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**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**  
**ELC LA NO. E099 OF 2024**

WALTER OTIENO OLUOCH .....APPELLANT

VERSUS

POLYCARP ODAA JORAM ..... 1<sup>ST</sup> RESPONDENT

AGIKA RATEMO FRED ..... 2<sup>ND</sup> RESPONDENT

LINET MOSOBA OMBASA ..... 3<sup>RD</sup> RESPONDENT

LAND REGISTRAR, KISUMU ..... 4<sup>TH</sup> RESPONDENT

HON. ATTORNEY GENERAL ..... 5<sup>TH</sup> RESPONDENT

***(Being an appeal from the Ruling and order of Hon. Robert  
M. Oanda (SRM) given on 21<sup>st</sup> November, 2024 in Winam ELC  
No. E43 of 2024)***

**BETWEEN**

WALTER OTIENO OLUOCH .....PLAINTIFF

VERSUS

POLYCARP ODAA JORAM ..... 1<sup>ST</sup> DEFENDANT

AGIKA RATEMO FRED ..... 2<sup>ND</sup> DEFENDANT

LINET MOSOBA OMBASA ..... 3<sup>RD</sup> DEFENDANT

LAND REGISTRAR, KISUMU ..... 4<sup>TH</sup> DEFENDANT

HON. ATTORNEY GENERAL ..... 5<sup>TH</sup> DEFENDANT

**J U D G E M E N T**

Introduction

The appeal herein challenges the ruling dated 21<sup>st</sup> November, 2024 in WINAM SPMC ELC NO. E043 OF 2024 (the suit). The record of appeal shows that the ruling was in respect of a preliminary

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objection raised by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents herein against the Appellant's suit.

The record shows that the Preliminary Objection was heard by way of written submissions which after the trial court had considered, vide its ruling dated 21<sup>st</sup> November, 2024, made a finding that the suit which ought to have been filed before the expiry of 12 years from 17<sup>th</sup> July, 1990 was filed out of time and hence statutorily barred. The court proceeded to uphold the Preliminary Objection and to dismiss the suit with no orders as to costs.

#### The appeal

Dissatisfied with the ruling, the Appellant, who was the Plaintiff in the suit, preferred the present appeal vide the Memorandum of Appeal dated 27<sup>th</sup> November, 2024 seeking for orders that the appeal be allowed, the ruling dated 21<sup>st</sup> November, 2024 be quashed and/or set aside and the Preliminary Objection be dismissed altogether, that costs of the appeal and the Preliminary Objection proceedings in the trial court be awarded to the Appellant. The grounds of appeal upon which the appeal was brought are that;

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1. the Learned trial Magistrate erred in law in upholding the Respondents' preliminary objection by so dismissing the Appellant's entire suit.
  2. the learned trial Magistrate erred in law in failing to find that the Appellant noticed the Respondents' fraudulently, unlawfully, illegally and or irregularly subdivision recently upon conduct of search certificate from the 4<sup>th</sup> Respondent's office.
  3. the Learned trial Magistrate erred in law in failing to find that the right of action of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents were concealed by the fraud of the Respondents as aforesaid or the action is for relief from the consequences of a mistake.
  4. the Learned trial Magistrate erred in law in failing to uphold the fact that the period of limitation does not begin to run until the Appellant discovered the fraud or the mistake or could with reasonable diligence have discovered it.
  5. the Learned trial Magistrate erred in law in decided the objection proceedings against the weight and or provisions of the Land Control Act, Cap.302 Laws of Kenya.
  6. the Learned trial Magistrate erred in law in failing to find that the doctrine of innocent purchaser cannot protect the title that the Lands office issues fraudulently and a usual "search" is not

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enough and that a buyer must call for and peruse and verify all entries in the parcel file before signing the sale agreement and all historical entries must be counterchecked and verified and that if there is a missing or unexplainable entry, a buyer shouldn't buy the land.

7. the Learned trial Magistrate erred in law in deciding the objection proceedings contrary to the provisions of evidence Act, Cap.80 Laws of Kenya and the Land Control Act, Cap 302 Laws of Kenya.

### Submissions

Vide directions given on 30<sup>th</sup> April, 2025, the appeal was heard by way of written submissions.

Written submissions dated 14<sup>th</sup> May 2025 were filed by the firm of D. E. K. Matete & Co. Advocates for the Appellant, written submissions dated 5<sup>th</sup> May 2025 were filed by the firm of Onsongo & Company Advocates for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents while written submissions dated 5<sup>th</sup> June 2025 were filed by the firm of Sala Mudany Advocates for the 1<sup>st</sup> Respondent. No submissions were filed for the 4<sup>th</sup> and 5<sup>th</sup> Respondents.

### Issues for determination

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From the grounds of appeal presented, the entire record of appeal generally and the submissions made, the issue that emerges for determination is whether or not the trial court erred in upholding the preliminary objection thereby dismissing the suit.

### Analysis and determination

This being a first appeal, this court is obligated to re-analyse the evidence placed before the trial court and draw its own conclusions. In *Selle & Another vs Associated Motor Boat Company Limited and Others [1968] EA 123* it was held that a court handling a first appeal is not necessarily bound to accept the findings of fact by the court below. It stated that

“an appeal to this 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 conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect.”

It has been submitted herein on behalf of the Appellant herein that the Appellant produced in court the green card and search

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certificate which were conducted on 18<sup>th</sup> July, 2024 and 19<sup>th</sup> July, 2024 respectively and OB NO.30 as reported on 14<sup>th</sup> October, 2024.

That the Appellant stated in his statement that he was not aware of the illegal transfer and sub-division up to when he conducted search and green card on 18<sup>th</sup> July, 2024 and 19<sup>th</sup> July, 2024 respectively to confirm ownership.

Counsel referred to section 26 of the Limitation of Actions Act and submitted that the Appellant produced enough evidence to prove that he detected the fraud on 18<sup>th</sup> July, 2024 and started the legal process by reporting the case of fraud to Kasagam police station on 14<sup>th</sup> October, 2024 and finally commenced the suit herein on 11<sup>th</sup> September, 2024.

Counsel relied on the case of *Justus Tureti Obara -vs- Peter Koipeitai [2014]eKLR* and the case of *Joseph Mwaniki Muchira -vs- Godfrey Muchangi (2018)eKLR* to support the submission.

Counsel submitted further that from the statement of defence, it was clear that there were contested facts which must be adjudicated upon, to ascertain whether the Respondent are right to state that they acquired title regularly.

That if there was any fraud committed as alleged by the Appellant, then the time begins to run from the date the fraud was discovered.

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That the evidence will bring to fore whether the Appellant is entitled to the land. Counsel referred to the case of *Dina Management Ltd -vs- County Government of Mombasa & 5 Others* on the doctrine of innocent purchaser for value.

Counsel urged the court to allow the appeal with costs.

On behalf of the 1<sup>st</sup> Respondent it has been submitted that the Preliminary Objection was properly raised and determined on pure points of law as established in *Mukisa Biscuits Manufacturing Company Limited -vs- West End Distributors Ltd [1969]EA 696* where it was held that a Preliminary Objection must raise a pure point of law capable of disposing of the suit without need of evidence. That the Preliminary Objection was anchored on section 7 of the Limitation of Actions Act. That the Appellant's suit filed 34 years after the cause of action arose was clearly statute-barred.

That the Appellant's claim of recent discovery of the fraud is untenable because section 26 of the Limitation of Action Act required that the fraud or mistake must have prevented the Plaintiff from discovering the cause of action and that the Plaintiff must have exercised reasonable diligence. Counsel relied on the case of *Gathoni -vs- Kenya Co-operative Creameries Ltd [1982]KLR 104*

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where it was held that a party relying on fraud, to extend the limitation period must prove active concealment by the Defendant.

Counsel submitted that the Appellant's reliance on section 26 of the Limitation of Actions Act was misplaced as no evidence was presented to show active concealment by the 1<sup>st</sup> Respondent.

Counsel relied on the case of Kiptui Arab Korir -vs- David Kiptoo [2017]eKLR where it was held that mere ignorance of a cause of action does not extend the limitation period unless fraud or mistake is proved. That the Appellant's failure to act within the limitation period renders the suit time-barred.

That the trial court correctly found that it lacked jurisdiction to handle a time barred suit. That the dismissal of the suit was therefore proper. Counsel urged the court to dismiss the appeal with costs and uphold the ruling of the trial court.

On behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents it has been submitted that it is settled law that parties are bound by their pleadings. Counsel relied on the case of IEBC & Another -vs- Stephen Mutinda Mule & 3 Others [2014]eKLR and the case of Joseph Mbuta Nziu -vs- Kenya Orient Insurance Company Ltd [2015]eKLR to support this submissions.

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Counsel submitted that the Appellant set his case in the plaint dated 6<sup>th</sup> September, 2024 and that the only date quoted and set out in the said plaint is 17<sup>th</sup> July, 1990 which the Appellant alleged to be the date when the alleged fraud, illegalities and/or irregularities were executed or carried out. That the Appellant did not set out the date he is alleged to have discovered, learnt or come across the actions/omissions and/or commissions complained of.

Counsel cited the cases of Hassan Nyanje Charo -vs- Khatia Mwashetani & 3 Others Civil Appeal No.14 of 2014 [2014]eKLR, Mukisa Biscuit Manufacturing Company Ltd -vs- West End Distributors [1969]EA 696 and IEBC -vs- Jane Cheperenger & 2 Others, Civil Application No.36 of 2014 [2015]eKLR and submitted that the test to be applied to determine a proper Preliminary Objection can be deduced as follows:-

- (i) A Preliminary Objection must be a pure point of law which if argued may dispose of the entire suit.
- (ii) Preliminary Objection should be based on the presumption that the pleadings and the facts as pleaded by the opposite side are correct or agreed facts.

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(iii) A Preliminary Objection cannot be entertained where;

- (a) The facts are disputed/contested.
- (b) The facts are liable to be contested.
- (c) What is sought is an exercise of judicial discretion.

That according to the pleadings in paragraph 7, 8 and 9 of the plaint, there having been no other date pleaded, it was open to the court to conclude that the cause of action on which the Appellant's suit was founded arose on 17<sup>th</sup> July, 1990.

Counsel relied on the provisions of section 7 of the Limitation of Actions Act, the cases of Mehta -vs- Shah (1965)EA, 321, Gathoni -vs- KCC Ltd (1982)KLR 104 and Iga -vs- Makerere University (1972) EA and submitted that the appeal lacks merit and urged the court to dismiss it with costs to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.

The threshold for a preliminary objection to be sustainable was set in the in the case of Mukisa Biscuit Manufacturing Co. Ltd - vs- West End Distributors Ltd [1969] E.A 696 as follows;

“...a Preliminary Objection consists a point of law which has been pleaded, or which order by clear implication out

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of pleadings and which if argued as a Preliminary point may disposed of the suit.

Examples are on objection to the jurisdiction of the court or plea of limitation or a submission that the parties are bound by contract giving rise to the suit to refer the dispute to arbitration.”

The court further held that

“A Preliminary Objection is in the nature of what used to be 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.”

From the foregoing, a preliminary objection must be based on pure points of law, must arise from the pleadings, may dispose of the suit if argued as a pure point of law and must be argued on the assumption that all facts pleaded by the opposite party are correct; it cannot succeed if any fact has to be ascertained; or if what is sought is the exercise of the court’s discretion.

I have read the plaint filed in the lower court. A copy thereof is on page 24 of the record of appeal. The Appellant pleaded in

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paragraph 7 of the plaint that at all material times to the suit, he was the registered owner of the whole of the suit land parcel known as KISUMU/KASULE/41, measuring approximately 0.6 Hectares as at 17<sup>th</sup> July, 1990, having obtained the land as at the date of land adjudication. That he was the first registered owner of the land and had never transferred his ownership and interest to anyone.

That on 17<sup>th</sup> July, 1990, the Defendants colluded and fraudulently transferred the suit land or caused the suit land to be transferred to the 1<sup>st</sup> Defendant and a title deed issued to him. That on 18<sup>th</sup> April, 2023, the 1<sup>st</sup> and 4<sup>th</sup> Defendants colluded and illegally sub-divided the suit land to KISUMU/KASULE/9969 and 9970 and sold No.9970 to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants jointly.

The Appellant therefore sought for orders of permanent injunction, declaration that transfer of the suit land to the 1<sup>st</sup> Defendant was unlawful, null and void ab ignition, declaration that the sale to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants was unlawful, an order of cancellation of new titles registered in the names of the 1<sup>st</sup> Respondent and the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, mesne profits, eviction order, costs of the suit and interest.

The Preliminary Objection raised related to a plea of limitation and sought that the suit be dismissed on the grounds that;

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- a) the suit was statutorily time barred by dint of section 7 of the Limitation of Actions Act Cap 22 Laws of Kenya.
- b) the suit was incompetent incurably defective, misbegotten and misconceived on account of the same being statutorily time barred and the court lacks jurisdiction to entertain, hear and determine the same.

Section 7 of the Limitation of Actions Act provides that;

“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.”

The only date referred to in the plaint was the 17<sup>th</sup> July, 1990 as the date when the cause of action arose. No other date was pleaded. There was no pleading whatsoever that the Appellant discovered the fraud on a date later than 17<sup>th</sup> July 1990.

On the face of the plaint, the date of the cause of action is 17<sup>th</sup> July, 1990. The suit is for recovery of the suit land. Section 7 of the Limitation of Actions Act prohibits the filing of suits for recovery of land after expiry of 12 years from the date the cause of arose.

There was no pleading or any material in the plaint that could avail the Appellant the exception provided for in section 26 of the Act.

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The trial court considered the pleadings in the plaint, the provisions of section 7 of the Limitation of Actions Act and decided cases and came to its decision contained in the ruling.

The date when the cause of action arose is a crucial component of a party's suit/action and the same must be clearly pleaded. This is so that it can be ascertained that the suit is filed within the limitation period and that the court has jurisdiction, as a suit that is time-barred divests the court of jurisdiction.

On the material placed before the trial court, the trial court did not err in upholding the preliminary objection.

I find no reason to interfere with the findings and decision in the ruling.

In conclusion, the court finds that the appeal lacks merit and hereby dismisses it.

Costs are awarded to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.

Orders accordingly.

**Judgement dated and signed at Kisumu and delivered virtually this 20<sup>th</sup> day of November, 2025.**

**E. ASATI**

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## **JUDGE.**

### **In the presence of:**

Maureen: Court Assistant.

Twena h/b for Matete for the Appellant

Awuor S for the 1<sup>st</sup> Respondent.

Onsongo for the 2<sup>nd</sup> & 3<sup>rd</sup> Respondents

No appearance for the 4<sup>th</sup> and 5<sup>th</sup> Respondents.