



**EKB v ECS & 2 others (Environment and Land Appeal
4 of 2023) [2025] KEELC 5352 (KLR) (17 July 2025) (Judgment)**

Neutral citation: [2025] KEELC 5352 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT AND LAND APPEAL 4 OF 2023**

**LA OMOLLO, J
JULY 17, 2025**

BETWEEN

EKB APPELLANT

AND

ECS 1ST RESPONDENT

LAND REGISTRAR 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

*(Being an appeal arising from the ruling of Hon. Charles Obulutsa
delivered on 3rd October, 2023 in Kericho CM ELC Case No. E056 of 2021)*

JUDGMENT

Introduction.

1. By a Memorandum of Appeal dated 13th October, 2023, the Appellant challenges the decision of Hon. Charles Obulutsa in Kericho CM ELC Case No. E056 of 2021 delivered on 3rd October, 2023

Factual Background.

2. The Appellant filed the Complaint dated 26th June, 2021 against the Respondents seeking the following orders;
 - a. That this Honourable Court be pleased to issue mandatory injunction compelling the land register (sic) to register the Applicant and the 1st Respondent herein as co-owners to the suit property plot number xxx Koiyet Settlement Scheme upon hearing and determination of the main suit.



- b. That the Plaintiff's proposed subdivision on the suit property in regards to one acre which is to devolve to Plaintiff's sister, one ACM to be enforced and further the 1st Defendant herein to be compelled execute (sic) and issue relevant completion documents to one ACM upon hearing and determination of main suit.
 - c. That the 2nd Defendant to effect transfer of one acre excised from plot number xxx Koiyet Settlement Scheme in favour of one ACM.
 - d. Any other orders/reliefs that the Court may deem fit and just to grant.
3. As at the time the Learned Trial Magistrate was delivering his ruling, neither of the Respondents had filed their Statements of Defence.
4. The 1st Respondent filed a Notice of Preliminary Objection dated 23rd August, 2022 which was on the following grounds;
 - a. That the instant suit offends the provisions of Section 7 of the *Limitation of Actions Act* as it is already time barred.
 - b. That the Court lacks jurisdiction as the instant suit seeks to assert matrimonial property rights under Section 7 and 17 (2b) (sic) of the *Matrimonial Property Act*.
 - c. That this suit is scandalous, frivolous, vexatious and abuse of the Court process.
5. The Learned Trial Magistrate delivered a ruling on 3rd October, 2023. He allowed the preliminary objection and struck out the suit.
6. The Appellant being aggrieved by the said ruling approached this Court by way of Appeal.
7. The Appeal was admitted for hearing on 18th November, 2024. The Court issued directions that the appeal be heard by way of written submissions.
8. On 29th January, 2025, the appeal was mentioned to confirm filing of submissions and then reserved for judgement.

The Appeal.

9. The grounds of Appeal are as follows;
 - a. The Learned Trial Magistrate erred in law and in fact by disregarding the Appellant's documentary evidence.
 - b. The Learned Magistrate erred in law and in fact in upholding the preliminary objection to the case on the grounds that the action was time-barred under the *Limitation of Actions Act*. The documents used as evidence in the suit by the Appellant from the Ministry of Lands clearly indicates that the complaint over the suit property known as Plot No. xxx Koyet Settlement Scheme was lodged on the 22nd January, 2014, well within the 12-year limitation period, contrary to the findings of the lower Court.
 - c. The Learned Honourable Magistrate erred in law and fact in finding its ruling (sic) for the 1st Respondent which finding was contradictory and against the weight of the evidence tendered by the Appellant.



- d. The Learned Trial Magistrate erred in law and fact in misdirecting himself in dismissing the case without proper consideration of the evidence presented, thus resulting in a miscarriage of justice.
 - e. The Learned Trial Magistrate erred in law and fact in disregarding the evidence of the Appellant on record hence resulting to a wrong decision.
 - f. The Learned Magistrate erred in law and in fact in not finding and/or taking into consideration that the Appellant has declaratory (sic) rights over the suit property known as Plot No. xxx Koyet Settlement Scheme as it is matrimonial property in accordance with Section 17 of the *Matrimonial Property Act*.
 - g. The Learned Magistrate erred in law and in fact in misguiding himself by filling in facts on behalf of the 1st Respondent while failing to consider that the Appellant's evidence. (sic) This amounts to the Court giving evidence on the 1st Respondent's behalf.
 - h. The Learned Magistrate applied the wrong principles in law in making his findings.
10. The Appellant prays for orders that;
- a. The Appeal be allowed.
 - b. The ruling by the Honourable Charles Obulutsa delivered on 3rd October, 2023 be set aside.
 - c. A declaration that the case was filed within the statutory limitation period.
 - d. This Honourable Court do order the reinstatement of Chief Magistrate ELC No. 56 of 2021 to its former status prior to the said dismissal, and it be set for hearing of the main suit on merits. (sic)
 - e. Costs and interest of this appeal to be awarded to the Appellant.

Issues for Determination.

11. The Appellant filed his submissions on 16th December, 2024, the 1st Respondent filed her submissions on 28th January, 2025 while the 2nd and 3rd Respondents filed their submissions on 29th January, 2025.
12. The Appellant submits that he is the 1st Respondent's husband. He also submits that he purchased plot No. xx Koiyet Settlement Scheme and registered it in the name of the 1st Respondent to hold in trust for him.
13. He further submits that the settlement scheme where he purchased the suit parcel had a rule that an individual could only purchase one plot at a time. They therefore agreed that the suit parcel would be registered in the name of the 1st Respondent and later be transferred to the Appellant.
14. It is the Appellant's submissions that the 1st Respondent refused to honor the said agreement and opted to subdivide the suit parcel. The 1st Respondent intends to register the resultant subdivisions in the names of the children and/or sell them to third parties.
15. It is also the Appellant's submissions that since he is the 1st Respondent's spouse, he has spousal rights over the suit property as it is matrimonial property.
16. The Appellant relies on Section 7 of the *Limitation of Actions Act*, the judicial decisions of Dickson Ngige Ngugi v Consolidated Bank Ltd (Formerly Jimba Corporation Limited) & another [2020]



- eKLR, *Mehuba Gelan Kelil & 2 Others vs Abdulkadir Shariff Abdirhim and 4 Others* [2015] eKLR and submits that the Learned Trial Magistrate erred in finding that the suit was statutorily time barred.
17. It is the Appellant's submissions that he availed documents from the Ministry of Lands which showed that he lodged a complaint over the suit property on 22nd January, 2014 and therefore the suit was not statutorily time barred as alleged by the 1st Respondent and as found by the Learned Trial Magistrate.
 18. The Appellant relies on Section 6 of the *Matrimonial Property Act* and submits that both he and the 1st Respondent have an interest in the suit parcel.
 19. The Appellant also submits that the Learned Trial Magistrate erred in denying his (Appellant) rights over the suit property. He goes on to submit that there is no provision in the *Matrimonial Property Act* which provides for the Court that has the jurisdiction to hear matters filed under it.
 20. The Appellant further submits that various Courts have jurisdiction to hear and determine cases on matrimonial property.
 21. The Appellant relies on Section 7 of the *Matrimonial Property Act* and submits that under that section, matrimonial property is divided upon dissolution of marriage. He however, is only seeking a remedy under the said Act because the 1st Respondent intends to dispose the suit property.
 22. The Appellant concludes his submissions by urging the Court to allow the appeal with costs.
 23. The 1st Respondent submits on the following issues;
 - a. Whether the Learned Trial Magistrate erred in law and in fact by upholding the preliminary objection to the case on the grounds that the action was time-barred under the *Limitation of Actions Act*.
 - b. Whether the Learned Trial Magistrate erred in law and in fact in not finding that the Appellant has declaratory rights over the suit property known as Plot No. xxx Koiyet Settlement Scheme.
 24. The 1st Respondent submits that the first issue addresses ground (b) of the Memorandum of Appeal. It is the 1st Respondent's submissions that the suit before the Trial Court offends Section 7 of the *Limitation of Actions Act*.
 25. It is also the 1st Respondent's submissions that as per paragraph 9 of the Appellant's Plaint, the cause of action arose on or about 30th June, 1993 when she (1st Respondent) purportedly frustrated the transfer of the suit property to the Appellant.
 26. It is further the 1st Respondent's submissions that the suit was filed in the year 2021 which was twenty-eight years after the cause of action arose.
 27. The 1st Respondent submits that the Appellant's argument that the cause of action arose in the year 2014 is flawed because by that year, the twelve-year limitation period had already lapsed.
 28. The 1st Respondent also submits that the Appellant cannot claim that time started running from the time he intended to enforce his rights when he clearly squandered his opportunity to take steps to protect his alleged interest.
 29. The 1st Respondent further submits that in the suit filed before the trial Court, the Appellant sought to recover an undisclosed portion of the suit parcel. The suit was not therefore seeking for a declaration of any matrimonial interest in the suit property. Since the claim was for recovery of land and not a matrimonial cause, the statute of limitation applies.



30. The 1st Respondent relies on the judicial decision of Mukuru Munge v Florence Shingi & 2 Others [2016] eKLR in support of her submissions.
31. The 1st Respondent also submits that the preliminary objection filed before the trial Court raised a pure point of law that was capable of disposing of the suit. The 1st Respondent further submits that the preliminary objection met the elements set out in the judicial decision of Mukhisa Biscuit Manufacturing Co. Ltd vs West End Distributors Company Limited (1969) EA 696.
32. The 1st Respondent also relies on the judicial decision of Bosire Ongero v Royal Media Services [2015] eKLR where the Court held that the question of limitation of time touches on the jurisdiction of the Court.
33. It is the 1st Respondent's submissions that the Learned Trial Magistrate did not therefore err in upholding the preliminary objection on the ground that the action was statutorily time barred under the Limitation of Actions Act.
34. With regard to the second issue, the 1st Respondent reiterates that the Appellant's claim was for recovery of a portion of the suit property and the subsequent transfer of the land to his sister one ACM.
35. The 1st Respondent submits that the Court having found that the claim was statutorily time barred, could not delve into the other issue of ownership of the suit property as it did not have jurisdiction to do so.
36. The 1st Respondent reiterates that from the pleadings filed, it is clear that the Appellant's claim did not touch on matrimonial property rights. The 1st Respondent relies on the judicial decisions of Jubilee Party of Kenya v Patrick Kabundu Mukiri & Peter Gichamba Mathingi [2017] KEHC 9368 (KLR), Atlas Copco Customer Finance Ltd vs Polarize Enterprises Ltd [2014] eKLR in support of her submissions.
37. It is the 1st Respondent's submissions that the Appellant has introduced the issue of matrimonial property on appeal which issue was not one of the issues for determination before the trial Court.
38. The 1st Respondent concludes her submissions by urging the Court to dismiss the Appellant's appeal with costs.
39. The 2nd and 3rd Respondents submit on the following issues;
 - a. Whether the Learned Magistrate erred in law and in fact in declaring the suit as time barred under the Limitation of Actions Act.
 - b. Whether the Appellant is entitled to reliefs sought.
40. With regard to the first issue, the 2nd and 3rd Respondents rely on Section 7 of the Limitation of Actions Act, the judicial decisions of Edward Moonge Lengusuranga v James Lanaiyara and another [2019] eKLR, Kiarie v Kiratu (Environment and Land Appeal 77 of 2019) [2023] eKLR and submit that it is the Appellants contention that he entered into an agreement with the 1st Respondent in the year 1993 when they executed transfer documents for the suit property.
41. It is the 2nd and 3rd Respondents submissions that the dispute between the Appellant and the 1st Respondent arose in the year 1993 when the agreement between them did not materialize.
42. It is also the 2nd and 3rd Respondents submissions that the Appellant had the right to sue and enforce his rights over the suit property but he did not explain why he delayed in filing the suit after the expiry of



the twelve-year statutory time limit. They rely on the judicial decision of *Gathoni v Kenya Co-operative Creameries Ltd* [1982] KLR 104 in support of their submissions.

43. It is further the 2nd and 3rd Respondents submissions that the trial Court's jurisdiction was challenged by way of a preliminary objection and the Court did not therefore have the authority to proceed further with the matter. The 2nd and 3rd Respondents rely on the judicial decision of *Owners of Motor Vessel Lilian S v Caltex* (no citation given) in support of their submissions.
44. The 2nd and 3rd Respondents submit that contrary to the Appellant's submissions, the Learned Trial Magistrate considered the facts and evidence on record before establishing that the Court did not have jurisdiction to hear and determine the matter due to the statutory time limit.
45. With regard to the second issue, the 2nd and 3rd Respondents submit that the Appellant seeks declaratory rights over the suit property while relying on Section 17 of the *Marriage Act*(sic).
46. They submit that the Environment and Land Court does not have the jurisdiction to determine ownership of matrimonial property. The 2nd and 3rd Respondents rely on the judicial decision of *NWN v LNM* (Environment & Land Case 51 of 2019) in support of their submissions.
47. They conclude their submissions by urging the Court to dismiss the appeal with costs.

Analysis and Determination.

48. The issues that arise for determination are as follows;
 - a. Whether the Learned Trial Magistrate erred in finding that the suit was statutorily time barred.
 - b. Whether the Learned Trial Magistrate erred in failing to find that the Appellant had matrimonial property rights over the suit property.
 - c. Who should bear costs of the appeal.

A. Whether the Learned Trial Magistrate erred in finding that the suit was statutorily time barred.

49. The role of the Appellate Court was stated by the Court of Appeal in the judicial 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.”
50. In *Abok James Odera T/A A.J Odera & Associates Vs John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR the Court held 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 reanalyze 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.”
51. The Appellant contends that he is the husband of the 1st Respondent. He also contends that he purchased the suit property and registered it in the name of the 1st Respondent with the agreement that the 1st Respondent will later transfer it back to the Appellant.



52. The Appellant contends that they made the said agreement because the settlement scheme where the suit parcel is located had a rule that one could only purchase one plot.
53. It is the Appellant's contention that the 1st Respondent failed to honor the said agreement so he instituted the suit before the trial Court.
54. Upon institution of the said suit, the 1st Respondent filed a preliminary objection on the ground that the suit was statutorily time barred which preliminary objection was allowed.
55. The Appellant contends that the Learned Trial Magistrate erred in finding that the suit was statutorily time barred and yet the cause of action arose in the year 2014 when he lodged a complaint over the suit property at the Ministry of Lands.
56. In response, the 1st Respondent submits that from the Plaint, the cause of action arose on 30th June, 1993 when she (1st Respondent) allegedly frustrated the transfer of the suit property to the Appellant.
57. The 1st Respondent also submits that the suit was filed in the year 2021 which was twenty-eight years after the cause of action arose. The Appellant's claim was therefore statutorily time barred.
58. The 2nd and 3rd Respondents submit that the dispute between the Appellant and the 1st Respondent arose in the year 1993 when the parties executed transfer documents in favour of the Appellant but the transfer did not proceed because of alleged frustration by the 1st Respondent.
59. The 2nd and 3rd Respondents also submit that the cause of action therefore arose in the year 1993 and at the time the suit was instituted in the year 2021, the twelve-year statutory time period had already lapsed.
60. Ground one of the Notice of Preliminary Objection dated 23rd August, 2022 is as follows;

“SUBPARA 1.

That the instant suit offends the provisions of Section 7 of the [Limitation of Actions Act](#) as it is already time barred”

61. The Learned Trial Magistrate at page 8 to 11 of his ruling held as follows;

“An action to recover land should be filed within 12 years from when the cause of action arose. The 1st Defendant argues that the land was transferred to her in 1991. On his part the Plaintiff says in 1993 the 1st Defendant executed transfer forms in his favour only to frustrate same (sic) after the forms were lodged at the land registry.

In the grounds opposing the preliminary objection, the Plaintiff stated that the suit is not time barred since the right accrued when he wanted enforce (sic) his right. This is self-defeating as he confirms the dispute arose then in 1993 after the 1st Defendant frustrated the transfer to him. The cause of action arose in 1993. If a suit should be filed within 12 years as provided in the [Limitation of Actions Act](#), then the Plaintiff should have filed suit latest 2005 but was filed in 2021, 16 years later...

The objection raised under the [Limitation of Actions Act](#) has merit since the suit was filed more than 12 years after the cause of action arose. The Plaintiff should have first obtained leave from Court to file suit out of time but did not do so. This is a pure point of law from the pleadings having the effect of disposing off the main suit as held in the case of Mukhisa Biscuit. The Court therefore lacks jurisdiction and should down tools as stated in the case



of Owners of MV Lilian S. The suit, on that ground, is hereby struck out with costs to the first Defendant...” [Emphasis Mine]

62. 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 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.”

63. In the judicial decision of Gichari & another v Muchiri (Environment & Land Case E010 of 2023) [2024] KEELC 1519 (KLR) (20 March 2024) (Ruling) the Learned Judge observed as follows;

“The Court earlier had stated that for determination on whether the suit is caught by limitation of action, (sic) the Court has to determine the cause of action herein. The case of Edward Moonge Lenguuranga vs James Lanaiyara & Another (2019) eklr, defined a cause of action as a set of facts sufficient to justify a right to sue to obtain property or enforcement of a right against a party. For a cause of action herein to be determined, it is important to look at the averments and the prayers sought in the Plaintiff.” (Emphasis mine)

64. In the above cited judicial decision, the Court held that in determining when a cause of action arose, it is important to look at both the averments and the prayers sought in the Plaintiff.

65. The cause of action as set out at paragraph 9 of the Plaintiff is as follows;

“That on or about 30th day of June, 1993, the 1st Defendant executed the transfer forms in Plaintiff’s favour, which were duly lodged at the land office, unfortunately, the suit property was not transferred to Plaintiff (sic) since the 1st Defendant herein frustrated the finalization of the process. The said land parcel is still registered in favour of the 1st Defendant.” (Emphasis mine)

66. The prayers sought in the Plaintiff are as follows;

- a. That this Honourable Court be pleased to issue mandatory injunction compelling the land register (sic) to register the Applicant and the 1st Respondent herein as co-owners to the suit property plot number 1X0 Koiyet Settlement Scheme upon hearing and determination of the main suit.
- b. That the Plaintiff’s proposed subdivision on the suit property in regards to one acre which is to devolve to Plaintiff’s sister, one ACM to be enforced and further the 1st Defendant herein to be compelled execute (sic) and issue relevant completion documents to one ACM upon hearing and determination of main suit.
- c. That the 2nd Defendant to effect transfer of one acre excised from plot number xxx Koiyet Settlement Scheme in favour of one ACM.
- d. Any other orders/reliefs that the Court may deem fit and just to grant.

67. From the averments in the Plaintiff it is evident that the cause of action arose in the year 1993 when the 1st Respondent is said to have executed transfer documents and allegedly frustrated the finalization of the transfer process.

68. The Appellant in his submissions contends that the cause of action arose in the year 2014 when he filed a complaint before the Ministry of Lands.



69. I also note that the Appellant at paragraph 16 of his Plaintiff stated that he lodged a complaint at the Kericho Lands Office which issue was deliberated on without any resolution.
70. From the pleadings, it is evident that the cause of action arose in the year 1993 and subsequently, in the year 2014, a complaint was lodged at the Kericho Lands Office and unsuccessful deliberations were held.
71. Before penning off on this issue, it is important to note that the general position Courts have taken is that the issue of limitation of time cannot be dealt with as a preliminary objection.
72. This is because, in most instances, the issue of when the cause of action arose cannot be determined from the pleadings and there are disputed facts as to when the cause of action arose.
73. This was the position taken by the Court in the judicial decision of *Sichuan Huashi Enterprises Corp. Limited v Micheal Misiko Muhindi* [2019] KEHC 2521 (KLR) where it was held as follows;
- “ 13. The law as I understand it is that the defence of limitation of time is a matter for determination at the trial; it cannot be dealt with in a summary manner or at preliminary stage or as a preliminary objection. The court should formulate limitation as one of the issues for determination and decide it on evidence adduced at the trial. On this see the case of *Oruta & Another vs. Nyamato* [1998] KLR 590, where the court held that limitation of action:-
- “ ... could only be queried at the trial but not by... a preliminary objection... The appellant could raise the objection at the trial and the trial judge would have to deal with the matter on the evidence to be adduced at the trial” (Emphasis mine).
74. In the present appeal, the Appellant expressly states in his Plaintiff at paragraph 9 that the cause of action arose in the year 1993. This fact is not disputed by the 1st Respondent and it formed the basis for her Preliminary Objection. In my view, formulation of limitation as a question for determination during the trial would be necessary when there are varying positions as to when the cause of action arose.
75. The Appellant has therefore not made a case for the setting aside of the Learned Trial Magistrate’s ruling. Consequently, this ground of appeal fails.

B. Whether the Learned Trial Magistrate erred in failing to find that the Appellant had matrimonial property rights over the suit property.

76. The Appellant contends that the Learned Trial Magistrate erred in not finding that he had matrimonial property rights over the suit property.
77. The 1st Respondent submits that the issue of whether or not the Appellant had matrimonial property rights over the suit property did not form part of the issues that were addressed by the Learned Trial Magistrate and they have only been introduced on appeal.
78. The 2nd and 3rd Respondents submit that the Environment and Land Court does not have jurisdiction to determine matrimonial property causes.



79. Ground two on the Notice of Preliminary Objection dated 23rd August, 2022 is as follows;
- “That the Court lacks jurisdiction as the instant suit seeks to assert matrimonial property rights under Section 7 and 17 (2b) (sic) of the *Matrimonial Property Act*.”
80. The Learned Trial Magistrate at pages 9 to 11 of his ruling held as follows;
- “The Second ground of the objection is that the dispute relates to matrimonial property and cannot be adjudicated upon until the marriage is dissolved. That seems not to be the legal position from a reading of Section 17 of the *Matrimonial Property Act* which states that... Section 17(2)(c) implies there need not be a petition filed relating to matrimonial cause where a person is seeking declaration (sic) as to rights of property contested between that person and a spouse.
- Section 17 which deals with declaration of rights over property even (sic) where there is no divorce or dissolution of the marriage should be distinguished from Section 7 of the *Matrimonial Property Act* which deals with distribution of matrimonial property where the parties are divorced or the marriage is otherwise dissolved.
- Having considered the preliminary objection, grounds of opposition, submissions and authorities, the Court finds the objection raised under the *Matrimonial Property Act*, cannot be sustained.” (Emphasis mine)
81. It is evident, the Learned Trial Magistrate in his ruling addressed ground two of the preliminary objection. It was premised on whether the Court had jurisdiction, under the *Matrimonial Property Act*, to issue the orders sought in the plaint.
82. The Learned Trial Magistrate did not address the question whether or not the Appellant had matrimonial property rights over the suit property. His ruling was limited to whether the court had jurisdiction to make an order declaring that the suit property was matrimonial property. The Learned Trial Magistrate correctly found that the Environment and Land court has power to do so under Section 17 of the *Matrimonial Property Act*. The decision in *B W M v J M C* [2018] eKLR speaks to this finding. The Court held as follows;
- “18. For avoidance of doubt, the Court notes that the *matrimonial Property Act* does not to define the Court that disputes relating to the Matrimonial property disputes should be referred for determination. It is thus the current legal position that concurrent jurisdiction is given to various Courts to hear disputes relating to matrimonial property rights including this Court. The only limitation applicable to this Court is that it can only hear such disputes if they involve or relate to occupation use and title to land. I find nothing to oust the jurisdiction of this Court and I proceed to determine the Preliminary objection.” [Emphasis Mine]
83. The Court of Appeal in the judicial decision of *Republic v Tribunal of Inquiry to Investigate the Conduct of Tom Mbaluto & others Ex-Parte Tom Mbaluto* [2018] eKLR held as follows;
- “It is in the discretion of the Court to allow a party to raise a new point on appeal, depending on the circumstances of the case. (See also *George Owen Nandy v. Ruth Watiri Kibe*, *CA No. 39 of 2015* and *Openda v. Ahn* [1983] KLR 165). In this case we have stated that the



appellant never raised the issue in his judicial review application, neither party addressed the issue in the High Court, the learned judge, quite properly did not address the issue and, to make the matters worse, the Appellant did not raise the issue in his memorandum of appeal in this Court. The Attorney General is entitled to complain, as he does, that he has been taken by surprise and denied a fair opportunity to respond to the new issue. As has been stated time and again, there is a philosophy and logical reason behind our Appellate system, which except in exceptional cases and upon proper adherence to the prescribed procedure, restricts the appellate Court to consideration of the issues that were canvassed before and decided by the trial Court. If that were not the case, the Appellate Court would become a trial Court in disguise and make decisions without the benefit of the input of the Court of first instance. (See *North Staffordshire Railway Co. v. Edge* [1920] AC 254).” [Emphasis Mine]

84. It is my view that the Appellant is precluded from raising the issue of whether he has rights over the suit property on account of it being matrimonial property. This is for the reason that it was not an issue for determination before the trial Court.
85. This ground of appeal also fails.

C. Who should bear costs of the appeal.

86. The general rule is that costs shall follow the event in accordance with the provisions of Section 27 of the *Civil Procedure Act* (Cap. 21). A successful party should ordinarily be awarded costs of an action unless the Court, for good reason, directs otherwise.

Disposition.

87. In the result, I find that this Appeal lacks merit and it is hereby dismissed.
88. Considering that the Appellant and 1st Respondent are members of the same family; each party shall bear own costs of the Appeal.
89. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO THIS 17TH DAY OF JULY, 2025.

L. A. OMOLLO

JUDGE.

In the presence of: -

Mr. Odhiambo for the Appellant.

Mr. Kipkorir for the 1st Respondent.

Mr. Ojwang for the 2nd and 3rd Respondents.

Court Assistant; Mr. Joseph Makori.

