



**Adera v Mbuji (Environment and Land Appeal E063 of 2021)
[2025] KEELC 7107 (KLR) (16 October 2025) (Judgment)**

Neutral citation: [2025] KEELC 7107 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL E063 OF 2021
SO OKONG'O, J
OCTOBER 16, 2025**

BETWEEN

JAPHETH AOKO ADERA APPELLANT

AND

GEORGE JUMA MBUJI RESPONDENT

***(Being an appeal from the judgment and decree of Hon. WINFRED
R.S. KIPNGENO (PM) delivered on 3rd August 2020 in Nyando
Senior Principal Magistrate's Court ELC No. 20 of 2020)***

JUDGMENT

1. This appeal challenges the judgment and decree of Hon. Winfred R.S. Kipngeno(PM) made on 3rd August 2020 in Nyando Senior Principal Magistrate's Court ELC No. 20 of 2020 (hereinafter referred to as "the lower court"). The Respondent sued the Appellant together with one The Third Engineering Bureau of CCCC Limited (hereinafter referred to as "the 2nd Defendant in the lower court") through a plaint dated 17th March 2020. The Respondent averred that on 30th June 1992, he purchased a portion of all that parcel of land known as Title No. Kisumu/Jimo East/1186 (hereinafter referred to as "the suit property") measuring 2.5 acres from the previous owner thereof, known as William Owidi Adera, deceased (hereinafter referred to as "the deceased") at a consideration of Kshs. 20,000/-, which he paid in full. The Respondent averred that the Appellant, who was a brother to the deceased was one of those who witnessed the execution of the agreement of sale.
2. The Respondent averred that the deceased and he applied for the consent of the Land Control Board to subdivide the suit property so that the portion thereof sold to the Respondent could be transferred and registered in his name. The Respondent averred that although they were issued with the consent, the deceased died before subdividing and transferring the portion of the suit property sold to the Respondent to the Respondent. The Respondent averred that at the time of the deceased's death, he had put the Respondent in possession of the sold portion of the suit property and the Respondent



- remained in possession waiting for the heirs of the deceased to take out grant of letters of administration and thereafter complete the transfer of the said portion of the suit property to the Respondent.
3. The Respondent averred that he was informed in February 2020 that there were people harvesting murram on the portion of the suit property that was sold to him. The Respondent averred that upon making inquiries, he learnt that the suit property had been transferred to the Appellant and that the Appellant had leased the same to the 2nd Defendant in the lower court suit to harvest murram for road construction. The Respondent averred that since the Appellant was aware of his interest in the suit property, he acted illegally in transferring the whole land to his name including the portion that was sold to the Respondent.
 4. The Respondent averred that the portion of the suit property sold to the Respondent by the deceased did not constitute the deceased estate for the purposes of succession and as such could not devolve to the administrator of his estate. The Respondent averred that the Appellant held the portion of the suit property measuring 2.5 acres sold to the Respondent by the deceased in trust for the Respondent. The Respondent averred that the purported lease between the Appellant and the 2nd Defendant in the lower court suit was illegal on account of the illegality in the Appellant's title. The Respondent prayed for judgment against the Appellant and the 2nd Defendant in the lower court suit for: an order of a permanent injunction restraining the Appellant and the 2nd Defendant in the lower court from entering, remaining on or carrying out or continuing to carry out any construction or excavation works on the suit property, a declaration that a portion of the suit property measuring 2.5 acres belonged to the Respondent and an order directing the Appellant to transfer the same to the Respondent in default of which the transfer to be effected by the Executive Officer of the court, and the costs of the suit.
 5. The Appellant filed a statement of defence in the lower court on 25th June 2020. The Appellant denied the Respondent's claim in its entirety. The Appellant denied holding a portion of the suit property in trust for the Respondent.
 6. The lower court heard the parties and their witnesses and delivered a judgment on 3rd August 2021. The lower court found that the deceased and the Respondent entered into two agreements of sale dated 24th June 1992 and 30th June 1992 through which the deceased sold to the Respondent a portion of the suit property measuring 2.5 acres. The court found that the Appellant acquired the whole of the suit property through succession after the death of the deceased. The court found no merit in the Appellant's contention that the deceased was of unsound mind and could not enter into a valid agreement of sale. The lower court found further that the Appellant and the deceased obtained consent of the Land Control Board to subdivide the suit property for the purposes of transferring the portion sold to the Respondent to the Respondent's name. Citing *Willy Kimutai Kitilit v. Michael Kibet*[2018]eKLR, court held that even if the consent to transfer was not obtained, that did not make the sale transaction void and unenforceable.
 7. The lower court found that the Respondent paid the full purchase price for the purchased portion of the suit property to the deceased and that the Appellant, who was the administrator of his estate, had not transferred the said portion to the Respondent. The court held that in the circumstances, the Appellant could not be allowed to hide behind the provisions of the *Law of Succession Act*, Chapter 160 Laws of Kenya, or the *Land Control Act*, Chapter 302 Laws of Kenya to defeat the Respondent's rights in the suit property. The lower court held that it was only fair and just that the portion of the suit property measuring 2.5 acres was transferred to the Respondent. The lower court ordered that a portion of land measuring 2.5 acres be hived out of the unexcavated part of the suit property and transferred to the Respondent. The Respondent was also awarded the costs of the suit.



8. The Appellant was aggrieved by the decision of the lower court and filed the present appeal on 3rd September 2021. In his Memorandum of Appeal dated 2nd September 2021, the Appellant challenged the lower court's judgment on the following grounds;
1. That the learned Magistrate erred in law and fact by applying erroneous principles and arriving at the conclusion that there was an agreement of sale between the Appellant and the Respondent.
 2. That the learned Magistrate erred in law and fact in making an award to the Respondent without establishing ownership of the suit property.
 3. That the learned Magistrate acted in error when she failed to properly evaluate evidence on record thus reaching an erroneous decision.
 4. That the learned Magistrate misdirected herself by finding that there was a valid agreement in existence between the Appellant and the Respondent in respect of the suit property.
 5. That the learned Magistrate erred in fact and in law by failing to appreciate that the Respondent's claim was time barred as it was over 12 years since the date of the alleged agreement for the purchase of the suit property.
9. The Appellant prayed that the appeal be allowed, the judgment and decree of the lower court delivered on 3rd August 2021 be set aside. The Appellant also prayed for the costs of the appeal.
- The Appeal was heard by way of written submissions.

The Appellant's submissions

10. The Appellant filed submissions dated 27th December 2024. The Appellant submitted that there was no valid agreement of sale between the Appellant and the Respondent meeting the requirements of a valid agreement in Section 3(3) of the Laws of Contract Act, Chapter 16 Laws of Kenya. The Appellant submitted that at the time the purported agreement of sale was executed, he was not present, and his mother, who was alleged to be another witness to the agreement was already deceased. The Appellant submitted that even if the agreement was signed as was alleged by the Respondent before the area Chief, the Chief testified that the Respondent only paid part of the purchase price in the sum of Kshs. 10,000/- and that he did not witness the payment of the balance of the purchase price in the sum of Kshs. 10,000/- by the Respondent. The Appellant submitted that the trial court erred in its finding that there was a valid agreement of sale between the Appellant and the Respondent.
11. The Appellant submitted further that the Respondent's suit was time barred under Section 7 of the *Limitation of Actions Act*, Chapter 22 Laws of Kenya. The Appellant submitted that the suit should have been brought within 12 years from the time the course of action arose. The Appellant cited *Bosire Ongero v. Royal Media Services* [2015]eKLR, and submitted that the issue of limitation of action goes to the jurisdiction, and as such when a suit is time barred, the court has no jurisdiction to hear it. The Appellant submitted that the lower court erred in entertaining the suit. The Appellant urged the court to allow the appeal.

The Respondent's submissions

12. The Respondent filed submissions dated 5th May 2025. The Respondent submitted that the Respondent established by evidence adduced before the trial court that there was a valid agreement of sale between the Appellant and the deceased which was signed before several witnesses, including government and court officials. The Respondent submitted that the said officials would have had no



reason to get involved in forgery. The Respondent submitted further that if the Appellant was serious about the alleged forgery of the agreement of sale, he should have reported the same to the police for appropriate investigation, which he failed to do, thereby negating his claim that he never signed the agreement. The Appellant submitted that if the deceased did not sign the agreement of sale, he would not have attended the Land Control Board for the consent to subdivide the suit property. The Appellant submitted that the agreement met the conditions set in Section 3(3) of the Law of Contract Act, Chapter 16 Laws of Kenya. The Appellant submitted that the lower court's finding that there was a valid agreement of sale between the parties could not be faulted.

13. On whether the Respondent had proprietary rights in the suit property, the Respondent submitted that the lower court established that the deceased sold to the Respondent a portion of the suit property measuring 2.5 acres, and the Respondent paid the full purchase price. The Respondent submitted that the parties obtained consent of the Land Control Board for the subdivision of the suit property and transfer to the Respondent his portion of the property. The Respondent averred that having purchased the said portion of the suit property and paid the full purchase price, the Appellant, who was registered as the owner of the property, was holding the portion thereof sold to the Respondent in trust for the Respondent, who had possession of the said property since 1992 when he purchased the same.
14. On the issue of the time bar, the Respondent submitted that the lower court suit was not time-barred. The Respondent submitted that the suit property was registered in the name of the Appellant fraudulently, which fraud was not discovered by the Respondent until 2020.
15. The Respondent submitted that the lower court did not err in entering judgment in favour of the Respondent against the Appellant, and urged the court to dismiss the appeal with costs to the Respondent.

Analysis and Determination

16. I have considered the pleadings and the proceedings of the lower court, the judgment of the court, the grounds of appeal filed by the Appellant, and the submissions by the advocates for the parties. This being a first appeal, this court has to reconsider and re-evaluate the evidence on record and draw its conclusions on the issues that were raised for determination before the lower court.
17. In *Gitobu Imanyara & 2 Others v. Attorney General* [2016] KECA 557 (KLR), the Court of Appeal stated as follows on the mandate of the court on a first appeal:

...this Court is not bound necessarily to accept the findings of fact by the court below and that an 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 allowances in this respect. See *Selle and Another v Associated Motor Boat Company Limited and others* [1968] EA 123 and *Williamson Diamonds Ltd. V. Brown* [1970] E.A.L.

18. As we discharge our mandate of evaluating the evidence placed before the High Court, we keep in mind what the predecessor of this Court said in *Peters –vs- Sunday Post Ltd* [1958] EA 424. In its own words: -

Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge



has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide.””

19. I will consider the Appellant’s grounds of appeal one after the other. On the first ground of appeal, the Appellant has not pointed out the erroneous principles of law applied by the lower court that led to the alleged erroneous conclusion. On ground two of appeal, the lower court made a finding that the Appellant acquired the suit property through succession and that the Respondent had a proprietary interest in the portion of the property measuring 2.5 acres. The order by the court for the transfer of the said portion of the suit property to the Respondent was based on those findings. It is therefore not correct to say that the lower court made an award in favour of the Respondent without establishing the ownership of the suit property. On ground three of appeal, I am satisfied from the judgment of the lower court that the court did refer to and evaluate the evidence on record before reaching a finding that the Respondent had established his case against the Appellant.
20. On ground four of appeal, I am satisfied from the evidence that was produced by the Respondent before the lower court that there was a valid agreement of sale between the Respondent and the deceased. The parties first entered into an agreement dated 24th June 1992. The agreement was handwritten and was signed by the Respondent and the deceased in the presence of nine witnesses. Among the witnesses to the agreement were the Appellant, the Assistant Chief, Jimo East/East Nyakach, and the Chief East Nyakach Location. The Chief gave evidence before the lower court and confirmed that the parties were known to him and that the agreement was signed in his office before him. He confirmed that both the Appellant and his mother were present. The other agreement, which was on the same terms, was signed on 30th June 1992, 6 days later, before a Magistrate. The agreement was signed by the deceased and the Respondent, and apart from the Magistrate, the Appellant and his mother, Agnes Agogo Adera, also witnessed the signing of the agreement by the two parties. The Appellant accepted at the trial before the lower court that the identity card number said to be his, put against his name in the two agreements, was his. Although the Appellant claimed to have been working and living in Rift Valley at the material time, he placed before the court no evidence in support of the allegation. The evidence by the Chief and the Respondent that the Appellant was present and witnessed the execution of the two agreements of sale was therefore not rebutted. The Appellant also claimed that at the time of the execution of the two agreements, his mother, who was said to have been one of the witnesses, was deceased. The lower court suit was filed on 21st May 2020. The Appellant’s mother’s Death Certificate, produced before the lower court, which was a product of late registration, was issued on 12th November 2020 while the lower court suit was pending. The same was no doubt tailor-made to suit the Appellant’s defence. The same, in my view, had no probative value in the circumstances. It is my finding in the circumstances that the lower court did not err in its finding that there was a valid agreement of sale of a portion of the suit property measuring 2.5 acres between the Respondent and the deceased.
21. On ground five of appeal, the following is my view: Order 2 Rule 4 of the Civil Procedure Rules provides as follows:
 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.”

22. In *Independent Electoral and Boundaries Commission & Another v. Stephen Mutinda Mule & 3 others* [2014]eKLR, the Court of Appeal cited with approval the Malawi Supreme Court of Appeal case of *Malawi Railways Ltd. v. Nyasulu* [1998]MWSC 3 where the judges quoted an article by Sir Jack Jacob entitled “The present importance of pleadings” published in 1960 *Current Legal problems*, at P.174 where the author stated as follows:

As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings ... for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called “Any Other Business” in the sense that points other than those specific may be raised without notice.”

23. I have noted from the Appellant’s defence in the lower court that the Appellant did not plead that the Respondent’s suit was time-barred. Although the issue was raised by the Appellant in his submissions before the lower court, the lower court did not express any opinion on the same. As mentioned in the authority cited above, cases are determined on pleadings. Neither submissions nor evidence takes the place of pleadings. Evidence can only be led on pleaded issues while submissions are made on the pleadings, evidence, and the law. With due deference to the authority cited by the Appellant on the issue, I disagree with the Appellant that the limitation of actions being a jurisdictional issue can be raised at any time, even without being pleaded. The provisions of the Civil Procedure Rules that I have reproduced above provides that if a defendant wishes to rely on the limitation of action as a defence, the same must be expressly pleaded. Since the issue was not pleaded, the lower court cannot be faulted for not considering it in the impugned judgment.

24. I am of the view that even if the issue was pleaded, the plea would still not succeed. From the plaint filed in the lower court, the Respondent was not seeking specific performance of the agreements dated 24th and 30th June 1992. The Respondent’s case was that the Respondent purchased the portion of the suit property measuring 2.5 acres, paid the full purchase price, and took possession, awaiting the transfer of the property to his name. The Respondent’s case was that the said agreements of sale, payment of the purchase price, and taking of possession created a constructive trust in his favour in relation to the suit



property against the registered owner. The question would then be, when was this trust breached to give the Respondent a cause of action, and is there a limitation period for causes of action for recovery of trust property by a beneficiary of the trust? In my view, the trust was breached on 22nd January 2014 when the Respondent, as the administrator of the estate of the deceased William Owidi Adera transferred the whole land to his name as a beneficiary of the estate including the Respondent's share of the property which the deceased held in trust, and thereafter in 2020 leased the said portion of land to the 2nd Defendant in the lower suit for harvesting murrum. This suit was filed on 21st May 2020. I am of the view that under Section 20(1)(b) of the *Limitation of Actions Act*, there is no limitation period for actions by a beneficiary of a trust against the trustee to recover trust property, like in this case. For the foregoing reasons, the suit was properly before the court and was not time-barred.

Conclusion

25. In conclusion, I find no merit in all the grounds of appeal put forward by the Appellant against the judgment of the lower court. The appeal lacks merit in the circumstances. The same is dismissed with each party bearing its own costs.

DELIVERED AND SIGNED AT KISUMU ON THIS 16TH DAY OF OCTOBER 2025

S. OKONG'O

JUDGE

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

Mr. Awuonda for the Appellant

Ms. Wanyangu h/b for Mr. Onyango for the Respondent

Ms. J.Omondi-Court Assistant

