



REPUBLIC OF KENYA



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**Kassim v Sandhu (Environment and Land Appeal E015 of 2023)  
[2025] KEELC 5199 (KLR) (10 July 2025) (Judgment)**

Neutral citation: [2025] KEELC 5199 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT AND LAND APPEAL E015 OF 2023**

**SO OKONG'O, J  
JULY 10, 2025**

**BETWEEN**

**SHABBAN OPIYO KASSIM ..... APPELLANT**

**AND**

**BALBIR SINGH SANDHU ..... RESPONDENT**

*(Being an appeal against the judgment and decree of Hon. T.A. ODERA CM delivered on 8th March 2023 in Kisumu CMC ELC No. 415 of 2018, Shabban Opiyo Kassim v. Balbir Singh Sandhu)*

**JUDGMENT**

1. This appeal is against the judgment delivered by Hon. T.A. Odera, CM on 8<sup>th</sup> March 2023 in Kisumu CMC ELC No. 415 of 2018 (hereinafter referred to as “the trial court”). The Appellant brought a suit against the Respondent at the trial court through a plaint dated 12<sup>th</sup> September 2018. The Appellant averred that at all material times, the Appellant’s father, Kassim Were Abdalla was the owner of all that parcel of land known as Kisumu/Kogony/2678 (hereinafter referred to as “the suit property”). The Appellant averred that the suit property was fraudulently hived off from the Appellant’s father’s hitherto larger ancestral parcel of land known as Kisumu/Kogony/2670 (hereinafter referred to as “Plot No. 2670”) and registered in the name of the Respondent. The Appellant averred that Plot No. 2670 had been subdivided into several portions. The Appellant averred that his father had entered into an agreement with the Respondent in 1982 to sell to the Respondent a portion of Plot No. 2670, but the sale was not completed. The Appellant averred that the Respondent, having failed to legally acquire a portion of Plot No. 2670, embarked on a fraudulent scheme to grab and register part of Plot No. 2670 in his name, which he succeeded in doing as aforesaid.
2. The Appellant averred that the Respondent claimed to have purchased the suit property from Vitalis Ndolo Akelo. The Appellant averred that Vitalis Ndolo Akelo had attempted unsuccessfully to acquire Plot No. 2670. The Appellant averred that Vitalis Ndolo Akelo’s fraudulent registration as the owner



of Plot No. 2670 was cancelled by the Land Adjudication Officer on 25<sup>th</sup> January 1985. The Appellant averred that there was no way Vitalis Ndolo Akelo could have sold a portion of Plot No. 2670 to the Respondent while he had no title to it. The Appellant prayed for judgment against the Respondent for;

1. A declaration that the land parcel Kisumu/Kogony/2678 (the suit property) belonged to the Appellant's father, Kassim Were Abdalla.
  2. Mesne profits for the period the Respondent had been in unlawful occupation of the suit property, together with interest.
  3. Costs of the suit.
3. The Respondent filed a statement of defence dated 22<sup>nd</sup> October 2018. The Respondent denied all the allegations made against him by the Appellant in the plaint. The Respondent denied that the Appellant's father was the owner of the suit property and averred that he was the registered owner of the suit property. The Respondent averred that the suit property was separate and distinct from Plot No. 2670 owned by the Appellant's father. The Respondent averred that the suit property was neither carved from nor a subdivision of Plot No. 2670. The Respondent averred that the suit property was acquired by him from the former owner, Ndolo Akelo, deceased, through an objection during the land adjudication and the same was registered in his name as the first registered owner. The Respondent averred that the Appellant was not entitled to the reliefs sought against the Respondent. The Respondent averred that the Appellant's suit against him was time-barred. The Respondent averred that there had been several suits between the Appellant's father and the Respondent, which the Appellant failed to disclose to the court. The Respondent urged the court to dismiss or strike out the Appellant's suit with costs.
4. The Appellant filed a reply to the Respondent's defence on 24<sup>th</sup> May 2019, in which he joined issue with the Respondent in his defence save for the admissions. The Respondent made an application dated 24<sup>th</sup> November 2020 seeking leave to amend the defence to plead a counterclaim, but the application was withdrawn on 22<sup>nd</sup> April 2021.
5. The trial court heard the matter and delivered a judgment on 8<sup>th</sup> March 2023. The trial court found the Appellant's suit not proved and dismissed the same with costs. The trial court made a further finding that the Respondent had proved his counterclaim against the Appellant partly. The trial court issued; a permanent injunction restraining the Appellant from entering upon, remaining on, developing, defacing the boundaries or beacons or dealing with the suit property, an order compelling the Appellant to vacate the suit property and demolish all the illegal structures he had erected thereon, and a declaration that the suit property was separate and distinct from land parcel, Kisumu/Kogony/2670 or any titles derived therefrom. The trial court framed several issues for determination. On the issue of whether the Appellant's suit was time-barred, the trial court first held that the suit was not time-barred because the Appellant had sought and obtained leave on 13<sup>th</sup> September 2018 to file the suit. However, later in the same judgment, the trial court found that the Appellant's suit was time-barred under Section 7 of the *Limitation of Actions Act*, Chapter 22 Laws of Kenya. The trial court found that the Appellant's father discovered the alleged fraudulent registration of the suit property in the name of the Respondent in 2003 and did not bring the suit until 2018 after a lapse of the 12-year limitation period. On the issue of whether fraud was properly pleaded by the Appellant, the trial court found that the Appellant had pleaded fraud but did not set out the particulars thereof as required under the law. The trial court found that this omission was fatal to the Appellant's claim which was based on fraud. The trial court held that the Appellant did not prove the fraud alleged against the Respondent to the required standard. The trial court having found that the Appellant did not prove fraud in the acquisition of the suit property by the Respondent, held that the Respondent was the



lawful owner of the suit property. On whether the Appellant had encroached on the land owned by the Respondent, the court found that there was no evidence in proof of the alleged encroachment. On whether the suit property and Plot No. 2670 were separate and distinct, the trial court held in the affirmative. On whether the Respondent was entitled to an injunction restraining the Appellant from interfering with the suit property, the trial court held that since the Respondent had proved that he was the lawful owner of the suit property, he was entitled to peaceful enjoyment of the property and as such a case for injunction had been made against the Appellant. It was on the basis of the foregoing findings and holdings that the trial court dismissed the Appellant's suit and entered judgment for the Respondent against the Appellant on the terms mentioned earlier in the judgment.

6. The Appellant was aggrieved by the decision of the trial court and preferred the present appeal. The Appellant filed a Memorandum of Appeal dated 5<sup>th</sup> April 2023, which was amended on 6<sup>th</sup> October 2023. In his amended Memorandum of Appeal, the Appellant challenged the judgment of the trial court on the following grounds;
  1. The Learned Trial Magistrate erred both in law and fact by finding that the suit was time barred whereas the Plaintiff had obtained leave to file the suit out of time in 2018 before filing the suit.
  2. The Learned Trial Magistrate erred both in law and fact by finding that the suit property was transferred to the Respondent by Ndolo Akelo, yet no evidence to that effect was produced in court.
  3. The Learned Trial Magistrate erred both in law and fact by finding that land can be transferred through an objection.
  4. The Learned Trial Magistrate erred both in law and fact by believing and relying on the evidence of the Respondent to the effect that the documents relating to the transfer of the suit property to him got burnt without evidence to corroborate the same, and which evidence was also contrary to DW2's evidence that the suit property was transferred to the Respondent through an objection.
  5. The Learned Trial Magistrate erred both in law and fact by relying on the evidence of DW2, although DW2 had failed to produce evidence showing that the suit property existed and was adjudicated.
  6. The Learned Trial Magistrate erred both in law and fact by failing to apply Section 26(1) of the *Land Adjudication Act*.
  7. The Learned Trial Magistrate erred both in law and fact by failing to find that there was a glaring inconsistency between the dates when the Respondent's alleged objection was determined and when the name of Ndolo Akelo was cancelled from the adjudication record.
  8. The Learned Trial Magistrate erred both in law and fact by failing to find that the Respondent's claim that he lodged an objection with the adjudication officer leading to the cancellation of the registration of Ndolo Akelo and insertion of his name in the adjudication record was suspect and lacked legal backing.
  9. The Learned Trial Magistrate erred both in law and fact by failing to find that Ndolo Akelo had no land to sell to the Respondent after 25<sup>th</sup> January 1981 when objection case No. 9 of 1983 was determined in favour of the Plaintiff's father.
  10. The Learned Trial Magistrate erred both in law and fact by failing to find that there was no way that the suit property could border parcel No. 2670.



11. The Learned Trial Magistrate erred both in law and fact by failing to find that the Respondent confirmed in cross-examination that he wrote a letter to Kogony Land Council of Elders that elicited a response which gave a clear picture of how the suit property was created from parcel No. 2670.
12. The Learned Trial Magistrate erred both in law and fact in failing to take into account the trend of inconsistencies leading to the registration of the Respondent as the owner of the suit property.
7. The Appellant prayed that the appeal be allowed and the judgment of the trial court be set aside and, in its place, judgment be entered for the Appellant as prayed in the plaint. In the alternative, the Appellant prayed that the court orders a new trial of the Appellant's case by the trial court. The Appellant also prayed for the costs of the appeal and the trial court suit.
8. The appeal was argued by way of written submissions. The Appellant filed submissions dated 28<sup>th</sup> January 2025 while the Respondent filed submissions dated 22<sup>nd</sup> April 2025.

### **The Appellant's submissions**

9. The Appellant submitted that the trial court's finding that the suit was time barred contradicted its earlier finding in the same judgment that since the Appellant had obtained leave of the court before filing the suit, the suit was not time-barred. The Appellant submitted further that the trial court erred in finding that the suit property was transferred to the Respondent by Ndolo Akelo while Ndolo Akelo had no interest in the land that he could transfer to the Respondent and in the absence of evidence of a valid agreement of sale between the two or an instrument of transfer of land. The Appellant submitted further that his case was not based solely on fraud and as such, the trial court's finding that his failure to plead fraud was fatal to his case was erroneous. The Appellant submitted that he had raised many other substantive issues such as failure by the Respondent to comply with the provisions of the *Law of Contract Act* and Section 6 of the *Land Control Act*. The Appellant submitted that the issue of failure to plead fraud was a technical issue which should not make a court of equity to close its eyes on the various glaring errors and inconsistencies in the acquisition of the suit property by the Respondent that the Appellant had highlighted. The Appellant submitted that the said technicality, if found substantive by the court, can be remedied by a re-trial of the suit which the court has the power to order. The Appellant prayed that the appeal be allowed as prayed in his memorandum of appeal.

### **The Respondent's submissions**

10. The Respondent submitted that the Appellant's appeal was filed out of time. The Respondent submitted that the appeal should have been filed by 8<sup>th</sup> April 2023 and that the Appellant's appeal was filed on 11<sup>th</sup> April 2023 outside the 30 days allowed by the law. The Respondent submitted that the appeal was incompetent.
11. The Respondent submitted further that the Appellant's suit before the trial court which was based on fraud was time-barred. The Respondent submitted that the suit should have been filed within 12 years from the date of accrual of the cause of action. The Respondent submitted that the Respondent acquired the suit property on 4<sup>th</sup> February 1983. The Respondent submitted that the leave to file the suit that was obtained by the Appellant ex parte could not save the suit and was subject to challenge in the suit. The Respondent submitted that although the trial magistrate contracted herself on the issue, she arrived at the correct finding that the suit was time-barred since the Appellant's father on whose behalf the suit was brought by the Appellant had known of the alleged fraud by the Respondent as early as 2003.



12. The Respondent submitted further that in any event, the Appellant neither pleaded fraud against the Respondent as required by the law nor proved the same at the trial to the required standard. The Respondent submitted that it was settled that fraud must be pleaded with the necessary particulars and strictly proved. The Respondent cited several authorities in support of his submissions, some of which I will refer to later in the judgment. The Respondent submitted that the Appellant and his father claimed that the suit property was fraudulently carved from the Appellant's father's land parcel No. 2670 without any evidence in proof of the allegation. The Respondent urged the court to dismiss the appeal with costs to the Respondent.

### **Analysis and Determination**

13. I have considered the pleadings filed before the trial court, the proceedings of the court and the judgment of the court. I have also considered the memorandum of appeal filed by the Appellant against the said judgment and the submissions by the advocates for the parties. This being a first appeal, the court has the duty to reconsider and re-evaluate the evidence on record and draw its own conclusions on the issues that were raised for determination before the trial court. In *Kenya Ports Authority v Kuston (Kenya) Limited* [2009] 2 EA 212, the Court of Appeal stated that:

“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”

See also, *Verani t/a Kisumu Beach Resort v Phoenix of East Africa Assurance Co. Ltd* [2004] 2 KLR 269, *Selle v Associated Motor Boat Co. Ltd.* [1968] EA 123 and *Abok James Odera t/a Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR on the duty of the first appellate court.

14. The appellate court will, however not interfere with the findings of fact by the trial court unless they were not based on evidence at all or they were based on a misapprehension of the evidence, or where it is demonstrated that the court acted on wrong principles in reaching its conclusion. See, *Makube v Nyamuro* [1983] KLR 403 and *Peter v Sunday Post Ltd.* [1958] EA 424.
15. I am of the view that the Appellant's fourteen (14) grounds of appeal most of which were not framed in accordance with the rules can be summarised into four (4) grounds namely; whether the trial court erred in its finding that the Appellant's suit was time-barred, whether the trial court erred in its finding that the Appellant's claim was not properly pleaded and proved to the required standard, whether the trial court erred in dismissing the Appellant's suit, and whether the appeal should be allowed. Before considering these issues, I will deal with the issue which has been raised by the Respondent which in the nature of a preliminary objection to the appeal. The Respondent has contended that the appeal was filed out of time and as such the same is incompetent.

### **Whether the appeal is competent**

16. Section 79G of the *Civil Procedure Act* provides as follows:

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period



any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”

17 Section 16A (1) and (2) of the *Environment and Land Court Act* 2011 provides that:

“(1) All appeals from subordinate courts and local tribunals shall be filed within a period of thirty days from the date of the decree or order appealed against in matters in respect of disputes falling within the jurisdiction set out in section 13(2) of the *Environment and Land Court Act*, provided that in computing time within which the appeal is to be instituted, there shall be excluded such time that the subordinate court or tribunal may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order.

(2) An appeal may be admitted out of time if the appellant satisfies the court that he had a good and sufficient cause for not filing the appeal in time.”

18. From the record, the judgment appealed against was delivered on 8<sup>th</sup> March 2023. This means that the appeal against the judgment should have been filed by 7<sup>th</sup> April 2023. The memorandum of appeal herein was filed and paid for on 11<sup>th</sup> April 2023. This means that the appeal was filed 4 days out of the prescribed time. There is no certificate from the lower court certifying that there was a delay in furnishing the Appellant with a certified copy of the decree of the trial court and the time that was taken to do so. The Appellant also did not apply to the court to admit the appeal out of time, suppose he had good and sufficient cause for not having filed the appeal within time. In the circumstances, I agree with the Respondent that the Appellant’s appeal was filed out of time without leave of the court and as such the same is incompetent. This finding would have been sufficient to dispose of the appeal. I will however proceed to consider the merit of the appeal for two reasons; first, in case I am not right in my finding that the appeal is incompetent and the finding is challenged on appeal, the Court of Appeal would want to know what my merit findings on the first appeal would have been, and secondly, the dispute between the parties over the suit property has been on since 2003 and for that reason, it is necessary to bring closure to the same.

#### **Whether the trial court erred in its finding that the Appellant’s suit was time-barred.**

19. The Appellant did not deny that his claim against the Respondent was time-barred. The Appellant contended that he had filed the suit before the trial court with leave of the court obtained on 11<sup>th</sup> September 2018, which effectively extended the limitation period for him. I have not had sight of the application which was filed by the Appellant in Kisumu CMC Misc. ELC No. 173 of 2018, in which the said leave was granted. It is therefore not clear to me under what provisions of the law it was brought. I have, however, perused the order made on 11<sup>th</sup> September 2018. The order purportedly granted the Appellant leave to file a suit against the Respondent for the determination of the rightful owner of the suit property. Did the Chief Magistrate’s Court have the power to extend the limitation period for filing a suit for the recovery of land? My answer is in the negative.



20. Section 7 of the *Limitation of Actions Act*, Chapter 22 Laws of Kenya provides as follows:

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

21. Section 26 of the *Limitation of Action Act* provides that:

“Where, in the case of an action for which a period of limitation is prescribed, either—

- (a) the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or
- (b) the right of action is concealed by the fraud of any such person as aforesaid; or
- (c) the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it:

Provided that this section does not enable an action to be brought to recover, or enforce any mortgage upon, or set aside any transaction affecting, any property which—

- (i) in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud had been committed; or
- (ii) in the case of mistake, has been purchased for valuable consideration, after the transaction in which the mistake was made, by a person who did not know or have reason to believe that the mistake had been made.”

22. A part from the provisions of Section 26 of the *Limitation of Actions Act* under which the limitation period for the recovery of land among others is extended by operation of law in cases where the cause of action is based on fraud or mistake, there is no other provision under the *Limitation of Actions Act* or any other law which provides for extension of the limitation period for a suit for recovery of land upon application. The only provisions of the *Limitation of Actions Act* which permits extension of time for filing a suit upon application are Sections 4(2), 27(1) and 28(1) of the *Act* when read together.

23. Section 4(2) of the *Limitation of Actions Act*, Cap 22 Laws of Kenya on the other hand provides that:

“An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued: Provided that an action for libel or slander may not be brought after the end of twelve months from such date.”

24. Section 27(1) of the said *Act* provides as follows;

“Section 4(2) does not afford a defence to an action founded on tort where:



- a. The action is for damages for negligence, nuisance or breach of duty whether the duty exists by virtue of a contract or a written law or independently of a contract or written law (emphasis mine) and
- b. The damages claimed by the Plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries of any person, and
- c. The court has, whether before or after the commencement of the action, granted leave for the purposes of this section, and
- d. The requirements of subsection (2) are fulfilled in relation to the cause of action.”

25. Section 28(1) of the *Limitation of Action Act* provides that;

“An application for leave of the court for the purposes of section 27 shall be made ex parte, except in so far as the rules of the court may otherwise provide in relation to applications made after the commencement of a relevant action.”

26. From the foregoing, it is only under Section 27 of the *Limitation of Actions Act* that leave can be granted by the court for the filing of a suit out of time. Section 27 of the *Limitation of Actions Act* applies only to actions for negligence, nuisance or breach of duty and where the damages claimed is in respect of personal injuries to a person. The court has no jurisdiction under Section 27 of the *Limitation of Actions Act* to grant leave to an applicant wishing to bring an action for the recovery of land after the limitation period provided for under Section 7 of the *Limitation of Actions Act* has expired.

27. It is my finding therefore that since the Appellant’s father, Kassim Were Abdalla on whose behalf the trial court’s suit was brought by the Appellant was aware by 2003 of the alleged fraudulent acquisition of the suit property by the Respondent, he should have brought the suit against the Respondent within 12 years from that date. The Appellant’s suit before the trial court was filed in 2018 after the expiry of the 12-year limitation period. The trial magistrate gave a conflicting finding on the issue. I, however, agree with the Respondent that the court’s final finding that the suit was time-barred was correct and I find no reason to disturb the finding.

**Whether the trial court erred in its finding that the Appellant’s claim was not properly pleaded and proved to the required standard.**

28. In *Kurshed Begum Mirza v Jackson Kaibunga* [2017] eKLR, the court stated as follows:

“(16) Turning to the second issue; according to section 107 of the *Evidence Act*, the burden of proof in any case lies with the party who desires any court to give judgment as to any legal right or liability. It is for that party to show that the facts which he alleges his case depends upon exist. This is known as the legal burden.”

29. In *Halsbury’s Laws of England*, 4<sup>th</sup> Edition, Volume 17, at paras 13 and 14, the authors have stated as follows on the burden of proof:

13. The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will



support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose.

14. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.”

30. The Appellant's case as pleaded was that the Respondent “fraudulently hived off a portion of the land parcel number Kisumu/Kogony/2670 and facilitated the creation of a new parcel of land known as Kisumu/Kogony/2678” which was in dispute. The Respondent denied the Appellant's claim and contended he had acquired the suit property lawfully. The burden was on the Appellant to prove the fraud that he alleged against the Respondent. In Black's Law Dictionary 9<sup>th</sup> Edition at page 731 fraud is defined as:

a knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment.”

31. In Vijay Morjaria v Nansingh Madhusingh Darbar & another[2000]eKLR, the court (Tunoi JA) stated as follows:

It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

32. In Railal Gordhanbhai Patel v Lalji Makanji [1957] EA 314, the court stated as follows at page 317:

Allegation of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”

33. In Virani t/a Kisumu Beach Resort v Phoenix of East Africa Assurance Co. Ltd [2004] 2 EA KLR 269, it was held that:

Fraud is a serious quasi-criminal imputation and it requires more than proof on a balance of probability though not beyond reasonable doubt”.

34. In Kampala Bottlers Ltd. v Damanico (UG) Ltd. [1990-1994] EA141(SCU), the Supreme Court of Uganda stated that:

To impeach the title of a registered proprietor of land, fraud must be attributable to the transferee either directly or by necessary implication. The transferee must be guilty of some fraudulent act or must have known of some act by somebody else and taken advantage of such act. The burden of proof must be heavier than a balance of probabilities generally applied in civil matters.”



35. Order 2 Rule 10 (1) (a) and (b) of the *Civil Procedure Rules* provides as follows:

- (1) Subject to subrule (2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing —
  - (a) particulars of any misrepresentation, fraud, breach of trust, wilful default or undue influence on which the party pleading relies; and
  - (b) where a party pleading alleges any condition of the mind of any person, whether any disorder or disability of mind or any malice, fraudulent intention or other condition of mind except knowledge, particulars of the facts on which the party relies.”

36. The Appellant accused the Respondent of fraudulently hiving off a portion of Plot No. 2670 and causing a new parcel known as Kisumu/Kogony/2678(the suit property) to be created and registered in the name of the Respondent. The Appellant had a duty to provide the particulars of the alleged fraud and then prove the said particulars. No particulars of the alleged fraud were pleaded. On proof of the alleged fraud, the Appellant spent so much energy trying to prove that the Respondent acquired the suit property irregularly and illegally instead of first establishing his interest in the suit property. Even if the Respondent had acquired the suit property irregularly and illegally, unless the Appellant established his interest in the suit property, the trial court could not grant the reliefs that he had sought. The Appellant claimed that the suit property was carved out of the Appellant’s father’s land parcel, Kisumu/Kogony/2670. As rightly pointed out by the Respondent in his submission, the Appellant had a duty to tell the court what the original measurement of Kisumu/Kogony/2670 was at the time of adjudication and what it became after the alleged carving out of the suit property from it. From the evidence placed before the trial court, Kisumu/Kogony/2670 measured 1.5 Ha. at the time it was registered on 3<sup>rd</sup> February 1992(See the Register at page 70 of the Record of Appeal). By 14th March 2003, when the Appellant’s father was registered as the owner of Kisumu/Kogony/2670 and issued with a title deed, the property had increased in size by more than 100% to 3.2 Ha. (See the Title Deed at page 66A of the Record of Appeal). It was common ground before the trial court that Kisumu/Kogony/2670 was no longer in existence. The Appellant’s father had subdivided the same into several portions. The Appellant did not tell the court whether the suit property was part of the 1.5 Ha., which was the original measurement of Kisumu/Kogony/2670 or 3.2 Ha. which was the adjusted measurement of the property. How was the trial court to determine whether the suit property was part of a non-existent parcel of land whose measurement at the time of the alleged carving out was not disclosed. It is my finding that the Appellant failed to establish that the suit property was part of Kisumu/Kogony/2670. The Appellant did not therefore prove that the Appellant’s father had interest in the suit property. In the absence of any interest in the suit property, the Appellant had no business challenging the Respondent’s title to the suit property. I therefore agree with the trial court that the Appellant failed to prove his case against the Respondent on a balance of probabilities.

**Whether the trial court erred in dismissing the Appellant’s suit, and whether the appeal should be allowed.**

37. From my findings above, the trial court did not err in dismissing the Appellant’s suit. The suit was time-barred, and the claim was not proved. I therefore find no reason to disturb the judgment of the trial court.



## **Conclusion**

38. In conclusion, I find that the appeal herein was filed out of time without leave of the court, and as such, the same is incompetent. It is also the finding of the court that the appeal lacks merit. The appeal is dismissed with costs to the Respondent.

**DELIVERED AND SIGNED AT KISUMU ON THIS 10<sup>TH</sup> DAY OF JULY 2025**

**S. OKONG'O**

**JUDGE**

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Kojo for the Appellant

N/A for the Respondent

Ms. J. Omondi-Court Assistant

