REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ELC APPEAL NO. E021 OF 2025

AGNES CHEPKOECH CHERIRO……1ST APPELLANT

BENARD KIBET SERON KIRUI…… …… 2ND APPELLANT

VERSUS

DAVID KIPKORIR RONOH……RESPONDENT

(Being an appeal from the Judgment and consequent Decree of Hon. Caroline A. Ocharo Chief Magistrate delivered on 14th April, 2025 in Molo ELC Case No. 60 of 2019)

JUDGMENT

This is an appeal arising from the judgment of Honourable Caroline A. Ocharo Chief Magistrate, Molo delivered on 14th May, 2021 in Molo ELC Case No. 60 of 2019.

The Appellants filed a Memorandum of Appeal dated 24th April, 2025 appealing against the said judgment on the following grounds: -

1. **THAT trial magistrate erred in law and fact by failing to appreciate the totality of the evidence that was before her, evidence that pointed that Paul Kipkemoi Ronoh did**

not have any interest to transfer to the Respondent and therefore all transactions between the said Paul Kipkemoi Ronoh and the Respondent were a nullity in law.

2. **THAT trial magistrate erred in law and fact by failing to take into account that the letter of allotment does not confer any property rights to a person unless there is acceptance and payment of the stand premium and ground rent. Once allotment letter is issued and the allottee does not meets the conditions therein, the land in question is available for allotment to someone else.**
3. **THAT the trial magistrate erred in law and fact in invoking the doctrine of double allocation whereas evidence challenging the allotment letter and title issued to Paul Kipkemoi Ronoh by the allotting authority-the Land Administrator-ADC, the Deputy Director Land Adjudication and Settlement Officer, the Land Registrar, National Land Commission and the County Commissioner clearly denied and distant itself from allotment letter to Paul Kipkemoi, clearly demonstrated that their records show that Joe Tabatai as the allottee of Plot No. 275 and**

276 and that there was no record of Paul Kipkemoi Ronoh as the allottee, distancing themselves from any allotment letter issued to the said Paul Kipkemoi, that there was no register for Nakuru/Sirikwa Scheme/276 in the name of the Respondent and that the Respondent's title was either acquired through fraud, unclear circumstances, mistake or misrepresentation the same was out rightly illegal.

4. **THAT the magistrate erred in law and fact in finding that both the Appellants and the Respondent's titles are authentic and were procedurally obtained whereas disregarding the evidence that the Registration of the Respondent as the proprietor of Nakurv/Sirikwa Scheme/276 was made in unclear and unexplained circumstances, the suit property is Molo/Sirikwa/276 and the Respondent's title was fraudulent as it was not authorized by the allocating authority or the ministry of land and was not supported by any documents.**
5. **THAT the magistrate erred in law and fact in failing to take into account the provisions Section 4(4) of the Limitation of Actions Act that the decision of the tribunal**

of 26/6/2006 could not have been enforced after 12 years to include bringing an action in respect of the right of ownership of Plot No. 276 and processing of the title. Failure to note that the parties herein were not the parties in the said tribunal suit, the suit property was not the subject matter therein and the matter proceeded and concluded after the deceased passed on without substitution.

6. **THAT the trial magistrate erred in law and fact misapprehended the law on duplicity of titles in that the title which is to be upheld is that which conformed to procedure and can properly trace its roots without a break in the chain. The Respondent's title was marred with irregularities, uncertainties and unclear circumstances leading to the issuance of the same whereas the Appellants demonstrated that their title had a good foundation without a break in chain, from issuance of the allotment letter to correspondence confirming the legal ownership/allottee, to payment of standard premium, obtaining discharge form on**

compliance of conditions in the allotment letter and subsequent issuance of the title.

7. **THAT the trial magistrate erred in law and fact in invoking the principal of duplicity of titles wrongly whereas the Respondent's title was distinct from the Appellant's title, there was no adjudication register/land register over the Respondent's Title only that of the Appellants, there was no parcel file for the Respondent title, the Appellant's title in any case was issued earlier hence the equitable doctrine of 'first in time prevails.**
8. **THAT the trial Magistrate erred in law and fact by turning a dispute over ownership of Molo/Sirikwa/276 into a claim of adverse possession and holding that since the Respondent had been in possession from 2012 .**
9. **THAT the Learned Magistrate erred in law and fact in holding that the Appellants counter claim was time barred whereas the cause of action arose by virtue of certificate of title on 4/8/2017, and the counter claim was filed in the year 2019 within the timelines provided under Section 7 of the Limitation of Actions Act.**

10. **THAT trial magistrate misdirected herself in law and fact in failing to take account of the probabilities materially to estimate the evidence that in the absence of proof of allocation to Paul Kipkemoi Ronoh or compliance with procedural requirements within the required timeline, it was academic for the trial court to entertain any claim of duplication of records or double allocation. Evidence that double allocation does not arise in the circumstances akin herein as there has only been one allocation: allocation in favour of Appellant's deceased husband and that there was never allocation to the Respondent and such allocation, if any, did not crystallize.**

11. **THAT the Learned Magistrate erred in law and fact by misapprehending documentary and oral evidence of the Deputy Director-Land Adjudication and Settlement Officer, the Land Registrar and the Land Administrator with ADC and finding that the despite the them not having record of Paul Rono and the Respondent, the same does not negate evidence presented on the genesis of the title in possession of the parties.**

12. **THAT the Learned Magistrate erred in law and fact failed to take account of particular circumstances and Evidence tendered that the Respondent's title was suspect and was not issued lawfully and procedurally, in any case evidence led to definite conclusion: that both titles were acquired lawfully and procedurally, the court ought to have invoked the equitable doctrine of 'first in time prevails' where the Appellant's title was acquired earlier.**
13. **THAT the Learned Magistrate erred in law and in fact in allowing himself to be guided by immaterial facts that did not form part of the issues for determination thereby exercising his discretion irrationally and in violation of the law and legal principles.**
14. **THAT the Learned Magistrate relied on wrong principles of law and fact in arriving at his Judgment.**

The Appellants seek orders setting aside the judgment and an order allowing the Appellants counterclaim and dismissing the Respondent's plaint. They also sought for costs of the present appeal.

BRIEF FACTS

The Respondent filed a suit against the Appellants vide a plaint dated 17th June, 2019 seeking to be declared as the rightful owner of land parcel No. MOLO/SIRIKWA 276, the suit property. He also sought for an order for cancellation of the Appellants' names from the land register.

The Appellants' vide its Defence and Counter claim dated 21st August, 2019, denied the allegations in the Plaint and averred that they were the registered owners of the suit property having been in open possession since 1993. In their Counterclaim, they sought for orders to be declared the lawful owners of the suit property together with an order of permanent injunction against the Respondent from trespassing onto the suit parcel.

At the hearing, the Appellants and Respondent testified and closed their cases. The trial magistrate found that the Respondent had proved his case on a balance of probabilities and proceeded to dismiss the Appellants' Counterclaim with costs to the Respondent.

The Appellants' being dissatisfied with the judgment lodged the instant appeal before this court.

This court on 7th October, 2025 admitted the appeal for hearing and the same was canvassed by way of written submissions.

Submissions

Counsel for the Appellants filed his submissions dated 21st October, 2025 where he identified four issues for determination. The first issue was whether the Appellants are the rightful owners of Land Parcel No. Molo/Sirikwa/276. He submits that there were two titles over the same property in both the 1st Appellant and Respondent's name. He relied on the case of **Munyu Maina V Hiram Gathiha Maina [2013] KECA 94 (KLR)** and **Dina Management Limited V County Government of Mombasa & 5 Others eKLR.**

He submits that the Respondent alleged that he purchased the suit parcel from one Paul Kipkemoi Rono vide a sale agreement dated 5th October, 2012 at Kshs. 650,000. He further submits that the Respondent alleged that at the time he was processing his title in 2017, he discovered that it was already in the Appellant's name. That the Appellants on the other hand contend that the land was originally allocated to Joel Tabatai by the ADC through the allotment letter dated 16th September, 2005. He adds that after Joel passed on, the Appellants' were appointed the administrators of his estate and upon settlement of the SFT loan, they were issued with a discharge of charge and issued with a title on 4th August, 2017.

It was counsel's submission that the Land Adjudication Officer testified that there were significant inconsistencies with the Respondent's root of title since the sale transaction between Andrew Kipketer Yegon and the Respondent was questionable. He adds that Yegon's name did not appear anywhere in the land records. He also submits that the offer letter issued to the Respondent was subject to strict conditions including payment of 10% of the purchase price upfront and balance within 90 days. He adds that failure to meet the said conditions resulted in cancellation of the offer without further notice.

He submits that evidence showed that the balance was cleared after two years thus one would infer that the offer letter had lapsed and was no longer valid by the time Joel had been issued with the allotment letter on 16th September, 2025. It was his submission that the Appellants supplied the court with a copy of the discharge of charge and the green card that showed the entries in support of their case. He relied on **Article 40 (6) of the Constitution** and **Section 26 of the Land Registration Act** and submits that the Appellants' are the rightful owners of the suit parcel.

The second issue was whether the trial court erred in law and fact in cancelling the title deed issued to the Appellants. Counsel submits in the affirmative and argues that the trial court erred in allowing the Respondent's prayers even after it found that there was no fraud, illegality or procedural impropriety with the title by both parties. He adds that were both titles are not found to be fraudulent, precedence demands that the first it time ought to have prevailed. He relied on the case of **Waterfront Holdings Limited V Kandie & 2 Others (Civil Appeal 88 of 2019)** and submits that Joel Tabatai and subsequently his estate should be recognized as the absolute owner of the suit parcel.

The third issue was whether the Appellants' counter claim is time barred. It was counsel's submission that the cause of action arose on 5th July, 2018 when the Respondent obtained the impugned title. He cited **Section 7 of the Limitation of Actions Act** and submits that time begins to run when a party's right to possession and ownership is first infringed. He submits that in the instant case, infringement occurred upon issuance of the parallel title to the Respondent in 2018 and not before. He further submits that until that moment, the Appellant's title remained unchallenged and no cause of action on

ownership could have crystallized. He adds that the doctrine of limitation could not be invoked to shield an unlawful title.

On the final issue of costs, he relied on **Section 27 (1) of the Civil Procedure Act** and urged the court to award the Appellants costs of the suit.

At the time of writing this judgment, the Respondent's submissions were not in the court records nor filed in the CTS.

Analysis and Determination

Upon consideration of the materials presented in respect to the Appeal herein including the Memorandum of Appeal and Record of Appeal I have taken the liberty to condense the grounds as raised in the memorandum of appeal to the following three issues which arise for determination:

1. **Whether the trial magistrate erred in law and fact in finding that the Respondent had proved his case on a balance of probabilities.**
2. **Whether the trial magistrate erred in law and fact in dismissing the Appellants' Counterclaim.**
3. **Who should bear the costs of the appeal.**

Being a first appeal, the court relies on a number of principles as set out in **Selle and another V Associated Motor Boat Company Ltd and others [1968] 1 EA 123**:

> **"…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 ..."**

Further as was held in the case of **Mwangi V Wambugu [1984] KLR 453** that an appellate court will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence; or where the court has clearly failed on some material point to take account of particular circumstances or probabilities material to an estimate of the evidence.

This court has keenly perused the record of appeal and it is not in dispute that this was a case of two conflicting titles. It is a fact that there were two titles for Molo/Sirikwa/276 issued in both the Appellant and Respondent's name. The Respondent claimed that he purchased the suit parcel from Paul Kipkemoi who had been allotted the same on 16th April, 1993. He further claimed that the Appellants fraudulently obtained the title to the suit property and that the tribunal had found that the 1st Appellant's deceased husband was the owner of plot 256 and 257. It was clear from the evidence that the Respondent paid for the land on 4th October, 2012.

PW2, Paul Kipkemoi upon cross examination confirmed that the tribunal ruled on plot 275 and not plot 276 being the suit property. PW4, the Deputy Director Land Adjudicator and Settlement on cross examination confirmed that ADC was to allocate the land and hand over the documents to the Settlement Fund Trustee (SFT) who issued an allotment letter. He added that the allotee was to then pay after which they would then discharge them and issue them with title documents. He also admitted that if one paid outside the 90 days period, the offer letter was not valid. He also confirmed that he did not have any discharge in favour of the Respondent or ground report

to confirm that the land was available for allocation. PW4 confirmed that no title could be issued without a discharge and transfer by government.

Section 107 of the Evidence Act, Cap 80, states that:

> **"Whosever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."**

Further, **Section 108 of the Act** states:

> **"The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."**

It is this court's view that both Appellants and Respondent having alleged fraud against each other in acquiring the suit property. The onus was therefore on them to prove the same.

DW1 confirmed that her late father Joel Tebatai Mungari was allocated Molo 276. DW3, the Land Registrar Nakuru produced a copy of the green card and title for Molo/Sirikwa/276 which showed that the suit parcel was registered in the Appellants' name. She also confirmed that there was a restriction registered on 29th November,

2017 and added that it was impossible to procure a tile with a pending restriction. She admitted that there was a list forwarded to them with the Respondent's name but with no record of how the title was issued. DW3 also confirmed that as per their records the Appellants were the rightful proprietors of the suit parcel. DW4, a Lands Administrator with ADC also gave evidence that on 25th May, 1993 they had allocated the suit property to Joel Tebatai. He confirmed that the allotment letter dated 5th February, 1993 never existed in their records.

In the Court of Appeal case of **Dr. Joseph N.K. Arap Ng'ok V Justice Moijo Ole Keiyua & 4 others C.A.60/1997,** the court held as follows:

> **"It has been held severally that a letter of allotment per se is nothing but invitation to treat. It does not constitute a contract between the offerer and the offeree and does not confer interest in land at all. It cannot thus be used to defeat a title of a person who is the registered proprietor of the said parcel of land."**

Further, in the case of **Mbau Saw Mills Ltd V Attorney General for and on behalf of the Commissioner of Lands) & 2 others [2014] eKLR**, the court found that:

> **"In order for an allotment letter to become operative, the allotee was required to comply with the conditions set out therein including the payment of stand premium and ground rent within the prescribed period."**

It is this court's view that the trial court rightly established that indeed there were two competing titles over the same property. It is also my opinion that the trial magistrate however misdirected herself when she found that both parties had genuine titles issued to them but went ahead to find that only the Respondent was the rightful owner of the suit parcel. While in agreement with the Appellants' counsel, I find this contradictory in all its form. I have keenly perused the alleged allotment letter dated 5th February, 1993 to one, Paul Kipkemoi Ronoh and it is a fact that his ID number does not tally with that in the sale agreement dated 5th October, 2012 where he allegedly sold the suit land to the Respondent. In addition, from the evidence adduced, it was a fact that the Appellants produced a discharge of charge as issued by ADC for the suit property thus

confirming that they had fulfilled their conditions in the terms of the offer letter. It is my opinion that even if this court was to assume that the allotment letter dated 5th February, 1993 was in fact valid, the Respondent had failed to comply with the conditions set out in the letter to warrant issuance of a discharge of charge. It was not disputed that the Respondent had paid the said amount 2 years after the stipulated period in the terms of the letter.

In light of the above, it is this court's view that the Respondent having failed to meet the conditions as stipulated in the allotment letter, it meant that the suit land was free to be allotted to another person.

It is important to note that a claim of ownership of land goes beyond just the allotment letter. There are steps of transfer and registration that ought to be finalized before one could claim ownership. Notably, DW4, the Land Administrator with ADC denied having in their records the alleged allotment letter issued to one, Paul Kipkemoi. The Appellants on the other hand adduced documentary evidence in form of the allotment letter dated 25th May, 1993 together with a discharge of charge issued by ADC and transfer documents in favour of the Appellants. In addition, the green card produced which the Respondent never rebutted, confirmed that the Appellants were the

lawful owners of the suit property. It was crystal clear from DW4's evidence that a title issued by SFT could not be issued without a discharge of charge. Furthermore, DW3, the Land Registrar confirmed that when there was a restriction placed on the land, one could not procure a title on the same parcel until the restriction was removed. It is this court's view that from the evidence, there were serious glaring loopholes in the Respondent's case in acquiring the title for the suit parcel which were never concretely substantiated.

It is this court's view that it was solely the Appellants and Respondent's duty to prove to the required standard that they were allocated the suit land and thus obtained ownership. It is my view that the Respondent failed to convince the court on a balance of probabilities that it had been allotted the suit land. The Appellants on the other hand proved their case to the required standard. Consequently, I find that the trial court erred in its finding that the Respondent had proved his case on a balance of probabilities against the Appellants.

On the second issue for determination, it is noteworthy that the trial magistrate *suo motto* raised the doctrine limitation of time. It went ahead and found that the Appellants' claim was statute barred having

been filed 16 years after the cause of action arose and ultimately dismissed the Appellants' counterclaim.

Section 7 of the Limitation of Actions Act provides as follows:

> **"An action may not be brought by any person to recover land after the end of 12 years from the date on which the right of action accrued to him and if it first accrued to some person through whom he claims to that person"**

Further **Section 26** of the same Act provides for an extension of the limitation of time in case of fraud or mistake wherein time starts running at the point when the fraud is discovered by the plaintiff. The section provides as follows:

> **"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, <u>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.</u>" [Emphasis mine]

In the instant case, it is clear that from the plaint and defence and counterclaim that he main cause of action was fraud. It is not in dispute that the Appellants have been in possession of the suit property until 2018 when they discovered that another title touching on the suit parcel had been issued in the Respondent's name. It is this court's view that from the above, the cause of action arose from the year 2018 as this was when the Appellants discovered fraud. It is also not in dispute that both parties filed their cases in 2019 which was one year after discovery of the fraud.

In view of the above, this court finds that the trial magistrate misdirected herself when it found that the Appellants' Counterclaim was statute barred.

The upshot of the foregoing is that the appeal is merited and I proceed to set aside the trial court's judgement delivered on 14th April, 2025. I subsequently enter judgment in favour of the Appellants

in terms of their counterclaim dated 21st August, 2019 and dismiss the Respondent's claim vide plaint dated 17th June, 2019. The Respondent shall bear the costs of the appeal. Orders accordingly.

JUDGMENT SIGNED, DATED AND DELIVERED ELECTRONICALLY AT NAKURU THIS 3RD DAY OF DECEMBER 2025.

A.O.OMBWAYO

JUDGE