



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

ELC APPEAL NO. 6 OF 2020

DIXON OKINDO MAGETO.....1ST APPELLANT

RICHARD NYAMANA BOSIRE ONYANCHA.....2ND APPELLANT

VERSUS

DINAH MAGETO.....RESPONDENT

(Appeal from the Judgment and Decree of Hon. E.A.

Obina (Principal Magistrate) delivered on the 28th day

of January, 2020 in KISII CMCC ELC No. 234 of 2018)

JUDGMENT

INTRODUCTION

1. The Respondent who is the daughter of the 1st Appellant brought an action in the Chief Magistrate's Court claiming that the 1st Appellant who had initially sold her plot number Kisii Site and Service Scheme/77 later fraudulently had it transferred to the 2nd Appellant after which it was registered as KISII MUNICIPALITY/BLOCK 1/471. She sought inter alia a declaration that she was the lawful owner of the suit property. The Appellants denied the Respondents claim and stated that the suit property had never been registered in the Respondent's name. The 1st Appellant denied having sold the suit property to the Respondent and asserted that he had only sold it to the 2nd Appellant hence the 2nd Appellant was lawfully registered as the owner thereof.

2. The case proceeded for hearing and both parties testified and called their witnesses. After receiving the competing evidence, the trial Magistrate held that there was uncontested correspondence from different Government agencies including the County Government of Kisii, the National Housing Corporation and the National Land Commission indicating that the suit property belonged to the Respondent. He held that the 1st Appellant sold the suit property to the Respondent and when he purported to sell the same plot to the 2nd Appellant, there was nothing to sell. Consequently, he held that the Respondent had proved fraud against 1st Appellant and entered judgment in favour of the Respondent in terms of the prayers sought in the Plaintiff.

3. The Appellants herein, being aggrieved by the judgment of the lower court filed this appeal vide a Memorandum of Appeal dated 10th February 2020 through the firm of Kaburi Henry & Company Advocates. They later engaged the services of Oguttu Mboya, Ochwal and Partners Advocates who filed a Supplementary Memorandum of Appeal dated the 13th February, 2020 citing 16 grounds which were argued in the Appellants written submissions in three clusters.

4. The Appellants raised the following Grounds of Appeal:

i. The learned trial Magistrate erred in fact and law in finding and holding that the 1st Appellant herein having entered into and executed a Land Sale Agreement with the Respondent, the same had no further registrable and/or ownership rights over and in respect of L.R No KISII TOWN /BLOCK 1/471 9 herein referred to as the suit property capable of being transferred in favour of the 2nd Appellant herein.

ii. In finding and holding that the 2nd Appellant had entered into and executed a Land Sale Agreement with the Respondent, the learned trial Magistrate erred in fact and in law, in failing to appreciate that the aforementioned Land Sale Agreement alluded to had

been disowned by the 1st Appellant and same could not be the basis of the judgment whatsoever in favor of the Respondent without due proof, as to the veracity and/or execution thereof, in terms of the provisions of Chapter 80, Laws of Kenya, Sections 71,72 & 76 of the Law of Evidence Act

iii. In finding and holding that a Sale Agreement had been entered into and/or executed between 1st Appellant and the Respondent, the Learned Trial Magistrate failed to address the issue of forgery of the signature of the 1st Appellant, which was alluded to by the 1st Appellant.

iv. The Learned Trial Magistrate erred in fact and law, in finding and holding that the execution of a Land Sale Agreement between the 1st Appellant and the Respondent (which was disputed) without any further Instruments of Conveyance, was sufficient to confer upon the Respondent ownership rights over the suit property, in violation of the principles of conveyance and the provisions of the Land Registration Act, No, 3 of 2012, which denote the process and instruments of conveyance.

v. The Learned Trial Magistrate erred in fact and law, in finding and holding that the Respondent herein had proved her claim anchored on fraud as against the Appellants herein, whereas the Respondent had never been registered as the proprietor and/or owner of the suit Property.

vi. In finding and holding that the Respondent had proved her case based on fraud as against the Appellants and in particular, the 1st Appellant, the learned trial Magistrate misconceived the law pertaining to fraud and the requisite standard of proof, in respect of claims and/or allegations of fraud. Consequently, the finding and holding of the learned trial Magistrate on burden and standard of proof, was erroneous and/or misconceived.

vii. The learned trial Magistrate erred in fact and law, in finding and holding that the allocation, allotment, transfer and ultimate registration of the suit property in favor of the 2nd Appellant, was fraudulent, yet the allotment, transfer and registration of the suit property, was carried out by the Managing Director, National Housing Corporation and the National Land Commission, respectively, who were not parties to the suit in the Subordinate Court and whose actions were therefore not impeachable by the Subordinate Court for want of none-joinder. (Sic).

viii. The Learned Trial Magistrate erred in fact and law, in paying undue premium to the evidence by PW 2 and PW 3, respectively and in particular, the documents alluded to by the said witnesses, even though the suit property herein had lawfully been approved for transfer to and/or in favor of the 2nd Appellant, by the designated officers of Kisii County Government and whose approvals, were binding on PW 2 and PW 3, respectively.

ix. The Learned Trial Magistrate erred in fact and law, in believing the evidence of PW 2 and PW 3, respectively, without subjecting the said evidence to suitable interrogation and/or analysis and thereby failed to discern the fraudulent conduct on the part of the said witnesses, who were hitherto party and/or privy to the alienation of the suit property in favor of the 2nd Appellant.

x. The Learned Trial Magistrate erred in law in finding and holding that the Respondent herein, whose purported rights and/or interests over and in respect of the suit property had not been registered, could supersede and/or surpass the 2nd Appellant herein, whose rights and/or interests over the suit property had been duly registered and thereby issued with a Certificate of Lease contrary to the provisions of the Land Registration Act, No, 3 of 2012 concerning priority of registrable interests over parcels of land. In this regard, the Learned Trial Magistrate, misconceived the import and law on registration.

xi. The Learned Trial Magistrate erred in fact and law, in finding and holding that the Respondent's suit in the Subordinate Court was proven on a balance of probabilities, which was erroneous insofar as the standard of proof on a claim of fraud, surpasses the balance of probabilities. Consequently, the Learned Trial Magistrate failed to properly direct and/or address his judicial mind to the incidence and standard of proof.

xii. The Learned Trial Magistrate erred in fact and law, in finding and holding that the Respondent's claim, essentially predicated on fraud was proven, notwithstanding the fact that the plea and/or claim on fraud anchored on the Land Sale Agreement dated 9th October 2008, was time barred by dint of the provisions of Section 4 of the Limitation of Actions Act, Chapter 22, Laws of Kenya.

xiii. The Learned Trial Magistrate failed and/or neglected to cumulatively and/or exhaustively evaluate the entire evidence (both oral and documentary) on record and hence arrived at an erroneous and slanted conclusion, contrary to and in contradiction of the evidence on Record.

xiv. The Learned Trial Magistrate erred in law in disregarding and/or ignoring the submissions mounted and/or filed by the Appellants herein, without assigning any plausible explanation and/or reason, whatsoever. Consequently, the Appellants herein have been subjected to unfair treatment and hence suffered a miscarriage of justice.

xv. The judgment of the Learned Trial Magistrate is convoluted and the issues raised by the Learned Trial Magistrate are slanted and thereby camouflaged the judicial mind of the Trial Court from appreciating, discerning and/or understanding the true nature of the dispute. Consequently, the judgment of the Learned Trial Magistrate is a nullity.

xvi. Though the Learned Trial Magistrate (sic) itemized issues for determination, (which in any event were slanted), the Learned Trial Magistrate, failed to address and/or analyze the issues for determination either seriatim or at all and thus same failed to render any determination on the itemized issues and the reasons for (sic) such determination. Consequently, the judgment of the Learned Trial Magistrate contravenes the mandatory provisions of Order 21 Rule 4 of the Civil Procedure Rules, 2010.

5. During the pendency of the Appeal, the 1st Appellant unfortunately passed away and on 26th July 2021, the Court marked the appeal by the 1st Appellant as having abated.

6. The Court directed that the Appeal be canvassed by way of written submissions. The Appellants filed their submissions on 12th October, 2021 while the Respondent filed her submissions on 9th November, 2021.

APPELLANTS SUBMISSIONS

7. The first cluster of grounds related to the two sale agreements. Learned counsel for the 2nd Appellant submitted that the trial Magistrate erred in finding that the 1st Appellant having entered into a land sale agreement with the Respondent, had nothing to sell to the 2nd Appellant. Counsel referred to the sale agreement dated 4th January 2008 between the 1st Appellant and the 2nd Appellant and the one dated 9th October 2008 between the 1st Appellant and the Respondent. He contended that following the sale agreement dated 4th January 2008, the 2nd Respondent had been issued with a Certificate of Lease on 8th March 2018. He relied on the case of **Daniel Kiprugut Maiywa v Rebecca Chepkurgat Maina (2019) eKLR** where the court applied the principle of *nemo dat quod non habet*.

8. It was the learned counsel's submissions that the 1st Appellant having transferred the suit property to 2nd Appellant through a legal process, any subsequent transfer was illegal and could not have any legal effect. He argued that there was nothing in the proceedings to show that the transfer of the suit property to the Respondent was valid as determined by the court.

9. The second cluster of grounds relates to the issue of fraud. It was counsel's contention that by finding that the Respondent had proved fraud against the 1st Appellant, the trial court misconceived the law pertaining to fraud and the requisite standard of proof in respect to claims of fraud. He based his submissions on the decision in the case of **Kuria Kiarie & 2 Others v Sammy Magera [2018] eKLR** where the Court of Appeal stated that:

"It is trite law that any allegations of fraud must be pleaded and strictly proved. See Ndolo _vs Ndolo (2008) 1 KLR (G & F) 742 wherein the Court stated that: "... We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases.. "...In cases where fraud is alleged, it is not enough to simply infer fraud from the facts."

10. He faulted the trial Magistrate for relying on the testimony of PW1 and PW2 yet they are the ones who lawfully approved the transfer of the suit property to the 2nd Appellant. It was his contention that the trial Magistrate ought to have subjected their evidence to interrogation to discern the fraudulent conduct on the part of those who were party to the alienation of the suit property in favor of the 2nd Appellant.

11. Counsel submitted that the trial Magistrate failed to find any wrong doing on the part of the 2nd Appellant yet he found and held that the transfer was conducted in a fraudulent manner. He relied on the decision in the case of **Joyce Kemunto Osoro (suing as the legal representative of Stephen Obonyo-deceased) v Attorney General & 9 others [2020] eKLR** where the Court held that:

"The title in the hands of an innocent third party can be impugned under Section 26 (1) (b) of the Land Registration Act if it is proved that the title was obtained illegally, unprocedurally or through a corrupt scheme.

Hon. Justice Munyao Sila in the case while considering the application of section 26(1) (a) and (b) of the Land Registration Act rendered himself as follows: "the law is extremely protective of title and provides only two instances for challenge of title, The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party, The second is where the certificate of title has been acquired through a corrupt scheme. For the first limb, it appears to me that the title of the 1st defendant was obtained by fraud or misrepresentation. However, there is no evidence that the 1st Defendant was a party to the fraud or misrepresentation. Indeed, to me the 1st Defendant was an innocent purchaser for value. He was probably conned of his money by the 2nd Defendant and that is why he is the complainant in the first count of the criminal charges facing the 2nd Defendant. I am not of the view that he was a party to the fraud or misrepresentation that conveyed the land to him. He was a victim of the scheme employed by the 2nd defendant. I cannot therefore impeach the title by virtue of the provisions of section 26 (1) (a). Is the title impeachable by virtue of section 26(1) (b)? First, it needs to be appreciated that for section 26(1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are the title was obtained illegally, unprocedurally or through a corrupt an innocent purchaser of innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of section 26(1) (b) In my view is to protect the real title holders from being deprived of the titles by subsequent transactions"

12. While still on the issue of fraud, learned counsel argued that trial Magistrate erred in finding and holding that the Respondent's claim, essentially premised on fraud was proven, notwithstanding the fact that the claim of fraud anchored on the land sale agreement dated the 9th October 2008 was time barred by dint of Section 4 of the Limitation of Actions Act, Chapter 22, Laws of Kenya. He contended that ordinarily, a case anchored on fraud ought to have been filed within a period of 3 years in accordance with Section 4(2) of the Limitations of Actions Act. He relied on the decision in the case of **Mwangi Kanyingi v Francis Kariuki Kanyingi & Another [2008] eKLR**.

13. The last ground on which learned counsel submitted is the question of forgery. He argued that there were two sale agreements that were presented before the trial court; one dated 4th January, 2008 between the 1st Appellant and the 2nd Appellant and the other one dated 8th October, 2008 entered between the 1st Appellant and the Respondent. Alluding to the said agreements, counsel contended that the trial

Magistrate failed to address the issue of forgery of the signature of the 1st Appellant in the sale agreement between the 1st Appellant and Respondent which was alluded to by the 1st Appellant.

14. Learned counsel also complained that the trial court failed to discern the variance between the signature in the sale agreement between the 1st Appellant and the Respondent vis-a-vis the signature of the 1st Appellant in agreement between the 1st Appellant and the 3rd Respondent which failure resulted in a miscarriage of justice.

15. It was the learned counsel's further submission that the trial Magistrate erred in failing to appreciate that the purported sale agreement was disowned by the 1st Appellant and thus there was no basis for finding in favor of the Respondent without due proof as to the veracity and/or execution thereof in terms of the provisions of Sections 71, 72 and 76 of the Law of Evidence Act, Chapter 80, Laws of Kenya.

RESPONDENT'S SUBMISSIONS

16. Learned Counsel for the Respondent submitted that the evidence on record in support of the Respondent's case was overwhelming. He submitted that the Respondent's testimony before trial court detailed the history and the dealings between himself and the 1st Appellant (now deceased) who was her father. He invited this Court to look at her testimony that she entered into a land sale agreement, paid and obtained the Clearance Certificate from the then Kisii Municipal Council, made the requisite application for transfer of said plot, obtained a letter of consent and paid levies to the tune of Kenya Shillings Twenty Three Thousand, Seven Hundred (Kshs. 23,700/=) only.

17. Learned counsel further invited the Court to consider that the letter dated 22/08/2008 from the Municipal Council of Kisii to the Managing Director of National Housing Corporation was sufficient evidence that the transfer and conveyance of the suit property from the 1st Appellant to the Respondent was completed. Counsel submitted that the trial Magistrate relied on the documents tendered in evidence and

therefore could not have erred in his findings.

18. Learned counsel submitted that the claim of fraud was pleaded and particularized in the Plaintiff. In terms of proving fraud, counsel submitted that the Respondent and her two witnesses PW2 Richard Olwande Odunga and PW3 Tom Nyagami Gai and the letters found at pages 87 to 90 of the Record of Appeal and more particularly the letter on page 88 were explicit that the transaction between the Appellants herein was fraudulent. Learned counsel contended the learned trial magistrate should not be faulted as the claim of fraud was not only pleaded but was also proved.

19. Regarding the claim that the Respondent's case before the trial Court was barred by the dint of Section 4 of the Limitation of Actions Act, Chapter 22 Laws of Kenya, learned counsel submitted that such a claim should be rejected because the same was not pleaded during the hearing of the suit at the lower court. He buttressed his argument by relying on the case of **Abdullahi Ibrahim Ahmed -vs- Lem Lem Keklue Muzolo Civil Appeal No. 278 of 2005/unreported** where the Court of Appeal rendered themselves on this issue as follows,

The issue of limitation was never before the learned Judge. Indeed, the Respondent never participated in the suit. She neither entered appearance nor filed a defense pleading despite being served. The issue of statutory limitation was brought up by the learned Judge Suo Moto during formal proof, interlocutory Judgment having long been entered. In terms of Order 2 Rule 41) the issue of limitation must be specifically pleaded before a Court can act on it. Order 2 Rule 4(1) of the Civil Procedure Rules states that: A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud inevitable accident, act of God, any relevant statute of limitation or any facts 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 Which raises issues of fact not arising out of the preceding pleading"

20. He further relied on the case of **Achola & Another -vs- Hongo & Another LLR NO.4007(CAK)** where the Court quoting Halburys Laws of England, fourth Edition, Volume 36 at paragraph 48 page 38 held as follows:

"Matters which must be specifically pleaded" stated, The defendant must in his defense plead specifically any matter which he alleges makes the action not maintainable or which, if not specifically pleaded might take, the plaintiff by surprise or which raises issue of fact not arising out of the statement of claim. Examples of such matters are performance, release, and any relevant statute of limitation, fraud or any act showing illegality."

21. Regarding the issue of the trial court failing to take into consideration that the 1st Appellant disowned the agreement between himself and the Respondent, counsel submitted that in as much as the 1st Appellant attempted to deny executing the sale of land agreement, this Court should and must disbelieve him on this just like the Subordinate Court did because the 1st Appellant did not disown or discredit the other documents as falsehoods or forgeries even though they were all signed by himself. He contended that his failure to disown the other document clearly showed that indeed the 1st Appellant executed and signed the land sale agreement.

22. This being a first appeal, this court has the liberty to consider, evaluate and draw its own conclusions on both law and facts as stated in **Gitobu Imanyara & 2 others v Attorney General** [2016] eKLR, where the Court of Appeal stated that;

"[A]n appeal to this Court from a trial by the High 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"

ISSUES FOR DETERMINATION

23. Having considered the Record of Appeal, judgment of the lower court, Supplementary Grounds of Appeal, and the written submissions filed by both parties, I discern the issues for determination as follows:

- i. Whether the trial Magistrate erred by in disregarding the sale agreement between the 2nd Appellant and the deceased 1st Appellant.
- ii. Whether the Respondent proved fraud against the Appellants to the required standard of proof.
- iii. Whether the claim of fraud was time barred.

ANALYSIS AND DETERMINATION

Whether the trial Magistrate erred in disregarding the sale agreement between the 2nd Appellant and the deceased 1st Appellant

24. Regarding the first issue, learned counsel for the 2nd Appellant contended that the lower court disregarded the fact that his agreement with DW1 entered into on 4th January, 2008 together with all his documents demonstrated that the suit property was legally transferred to him. Even though DW1 and the 2nd Appellant testified that they entered into a sale agreement in respect of the suit property on 4th January 2008, it is not in dispute that sometime in 2008 the suit property was under threat of being forfeited to the Municipal Council because DW1 been unable to pay the outstanding rates.

25. It is also not in dispute that DW1 called his daughter (PW1), the Respondent herein to pay the outstanding rates because he was unable to pay. DW1 did not contest the Rate Clearance Certificate dated 19th August, 2008 (see page 85 of the Record of Appeal) nor did he disown the receipt dated 19th October, 2008 from the Municipal Council of Kisii that was submitted by the Respondent as proof that she had paid for all transfer fee and all necessary fees required (see page 83 of the Record of Appeal). The same bear a date after the said sale agreement was entered into.

26. If indeed there existed an agreement dated 4th January 2008 between the DW1 and the 2nd Appellant, one wonders why the suit property still fell into debt and was under threat of being forfeited to the Municipal Council later in the year. Why would the 2nd Appellant who purportedly bought the suit property at the sum of Kshs. 350,000 in January 2008 not spring into action to save 'his property' from being repossessed since it took the efforts of the Respondent to save it? Surprisingly, the 2nd Appellant does not deny the fact that the Respondent paid Kshs. 77,000 to save the property from being repossessed by the Municipal Council of Kisii.

27. It is interesting to note that DW1 did not dispute the letter dated 22nd August, 2008 which originated from the Municipal Council of Kisii and was addressed to the National Housing Corporation indicating that DW1 wished to transfer the suit property to the Respondent. This letter came before the one dated 8th November 2010 indicating that DW1 wanted to transfer the suit property to the 2nd Appellant. This only shows that there was an earlier sale agreement between the DW1 and the Respondent as DW1 would not have applied for consent to transfer the suit property to the Respondent if there he had not agreed to sell it to her.

28. There is also no explanation why DW1 took steps to transfer the suit property to the 1st Appellant 2 years after the Municipal Council of Kisii had consented to the transfer of the suit property to the Respondent vide a letter dated 22nd August 2008. The said letter remains unchallenged and was central to the decision of the trial Court.

29. The other question that begs an answer is why the allotment letter and the lease document were issued to the 2nd Appellant in 2016 and 2018 respectively. The Certificate of Lease was issued 10 years after the purported agreement dated 4th January 2008 without any explanation.

30. The only logical inference that can be drawn from the aforementioned series of events is that the agreement must have been an afterthought and it was crafted to fit into the transfer process that DW1 commenced in 2010 and concluded the same in 2018. I therefore cannot fault the trial Magistrate for disregarding the impugned sale agreement dated 4th January, 2008 as it would not have changed the tide in favor of the 2nd Appellant. In the circumstances, the principle of *nemo dat quod non habet* does not apply.

Whether the Respondent proved fraud to the required standard.

31. It is common ground that the Plaintiff's suit is based on fraud. In the case of **Kuria Kiarie & 2 Others v Sammy Magera [2018] ECLR** the Court of Appeal stated that:

"It is trite law that any allegations of fraud must be pleaded and strictly proved. See Ndolo vs Ndolo (2008) 1 KLR (G & F) 742 wherein the Court stated that: "... We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases.. "...In cases where fraud is alleged, it is not enough to simply infer fraud from the facts."

32. A clear look at paragraph 6 of the Complaint shows that the Respondent pleaded and particularized the allegation of fraud. The Respondent claimed that without her knowledge, the 1st Appellant had proceeded to Kisii Municipal Council and misrepresented the position by asking the Municipal Council to revoke the agreement and transfer he had executed in favour of the Respondent and transfer the suit property to the 2nd Appellant. He listed the following as the particulars of fraud;

- i. "Executing fresh documents of transfer of plot to the 2nd Respondent without revoking the agreement with the Respondent
- ii. Transacting on the said plot without notice to the respondent
- iii. The 1st and 2nd Appellants transacting on the Plot fully aware of the transaction between the 1st Appellant and the Plaintiff.
- iv. Transacting on the Plot that had already changed to the Plaintiff".

33. The next question is whether the Respondent presented sufficient evidence to prove the claim of fraud to the required standard.

34. First and foremost, it was not contested at trial that the Kisii Municipal Council had vide a letter dated 22nd August 2008 given the green light for the suit property to be transferred to the Respondent. The Respondent testified that the 1st Appellant had through misrepresentation caused the suit property to be transferred to the 2nd Appellant and it took the efforts of the Kisii County Government through its letters dated 15th February, 2016, 10th April 2016 and 17th November, 2016 to put the record straight and cause the allotment letter issued to the 2nd Appellant in the same year to be cancelled and an allotment letter issued to her on 8th February, 2017.

35. The fact that the DW1 did not contest the contents of the said letters confirms that he had misrepresented to the officials of the County Government of Kisii that he had sold the suit property to the 2nd Appellant. This amounts to fraud.

36. From the above exposition, it is clear that the Certificate of Lease that was subsequently issued to the 2nd Appellant in 2018 after the allotment letter issued to him had been cancelled by the issuing authority (the County Government of Kisii) was fraudulent. I therefore see no error in the conclusion arrived at by the trial Magistrate that the Respondent had proved his claim of fraud against the 1st Appellant to the required standard. Even if the 2nd Appellant did not directly participate in the fraud, his title is impeachable under the provisions of section 26 1(b) of the Land Registration Act. See the case of **Joyce Kemunto Osoro (supra)**.

Whether the claim of fraud was time barred.

37. As correctly argued by the learned Counsel for the Respondent the issue of Limitation was not pleaded in the Defence nor was it raised during the hearing in the subordinate court and therefore it would be wrong to blame the trial Magistrate for not determining an issue that was never pleaded. In arriving at this conclusion, I am guided by the case of **Achola & Another -vs- Hongo & Another LLR NO.4007(CAK)** where the Court held as follows:-

"..... The defendant must in his defense plead specifically any matter which he alleges makes the action not maintainable or which, if not specifically pleaded might take, the plaintiff by surprise or which raises issue of fact not arising out of the statement of claim. Examples of such matters are performance, release, and any relevant statute of limitation, fraud or any act showing illegality."(Emphasis supplied).

38. Having considered the Record of Appeal, submissions, the authorities cited to me and the law, I find and hold that the the Appeal is without merit and it is dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT KISII THIS 1ST DAY OF FEBRUARY, 2022.

.....

J.M ONYANGO

JUDGE