



**Owegi v Okubo & another (Environment and Land Appeal E045 of 2024)  
[2025] KEELC 18514 (KLR) (17 December 2025) (Judgment)**

Neutral citation: [2025] KEELC 18514 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT AND LAND APPEAL E045 OF 2024  
SO OKONG'O, J  
DECEMBER 17, 2025**

**BETWEEN**

**PATRICK OCHAM OWEGI ..... APPELLANT**

**AND**

**WECHE RAPHAEL OKUBO ..... 1<sup>ST</sup> RESPONDENT**

**THE LAND REGISTRAR, KISUMU ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the ruling of Hon. D.N. Ogoti, CM delivered  
on 5th June 2024 in Kisumu CMCELC NO. E066 OF 2021)*

**JUDGMENT**

1. This appeal challenges the ruling and order of Hon. D.N. Ogoti, CM, delivered on 5<sup>th</sup> June 2023, in Kisumu CMCELC No. E066 of 2021 (hereinafter referred to as “the lower court”). Appellant brought the lower court suit against the Respondents on 24<sup>th</sup> May 2021. In his amended plaint dated 13<sup>th</sup> July 2021, the Appellant averred that at all material times, he was the registered owner of all that parcel of land known as Title No. Kisumu/Ojola/805 measuring 1.1 hectares (hereinafter referred to as “the suit property”). The Appellant averred that sometime in January 1983, he sold to the 1<sup>st</sup> Respondent a portion of the suit property measuring 0.06 of a hectare. The Appellant averred that he never sold the 1<sup>st</sup> Respondent the whole of the suit property, and never executed any transfer in his favour for the whole of the suit property. The Appellant averred that the agreement of sale of the portion of the suit property between him and the 1<sup>st</sup> Respondent was null and void for want of the Land Control Board Consent. The Appellant averred that the 1<sup>st</sup> Respondent never took possession of the portion of the suit property sold to him by the Appellant until 38 years later in December 2020, when the 1<sup>st</sup> Respondent came to the suit property and fenced the entire parcel of land, including the Appellant’s homestead, which he claimed to have subdivided into three portions, Title Nos. Kisumu/Ojola/5059, 5060, and 5061.



2. The Appellant averred that the registration of the suit property in the name of the 1<sup>st</sup> Respondent and the subdivision of the property into three portions were carried out by the 1<sup>st</sup> Respondent illegally and fraudulently without the consent of the Appellant, with the connivance of the 2<sup>nd</sup> Respondent. The Appellant pleaded several particulars of fraud against the Respondents. The Appellant sought judgment against the Respondents jointly and severally for an order cancelling the subdivision of the suit property into Title Nos. Kisumu/Ojola/5059, 5060, and 5061, and restoring the property, a permanent injunction restraining the Respondents from interfering with the suit property in any way, mesne profits, costs, and interest.
3. The 1<sup>st</sup> Respondent filed a statement of defence in the lower court on 28<sup>th</sup> May 2021. The 1<sup>st</sup> Respondent denied the Appellant's claim in its entirety. The 1<sup>st</sup> Respondent averred that he was the registered owner of the suit property and its subdivisions, Title Nos. Kisumu/Ojola/5059, 5060, and 5061. The 1<sup>st</sup> Respondent averred that the Appellant's suit was an attempt by the Appellant to renege on and frustrate the agreement of sale of the suit property that the parties entered into in 1983. The 1<sup>st</sup> Respondent averred that he acquired the suit property lawfully and procedurally. The 1<sup>st</sup> Respondent denied that he acquired the property illegally and fraudulently in collusion with the 2<sup>nd</sup> Respondent. The 1<sup>st</sup> Respondent averred that the Appellant's suit was time-barred pursuant to the provisions of Section 4 of the [Limitation of Actions Act](#), Chapter 22 Laws of Kenya.
4. The Appellant filed a reply to defence on 10<sup>th</sup> June 2021, in which he joined issue with the 1<sup>st</sup> Respondent in his defence. The Appellant denied that its plaint disclosed no cause of action and that the same was time-barred as claimed by the 1<sup>st</sup> Respondent.
5. On 3<sup>rd</sup> March 2023, the 1<sup>st</sup> Respondent filed a Notice of Preliminary Objection in which he contended that the Appellant's suit was time-barred pursuant to the provisions of Section 4 of the [Limitation of Actions Act](#), Chapter 22 Laws of Kenya, and that the suit was incompetent, bad in law, and an abuse of the process of the court. On 10<sup>th</sup> March 2023, the 1<sup>st</sup> Respondent filed an application by way of Notice of Motion dated 9<sup>th</sup> March 2023, supported by the affidavit of his advocate Richard Onsongo, seeking an order that the Appellant's suit be struck out on the ground that the suit was time-barred. The application was brought under Sections 4(1)(a) and 7 of the Limitations Act. The 1<sup>st</sup> Respondent averred that the Appellant sold to him the suit property in January 1983, and on 6<sup>th</sup> January 1983, the suit property was transferred and registered in his name. The 1<sup>st</sup> Respondent averred that the Appellant's suit was brought about 40 years after the property was sold and registered in the name of the 1<sup>st</sup> Respondent. The 1<sup>st</sup> Respondent averred that to the extent that the suit was brought to enforce the contract of sale of land, the same was barred under Section 4 (1) of the [Limitation of Actions Act](#), and to the extent that it was for the recovery of the suit property, it was time-barred under Section 7 of the [Limitation of Actions Act](#). The 1<sup>st</sup> Respondent averred that the suit could not be saved through an amendment. The 1<sup>st</sup> Respondent's application was heard by way of written submissions. In his submissions, the 1<sup>st</sup> Respondent reiterated that the suit was time-barred under the provisions of Sections 4(1) and 7 of the [Limitation of Actions Act](#). On his part, the Appellant submitted that the application did not meet the threshold for striking out a suit. The Appellant submitted that in his plaint, he had claimed that the 1<sup>st</sup> Respondent had fraudulently and illegally transferred the suit property into his name and proceeded to subdivide it. The Appellant submitted that his cause of action arose when he discovered the 1<sup>st</sup> Respondent's acts of fraud, and not when the agreement between him and the 1<sup>st</sup> Respondent was made or when the suit property was registered in the name of the 1<sup>st</sup> Respondent. The Appellant submitted that his plaint raised serious triable issues which should be tried. The Appellant prayed that he be given his day in court.



6. In a ruling delivered on 5<sup>th</sup> June 2024, the lower court determined the 1<sup>st</sup> Respondent's Preliminary Objection dated 2<sup>nd</sup> March 2023 instead of the 1<sup>st</sup> Respondent's Notice of Motion application dated 9<sup>th</sup> March 2023, which was argued by the parties. The lower court found that since the Appellant had admitted in paragraph 5 of his amended pleadings that he sold a portion of the suit property to the 1<sup>st</sup> Respondent in January 1983, the Appellant's suit against the 1<sup>st</sup> Respondent after almost 40 years was time-barred under both Section 4(1) and Section 7 of the Limitation of Actions Act. The lower court found further that since the suit was time-barred, the court had no jurisdiction to hear it. The lower court held that the suit was an abuse of the court process and dismissed it with costs to the Defendant.
7. The Appellant was aggrieved by the decision of the lower court and preferred the present appeal. In his Memorandum of Appeal dated 1<sup>st</sup> July 2024, the Appellant challenged the lower court's ruling on the following grounds;
  1. That the learned trial magistrate erred in law and fact by finding that the court lacked jurisdiction to try the suit that was before it.
  2. That the learned trial magistrate erred in law and fact in failing to find that the Appellant's claim against the 1<sup>st</sup> Respondent concerned fraudulent registration of the suit property in the name of the 1<sup>st</sup> Respondent, and as such, whether or not the suit was time-barred depended on when the Appellant discovered the fraud rather than the date when the agreement of sale between the parties was made.
  3. That the learned trial magistrate erred in law and fact in ruling on the notice of preliminary objection dated 2<sup>nd</sup> March 2023, when the matter that was before him and in respect of which the parties had filed written submissions was the 1<sup>st</sup> Respondent's Notice of Motion application dated 9<sup>th</sup> March 2023.
8. The Appellant prayed that the appeal be allowed and the ruling of the lower court be set aside, and in place thereof, an order be made dismissing the 1<sup>st</sup> Respondent's Notice of Motion application dated 9<sup>th</sup> March 2023. The Appellant also prayed for the costs of the appeal. The appeal was heard by way of written submissions. The Appellant filed submissions dated 3<sup>rd</sup> October 2025, while the 1<sup>st</sup> Respondent filed submissions dated 6<sup>th</sup> October 2025.

### **Analysis and determination**

9. I have considered the pleadings and the proceedings of the lower court, the ruling of the court, the grounds of appeal filed by the Appellant, and the submissions by the parties. In my view, the appeal raises only two issues for determination, namely, whether the lower court erred in ruling on a notice of preliminary objection that was not before it, and secondly, whether the lower court erred in upholding the preliminary objection. As I have stated earlier in the ruling, the 1<sup>st</sup> Respondent filed a Notice of Preliminary Objection and a Notice of Motion application dated 9<sup>th</sup> March 2023, in which he raised the issue that the Appellant's suit was time-barred and, as such, should be struck out. From the proceedings, the 1<sup>st</sup> Respondent's advocates disclosed that he was not comfortable proceeding with the Notice of Preliminary Objection as the issue he had raised required facts, and as such could not be determined through a preliminary objection. The Appellant filed the Notice of Motion application dated 9<sup>th</sup> March 2023, so that he could support his preliminary objection with facts. After filing the application, the 1<sup>st</sup> Respondent was urged to withdraw the Notice of Preliminary Objection, but he was adamant. The court record is clear that what the court gave directions on was the 1<sup>st</sup> Respondent's Notice of Motion application dated 9<sup>th</sup> March 2023, and it was in respect of this application that the



advocates for the parties filed written submissions. The lower court was therefore supposed to rule on the application rather than the Notice of Preliminary Objection. In the circumstances, I agree with the Appellant that the lower court erred in ruling on the Notice of Preliminary Objection that was not before it.

10. Assuming that the Notice of Preliminary Objection was properly before the lower court, did the court err in allowing it? In *Hassan Ali Joho & Another v. Suleiman Said Shahbal & 2 others* (2014) eKLR, the Supreme Court stated as follows on preliminary objections:

“To restate the relevant principle from the precedent setting case, *Mukisa Biscuit Manufacturing Co. Ltd. Vs West End Distributors* (1969) EA 696.

‘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 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 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 exercise of judicial discretion.’”

11. In *Oraro v. Mbaja*[2005]1KLR141, the court stated that:

“A preliminary objection correctly understood is a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not as a matter of legal principle, a true preliminary objection which the court should allow to proceed.”

12. I agree with the Appellant that the 1<sup>st</sup> Respondent’s preliminary objection to the lower court suit had no merit. It is not disputed that the suit property was registered in the name of the Appellant as the first registered owner on 21<sup>st</sup> July 1978. The suit property was transferred to the 1<sup>st</sup> Respondent on 6<sup>th</sup> January 1983, and its title was closed upon subdivision into Title Nos. Kisumu/Ojola/5059, 5060, and 5061 on 23<sup>rd</sup> September 2014. The Appellant’s case, as pleaded in the lower court was that he only sold to the 1<sup>st</sup> Respondent a portion of the suit property measuring 0.06 of a hectare. The Appellant averred that he never applied and obtained the consent of the Land Control Board for the transaction and did not transfer the suit property to the 1<sup>st</sup> Respondent. The Appellant averred that for over 38 years after he entered into the said agreement for sale with the 1<sup>st</sup> Respondent, the 1<sup>st</sup> Respondent did not come back to him on the transaction. The Appellant averred that it was not until December 2020 that the 1<sup>st</sup> Respondent came to the suit property and fenced three portions thereof separately that he learnt that the 1<sup>st</sup> Respondent had transferred the whole land to his name and had proceeded to subdivide it into three portions. The Appellant averred that the transfer of the whole of the suit property to the 1<sup>st</sup> Respondent and the subsequent subdivision thereof into three portions was carried out by the 1<sup>st</sup> Respondent illegally and fraudulently in collusion with the 2<sup>nd</sup> Respondent.

13. The Appellant’s suit was not seeking the enforcement of the contract of sale that the Appellant entered into with the 1<sup>st</sup> Respondent in January 1983. The issue of the claim being time-barred on that account under Section 4(1) of the *Limitation of Actions Act* could not, therefore, arise. I agree with the 1<sup>st</sup> Respondent that the Appellant is seeking the recovery of the suit property from him and that a suit for the recovery of land should be brought within 12 years from the date of the cause of action. However,



Section 26 of the *Limitation of Actions Act* provides that where the claim is based on fraud or mistake, the limitation period does not run until the fraud or mistake is discovered. The Appellant claimed that the transfer of the suit property to the 1<sup>st</sup> Respondent was fraudulent. The Appellant pleaded that he discovered the fraud in December 2020 and filed the lower court on 24<sup>th</sup> May 2021. I agree with the submission by the Appellant that whether or not the Appellant's lower court suit was time-barred depended on when the Appellant discovered the alleged fraud, and that issue could only be determined at the hearing of the suit, and not through a preliminary objection. It is therefore my finding that the 1<sup>st</sup> Respondent's preliminary objection was wrongly taken, and should have been dismissed by the lower court.

## **Conclusion**

14. In conclusion, I find merit in the Appellant's appeal and make the following orders:
  1. The ruling and orders made by the lower court on 5<sup>th</sup> June 2024 allowing the 1<sup>st</sup> Respondent's preliminary objection dated 2<sup>nd</sup> March 2023 and dismissing the Appellant's suit are set aside and substituted with an order dismissing the 1<sup>st</sup> Respondent's said preliminary objection with costs to the Appellant.
  2. The Appellant shall have the costs of the appeal.
  3. The lower court shall proceed to hear and determine the lower court suit on merit.

**DELIVERED AND SIGNED AT KISUMU ON THIS 17<sup>TH</sup> DAY OF DECEMBER 2025.**

**S. OKONG'O**

**JUDGE**

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

Ms. Atieno for the Appellant

Mr. Onsongo for the Respondent

Ms. J. Omondi-Court Assistant

