 7 of the Limitation of Action Act, Chapter 22 Laws of Kenya.

9. Additionally, learned counsel for the Appellant submitted that in finding and holding that the Respondent's suit was for recovery of land, the learned trial magistrate misapprehended and misconceived the substratum of the Respondent's suit.

10. At any rate, learned counsel for the Appellant has submitted that the Respondent's suit sought for a primary order for specific performance and hence same [suit] was founded on contract. In this regard, learned counsel for the Appellant has submitted that the suit by and on behalf of the Respondent ought to have been filed within 6 years from the date of the contract.

11. In a nutshell, learned counsel for the Appellant has therefore contended that the Respondent's suit was therefore time barred as at the time when same was filed. To this end, learned counsel for the Appellant has cited and referenced the provisions of Section 4[1] of the *Limitation of Actions Act*, Chapter 22 Laws of Kenya.

12. On the other hand, learned counsel for the Appellant has also cited and referenced various decisions including E Torgbor v Ladislaus Odongo Ojuok [2015]eKLR and Gathoni v Kenya Cooperative Cremaries Ltd [1982]eKLR, respectively.

13. Secondly, learned counsel for the Appellant has submitted that the learned trial magistrate erred in law in failing to find and hold that the suit premised on the sale agreement between the Appellant and the Respondent was time barred. In this regard, learned counsel for the Appellant has adverted to the fact that the agreement had a completion date which was 90 days from the date entry into the sale agreement.

14. Owing to the fact that the learned trial magistrate misapprehended the completion date of the agreement, learned counsel for the Appellant has ventured forward and contended that the learned trial magistrate failed to appreciate that the Respondent herein had breached the terms of the sale agreement by failing to pay the balance of the purchase price within the set timelines.

15. Thirdly, learned counsel for the Appellant has submitted that the learned trial magistrate also erred in law in not finding and holding that the sale agreement was subject to the provisions of *Land Control Act*, Chapter 302 Laws of Kenya. In particular, it was contended that insofar as no land control board consent was procured and obtained within the 6-months statutory period, the sale agreement was rendered null and void. In this respect, Learned Counsel for the Appellant invoked and relied on the provisions of section 8 of the *Land Control Act*, Chapter 302, Laws of Kenya.

16. Fourthly, learned counsel for the Appellant has submitted that the learned trial magistrate erred in law in failing to appreciate the legal issues raised by the Appellant at the foot of the application dated the 2nd September 2022. In this regard, it has been contended that having failed to appreciate the issues raised at the foot of the application, the learned trial magistrate erred in not considering the merits of the application.

17. Arising from the foregoing, learned counsel for the Appellant has therefore contended that the ruling by the learned trial magistrate is therefore erroneous and thus ought to be set aside. Furthermore, learned counsel for the Appellant has implored the court to proceed and allow the appeal and by extension to allow the application dated the 2nd September 2022.

b. Respondent's Submissions:

18. The Respondent filed written submissions dated the 14th August 2024, and wherein the Respondent has raised and canvassed six [6] pertinent issues for consideration and determination by the court.

19. Firstly, learned counsel for the Respondent has submitted that the Respondent's suit was filed within the statutory timelines and hence the suit was not time barred. In this regard, it has been contended that though the agreement was entered into and executed on the 2nd August 2008, the cause of action did not arise on the date of execution of the agreement in the manner posited by Learned Counsel for the Appellant.

20. To the contrary, learned counsel for the Respondent has submitted that the cause of action pertaining to and concerning the subject matter arose/accrued when the Respondent discovered that the

Appellant had already procured the certificate of title in her name together with one, namely, Peter Njenga Waweru albeit without informing the Respondent.

21. According to the Respondent, the cause of action as pertains to the suit matter therefore accrued/arose on the 24th July 2014, same being the date when the Appellant procured and obtained the certificate of title in respect of the suit property, albeit without due notice to the Respondent herein.

22. Other than the foregoing, learned counsel for the Respondent has submitted that a cause of action based on contract does not arise on the date of execution of the contract but on the date when the contract is breached. Consequently, and in this regard, learned counsel for the Respondent has reiterated the finding by the learned trial magistrate that the suit was filed within the prescribed statutory duration.

23. In support of the submissions that the suit was filed within the statutory duration, learned counsel for the Respondent has referenced various decision including Diana Katumbi Kiio v Reuben Musyoki Muli and Ann Murambi v John Mnyau & Another [2018]eKLR, respectively.

24. Secondly, learned counsel for the Respondent has submitted that though the parties agreed that the completion date was 90 days from the date of execution, however, the parties did not make time to be of essence. In this regard, it has been contended that if the Appellant was keen to make time to be of essence, then it behooved the Appellant to issue and serve a completion notice.

25. Nevertheless, learned counsel for the Respondent has submitted that no such completion notice was ever served by the Appellant herein. In this regard, learned counsel for the Respondent has therefore contended that the competition duration cannot be deployed for purposes of calculating the limitation period.

26. In support of the foregoing submissions, learned counsel for the Respondent has cited and referenced inter-alia the case of Pius Francis Omweri v Shadrack K Kiptugen [2022] KECA 413 [KLR]; Simson v Connoly [1953] 2 ALL ER 474; George Njenga Kagai v Samuel Kabi Njoroge & Another [2019]eKLR and Gurdev Singh Birdi & Narinda Singh Gatorah [Suing as Trustees of Ramgaria Institute of Mombasa] v Abubakar Madhbuti [1997]eKLR, respectively.

27. Premised on the foregoing, learned counsel for the Respondent has submitted that if the Appellant had intended to invoke and rely on the completion duration, it was incumbent upon same [Appellant] to issue and serve a completion notice and only then would time be made to be of essence.

28. Thirdly, learned counsel for the Respondent has submitted that the issue of Land Control Board consent was neither pleaded nor canvassed before the court of first instance. Besides, it has been contended that insofar as the issue of land control board consent was neither canvassed before the trial court, same [lack of consent] cannot therefore be raised for the first time in this appeal.

29. To this end, learned counsel for the Respondent has cited and referenced the holding in the case of Kenya Hotels Kenya Ltd v Oriental Commercial Bank Ltd [2018]eKLR, where the court found and held that a new issue which has not been canvassed before a court of first instance cannot be raised and canvassed for the first time in appeal.

30. Fourthly, learned counsel for the Respondent has also submitted that other than the fact that the issue of lack of consent was not raised before the trial magistrate, the same issue was neither pleaded nor adverted to in the statement of defence. In this regard, learned counsel for the Respondent has therefore submitted that having not impleaded the issue, the Appellant is prohibited from canvassing same by dint of Order 2 Rule 4[2] of the Civil Procedure Rules 2010.

31. Fifthly, learned counsel for the Respondent has also submitted that the Appellant herein cannot contend that the Respondent is the one who breached and violated the terms of the sale agreement by failing to pay the balance of the purchase price. To the contrary, learned counsel has posited that it is the Appellant who was guilty of breach of contract by inter-alia failing to discharge her contractual obligation in accordance with the terms of the contract under reference.

32. Finally, learned counsel for the Respondent has submitted that the Respondent's suit touched on and or concerned recovery of land. In this regard, counsel posited that a suit for recovery of land is guided and regulated by the provisions of Section 7 of the *Limitation of Actions Act*, Chapter 22 Laws of Kenya and not Section 4[1] thereof.

33. Based on the contention that the suit was for recovery of land, learned counsel for the Respondent has therefore invited the court to find and hold that the limitation period is therefore 12 years. In this regard, learned counsel for the Respondent has posited that the Respondent's suit was therefore filed timeously and in accordance with the law.

34. In view of the foregoing, learned counsel for the Respondent has therefore submitted that the ruling by the learned trial magistrate, which found and held that the suit was not time barred, is lawful. In this respect, counsel has implored the court to reaffirm the finding and holding by the trial magistrate.

35. In a nutshell, the Respondent has implored the court to find and hold that the appeal beforehand is devoid of merits. Consequently, the court has been invited to dismiss the appeal with costs.

Jurisdictional Posture:

36. The appeal beforehand is a first appeal from the decision of the court of first instance. By virtue of being a first appeal, this honourable court is vested with the requisite jurisdiction to review, re-evaluate and re-analyse the findings of the court of first instance and thereafter to arrive at independent conclusions, taking into account the evidence on record and the applicable laws.

37. Nevertheless, it is imperative to underscore that even though this court is clothed with jurisdiction to review, re-evaluate and re-analyse the findings and observations of the trial court, this court is however called upon to exercise necessary caution and circumspection. In addition, the court is called upon to defer to the findings of the trial court unless, the findings of the trial court are informed by extraneous factors or better still, are perverse to the evidence on record.

38. The scope and jurisdictional remit of this court whilst entertaining a first appeal has been elaborated upon and underscored in various decisions. In the case of Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123, where the principle was enunciated thus:

> " ...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this 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..."

39. Likewise, the extent and scope of the Jurisdiction of the first appellate court was also elaborated upon in the case of Abok James Odera T/A A.J Odera & Associates versus John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR, where the court held thus;

We also wish to be guided by the reasoning of this court in the case of Mwana Sokoni versus Kenya Business Limited (1985) KLR 931 page 934,934 thus:-

> " Although this court on appeal will not lightly differ from the Judge at first instance on a finding of fact, it is undeniable that we have the power to examine and re-evaluate the evidence on a first appeal if this should become necessary. As was said by the house of Lords in Sottos Shipping versus Sauviet Sohold, the Times, March 16,1983.
>
> "It is uncertain whether their Lordships should have reached the same conclusion on the evidence, but it is important that, sitting in the appellate court they should be over mindful of the advantages enjoyed of the trial Judge who saw and heard the witnesses and was in a comparably better position than the Court of Appeal to assess the significance of what was said, how it was said, and equally impotent what was not said"

Again in Peters versus Sunday Post Limited (1958) EA424, a decision of the Court of Appeal for Eastern Africa, Sir Kenneth O' Conner, P said at page 429:

> " It is a strong thing for an appellate court to differ from the finding on a question of fact of the Judge who tried the case and who has had the advantage of seeing and hearing and the witnesses"

40. Guided by the ratio decidendi in the decision [supra], this court is now well positioned to interrogate the ruling rendered by the Senior Principal Magistrate and to discern whether the magistrate took into account the relevant facts and the law or otherwise. In addition, this court would also interrogate whether the trial court properly conceived and thereafter applied the provisions of the *Limitation of Actions Act*, Chapter 22 Laws of Kenya.

Issues For Determination:

41. Having reviewed the pleadings filed; the contents of the Application dated the 2nd September 2022 and the response thereto and having taken into account the proceedings of the trial court and finally upon consideration of the written submissions filed by the advocates for the respective parties, the following issues do crystalize [emerge] and are thus worthy of determination;

    i. Whether the Respondent's suit vide Plaint dated 25th July 2018 was time barred or otherwise.

    ii. Whether the Appellant herein is at liberty to canvass and raise the issue of lack of land control board consent for the first time before this court or otherwise.

Analys And Determination:

Issue Number 1. Whether the Respondent's suit vide plaint dated 25th July 2018 was time barred or otherwise.

42. The Appellant and the Respondent entered into and executed a sale agreement dated the 2nd August 2008 and in respect of which the Appellant herein covenanted to sell to and in favour of the Respondent a portion of Land measuring half acre out of L.R No. Nairobi/Block 126/44 [hereinafter referred to as the suit property].

43. It is instructive to state that upon entry into and execution of the sale agreement, the Respondent paid to the Appellant the sum of Kes.300, 000/= only and which payment was duly acknowledged by the

Appellant. Besides, it is also acknowledged that the Respondent proceeded to and paid an additional Kes.100, 000/= only on the 29th August 2008.

44. Despite the entry into and execution of the sale agreement, it appears that the transaction was not concluded and thus the Respondent proceeded to and filed the suit before the Chief Magistrate's Court. For good measure, the Respondent herein sought various reliefs inter-alia an order for specific performance to compel the Appellant to perform her part of the contract and in particular to transfer half acre portion of the suit property to the Respondent.

45. Suffice it to point out, that upon the filing of the suit, the Appellant herein duly entered appearance and thereafter filed a statement of defence dated the 17th July 2019. Instructively, the Appellant denied the claims by the Respondent and furthermore contended that the Respondent's suit was statute barred.

46. For coherence, the contention pertaining to the suit being statute barred was adverted to at the foot of paragraph 16 of the statement of defence. Same stated as hereunder;

> 16. The Defendant further states that the Plaintiff's claim is statute barred.

47. Other than the foregoing, it is common ground that the Appellant filed an application dated the 2nd September 2022 and wherein the Appellant sought to have the Respondent's suit struck out on the basis that the suit was not only time barred but also constituted an abuse of the due process of the court.

48. Suffice it to point out that the Application by the Appellant was canvassed before the magistrate who thereafter rendered a ruling dated the 24th November 2023. Instructively, the learned magistrate found and held that the Respondent's suit concerned recovery of land and thus same [suit] was governed by the provisions of Section 7 of *Limitation of Actions Act*, Chapter 22 Laws of Kenya.

49. It is the said finding and holding by the learned magistrate that has precipitated and provoked the instant appeal. According to the Appellant, the suit beforehand touches on and concerns breach of the sale agreement [contract] and hence same [suit] ought to have been filed within 6 years from the date of execution of the sale agreement.

50. On the other hand, the Respondent contends that the suit beforehand touches on and concerns recovery of land. In this regard, it has been contended that the suit therefore ought to have been filed within 12 years in accordance with the provisions of Section 7 of the Limitation of Action Act.

51. On the other hand, the Respondent has also posited that even if the suit touches on and concerns breach of contract, the timeline for filing of the suit cannot be reckoned and/or computed from the date of execution of the sale agreement. To the contrary, it has been submitted that the timeline for filing of the suit will be computed from the date of breach of the contract. In any event, it has been contended that it is the breach of contract that births the cause of action.

52. Having reviewed the rival submissions by the parties, I beg to take the following position. It is common ground that the Appellant and the Respondent entered into a sale agreement dated the 2nd August 2008. Furthermore, the said sale agreement, contained various terms and clauses which were agreed upon by the parties.

53. In particular, the sale agreement under reference stipulated inter-alia that upon execution of the sale agreement, the vendor was obligated to undertake the subdivision and demarcation of the portion of land sold to the Respondent immediately. In addition, the subdivision/demarcation was to be done through a surveyor so as to facilitate the issuance of the title documents in favour of the purchaser.

54. Other than the clause which adverted to the foregoing, there was also clause 6 which stipulated as hereunder;

SUBPARA 6.

The vendor shall undertake the said subdivisions exercise and procurement of the title in respect of the plot being sold to the purchaser within a period of 90 days from the date of this agreement.

55. From the contents of clause 6 [whose details have been highlighted in the preceding paragraph], it is crystal clear that the sale agreement that was entered into between the Appellant and the Respondent contained a completion timeline. For good measure, the vendor was obligated to undertake the subdivision exercise and procurement of title documents in respect of the portion being sold to the Respondent within 90 days.

56. Suffice it to state that the subdivision in question and the procurement of title of the plot sold to the Respondent was never undertaken or procured within the stipulated duration. To the extent that the subdivision and the procurement of title were not done within the set timeline, what becomes apparent is that upon the lapse of the 90 days period, the contract stood breached by the Appellant. For good measure, the Appellant herein had not performed the obligations adverted to and highlighted at the foot of the sale agreement.

57. Insofar as the Appellant has not complied with and/or adhered to clause 6, the sale agreement stood breached and, in this regard, it behooved the Respondent to commence any civil proceedings on account of breach of contract. Instructively, the cause of action in favour of the Respondent accrued the moment the terms of the sale agreement were breached.

58. To my mind, the agreement having been entered into and executed on the 2nd August 2008, the 90-day duration which constituted the completion duration lapsed and/or extinguished on or about 2nd November 2008. In this regard, the Respondent was therefore at liberty to commence the civil proceedings.

59. I beg to state that the cause of action for breach of contract does not arise on the date when the contract was entered into and/or executed. However, the cause of action for breach of contract does arise and/or accrue the moment the contract is breached by either party. In this regard, the contract/sale agreement between the parties stood breached by the Appellant who did not comply with the stipulations at the foot of clause 6 thereof.

60. To underscore the legal position that a cause of action for breach of contract accrues upon the breach thereof and not from the date of execution, it suffices to cite and reference the decision in the case *Diana Katumbi Kiio v Reuben Musyoki Muli (Civil Appeal 211 of 2015)* [2018] KECA 860 (KLR) (Civ) (19 January 2018) (Judgment), where the court held thus;

> " 17. A cause of action in contract arises from breach of the contract and not at the time it is executed. According to the author in the Journal of International Banking and Financial Law: " What's the Limit" ([2007] 11 JIBFL 642:-
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> "In contract the cause of action accrues when the breach occurs, but in tort the cause of action accrues when damage is first sustained. The cause of action, whether in tort or contract, arises regardless of whether or not the claimant could have known about the damage."

We agree with that exposition.

61. The computation of time for filing of a suit for breach of contract was also adverted to in the case of Deposit Protection Fund Board in Liquidation of Euro Bank Limited (In Liquidation) vs Rosaline Njeri Macharia & Another [2016] eKLR. This Court stated:

> " As to whether the suit was statute barred under the *Limitation of Actions Act*, the suit was filed on 19th July 2007. By dint of paragraphs 24, 25, 26, 28, 29 and 30 of the plaint, the cause of action was pleaded to have accrued on 27th July 1999 when the alleged breach of contract occurred. As the breach was of a contract relating to lending of money whose security instrument is contested, section 4(1)(a) of the Limitations of Actions Act, Cap 22 requires that an action founded on contract may not be brought after the end of six years from the date on which the cause of action accrued. In this appeal, the "suit" having been instituted in 2007 when the accrual of the cause of action was in July 1999, it was clearly filed outside the six-year period and consequently was time barred, if indeed it was a suit."

62. Flowing from the foregoing exposition, I come to the conclusion that the cause of action founded on breach of contract in favour of the Respondent herein accrued immediately upon the breach of the contract by the Appellant. In any event, the breach of the contract by the Appellant arose when the Appellant failed to comply with and/or abide by clause 6 of the sale agreement, which circumscribed the timeline for undertaking various obligations.

63. Having found and held that the cause of action in favour of the Respondent arose immediately, clause 6 of the sale agreement was not complied with, the next question that merits determination is whether the suit beforehand was filed within the prescribed timeline.

64. To my mind, the Respondent's suit was based and founded on breach of contract. In this regard, the Respondent was obliged to file the suit within 6 years from the 2nd November 2008, same being the date when the cause of action accrued. [See *Pius Kimaiyo Langat v Co-operative Bank of Kenya Limited (Civil Appeal 48 of 2015*) [2017] KECA 152 (KLR) (Civ) (1 December 2017) (Judgment)].

65. The cause of action having accrued on or about the 2nd November 2008 [taking into account clause 6 of the sale agreement], the Respondent was under obligation to file the suit beforehand within 6 years. The 6-year duration would run up to and including the 1st November 2014 or thereabouts.

66. However, there is no gainsaying that the suit beforehand was not filed until the 2th July 2018. Quite clearly, by the time the suit was being filed, the prescribed timeline for filing a suit for breach of contract had lapsed. In this respect, it is imperative to reference the provisions of Section 4[1] of the *Limitation of Actions Act*, Chapter 22 Laws of Kenya as hereunder;

> 4. (1)(a):
> 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,.....

67. To the extent that the suit was filed long after the lapse of the statutory duration, there is no gainsaying that the suit was statute barred. Consequently, the Respondent herein stood non-suited and thus could not approach the court with a view of canvassing a stale claim.

68. The Limitation of Actions has the effect of extinguishing a claim and thereafter the claim which is extinguished becomes redundant, otoise and incapable of being ventilated before a court of law. In this

respect, it suffices to take cognizance of the decision in IGA v Makerere University [1972] EA 65 where Mustafa, J. A. held as follows:-

> " A Plaint which is barred by limitation is a Plaint "barred by law". Reading these provisions together it seems clear to me that unless the appellant in this case had put himself within the limitation period by showing grounds upon which he could claim exemption the Court "shall reject" his claim. The appellant was clearly out of time, and despite opportunity afforded by the Judge he did not show what grounds of exemption he relied on, presumably because none existed. The limitation Act does not extinguish a suit or action itself but operates to bar the claim or remedy sought for, and when a suit is time barred, the Court cannot grant the remedy or relief sought."
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> Law, Ag. V. P. in the same case inter alia stated thus:
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> > " ... The effect then is that if a suit is brought after the expiration of the period of limitation, and this is apparent from the Plaint, the Plaintiff must be rejected."

69. The effect[s] of the statute of limitation on a cause of action was also highlighted in the case of Dhanesvar V Mehta vs. Manilal M Shah [1965] EA 321 where it was stated:

> " The object of any limitation enactment is to prevent a plaintiff from prosecuting stale claims on the one hand, and on the other hand to protect a defendant after he had lost the evidence for his defence from being disturbed after a long lapse of time. The effect of a limitation enactment is to remove remedies irrespective of the merits of the particular case".

70. Other than the foregoing decisions, the implication of the law of limitation on a cause of action was also adverted to in the case of Gathoni vs Kenya Cooperative Creameries Limited (Civil Application No. 122 of 1981)[1982] eklr:

> " The law on limitation 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."

71. From the foregoing analysis, it is my finding and holding that the Respondent's suit which essentially touched on and concerned breach of contract, was filed outside the prescribed timeline. In this regard, the Respondent's suit was statute barred by dint of Section 4[1] of the *Limitation of Actions Act*, Chapter 22 Laws of Kenya.

72. Before departing from this issue, it is apposite to consider the finding and holding by the learned trial magistrate that the suit by the Respondent for recovery of land and not for breach of contract. In this regard, the learned magistrate ventured forward and applied the provisions of Section 7 of the Limitation of Action Act and thereafter held that the suit was filed within the prescribed timeline.

73. To start with, a suit for recovery of land, which is underpinned by the provisions of Section 7 of the Limitation of Action Act, [supra] can only be commenced by the registered owner of the land or his/her legal representative. In this regard, the pre-supposition is that the property belonged to the person but same has since been trespassed upon by a third party and hence the necessity for recovery.

74. Put differently, recovery of the suit property denotes an action being taken by a person who was hitherto the owner or proprietor or better still a legal representative thereof, but who has since been disposed of the property by a third party.

75. Recovery of land is defined by google as hereunder;

> " Recovered the lands" means to regain or reclaim control or ownership of a piece of land that was lost or taken away before. This can occur in various ways, such as through legal

76. To my mind, the Respondent herein had never owned the portion of land which was being sold unto him [Respondent] at the foot of the sale agreement dated the 2nd August 2008. To the extent that the Respondent had never owned the land in question, same could not seek to purport to file any claim for recovery of land.

77. At any rate, it is not lost on this court that the Respondent herein did not file a suit for recovery of land in the manner adverted to by the learned magistrate. To the contrary, the Respondent's suit sought for an order of specific performance. Simply put, the Respondent appreciated and acknowledged that the suit property was owned by the adverse party but nevertheless sought to compel the adverse party to perform her part of the bargain.

78. I am afraid that the invocation and reliance on the provisions of Section 7 of the *Limitation of Actions Act*, Chapter 22, Laws of Kenya, by the learned magistrate and the finding attendant thereto, were based on misapprehension as pertains to the cause of action that was impleaded by the Respondent and the import of the said provisions of the law.

79. Arising from the foregoing analysis, my answer to issue number one [1] is therefore fourfold. Firstly, the Respondent's claim was based on breach of contract. Instructively, it is the said contract that the Respondent was seeking to compel the Appellant to perform and hence the prayer for specific performance.

80. Secondly, the cause of action in favour of the Respondent accrued and arose immediately the Appellant failed to comply with the provisions of clause 6 of the sale agreement. For coherence, the provisions of clause 6 of the sale agreement were/are clear. In any event, the said clause 6 made the sale agreement time bound and by extension time was therefore of essence.

81. Thirdly, the Respondent's suit was not a suit/claim for recovery of land. For good measure, one can only endeavour to recover land, if same had hitherto been the registered owner thereof. However, where the rights of the claimant have not accrued, no cause of action for recovery of land can arise and/or ensue. [See the decision of the Court of Appeal in Nelson Kazungu Chai and Others versus Pwani University [2017]eklr]. [See also the decision of the Court of Appeal in Kenya Forest Service versus Rutongot Farm Limited [2015]eklr]

82. Fourthly, the Respondent's suit, which was essentially a suit for breach of contract was time barred by the time same [suit] was filed. To this end, the Respondent was non-suited by dint of Section 4[1] of the *Limitation of Actions Act*, Chapter 22, Laws of Kenya.

Issue Number 2

Whether the Appellant herein is at liberty to canvass and raise the issue of lack of land control board consent for the first time before this court or otherwise.

83. Other than the question of limitation, which has been canvassed in the preceding paragraphs, the Appellant also contended that the learned magistrate erred in law in not finding and holding that the Respondent's claim to the suit property or the portion thereof was barred by the provisions of the *Land Control Act*, Chapter 302 Laws of Kenya.

84. According to the Appellant, the transaction pertaining to and concerning the suit property was a controlled transaction. In this regard, the Appellant contends that by virtue of being a controlled transaction, it was therefore imperative that the land control consent be procured and obtained in accordance with Section 6 of the said Act.

85. Nevertheless, learned counsel for the Appellant contends that the requisite land control board consent was neither procured nor obtained and hence the sale agreement/transaction was rendered void by dint of Section 8 of the *Land Control Act*, Chapter 302, Laws of Kenya.

86. On the other hand, the Respondent has contended that the question of land control board consent was neither pleaded by the Appellant at the foot of the statement of defence or otherwise. Furthermore, it has also been contended that the issue of lack land control board consent was also never canvassed before the learned magistrate.

87. Additionally, learned counsel for the Respondent has submitted that the issue of land control board consent is being raised and adverted to before this court for the first time. In this regard, learned counsel for the Respondent has posited that the issue of land control board consent is therefore misconceived.

88. As concerns the question of land control board consent, I beg to address same is a three – pronged manner. Firstly, the issue of land control board consent was neither adverted to nor contained in the body of the sale agreement dated the 2nd August 2008. To the extent that the issue of land control board consent was never articulated in the sale agreement, the Applicant herein cannot advert to same. In any event, an endeavour to raise and canvass the issue of land control board consent would be tantamount to unilateral amendment of the sale agreement.

89. Suffice it to point out, that a party to a sale agreement and/or contract is bound by the terms thereof. Consequently, no party can purport to single handedly amend a contract by introducing a new term and/or clause. [See *Centurion Engineers & Builders Limited v Kenya Bureau of Standards (Civil Appeal E398 of 2021*) [2023] KECA 1289 (KLR) (27 October 2023) (Judgment)]

90. Secondly, the question of lack of the Land Control Board Consent is a question which ought to have been pleaded by the Defendant. In this regard, it suffices to reference the provisions of Order 2 Rule 4 of the Civil Procedure Rules, 2010, which provides as hereunder;

> [Order 2, rule 4.] Matters which must be specifically pleaded.
>
> 4. (1) 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.
>
> (2) Without prejudice to subrule (1), a defendant to an action for the recovery of land shall plead specifically every ground of defence on which he relies, and a plea that he is in possession of the land by himself or his tenant shall not be sufficient.

91. Finally, it is also important to underscore that the Appellant herein cannot raise and canvass a new issue whether of law or otherwise for the first time before the appellate court. Suffice it to state that the only exception to the general rule is a question or issue concerning jurisdiction.

92. Without belabouring the point, it is instructive to take cognizance of the holding in the case of *Kenya Commercial Bank Ltd v Osede (Civil Appeal 60 of 1982)* [1982] KECA 35 (KLR) (29 December 1982) (Judgment), where the court held as hereunder;

> In the recent case of Balchin v Buckle (Times) June 1, 1982 (a case relating to the (hitherto overlooked) non-registration of a covenant), it was held that where the right of appeal is statutory, it is to be confined to points of law raised before and decided by the trial Judge. Stephenson LJ said:
>
> "It (has) been clear for nearly a century, and perhaps more, that the litigant could not take a completely new point of law for the first time on appeal and the Court of Appeal had no jurisdiction to decide a point which had not been the subject of argument and decision in the County Court.
>
> There were two exceptions to the ban on considering a point not considered in the County Court. If the County Court had done something which was illegal or outside its jurisdiction, in either case whether or not the appellant took the point the Court of Appeal could and must reverse the decision of the County Court: Oscroft v Benabo [1967] 1 WLR 1087."

93. Arising from the foregoing, it is my finding and holding that it is not open for the Appellant herein to raise and canvass a new point of law which was neither pleaded nor canvassed before the learned magistrate. In this regard, the ground of appeal premised on lack of land control board consent is misconceived and legally untenable.

Final Disposition:

94. Flowing from the discussion [details contained in the body of the judgment], it must have become crystal clear that the Respondent's suit was filed outside the prescribed timelines and hence same [suit] was statute barred.

95. On the other hand, it also apparent that the finding and holding by the learned magistrate that the Respondent's suit was for recovery of land and thus anchored on Section 7 of the Limitation of Action Act, was misconceived and erroneous.

96. In the premises, the final orders that commend themselves to this court are as hereunder;

    i. The Appeal herein is successful and same be and is hereby allowed.

    ii. Consequently, the Ruling of the learned magistrate rendered on the 24th November 2023 be and is hereby set aside.

    iii. That the Appellant's application dated the 2nd September 2022 be and is hereby allowed.

    iv. The Respondent's suit vide Milimani MCELC No. 68 of 2018 be and is hereby struck out.

    v. The Appellant be and is hereby awarded half cost of the appeal; and costs of the proceedings in the Chief Magistrate's Court.

97. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF OCTOBER 2024.

OGUTTU MBOYA

JUDGE.

In the Presence of:

Benson - Court Assistant.

Ms. Waweru for the Appellant

Ms. Kinyua for the Respondent