

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ELC APPEAL NO. 029 OF 2025

LAWRENCE OPIYO
ODONGO.....APPELLANT

VERSUS

DAVID OWINO WADIYA.....1ST
RESPONDENT

MIGORI COUNTY LAND REGISTRAR.....2ND
RESPONDENT

THE HONORABLE ATTORNEY GENERAL.....3RD
RESPONDENT

JUDGMENT

(Being an appeal arising from the Ruling of Hon. M. Okuche,
Senior Principal Magistrate, delivered on 15th day of October, 2024
in Migori Chief Magistrate’s Court in ELC No. 29 of 2022)

1. Before this court is an appeal arising from the ruling of Honorable Okuche, Senior Principal Magistrate, at Migori Delivered on 24th October, 2024 in ELC case no. 29 of 2022. The ruling in question was premised on a preliminary objection raised by the 1st defendant, now 1st Respondent, challenging the jurisdiction of the court to hear and determine the matter. He argued that the said matter was filed out of time and

without leave of the court. The court concurred with the Defendant and found that the defendant's preliminary objection was meritorious. It dismissed the suit with costs to the them (Defendants).

2. The Plaintiff, being aggrieved by the court's ruling, filed the instant appeal which is based on three grounds, as can be seen from the Memorandum of Appeal dated 12th August, 2024. They are thus:

- a) THAT the trial court erred in law and in fact by failing to appreciate that the appellant ought to have been allowed to speak in a language of his choice and the language that he can speak, hence he reasons why words spoken in court are always interpreted to the language of the court.
- b) THAT the court erred in law and in fact by failing to appreciate that a preliminary objection ought to be raised on a point of law, and not where the facts pleaded are disputed.
- c) THAT as a result, the trial magistrate erred and dismissed the appellant's case with costs to the defendants.

- 3.** The Appellant prayed that his appeal be allowed and the order dismissing his case be set aside and judgment be entered for him as prayed in the Plaint. The Appellant also prayed for costs, both in the lower court and in this court.
- 4.** The Appellant filed submissions in support of the Appeal. The gist of his submissions is that the preliminary objection raised by the 1st Respondent did not meet the criteria set for preliminary objections because it raises matters that are not points of law. Specifically, he argues that the preliminary objection is premised on the question of when the appellant discovered the fraudulent transaction relating to his land, which issue is disputed.
- 5.** Further, the Appellant maintained that on 26th September, 2023 when he appeared before the trial court for the hearing of his case, he was not allowed by the court to speak in a language that he understands. He maintains that he was made to speak in Kiswahili, a language he is not conversant with hence the mix-up with the dates as to the year when the fraud took place.
- 6.** In addition, he insisted that he discovered the fraudulent transfer of his land in 2020 and filed this lower court suit in

2022, which period is two years. According to him, the suit was filed only two years after the discovery of the fraud, which period is within the statutory time limit imposed by Section 7 of the Limitation of Actions Act, Chapter 22 Laws of Kenya.

7. The 1st Respondent's submissions, on the other hand, are dated 5th June 2025. They are centered around the argument that the Appellant herein admitted in court that he discovered the alleged fraudulent dealing on his land in 1984 but took 39 years to institute a recovery of the suit land. The 1st Respondent also argued that leave of court was never sought before bringing the action out of time and the reason given by the Appellant for such delay was that he did not have money to file a suit.

8. The 1st Respondent framed three issues for determination by this court, being: whether the appellant's right to fair hearing was infringed; whether the preliminary objection was merited and who should bear the costs of the appeal. In answering the first issue, the 1st Respondent maintained that on 26th September, 2023 the Appellant was ably represented by his

counsel who led him examination in chief as well as re-examined him in Kiswahili language.

9. He argues that had counsel seen the need for interpretation, he would have ensured the same was done. He states the Appellant told the court that he discovered the said fraud in 1984, upon being cross-examined by the 1st Respondent's counsel. Further, he repeated the same upon being cross-examined by the counsels of the 2nd and 3rd Respondents. The 1st Respondent concludes that that the three occasions that the Appellant admitted having discovered the fraud in 1983 cannot be attributed to failure to understand Kiswahili language.

10. As to whether the preliminary objection raised by the 1st Respondent at the trial court was merited, he submitted that the Appellant having admitted to the court that he discovered the alleged fraud 39 years before institution of the suit, it was time barred pursuant to Section 7 as read together with Section 26 of the Limitations of Actions Act, Cap 22 Laws of Kenya and relied on a host of authorities to support this submission. He maintained that, since limitation of time goes to the jurisdiction

of the court, the suit having been time-barred, the trial court had no jurisdiction to hear and determine the matter.

- 11.** Regarding costs, the 1st Respondent relied on Section 27 of the Civil Procedure Act to argue that costs follow events and as such he argued this court to dismiss the suit and the costs of the appeal be awarded to him.

Issues, Analysis and Determination

- 12.** I have identified the following to be the issues for determination in the instant appeal:

- a) Whether the trial court erred in law and fact in finding merit in the 1st Respondent's preliminary objection; and
- b) Who should bear the costs of this appeal

- 13.** This being a first appeal, I will analyze and re-assess the evidence on record for purposes of forming this court's own conclusion concerning the issues at hand. In so doing, I must warn myself that, unlike the trial magistrate, I did not have the benefit of seeing or hearing the appellant when he testified at the trial court. The then East African Court of Appeal in the celebrated case of **Selle v Associated Motor Boat Company [1968] EA 123** set out the parameters to be adhered to by a

first appellate court when reviewing evidence tendered before the trial court. The court pronounced itself as hereunder: guided by the authority here the court held as follows:

“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 allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif vs. Ali Mohamed Sholan (1955), 22 E. A. C. A. 270).

14. In **Jabane v Olenja [1986] KLR 661, 664 664**, the court added its voice to this matter in the following terms:

“More recently, however, this Court has held that it will not lightly differ from the findings of fact of a trial judge who had had the benefit of seeing and hearing all the witnesses and will only interfere with them if they are based on no evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did - see in particular Ephantus Mwangi -vs- Duncan Mwangi Wambugu (1982-88) 1 KAR 278 and Mwanasokoni vs. Kenya Bus Services (1982-88) 1 KAR 870.”

15. This Court must, however, point out at this juncture that the decision of the trial court was not based on the merits of the parties’ evidence but on the pleadings as were compared with the law. The trial magistrate, therefore, exercised discretion on the matter and arrived at the conclusion as he did. Thus, an appeal arising from the exercise of discretion of a court would be looked at slightly differently in terms of the principles to apply in determining it from those where the trial court arrived

at a conclusion based on the valuation of the merits of evidence.

16. The above position is restated in many a decision as can be seen from the few cited below by this court. These conditions to be observed were stated in **Supermarine Handling Services Ltd versus Kenya Revenue Authority [2010] eKLR (Civil Appeal 85 of 2006)** where the Court stated:-

“... Thus, where a trial Court has exercised its discretion on costs, an appellate Court should not interfere unless the discretion has been exercised injudiciously or on wrong principles. Where it gives no reason for its decision the Appellate Court will interfere if it is satisfied that the order is wrong. It will also interfere where reasons are given if it considers that those reasons do not constitute “good reason” within the meaning of the rule”.

17. This was the same position posited by the Court of Appeal in **Farah Awad Gullet v CMC Motors Group Limited [2018] eKLR** where it held that

“...the Court of Appeal, in interfering with the exercise of discretion of the trial Judge appealed from, ought to satisfy itself that the exercise of that discretion either way was improper and therefore warrants interference.”

18. Again, in **Edward Sargent versus Chotabha Jhaverbhat Patel [1949] 16 EACA 63**, the court held that there is no bar to an appeal lying to an Appellate Court against an order made in the exercise of judicial discretion. However, for the Appeal Court to interfere it can only do so if it be shown that the discretion was exercised injudiciously.

19. Furthermore, in **Mbogo and Another v Shah [1968] EA 93 at 96** the court held:

“For myself I like to put it in the words that a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as

a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been mis-justice.”

20. Also, in **Agola v Ngodhe (An administrator to the Estate of Zakayo Ngodhe) (Environment and Land Appeal E025 of 2024) [2025] KEELC 1367 (KLR) (6 March 2025) (Judgment)**, this court stated;

“As for the instant appeal, it is clear that it arose from the low court’s exercise of discretion. Regarding appeals of such nature, the appellate court will not normally interfere with the discretion of the trial court unless the trial magistrate or judge exercised the discretion wrongly, injudiciously or misdirected himself in some matter thereby arriving at a wrong decision, the decision clearly wrong.”

21. Having carefully analyzed the decisions and compared their import in relation to the facts of this case, I am of the humble view that their holdings are relevant. Therefore, this court shares in their opinion. Thus said, I have carefully analyzed all

the pleadings filed by the parties in both the trial court and in this one including the Plaint, the Witness Statement and Replying Affidavit filed at the trial court by the appellant herein, the proceedings at the trial court, as well as the preliminary objection raised by the 1st respondent herein together with his submissions.

22. Order 51 Rule 14 of the Civil Procedure Rules, 2010

provides that filing of a notice of preliminary objection is one of the avenues a party may pursue when opposing an application. It says no more about preliminary objections how the matter progresses thereafter. Despite that deficiency, the road has often been clear about it because such objections being on points of law take precedence above all other considerations when determinations are being considered. I have often heard parties trying to convince courts that preliminary objections can be heard together with either applications or other issues raised. I respectfully disagree. They take precedence and should be considered first before anything else. This is because if the law provides differently from the case before a court, that

should be known or clarified first before the matter proceeds further.

23. Therefore, in the seminal case of **Mukhisa Biscuits Manufacturing Limited v Westend Distributors (1969) EA 969** the judges set out the threshold that must be met for a preliminary objection to be successful. Accordingly, the court held that:

“A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration. A preliminary objection is in the nature of that used to be called a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

24. In this case, the 1st Respondent's preliminary objection in the trial court was based on **Section 7** as read with **Sections 13, 17** and **26** of the **Limitation of Actions Act, Chapter 22** Laws of Kenya. **Section 7** provides as hereunder:

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.

25. Section 26 on the other hand 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.

26. As can be discerned from the **Mukhisa Biscuit manufacturing Limited case** (supra) as read with well as **sections 7 and 26** of the **Limitations of Actions Act**, limitation on time with regard to when a claim for fraud or recovery of land should be presented before a court of law as imposed by statute is a point of law. That is a preliminary point on which a notice of objection may be raised. That was taken up in the trial court. I concur with the court that the suit related to recovery of land and thus fell squarely within the ambit of Sections 7 and 26 of the Limitations of Actions Act.

27. A reading of the Plaintiff shows that the appellant seeks to recover land which he maintains was fraudulently transferred and registered in the name of the 1st respondent. The 1st respondent maintained that the action was time-barred by virtue of the fact that the appellant admitted in the trial court that he discovered the alleged fraud in 1983 but waited for 39 years to institute a suit. His excuse for this delay was that

he lacked the finances for institute a suit. He further maintained that leave of court was never sought before instituting this suit. How else could that not be compared with what the law provides and be taken up in the objection?

28. The appellant alleges that the cause of action arose in 2020 when he discovered the fraud after conducting a search and instituted a suit in 2022, which period was within the statutory time limitation. He blames the trial court for not allowing him to speak in a language that he understands as he was made to speak Kiswahili the confusion concerning the time when the cause of action arose.

29. This is obviously a mere reprobating of what is clear to everyone. It does not change the fact that the appellant pleaded the times when the fraud is alleged to have taken place. Particularly, at paragraph 5 of the Pleint he pleaded that on 30th August 1983 the parcel No. Suna East/Area "B"/KWA/694 was subdivided and registered into the 3rd Defendant's name as parcels Suna East/Area "B"/KWA/860 and 861. At paragraph 6 he says parcel number 860 was registered in his name. He states that on 10th August 1983 (sic), parcel no.

Suna East/Area "B"/KWA/860 was subdivided into the 1st Defendant's name. He particularizes those acts of fraud in paragraph 8 of the Plaint. He does not plead as to how and when he discovered this fraud.

30. Parties bound by their pleadings. They are not permitted to depart in adduction of evidence from the pleadings otherwise it would amount to trial or defence by ambush. One's case must be stated and made plain to the other or adverse party so that they know what to expect both in pleadings and evidence so that they too prepare. To do otherwise would lead to an unfair trial which is not only unconstitutional but would open a den and present to the adverse party of a boundless marouding mongrel which would obviously devour them. That would be unfair and an uneven ground for play.

31. The Supreme Court of Kenya in **Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR** while discussing the essence of pleadings in an election petition found and held as follows in respect to:-

“In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled

legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings...”

32. In a fairly similar issue for determination, A C Mrima J. in the case of **Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR**, stated as follows: -

“It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any

evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings: -“.....it is now trite principle in 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 another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”

33. This court, just like the trial court, cannot go beyond the pleadings in analyzing the preliminary objection. The Plaintiff is clear that the Plaintiff claims there was fraud, he alleges it was done in 1983 and/ or so soon thereafter because the plaintiff

avers at paragraph 8(c) that a mutation form was drawn or dated 2nd September 1985.

34. This Court could have paused a fundamental question: regarding when the appellant acquired his title, if at all he alleges that he discovered the fraud in 2020. But that would be inviting an analysis of the evidence hence I hold my peace. Let me to continue with the analysis on the legal point as was before the trial court.

35. I have looked at the trial court's proceeding on 26th September, 2023 when the appellant maintains that the court made him speak in Kiswahili, a language he did not understand. The court record indicates that the applicant herein testified in Kiswahili and was led in chief by his counsel. In cross-examination, he stated that he discovered that fraudulent activities complained of in 1984 and even told the court there were 30 years between 1984 and 2020. More importantly, the appellant was re-examined by his counsel and reiterated that he discovered that his land "was stolen in 1984". All that is evidence. It does not change the fact that at no point in time did the plaintiff plead the time he discovered the fraud, even if

he were to testify in a language he understood. But this does not mean that the court agrees with him about the proceedings having been conducted in a language foreign to him. This is only a reed he is trying to cling to as he sinks. The issue for determination both at the trial court and this one is what his pleadings contained in the trial court vis-à-vis the provisions of the law in question. The court in its ruling dated 24th October, 2024 found the preliminary objection merited and dismissed the suit with costs to the defendants.

36. Let us hear the conclusion of the whole matter: let the appellant be contented with what he already owns and leave the finding of the trial court unchallenged because it was sound and based on good analysis. The upshot is, I find and hold that the instant appeal is not merited and is hereby dismissed.

37. As to who should bear the costs of this appeal, **section 27 of the Civil Procedure Act** provides that costs are awarded at the discretion of the court and that costs follow events. The 1st Respondent having succeeded should be awarded costs of the appeal. It follows that the costs shall be borne by the appellant.

38. The original lower court file is to be transmitted forthwith back to the said court.

39. Orders accordingly.

Judgment dated, signed and delivered virtually via the Teams Platform on the 13th day of November 2025.

HON. DR *IUR* NYAGAKA

JUDGE

In the presence of

Court Assistant: Ms Lola

Ms. Agade Advocate for Ooro Advocate for the Appellant

No appearance for the Respondents (date had been taken in their presence)