

- (iv) The Learned Trial Magistrate erred in law and in fact by applying her own theory in assessing the pleadings evidence and exhibits which made her fall into error of speculation and inserted her facts and findings which were not supported by the pleadings evidence and exhibits.
 - (v) That the Learned Judge erred in law and in fact in purporting to put into perspective materials and facts not contained in the pleadings, evidence exhibits and submissions of parties.
3. On the strength of the above grounds of Appeal, the Appellant sought the reliefs set out at paragraph 1 of this judgment.
 4. The Original Record of Appeal was filed on 17.02.2025, the same was deficient culminating into a supplementary record of Appeal being filed on 20.03.2025; The Supplementary record of Appeal and the Original record of Appeal were consolidated and a consolidated Record of Appeal was filed on 9th April 2025.
 5. Upon issuance of directions on the Appeal that resulted into its admission for hearing, the court directed the same to proceed by way of written submissions; which are summarised as here follows;-

Appellant's Submission

6. The Appellant submits that the suit seeks specific performance of the contract by way of an Agreement for sale dated 20th December 1993 which Agreement meets all the legal requirements.
7. The Appellant submits that he has been in occupation of the suit parcel for over 30 years and thus is entitled to adverse possession.
8. In support of the above submissions, the Appellant places reliance on the decisions in the following case
 - (i) Reliable Electrical Engineers Ltd Vs. Mantrac Kenya limited 2006 eKLR.
 - (ii) Cherorei Vs. Muigai (Environment and Land Case E005 of 2023 KEELC5604 KCR.

Respondent's Written Submissions

9. The Respondent submitted on one issue as to whether or not the Appeal was merited and submitted on the grounds of appeal seriatim.
10. On ground 1, the Respondent submits that the counter-claim had sought the general relief in term ***“of any other relief the court deems fit to grant”*** and thus the Learned Magistrate was right to issue any order for the removal of the caution.
11. On ground 2, 4 and 5, the Respondent submits that the Learned Magistrate did analyse the pleadings, evidence exhibits and submissions and reached the correct finding that the suit was time barred and the issue of adverse possession was not proven.
12. On ground 3, the Respondent submits that the Learned Magistrate did not at any time find that a prima facie case had been established by the Appellant; and this was the Appellant’s own doing.
13. The Respondent thus submits that the impugned judgment herein was sound and ought to be upheld and this Appeal be dismissed.
14. It is common ground between the Appellant and Respondent that the Appellant as plaintiff before the trial court sought for specific performance over the Agreement for sale dated 20th December 1993.
15. It is common ground between the Appellant and Respondent, that the Respondent’s counter-claim before the trial court was based on encroachment of part by the Appellant on part of Transmara/Mapashi/185 and fraudulent transfer of the whole of Transmara/Mapashi/210.

Issues for determination

16. The issues for determination arising from this Appeal are thus;
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 - (i) Whether or not the Appeal is merited? In deciding this issue, the court shall seek to determine

- (a) Whether the Appellant proved his case before the trial court so as to be entitled to the relief of specific performance as originally prayed for in the Plaintiff.
 - (b) Whether the Respondent's counter-claim before the trial court was merited?
- (ii) What orders ought to issue.
 - (iii) Who bears the costs of the Appeal.

Analysis and Determination

The duties of the first Appellate court were laid down in the decision in the case of Selle and Another Vs. Associated Motor Boat and 3 Others, which were stated to be *inter alia*, ***“An appeal to this court from a trial by the High Court is by way of retrial by and the principles upon which this court is 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.....”***

- 17. At page 15 of the Record of Appeal, in the trial court judgment, the Learned Trial Magistrate observed that the suit for enforcement of the Agreement for sale was filed 25 years later after the Agreement had been entered and therefore the suit was time barred by virtue of sections 4 and 7 of the Limitation of Actions Act, and proceeded to dismiss the plaintiff's suit; which sought for specific performance.
- 18. I have reviewed the pleadings and the evidence, as well as the judgment by the trial court.
- 19. The Agreement for sale P.Exhibit 1 appearing at page 93 of the record of Appeal was dated 20.12.1993 in respect of about 9 acres, 6 acres in Transmara/Mapashi/210 and 3 acres in Transmara/Mapashi/185.
- 20. The Agreement (P.Exhibit 1) was said to have been drawn and witnessed by Mr. Kerosi Ondieki Advocate who testified and P.W.2 his testimony appearing at pages 69-70 of the Record of Appeal.

21. The Appellant sought and pleaded specific performance in respect of the said Agreement signed in 1993.
22. The suit before the Trial court was filed in 2019. It was thus filed 26 years. Was this Agreement for sale enforceable? It is undoubted that an Agreement for sale as a contract faces the issues of Limitation of time and in terms of section 4(1) (a) of the Limitation of Action Act the contract was unenforceable. In so far as the same sought to recover land, the same become unenforceable after 12 years; under section 7 of the Limitation of Action Act.
23. The Learned Trial Magistrate thus reached the correct conclusion that the plaintiff's suit having been based on the Agreement for sale dated 20.12.1993 was statute barred, that being the same conclusion that I have reached herein.
24. With regard to the claim of adverse possession, as submitted by the Appellant the same was not expressly pleaded in the Plaint dated 3rd June 2019, but the same was introduced in the submissions filed by the plaintiffs dated 5th February 2024.
25. Having not pleaded adverse possession in the Plaint, and noting that parties are bound by the pleadings, the claim was not before the trial court for determination and the Learned Trial Magistrate was right in dismissing the same.
26. In making the above findings I am guided by the decision in the case of Daniel Toroitich Arap Moi Vs. Mwangi Stephen Murithi and Another (2014) eKLR where the court observed as follows: -
"....submissions cannot take the place of evidence. The 1st Respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties, "marketing language", each side endeavouring to convince that tis case is the better one. Submissions we reiterate do not constitute at all. Indeed, there are many cases decided

without hearing submissions but based only on evidence presented...”

27. By parity of reasoning, submissions are not pleadings. Have not pleaded adverse possession, the submission on it would not aid the Appellant.

28. It is trite law, that parties are bound by their pleadings as was stated in the decision in the case of IEBC Vs. Stephen Mule where the court observed as follows; -

“It is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings or put in other way, which is at variance with the averments of the pleadings goes to t no issue and must be disregarded.”

29. In view of the above decisions, and having found that the claim of adverse possession was not pleaded but only introduced in submissions. The same was not an issue for determination before the trial court and the Learned Magistrate was right in dismissing the same.

30. It follows that the plaintiff’s suit for specific performance of the Agreement dated 20.12.1993 was not merited having been found to be statute barred and there was no claim for adverse possession of the 3 acres in Transmara/Mapashi/185 before the trial court and the Learned Magistrate did not make any error in law and in fact in making the decision as she did, in respect of the Appellant’s case as plaintiff before the trial court.

31. With regard to the counter-claim filed by the Respondent in respect of Transmara/Mapashi/210.

The trial court found that the Respondent’s case was challenging a first registration; in title obtained by Adjudication, the Respondent ought to have followed the process in Land Adjudication Act.

32. P.Exhibit 1, shows that the Respondent sold 6 acres in Transmara/Mapashi/210 in 1993. The title exhibited by the Appellant was issued to him in 1996.
33. It follows that the Respondent's counter-claim in respect of Transmara/Mapashi/210 was equally time barred, and the particulars of fraud and illegality not having been proven.
34. Thus, in answer to issue number 1, the court finds that the Appeal herein is not merited as the plaintiff claimed before the trial court was statute barred while the claim of adverse possession was not pleaded in the Plaint, but introduced in the plaintiff's submissions, that the counter-claim in respect of Transmara/Mapashi/210 was equally time barred and the trial court thus reached the right conclusion and id not make any error.
35. The removal of the caution by the Learned Magistrate that was faulted by the Appellants herein fell under the heading of ***"any other relief the court deem fit to grant"*** and that ground of Appeal equal fails.
36. The court on the issue of what reliefs ought to issue having found the Appeal not be merited, has no option but to dismiss the Appeal; and affirm the impugned judgment.
37. Costs of the Appeal, the suit and counter-claim before the trial court are awarded to the Respondent.

Dated at Kilgoris this 13th day of October, 2025.

Hon. M.N Mwanyale
Judge

In the presence of

CA - Emmanuel/Sylvia/Sandra

Mr. Makori for Appellant

Mr. Tawo for Respondent