



**Digoi v Seurei (Environment and Land Appeal E001 of 2024)  
[2025] KEELC 3845 (KLR) (15 May 2025) (Judgment)**

Neutral citation: [2025] KEELC 3845 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ELDORET  
ENVIRONMENT AND LAND APPEAL E001 OF 2024**

**CK YANO, J**

**MAY 15, 2025**

**BETWEEN**

**ANDREW DIGOI ..... APPELLANT**

**AND**

**AUGUSTINE KIMELI SEUREI ..... RESPONDENT**

*(Appeal emanates from the judgment and decree of Hon. N. Wairimu  
(SPM) delivered on 24th April, 2023 in Eldoret CMELC No. 5A of 2019)*

**JUDGMENT**

1. This Appeal emanates from the judgment and decree of Hon. N. Wairimu (SPM) delivered on 24<sup>th</sup> April, 2023 in Eldoret CMELC No. 5A of 2019. Aggrieved by the said decision, the Appellant lodged the instant Appeal against the entire decision vide a Memorandum of Appeal dated 16<sup>th</sup> January, 2024 outlining the following grounds of Appeal, THAT: -
  - i. The Learned magistrate erred in law and in fact in failing to hold that the respondent's suit was time barred.
  - ii. The Learned magistrate erred in law and in fact in finding that there was fraud involved in the acquisition of title to the suit property by the Appellant despite lack of evidence in support of the allegations of fraud against the appellant.
  - iii. The Learned magistrate erred in law and in fact since the entire judgment is based on false assumption that the allegations by the respondent against the appellant on fraud which are to be proved in law by the respondent were proven when in fact no scintilla of evidence was led in support of each allegations of fraud as required by law and hence the said judgment is for quashing ab initio.



- iv. The Learned magistrate erred in law and in fact in shifting the burden of proof of the fraudulent allegations to the appellant contrary to the provisions of section 108 of the [Evidence Act](#).
- v. The Learned magistrate erred in law and in fact by failing to appreciate that the standard of burden of proof for fraud lay entirely with the respondent who had alleged the same and in proceeding to conclude that fraud was proved in the absence of any evidence adduced by the respondent.
- vi. The Learned magistrate erred in law and in fact in misapplying and misinterpreting the provisions of section 24, 25 and 26 of the [Land Registration Act](#) 2012 hence arriving at a wrong decision.
- vii. The Learned magistrate erred in law and in fact by completely misinterpreting the principle of indefeasibility of title in land law.
- viii. The Learned magistrate erred in law and in fact in failing to be an umpire and in assuming the role of witness of the respondent as no evidence was adduced on the state of the register for the suit property and in proceeding to fill the gaps left by lack of the said evidence.
- ix. The Learned magistrate erred in law and in fact in issuing orders against the land registrar who was not a party to the said suit.
- x. The Learned magistrate erred in law and in fact in failing to appreciate that she had no jurisdiction to order a cancellation of title without directing who would proceed to effect the said cancellation.
- xi. The Learned magistrate erred in law and in fact in finding against the appellant.
- xii. The Learned magistrate erred in law and in fact in finding that the suit land was purchased by the respondent.
- xiii. The Learned magistrate erred in law and in fact in finding that the respondent was the rightful and actual owner of the suit parcel.
- xiv. The Learned magistrate erred in law and in fact in finding that the agreement for exchange dated 2.5.1989 as presented did not meet the statutory threshold of an instrument capable of passing/ transferring an interest in land or a contract of land.
- xv. The Learned magistrate erred in law and in fact in considering issues that were neither raised, pleaded nor submitted upon by the respondent while making her decision.
- xvi. The Learned magistrate erred in law and in fact in failing to find that the respondent's evidence was full of inconsistencies and falsehoods thus unreliable.
- xvii. The Learned magistrate erred in law and in fact in failing to find that the appellant's registration of title over the suit property and subsequent possession of the suit land was legal and proper.
- xviii. The Learned magistrate erred in law and in fact in failing to find that the respondent's actions on the suit land constituted actionable trespass.
- xix. The Learned magistrate erred in law and in fact in failing to evaluate and analyze the evidence tendered by the appellant.



- xx. The Learned magistrate erred in law and in fact in holding that the respondent had proved his case on a balance of probabilities.
- xxi. The Learned magistrate erred in law and in fact in predisposing her mind to a position favourable to the respondent against the appellant and thereby arrived at a wrong decision.
2. Consequently, the Appellant sought the following Orders: -
- a. The appeal be allowed.
  - b. That the judgment and decree of the learned trial magistrate dated 24.4.2023 be set aside and in lieu thereof the respondent's suit be dismissed with costs.
  - c. Costs of the appeal to the appellant.
3. A brief background to bring the Appeal into perspective is that the respondent herein filed a suit Eldoret CMELC No. 5A of 2019 vide a plaint dated 5.6.2017, seeking declaratory orders that the registration of the suit land in the name of the appellant herein was fraudulent and the same be cancelled and registered in the name of the respondent. He also sought eviction orders against the appellant and an order of permanent injunction.
4. The respondent's suit was premised on the fact that he validly purchased the suit land vide a sale agreement dated 3/8/1988 from one James Kipyego Arusei; duly paid the purchase price in full and thereafter took immediate possession. Sometimes in the year 2009, he allowed the appellant to occupy and use the suit land to support his family. That the appellant took possession and fraudulently proceeded to process the title of the suit land in his favor.
5. The appellant filed a statement of defence dated 12.07.2017, denying all the allegations made in the plaint. It was his claim that the suit parcel was sold to him by the said James Arusei and thereafter took possession in the year 1988. That he has been occupying the suit land to date and has even put up residential houses for a period of over 29 years.
6. The appellant thus maintained that he is the rightful owner of the suit land and that all the procedural requirements were duly complied with before the land was registered in his name.
7. The Appeal was canvassed by way of written submissions. Both parties filed their rival submissions. The Appellant filed his submission dated 9<sup>th</sup> April, 2025 while the Respondent filed his submissions dated 25<sup>th</sup> March, 2025 which I have considered and summarized as hereunder.

### **Appellant's Submissions;**

8. The Appellant submitted on 5 issues; whether the respondent's suit was time barred, whether the appellant is the rightful owner of the suit land, whether the appellant's registration of title was procedural, whether the respondent pleaded and proved fraud against the appellant and whether the appellant is entitled to costs.
9. On the first issue, it was his submission that during the hearing of the case in the trial court, evidence was led to prove that the instant suit is time barred. That the suit was filed in the year 2017 and the respondent's suit arises from a contract entered into in the year 1988. It is therefore his claim that the suit was filed after 29 years outside the statutory period of 12 years as required in law.
10. Further, that the title deed was obtained by the appellant in the year 1990 which is still outside the 12 years statutory period. That the appellant has been living on the suit land for over 29 years.



11. It was therefore his submission that the respondent's suit is time barred by virtue of section 4,7 and 8 of the *Limitation of Actions Act*, the same having been filed after 12 years. Consequently, the trial court could not give any remedies and thus the trial court erred in law and in fact in failing to evaluate and analyze the cardinal point that the respondent's suit was time barred and arrived at a wrong conclusion.
12. On the second issue, it was his submission that the appellant proved that he is the rightful owner of the suit land. That he gave evidence and produced documents to support his case which evidence remained uncontroverted by the respondent. That he produced a copy of the title deed, copy of transfer and land exchange agreement dated 2/5/1989 and allotment letter dated 8/2/1988, cash payment from Mumias Sugar. He maintained that all these documents showed that the suit land belonged to the appellant and the trial court failed to properly analyze the documents.
13. He admitted that the first Allottee was Kipyego Arusei vide a letter from the Provincial Commissioner Rift Valley Province dated 5.3.1986. He maintained that the same was changed when the 1<sup>st</sup> allottee exchanged the suit land with the appellant vide a lawful Exchange Agreement dated 2.5.1989 and this led to the second allotment to the appellant vide an Allotment Letter dated 8.2.1988. Consequently, the appellant became an allottee after the purchase.
14. On the exchange agreement dated 2/5/1989, he submitted that the exchange letter was duly executed by both the appellant and the late James Arusei. That the same occurred at the same time when the suit land was being purchased and an inference ought to have been drawn that the exchange was for the suit land. That the same was not witnessed for the reason that only the appellant and the late James Arusei were present at the time of executing the agreement.
15. On his allegation that the sale agreement was entered into by the respondent's wife on his behalf, it was his submission that he gave a plausible reason on how he donated the power to write and sign the agreement.
16. He further averred that the respondent did not adduce any evidence to demonstrate that the title of the suit land was acquired illegally, unprocedurally and/or through a corrupt scheme. That the respondent did not particularize and prove the allegations of fraud against the appellant and no document was produced to show fraud on the part of the appellant
17. On the issue of the process used in the registration of the title, he submitted and maintained that the process was procedural and devoid of fraud.
18. I do also note that the appellant from paragraph 31 – 39 raised an issue of constructive trust. I must state that this is a new issue being raised at the submission stage. The same was neither included in the grounds of appeal nor prosecuted during the hearing in the trial court. This court will therefore disregard the same.
19. In conclusion, counsel urged the court to find that the appeal is merited and proceed to uphold it with costs, both of the appeal and of the trial court.

#### **Respondent's Submissions ;**

20. Counsel for the respondent submitted on two issues; whether learned trial magistrate erred in law and in fact by finding that the appellant's registration of title over the suit property and subsequent possession of the suit land was illegal and not procedural and whether the learned trial magistrate erred in law and in fact by cancelling the title of the suit property.
21. On the first issue, counsel relied on the case of *Teresia Wangari Mbugua vs Jane Njeri Nduati & Another* [2020] eKLR where the court cited with approval the case of *Hubert L. Martin & 2 Others*



- vs Margaret J. Kumar & 5 Others [2016] eKLR to buttress the fact that the onus was on the appellant to demonstrate the root of his ownership and that the title held was illegal and obtained procedurally.
22. They submitted that the process of transfer and registration of title is well anchored under section 44 of the *Land Registration Act*, which outlines the requirements of a proper transfer instrument, which shall then be used in the registration.
  23. It was his contention that the appellant provided an undated transfer form that was neither signed by the transferor nor the lands registrar as required by law. This he maintained was in violation of the provisions outlined in the *Land Registration Act*.
  24. That although the appellant stated that he obtained the requisite consent from the LCB, no such consent was adduced in evidence in court. He thus averred that the trial magistrate was right in holding that the procedure for registration of the title of the suit land in favor of the appellant was questionable and not proper within the legal procedures.
  25. On the issue of fraud, counsel submitted that the appellant was put to task to prove the procedure he followed in acquiring title but he failed to sufficiently prove the same. That no consent from the Land Control Board was adduced, that he produced a defective transfer instrument, that the appellant failed to explain the existence of the two Allotment Letters and was further unable to disclose how he acquired the suit property.
  26. On the nature of acquisition of the suit land, the respondent added that the appellant had three different versions of how he acquired the land. First that he was allotted the land, second that he bought the land and lastly that he acquired the same through the exchange of land vide the exchange agreement dated 2/5/1989. He thus submitted that the appellant's acquisition of the suit land is questionable.
  27. That on the other hand, the respondent duly presented a sale agreement dated 03/08/1988 between himself and the original owner of the suit land. That the said agreement contained all the requirements as provided under section 3 of the Law of Contracts Act.
  28. In conclusion, it was his position that the trial magistrate arrived at the right decision in finding that the registration of the suit land in favor of the appellant was acquired fraudulently with no regard to the legal procedure anchored in law.
  29. On the second issue, counsel relied on the provision of section 26 and 80 of the *Land Registration Act* and on the decision in the case of Alice Chemutai Too vs Nickson Kipkurui Korir & 2 Others [2015] eKLR.
  30. He maintained that the trial magistrate had the requisite jurisdiction to cancel a registered title and the said power is anchored on the *Land Registration Act* as outlined above.
  31. In conclusion, it was his submission that the appellant clearly failed to adduce any factual evidence in law and in fact to support of his appeal. He urged the court to dismiss the appeal with costs.

### **Analysis and Determination:**

32. I have critically looked at the grounds in the Memorandum of Appeal, Record of Appeal filed and the rival submissions in totality and it is my considered view that the main issue arising for determination is whether this Court should interfere with the trial court's findings and exercise of discretion by setting aside its judgment and decree.
33. This court has considered all the 21 grounds in the memorandum of appeal and I have crystallized the same into the following issues of determination: -



- a. Whether the respondent's suit was time barred
  - b. Whether the issue of fraud was particularized and sufficiently proved by the respondent
  - c. Who is the rightful owner of the suit property,
  - d. The issue of cancellation of title by the trial court
  - e. Who will bear the costs of the appeal.
34. This court's jurisdiction as a first appellate court is to reappraise the evidence or issues which were before the trial court and make its own conclusion. This mandate does not however entail taking on board new issues which were never brought to the trial court's attention or matters that were not subject of the trial court's consideration or tribunal as in the instant case. See the Court of Appeal decision in *Oi Pejeta Ranching Limited vs David Wanjau Muhoro* [2017] eKLR.

**i. Whether the respondent's suit was time barred**

35. It is the appellant's contention that the respondent's suit in the trial court was time barred. That the respondent's claim was anchored on a sale agreement entered in the year 1988 whereas the suit was filed in the year 2017; 29 years after the contract, which period is more than the 12 years statutory period.
36. He also averred that the title which the respondent sought to cancel was acquired in the year 1990, and by the time of filing the suit, the 12-year statutory period had already lapsed. He therefore maintained that the suit as filed offends the provisions of section 4 and 7 of the *Limitation of Actions Act*.
37. The respondent did not address the issue of time limitation in his submissions. I have however looked at the plaint in the record of appeal and at paragraph 5 and 6, it is the respondent's claim that sometimes between the year 2009 and 2010, he granted the appellant consent to occupy the suit parcel on the understanding that the appellant would move out of the land once his children are grown.
38. He accused the appellant of fraudulently processing the title of the suit land and having the same registered in his name as the proprietor hence the suit.
39. It is now well settled that the issue of a suit being time barred goes to the root of a court's jurisdiction to entertain a claim before it. In the case of *Bosire Ongero v Royal Media Services* [2015] eKLR, the court stated that;
- “The question of limitation touches on the jurisdiction of the court, which means that if a matter is statute barred, the court would lack jurisdiction to entertain it. ....”
40. I have carefully looked at the Record of Appeal, particularly the Statement of Defence dated 12.7.2017, in order to ascertain whether the issue of statutory limitation was raised at the trial stage or if the same is being introduced at the appellate stage.
41. I do note that at paragraph 15, the appellant raised the same and deponed that the suit is incompetent, the same being based on a contract entered into in the year 1988 and is against the *Limitation of Actions Act* and the suit cannot therefore stand. The same has also been included in ground 1 in the memorandum of appeal.
42. Section 4 and 7 of the *Limitation of Actions Act* provides as follows: -
- (4)



- (1) 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
  - (b) .....
  - (c) .....
  - (d) .....
  - (e) .....

7. Actions to recover land

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.

43. The sections above prescribe the limitation period for the institution of suits relating to the recovery of land within a period of 12 years, from the date on which the right of action accrued to him. The question that therefore follows is whether the respondent's suit offends the said provisions; does the same relate to the recovery of land and secondly was the same filed within the statutory period of 12 years.
44. I do note that even though the appellant contends that the respondent's claim was based on a sale agreement entered into in the year 1988, from a look at the plaint and the orders sought therein, the respondent used the said contract as a basis to support his ownership claims and prove his acquisition of the suit land. There was no substantive issue arising from the said contract. It is therefore my finding that the section 4 (1)(a) is not applicable in the instant suit.
45. What however is at the center of this suit is the issue for the recovery of land. I have carefully looked at the plaint and the orders sought therein and I must say that the effect of the orders sought therein is to recover the suit land from the appellant by cancellation of the title in his name and consequently evict him from the land.
46. In paragraphs 5 and 6 of the plaint as pointed out hereinabove, the respondent avers that the appellant entered into the suit land sometimes between 2009 and 2010. If the suit was filed in the year 2017, this was between 7 and 8 years. This makes it within the statutory timelines of 12 years.
47. However, it is also the respondent's claim that he found out that the appellant had presented himself as the owner of the suit land and fraudulently had the title of the suit parcel processed and registered in his name.
48. Now, the respondent in his plaint did not indicate when he found out of the said registration and title issued in favor of the appellant, either by omission or deliberately.
49. Be that as it may, I have looked at the title deed produced by the appellant as Dexh. 1. It is worth pointing out that the same is in the name of the appellant, having been registered on 23/7/1990. Thus, in my considered view, the fraudulent allegations raised by the respondent could only have happened prior to the said registration in the year 1990.
50. From the foregoing, it is my considered opinion that the suit as filed was time barred on account of the provisions of section 7 of the *Limitation of Actions Act* and no leave was sought prior to filing of the same, to have the claim admitted out of time.



51. Consequently, the trial court was not vested with the requisite jurisdiction to entertain the matter as filed by the respondent.
52. As held by Nyarangi J. in classical case of Owners of Motor Vessel 'Lilian S' vs Caltex Oil Limited [1989] eKLR, once a court finds that he has no jurisdiction, it must down its tools and make no further step. Having held that the trial court was not vested with the jurisdiction to entertain the matter as filed, I find that discussing the remaining issues would amount to an academic exercise.

**Conclusion:**

53. In the upshot, I accordingly find that the Appeal dated 16<sup>th</sup> January, 2024 is merited on account of the suit being time barred pursuant to section 7 of the Limitation of Actions Act.
54. The appeal is hereby allowed on the following terms: -
  - i. The judgment and decree of the learned trial magistrate dated 24.4.2023 be and is hereby set aside and in lieu thereof the respondent's suit is hereby struck out.
  - ii. Costs of the appeal and trial be borne by the Respondent
55. It is so ordered.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 15<sup>TH</sup> DAY OF MAY, 2025.**

**HON. C. K. YANO**

**JUDGE, ELC**

In presence of;

Mr. Kagunza for Appellant.

Mr. Kipkemboi holding brief Mr. Kosgei for Respondent.

Court Assistant – Laban

