

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ELC APPEAL NO. E016 OF 2024

**LMK INVESTMENT LIMITED.....1ST
APPELLANT**

**GEORGE PETER KALUMA.....2ND
APPELLANT**

VERSUS

**ALFRED OSORO OYOPUDO.....1ST
RESPONDENT**

**JACOB DWALO ARIADO.....2ND
RESPONDENT**

**CYNTHIA ACHIENG ABIERO.....3RD
RESPONDENT**

***(Being an Appeal from the Ruling of Hon. Charles Mutai
delivered at Homa Bay on the 18th day of April, 2024 in
HOMA BAY CMC ELC NO. E045 OF 2023)***

JUDGMENT

Brief facts from trial court record

1. The Appellants sued the Respondents in Homabay Chief Magistrate’s Court, Environment and Land Case number E045 of 2023 through a Complaint dated 12th September 2023. It was their claim that by an agreement dated 20th August 2021, they purchased from Johana Wagumba Aruthi and obtained

beneficial ownership and interest in 2.5 acres being part of all that parcel of land known as Kanyada/Kotieno/Katuma 'A'/1624, which was a subdivision of Kanyada/Kotieno/Katuma 'A'/850, registered in the names of Johana Wagumba Arudhi, Samson Omari Arudhi and Paulina Akoko Arudhi. They pleaded that the parcel bordered the Homabay Rongo Road to the East and Kabunde Airstrip. By the time of the transaction the said Johana Wagumba Arudhi and Paulina Arudhi had died leaving the plaintiff (sic) as the only surviving proprietor of the family land, which the Plaintiffs said he was selling to enable him get money to build a rental house.

- 2.** The plaintiffs duly paid the purchase price and the Vendor applied it to building a 10 door rental premises adjacent to the suit property, which premises still exist to date.
- 3.** It was the plaintiffs' claim that the Defendants had since gone to the plaintiffs' suit land, seeking to take possession thereof and claiming that they had titled thereto. He they added that the defendants' claim to the title was null and void and fraudulent, and based on a fraudulent Succession Cause of which the Grant of Letters of Administration reportedly made

on 1st of March,2013 and a Certificate of Confirmation issued on 11th September 2013 by the Homabay Chief Magistrates' Court Succession Cause No. 70 of 2013, In the matter of Johanna Wagumba Arudhi, deceased were misrepresented, falsely and fraudulently urged. In it the applicants had alleged that he (Johana Wagumba) died in the year 2008. The Plaintiff's added that the records in the Homa Bay County Referral Hospital showed that the said Johana Arudhi was admitted on the 28th of June 2018 and died on 20th June 2018, and not in the year 2008.

4. Further, that on 11th September 2013 a Certificate of Confirmation of Grant over the estate of the said Johanna Waguumba Arudhi was purportedly issued and vested on the 1st Defendant all that parcel of land known as Kanyada/Kotieno/Katuma 'A'/1624 and it was a subdivision of parcel number Kanyada/Kotieno/Katuma 'A'/850. They added that subsequent to that the Defendants purported to subdivide parcel Kanyada/Kotieno/Katuma 'A'/1624 to parcel numbers Kanyada/Kotieno/Katuma 'A'/2526, Kanyada/Kotieno/Katuma 'A'/2527, Kanyada/Kotieno/Katuma 'A'/2528, with the title

Kanyada/Kotieno/Katuma 'A'/2528 comprising in the Applicants suit land being in the 2nd and 3rd Defendants names. They then purported to subdivide it into parcel Nos. Kanyada/Kotieno/Katuma 'A'/2983 and Kanyada/Kotieno/Katuma 'A'/2984 and to register the same in the names of the second and third defendants.

5. In addition, they added, these subdivisions were meant to make the (ownership of) the parcels of land go beyond trace, to the detriment of the Applicant's proprietary rights therein. They added that the Homa Bay Chief Magistrates' Court Succession Cause No. 70 of 2012 did not exist, and the physical file could not be traced. They give the full particulars of the misrepresentation and fraud regarding that succession cause, specifically at paragraph 15 of their Plaint. Those particulars of fraud and misrepresentation numbered nine (9). Finally, they sought several reliefs, which were as follows.:

1. An injunction be issued restraining the Respondents by themselves, their agents, servants, employees, family members, relatives, assigns, or whomsoever acting under the instructions or claiming through them from alienating,

subdividing, selling, transferring, charging, leasing, disposing of, renting, entering, dealing in or in any way interfering with the Plaintiff's possession of all that parcel of land comprised in Kanyada/Kotuma/Katuma 'A'/2523, and the subdivisions Kanyada/Kotuma/Katuma 'A'/2983 and Kanyada/Kotuma/Katuma 'A'/2984.

2. A declaration that the 1st Defendant did not/ does not acquire or have lawful title to the land comprised in all that property registered as title numbers Kanyada/Kotuma/Katuma 'A'/2523, and the subdivisions Kanyada/Kotuma/Katuma 'A'/1624 and Kanyada/Kotuma/Katuma 'A'/2528.

3. A declaration that the 2nd Defendant does not have lawful title to the land comprised in all that property registered as title number Kanyada/Kotuma/Katuma 'A'/2528 and Kanyada/Kotuma/Katuma 'A'/2983 being the subdivision of Kanyada/Kotuma/Katuma 'A'/2528 and that the said parcel numbers Kanyada/Kotuma/Katuma 'A'/2528 and Kanyada/Kotuma/Katuma 'A'/2983 are fraudulent null and void.

4. A declaration that the 3rd Defendant does not have lawful title to the land comprised in all that property registered as title number Kanyada/Kotuma/Katuma 'A'/2528 and Kanyada/Kotuma/Katuma 'A'/2984 being the subdivision of Kanyada/Kotuma/Katuma 'A'/2528 and that the said parcel numbers Kanyada/Kotuma/Katuma 'A'/2528 and Kanyada/Kotuma/Katuma 'A'/2984 are fraudulent null and void.

5. An order revoking title numbers Kanyada/Kotuma/Katuma 'A'/1624 transmitted and registered in the name of Alfred Osoro Oyopudo pursuant to Certificate of Confirmation of Grant dated 11th September, 2013 and the subdivision titles therefrom including Kanyada/Kotuma/Katuma 'A'/2528, Kanyada/Kotuma/Katuma 'A'/2983 and Kanyada/Kotuma/Katuma 'A'/2984.

6. The Registrar of Lands, Homabay be ordered to rectify the register, restore all that parcel of land as title number Kanyada/Kotuma/Katuma 'A'/1624 to the name of Johanna

Wagumba Arudhi and to cancel and remove all subsequent entries thereon.

7. The Registrar of Lands to be ordered to survey, register and issue title in respect of those parcels of land now known as Kanyada/Kotuma/Katuma 'A'/2528 now subdivided into Kanyada/Kotuma/Katuma 'A'/2983 and Kanyada/Kotieno/Katuma/ 2984 in the name of the Plaintiffs and/ or Plaintiff's nominees

8. General damages.

9. Any other relief that the Honourable court may deem fair and just to grant in the circumstances

10. Costs.

7. Subsequent to that, the defendants filed a Notice of Preliminary Objection dated 18th September 2023. The Preliminary Objection was based on three grounds which were follows:

1. That the plaintiffs' cause of action being founded on a contract dated 20th August 2011 is bad by effluxion of time by dint of Section 4(1) (a) of the Limitation of Actions Act, Cap 22 Laws of Kenya.

2. That based on the above, the Court does not have jurisdiction as the suit is bad in law, incurably defective and should be dismissed with costs to the (*sic*).
3. That the suit is an abuse court process.
- 8.** Following the prosecution of the Objection, the trial Court delivered a Ruling on 18th April 2024. The Ruling, brief as it was contained the reasoning of the learned trial magistrate. He noted that the Plaintiff's argument and case was that the suit was not statute barred because the cause of action was based on fraud under the statute of limitation. Further, that as per Sections 7 and 26 of the Limitation of Actions Act, the period was three (3) years from the time the fraud was discovered, and further that to the Plaintiffs the fraud was discovered in April 2021. He set out one issue for determination, which was whether the suit and the application were time barred.
- 9.** It was the learned Trial Magistrate's view, and this Court agrees with him, that a Preliminary Objection arises from pleadings by a clear implication therefrom and is only based on a point of law. He referred to the decision of **Mukisa Biscuit Manufacturing Company Limited [1969] EA 696.**

10. He then proceeded to make a finding that he was convinced that the suit was statute barred. He gave the reason that it was so because the plaintiffs' claim was based on a sale agreement dated 20th August 2011, and since this constituted a contract then, by virtue of Section 4, of the Limitation of Actions Act which sets out the timeline or deadline to six years for an action to be brought, then the time for filing such the claim expired on August 20th 2017 (sic).

11. He added that the Plaintiffs in their Replying Affidavit had conceded that the Preliminary Objection regarding the statute of limitation had merit. Further, that even if the Plaintiff's solely relied on Section 7 of the Limitation of Actions Act, time had still expired. He found further that if the plaintiff intended to enforce a right related to land, the applicable statute of limitation of was 12 years (sic) which should have expired on the 20th of August 2023. He upheld the preliminary objection and dismissed the suit with costs to the Defendants.

1. It was upon the Ruling that the Appellants instituted the instant appeal on the following grounds:

- 2. That the Honourable Court erred in law and in fact by finding that the Appellants' suit is time barred.**
- 3. That the Honorable Court erred in law and in fact in failing to find that the case is an action to recover land and not a mere claim of tort in the strict sense of the word, and therefore is subject to Sections 7 and 26 of the Limitations of Actions Act and not Section 4(1)(a) of the Act as claimed on the face of the Notice of Preliminary Objection.**
- 4. That the Honorable Court erred in law and fact in ignoring the fact that the Appellants seek to revoke a title that was fraudulently acquired hence effluxion of time does not suffice in the circumstances to defeat this case, especially given the underlying facts.**
- 5. The Honorable court erred in law and fact in failing to find that this being a land matter, it should be heard and determined on merits as opposed to being dismissed and/or struck out summarily.**
- 6. The Honorable court erred in law and fact in ignoring the undisputed fact that the succession was done of a**

living person, that the succession was in fact fraudulent and non-existent in the court records, that it is on the premises of this succession that the impugned titles were acquired and that the Appellants only discovered the fraud in 2021.

7. The Honorable court erred in law and fact in allowing a party with a bad title founded on illegal and non-existent succession and obtained from a person without the legal capacity or good title to hide behind the Limitation of Actions Act.

8. The Honorable court erred in law and in fact by sanitizing and cleansing the whole fraudulent processes without scrutiny contrary to the interest of justice and fairness.

9. The Honorable court erred in law and fact by failing to appreciate that the cause of action is fraud and not purely about enforcement of a sale of land agreement.

10. That the Honorable Court erred in law and fact by unjustly dismissing the suit despite the weight of evidence.

12. They prayed for court to set aside the ruling of the trial court and consequential orders, and the costs of the appeal.

13. The Appeal was canvassed by way of written submissions. The Appellants did not file theirs but the 2nd and 3rd Respondents did.

Submissions

14. In their written submissions dated this 27th June 2025, the 2nd & 3rd Respondents began by giving the background of the appeal, which this Court has also given above. It thus need not rehash it.

15. They set out three issues for determination. They are whether the decision of the trial court was proper; whether the applicants had the locus standi to file this suit in the first place; and who to bear the costs.

16. On whether the trial court's decision was proper, they argued that the ruling was meritorious, having been based on section 4(1) of the Limitation of Actions Act. They stated that

since Section 4(1) provides that no claim on contract shall be brought at the end of six years after the accrual of the cause of action and they raised the point of law as such, the suit was time barred and incompetent. They relied on the decision of **Salim Mohamed Salim Tweshe v Khalid Salim Naaman & 5 others (2020) eKLR** and the **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd [1969) EA 696.**

17. They added that a suit barred by limitation is a claim barred by law, hence by operation of law, the Court cannot grant the relief sought. They relied on **Bosire Ogero v Royoa Medial Services [2015] eKLR**. They stated that the Appellant's claim was based on a sale agreement dated August 20th 2011 hence the six-year deadline to file a lawsuit expired on August 20th, 2017.

18. Regarding the appellant's argument that the cause of action was based on fraud they opined not by relying on Section 26 of the Limitation of Actions Act which they cited. On that, they argued that the Appellants had failed to demonstrate that the **2nd and 3rd Respondents** knew about any fraud concerning the

land at the time of purchase or that they participated in the alleged fraud.

19. About the assertion in the Memorandum of Appeal that the claim pertained to the recovery of land and not the tort of fraud per se and that the fraud was discovered in 2021, they argued that the Appellants failed to take any proactive measures to safeguard their interest in the property or ensure the completion and formalization of the transaction and even lodging a caution on it. They added that the Appellants did not do due diligence, even by carrying out a simple search, by failing to investigate the alleged fraud during the years 2012 and 2013 or even prior to their purported discovery of the fraud in 2021.

20. They then argued that the suit property had been the subject of litigation twice, in **Homa Bay CMELC no. 5 of 2015: Mary Wambui Kuria vs Alfred Osoro Oyopudo**; and **Homa Bay CMELC No. 19 of 2015: Alfred Osoro Oyopudo vs Seth Ajwang**, hence it was disingenuous for the Appellants to allege discovery of fraud in 2021.

21. Regarding the second issue, which is whether the Appellants had the locus to file suit for recovery of land or a tort of fraud, they argued that contrary to the assertions by the Appellants, Section 37 of the Land Registration Act, 2012, unequivocally provided that a person may transfer, lease, or charge a property with or without consideration by an instrument, and the transfer shall only take effect upon filing the instrument; and registration of the transferee as proprietor of the land, lease or charge. Further, that Section 26 of the Land Registration Act provided that the certificate of title upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner.

22. They then contended that since there was no evidence that the suit property was transferred to the appellants at any point in time, their claim was legally untenable and devoid of merit as contractual interest, by way of sale agreements, could not serve as a basis for asserting proprietary claims against the Respondents. They opined that the appellants' claims could

only lie to against the personal representative of the estate of the deceased vendor. They relied on the decision of **Bharminder Singh Osahan v Helicopters International Limited [2021] KEHC 5015 (KLR)** and that of **Rajesh Pranjivan Chudasama v Sailesh Pranjivan Chudasama [2014] KECA 250 (KLR)**.

23. On costs, they submitted that they be awarded the same since the appeal lacks merit.

Issue, Analysis and Determination

24. At the outset, I must allay parties' fears. Since I have read one or two decisions of my brother judges wherein parties lost their matters on account of failure to file written submissions, I am almost certain that the Appellants' mind must be spinning as to what shall befall their appeal because they did not file written submissions as directed. But I want to inform them that they should not let their hearts be troubled because this Court always considers the parties' cases based on the law, pleadings and evidence. Submissions only form the icing on the cake. Cakes are not discarded merely because the makers did not put icing on them. Therefore, the taste of the cake should be

the ultimate goal of anyone who genuinely wants to confirm whether the cook passed the test of preparing a delicious cake. As was ably put by the Court of Appeal in **Moi v Muriithi & another (Civil Appeal 240 of 2011) [2014] KECA 642 (KLR) (9 May 2014) (Judgment)**,

“Submissions are generally parties’ “marketing language”, each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented.”

25. That said, this Court has considered the appeal. It has carefully analyzed the law in issue and the submissions of the 2nd and 3rd Respondents. It is of the view that only three issues lie for determination. They are, whether a party can raise a ground of argument on an issue not taken up before the trial court; whether the appeal is merited; and who to bear the costs of the appeal.

26. This is a first appeal hence the legal position regarding how this court should determine one as such is settled. There are two clear legal stand points: whether this court, as that point is determining an appeal arising from a decision made by the lower court, based on determination of the same on merits of the evidence on the one hand, or regarding the exercise of discretion of that court on the other.

27. Regarding where the determination is based on a meritorious determination of evidence and the law, the Court of Appeal has clearly restated the position that this court must evaluate the evidence afresh and draw its own conclusion even though it did not see the witnesses testify so as to form an opinion on their demeanor, unless specifically recorded. This is the position stated in **Selle and another v Associated Motor Boat Company Ltd and others [1968] 1 EA 123** wherein the Court of Appeal held:

“...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 ...”

28. It was also restated in **Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co Advocates [2013] eKLR** as follows:

“This being a first appeal, we are reminded of our primary role as a first appellate court, namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way.”

29. Additionally, the Court the of Appeal, in the case of **Susan Munyi v Keshar Shiani (2013) eKLR** stated as follows:

“As a first appellate court our duty of course is to approach the whole of the evidence on record from a

fresh perspective and with an open mind. We are to analyse, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions”

30. Also, in **Williamson Diamonds Ltd and another v Brown** [1970] EA 1, it held that:

“The appellate court when hearing an appeal by way of a retrial, is not bound necessarily to accept the findings of fact by the trial court below, but must reconsider the evidence and make its own evaluation and draw its own conclusion.”

31. Further, in **PIL Kenya Limited v Oppong** [2009] KLR 442, it was held that:

“It is the duty...of a first appellate court to analyse and evaluate the evidence on record afresh and to reach its own independent decision, but always bearing in mind that the trial court had the advantage of hearing and seeing the witnesses and their demeanour and giving allowance for that”.

32. Similarly, decision of **Gitobu Imanyara & 2 others Vs Attorney General** [2016] eKLR. It was 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 allowances in this respect.”

33. Regarding where the Court exercises discretion and an appeal arises therefrom the court has to consider whether exercised injudiciously and or proceeded on the wrong principles or included matters he ought not to have included or failed to take into account some he ought to have considered. Thus, issues **Supermarine Handling Services Ltd V Kenya Revenue Authority [2010] KECA 373 (KLR)** the court held as follows:

“...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”.

34. Also, in Supermarine Handling Services Ltd versus Kenya Revenue Authority [2010] eKLR (Civil Appeal 85 of 2006) 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”.

35. Similarly, in Farah Awad Gullet v CMC Motors Group Limited [2018] eKLR the Court of Appeal 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.”

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

37. 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.”

38. 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.”

39. Also, in **Nyaoke & 7 others v Ayaga (Environment and Land Appeal E024 of 2024) [2025] KEELC 7345 (KLR) (28 October 2025) (Judgment)** this court held,

“Again, it is worth of note that this is an appeal that challenges the exercise of discretion by the trial

court. The principles that govern the instances that an appellant court may interfere with a decision arrived at by exercise of discretion by a court appealed from are now settled. This court must be cautious in deciding to interfere with the discretion of the trial court. If I must do so, I should not substitute my decision with the that of the trial court. I must consider and find, if I have to overturn that decision, that the trial court failed to act judiciously or was plainly wrong on principles that he proceeded on or considered or failed to consider factors which he ought not or ought to have considered, respectively.”

40. The decisions above settle the legal and factual elements this court is obligated to consider. Thus, the trial magistrate having made a decision based on discretion and it is that determination I am now reconsidering, I must analyze it in light of whether he proceeded on or considered or failed to consider factors which he ought not or ought to have considered, acted injudiciously or failed to act judiciously, or was plainly wrong on principles.

41. I must start with a consideration he made that is plainly or obviously wrong, although it does not of itself render his entire decision wrong. It is that having rightly found that a preliminary objection is a point of law that must be decided based on pleadings and the law, the trial magistrate went on to state further that the Plaintiffs, in their Replying Affidavit, had conceded that the Preliminary Objection regarding the statute of limitation had merit.

42. With all due respect, the learned trial magistrate was plainly wrong in taking the above material as part of what would firm up his finding that the preliminary objection was merited. This is because, the issue before him was a point of law which he was supposed to discern from the pleadings which are the Plaintiff, the Defence and the Reply to Defence, if any, and the law. When he took into account facts pleaded in an affidavit he ceased to proceed on a point of law but ventured into the merits of the matter.

43. Regarding the further grounds of appeal on his finding that the suit was time barred, and that the court had no jurisdiction, the whole decision turns on the content of the Plaintiffs'

pleadings on the cause of action they presented before the court, and what the law provides on the same. This court, thus, uses the conventional process of making legal determinations, which is what was the Issue (**I**) the Plaintiffs, now Appellants, presented before the trial Court? What is the law or Rule (**R**) on the issue? What facts were pleaded on the issue and what is the application (**A**) of the law on them? What conclusion (**C**) did the court make? With that analysis then this Court will, by the same token proceed in like manner to make a conclusion at this level on the conclusion the trial magistrate arrived. That is to say this Court will ask itself thus, what is the Issue (**I**) before me? What is the Rule (**R**) on it? What is the application (**A**) of the law to it? What conclusion (**C**) should I then make on it?

44. Here below is the determination.

The Issue (I):

45. This Court therefore sets out to find out what the issue was that was presented before the trial court. That means the court asks question, what was the cause of action against the defendants as presented by the Plaintiffs in their Plaint? The

Plaintiffs had claimed that they bought the suit parcels of land measuring about 2.5 acres by agreement dated 20th August 2021 and taken possession thereof. Further, that the Defendants had (thereafter, the time not specified) proceeded to the Plaintiffs' (now owned) parcels of land, "the suit lands", and attempted to take possession thereof, claiming that they were the owners. It was upon that action that the Plaintiffs made investigations and discovered that the defendants had committed fraud and misrepresentation in the years 2012 and 2013. The Plaintiffs pleaded these acts of fraud and misrepresentation in seven paragraphs, between 9 and 16, and particularized them in one, being, paragraph 15. They then sought several reliefs, including orders of cancellation of the titles held by the Defendants.

The Rule (R):

46. The law on the limitation of actions. Regarding actions of fraud is to be found in. Section 4 of the Limitation of Action Act. In particular, Section 4. Subject.

- 47.** “Where, in the case of an action for which a period of limitation is prescribed,
- 48.** either—
- 49.** (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
- 50.** (b) the right of action is concealed by the fraud of any such person as aforesaid; or
- 51.** (c) the action is for relief from the consequences of a mistake,
- 52.** 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:”

The Application (A):

- 53.** Before the trial magistrate was a preliminary objection, he was to determine and he did. It is the determination that led to the institution of the instant appeal. In the Objection, the Defendants argued that the plaintiffs challenged acts of fraud which they ought to have discovered in the year 2012 or 2013.

Further, that the Plaintiff's claim challenged the validity of contracts entered in the year 2011 in regard to which the time for filing suits against the same had since expired by the time the suit was filed. The court agreed with them. It found that because of the expiry of time, which according to the court was six years from the time of entering the agreements, the suit was time barred. Also, that time for bringing against the claim for fraud was long ended.

Conclusion (C):

54. As noted above, the court concluded that by virtue of the fact that plaintiffs referred to a sale agreement entered between the Defendants and the then vendors (whom the plaintiffs alleged committed fraud with the buyers) on 20th August 201, the cause of action was in regard to the contract, hence the suit was time barred. He dismissed it.

55. This court finds that the trial magistrate was right only on a small aspect: the interpretation of the law. In dismissing the suit, he rightly observed, only on the legal point in issue about the period for actions on contracts, Section 4 of the Limitation

of Actions Act. It sets out the timeline or deadline to six years for actions on them to be brought.

56. This conclusion having precipitated the instant appeal, then the Issue herein is whether the conclusion that the trial magistrate was right or correct.

57. The law, as has been stated above at this point, is that this court will not interfere with the discretion of the trial court unless there is a finding that the decision of the learned magistrate was injudicious or took into account matters it was not supposed to, or failed to take into account matters which it ought to have done, or the decision was plainly wrong.

58. Applying then the law to the facts as presented in this Appeal and as summarized in the previous paragraphs above this court finds that the Trial Magistrate grossly erred in finding that the issue before him was that the cause of action in the suit challenged the agreements entered on 20th August 2011 whereas it was actually based on fraud and or misrepresentation, and these were discovered by the Appellants in 2021 or so soon thereafter after they had entered an agreement with the seller of the suit parcels of land. It is

worth noting that the Appellants were not the owners of the suit parcels of land in the years 2012/ 2013. They had no relationship whatsoever over the said parcels of land. It is therefore inconceivable that they would have discovered the fraud in issue when it was committed. The claim depended also on when the fraud or misrepresentation was discovered which was after or at the time of entry of the agreement between the appellants and the sellers of the suit lands. Thus, the suit having been brought before the expiry of three years upon the sale of the suit lands to the current alleged owners then it was not time barred. The trial magistrate erred in law and fact in finding that it was statute barred.

59. As a parting shot, one issue the respondents argued in their submissions before me, which was curious, was that they raised the contention that the Appellants had no capacity or locus standi to institute the suit. This court is of the humble view, with due respect, that this issue was not before the trial court when the preliminary objection was taken and even argued. It cannot, therefore, be raised at this stage. It is an afterthought. In any event, Order 1 Rule 13 provides that no

suit may be defeated for the reason of misjoinder or nonjoinder of a party. That means, that regarding the suit before the trial court, it is still open for the Appellants or the trial court on its own motion to join a party whose presence is necessary for the court to arrive at a just decision on all issues in controversy before it rather than defeating the cause of action on account of that technicality.

60. It is for those reasons that this finds that the Appeal succeeds in its entirety. The court sets aside the order of dismissal of the suit in the trial court and reinstates the suit. It directs further that the suit be placed before a different magistrate other than the one who heard the Preliminary Objection.

61. The appellants shall have the costs of this appeal.

62. Orders accordingly.

Judgment **dated, signed, and delivered virtually** via the **Teams Platform this 29th day of January 2026.**

HON. DR. IUR NYAGAKA
JUDGE

In the presence of,

Ms. Q. Adoyo advocate for the Appellants.