Tarus v Kipngetich (Civil Appeal 40 of 2019)
[2025] KECA 235 (KLR) (14 February 2025) (Judgment)

Neutral citation: [2025] KECA 235 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CIVIL APPEAL 40 OF 2019

MA WARSAME, JW LESSIT & WK KORIR, JJA

FEBRUARY 14, 2025

BETWEEN

DAVID TARUS ..... APPELLANT

AND

EMMANUEL KIPNGETICH ..... RESPONDENT

(Being an appeal from the Judgment of the Environment and Land Court at Eldoret (Angima, J.) dated 24th January 2019 in ELC Case No. 212 of 2013.)

JUDGMENT

1. David Tarus, the appellant herein appeals to this Court against the decision of the Environment and Land Court at Eldoret (Angima, J.) delivered in favour of Emmanuel Kipngetich, the respondent on the 24th January 2019.

2. A brief background of the matter is that via a Plaint dated 2nd October 2012 the respondent filed a suit against the appellant and one Raymond Tarus [deceased] (hereinafter Raymond) and sought judgment against them jointly and severally for orders:

    a. An order of mandatory injunction compelling the appellant and Raymond to cease and desist from obstructing the intended survey and partition of parcel No. Nandi/Kamobo/1427 failing which the honorable court do issue an order to compel the appellant and Raymond jointly and severally whether by themselves or through their agents, servants, employees or whomsoever acting on their instructions from any act or form of obstruction and or blocking the intended partition.

    b. Costs of the suit

    c. Any other or further orders that the honorable court may deem to grant."

3. The respondent's case was that he was a co-registered owner of portion of parcel Nandi/Kamobo/1427 ('suit land') with the appellant and one Marcella Jelagat Tarus, the deceased's mother of the 2nd defendant Raymond. The appellant and Marcella owned 9.0 acres and 5.5 acres respectively, while the respondent owned 1 acre. The respondent's case was that the suit land measuring, 6.30 ha was inherited from Kiptarus arap Kogo (deceased) and that the respondent had purchased his portion of the suit land before the succession into the estate of Kogo.

4. The respondent pleaded that on several occasions he sought the apportioning of the suit land so that he could have his own separate title with no success due to the noncooperation and obstruction by the appellant and the 2nd defendant who had lodged a caution in order to block the issuance of consent from the relevant Land Control Board.

5. The appellant and Raymond entered appearance and filed a joint statement of defence dated 12th October 2012. It was their defence that the respondent was not the registered owner of 1.0 acre out of the suit land, but that Marcella Jelagat Tarus (deceased), the appellant and the respondent were jointly registered as the proprietors of the suit land. Further, that the suit land could not be legally partitioned as one of its registered owners was deceased. Moreover, that the Land Control Board did not have the legal capacity to issue consent for sub-division under the circumstances.

6. It was also pleaded that the respondent suing alone lacked the legal capacity to institute the suit as he was neither the legal administrator of the estate of Paul Kogo, nor the proprietor of the suit land. The appellant and Raymond [who died before the transfer of the suit land to the beneficiaries] stated that the legal administrators of the estate of Paul Kogo were Regina Cheptepkeny Tarus (deceased), Marcelle Chelagat Tarus (deceased) and the appellant.

7. The appellant pleaded that the respondent was fraudulently registered as a proprietor of 1.0 acre of the suit land through the cause In the matter of the estate of Paul Kogo, Kapsabet Succession Cause No. 32 of 1989, yet he was neither a beneficiary nor a dependant nor did he have any agreement to show he ever bought a portion of the suit land from Paul Kogo (deceased).

8. The appellant and the 2nd defendant pleaded particulars of fraud on the part of the respondent as; misleading the petitioner Jane Kogo, into amending affidavit of confirmation of Grant to show benefit of 1acre of the suit land to the respondent; failing to disclose that he was not the beneficiary or dependant of the deceased; and failing to produce sale agreement of 1 acre out of the suit land.

9. The appellant pleaded that he noticed the fraudulent acts of the respondent when he applied to rectify the Grant and noticed that the respondent had been awarded 1.0 acre of the suit land and therefore filed before the Succession Cause an application for nullification of Grant of Letters of Administration issued on 8th December 1994 to Jane Cheptoo Kogo, appellant, Regina Cheptepkeny, Marcella Jelat Tarus, and the respondent.

10. Reasons wherefore the appellant and Raymond prayed that the respondent's suit be dismissed with costs.

11. The respondent filed a reply to the appellant's and Raymond's defence dated 23rd October 2012. The appellant denied the defence and maintained that the appellant and Raymond were still obstructing and objecting to the partitioning of the suit land. He further contended that the Land Control Board was legally capable and empowered to give him together with the appellant consent to partition the suit land since there was a clear indication of their respective shares in the register of the suit land. The respondent further pleaded that the acts of fraud as attributed to him were made in bad faith and with malice since the 1 acre was registered to him for more than 18 years. In addition, that there were

no complains at the time of Confirmation of Grant and that it only arose when he sought to obtain his separate title. The respondent also pleaded that it was within the knowledge of the appellant and Raymond that he legally purchased the portion more than 20 years before and that it was inconceivable and malicious that the appellant could be asking for the agreement for something done that long time ago. Lastly, that there has been no application for nullification of Grant and none was presented before any court. He therefore asked for the dismissal of the appellant's statement of defence and for judgment to be entered as prayed for in his Plaint.

12. The matter proceeded before the ELC by way of viva voce evidence. Both parties were represented by counsel, Mr. Choge for the respondent and Mr. Rugut for the appellant. The respondent adopted his witness statement as his evidence, which was a reiteration of his case as pleaded, and produced the documents listed in his list of exhibits. He was cross- examined by Mr. Rugut. After the respondent closed his case, Mr. Rugut applied for adjournment to enable him call the appellant and Raymond but the Judge declined, noting that there was no good reason shown why the case should be adjourned. The appellant's case was therefore closed without calling any evidence.

13. In the judgment of the trial [ELC] court dated 24th January 2019 Angima, J. found that the appellant and 2nd defendant called no evidence to prove fraud pleaded in their statement of defence and that they did not adduce any evidence to show they filed an application for rectification of the Grant to remove the respondent's name from it.

14. The Judge found that from the record before him, it was clear that the respondent was registered as proprietor of 1 acre of the suit land that he acquired through the Kapsabet Succession Cause No. 32 of 1989 and that the ownership was confirmed through the certificate of search filed by the respondent. The Judge observed that as the respondent had acquired the suit land through the Succession Cause, the legality or propriety of the acquisition could only be challenged before the succession court. The Judge gave judgment in the respondent's favour, granted the orders sought and also gave what he termed as facilitative orders authorizing the Deputy Registrar of the court to sign and execute all necessary forms, documents and papers in order to facilitate the partitioning and sub-division of the suit land to enable each party to have their respective title to their portion of land.

15. In the upshot Angima, J. entered judgment for the respondent against the appellant and Raymond (deceased) in the following terms:

    a. "An injunction be and is hereby issued restraining the appellant and Raymond by themselves, their agents, servants or employees from howsoever obstructing the intended survey and partition of Title No. Nandi/Kamobo/1427.

    b. Deputy registrar of the court is hereby authorized to sign and execute all necessary forms, documents and papers in order to facilitate the sub-division and partitioning of the suit property so that each of the owners in common may obtain separate titles for their respective shares.

    c. The respondent is hereby awarded costs of the suit to be borne by the appellant and Raymond."

16. Aggrieved with the judgment the appellant preferred an appeal to this Court. In his memorandum of appeal dated 5th March 2019, the appellant raised 24 grounds of appeal that are in contravention to rule 88 of the Court of Appeal Rules. Rule 88 provides:

    " 88. Contents of memorandum of appeal

1. A memorandum of appeal shall concisely set forth under distinct heads, without argument or narrative, the grounds of objection to the decision appealed against, specifying-

    a. the points which are alleged to have been wrongly decided; and

    b. the nature of the order which it is proposed to ask the Court to make.

2. The grounds of objection shall be numbered consecutively.

3. A memorandum of appeal shall be substantially in Form F as set out in the First Schedule and signed by or on behalf of the appellant."

17. The Court of Appeal had this to say regarding rule 88 of the Court of Appeal Rules in the case of Robinson Kiplagat Tuwei vs. Felix Kipchoge Limo Langat [2020] eKLR:

> "We are yet again confronted with an appeal founded on a memorandum of appeal that is drawn in total disregard of rule 86 of the Court of Appeal Rules. That rule demands that a memorandum of appeal must set forth concisely, without argument or narrative, the grounds upon which a judgment is impugned. What we have before us are some 18 grounds of appeal that lack focus and are repetitively tedious. It is certainly not edifying for counsel to present two dozen grounds of appeal, and end up arguing only two or three issues, on the myth that he has condensed the grounds of appeal. This Court has repeatedly stated that counsel must take time to draw the memoranda of appeal in strict compliance with the rules of the Court. (See Abdi Ali Dere v. Firoz Hussein Tundal & 2 Others [2013] eKLR) and Nasri Ibrahim v. IEBC & 2 Others [2018] eKLR. In the latter case, this Court lamented:
>
> "We must reiterate that counsel must strive to make drafting of grounds of appeal an art, not an exercise in verbosity, repetition, or empty rhetoric
>
> ... A surfeit of prolixious grounds of appeal do not in any way enhance the chances of success of an appeal. If they achieve anything, it is only to obfuscate the real issues in dispute, vex and irritate the opposite parties, waste valuable judicial time, and increase costs." The 18 grounds of appeal presented by the appellant, Robinson Kiplagat Tuwei against the judgment of the Environment and Land Court at Eldoret (Odeny, J.) dated 19th September 2018 raise only two issues..."

18. What the appellant filed is not concise but is without focus, is argumentative and repetitive and is a narrative. The main issues raised in the memorandum and grounds of appeal are whether the learned trial Judge erred to find the respondent proved his case to the required standard; whether the respondent's suit was time barred by limitation; whether the respondent acquired title to the suit land through fraud; whether the doctrine of exhaustion was flouted and, whether the respondent had a good title.

19. The respondent on his part filed a notice of grounds affirming the decision of the trial court dated 3rd April 2019. He raised seven (7) grounds namely: That the registration of the respondent as the co-proprietor of Nandi/Kambo/1472 was proper, regular and above board; that the process of registration was never objected to by the co-proprietors; that the appellant did not and never proved that he was entitled to the respondent's portion of the land; that the appellant never protested the

confirmation of the Grant of Letters in favor of all the co-proprietors who attended court during the confirmation of the said Grant; that the appellant at all material times acknowledged the respondent as the co-proprietor of the suit portion of the land; that the appellant is not the administrator of the Estate of the deceased Co-proprietor Marcella Jelagat Tarus; and that the trial court had no jurisdiction to hear and allegedly determine issues arising in a succession cause before the high court. The respondent thus prays that the appeal be dismissed with costs and judgment of Angima, J. be upheld.

20. We heard this appeal on 15th July 2024. Present at the hearing was learned counsel Mr. Sego for the appellant whereas learned counsel Mr. Choge was present for the respondent. Mr. Sego relied on the appellant's written submissions dated 10th March 2023. Mr. Choge also relied on the respondent's written submissions dated 16th May 2024. Both counsel briefly highlighted their submissions as follows.

21. Mr. Sego contended that the unlawful addition of the respondent as an administrator of the estate of Paul Kogo (deceased) resulted to unlawful Grant of Letters of Administration which was incapable of conferring lawful ownership to the respondent and therefore the purported subsequent registration of the respondent as a tenant in common in Nandi/Kamobo/1427 on 9th December 1994 was fraudulent, corrupt, unprocedural and criminal in nature. The appellant relied on the case of Alice Chemutai Too vs. Nickson Kipkurui Korir & 2 Others [2015] eKLR and emphasized that the respondent could not purport to have a lawful title as a tenant in common in terms of sections 91 and 92 of the *Land Registration Act*.

22. The appellant also challenged the jurisdiction of the superior court and submitted that the court had no jurisdiction at all and that therefore the decree was null and void. In addition, counsel urged, the superior court lacked jurisdiction in terms of section 94 of the *Land Registration Act* to deal with partition of land held in common and quoted the case of Harrison Mutisya Mbithi vs. Nthambi Daniel Kioko & 9 Others [2022] eKLR. The appellant further relied on the case of Owners of Motor Vessels "Lillian S" vs. Caltex Oil (Kenya) Limited [1989] eKLR and Macharia & Another vs. Kenya Commercial Bank Ltd & 2 Others (Application 2 of 2011) [2012] KESC 8 (KLR) (23 October 2012) (Ruling) and submitted that the superior court ought to have ceased acting for lack of jurisdiction.

23. Furthermore, the appellant submitted that the doctrine of exhaustion applied in this case as the respondent ought to have exhausted the dispute resolution mechanism outside court before invoking the jurisdiction of the court and relied on this Court's decision in Geoffrey Muthinja & Another vs. Samuel Muguna Henry & 1756 Others (2015) eKLR and Speaker of the National Assembly vs. Karume (Civil Application 92 of 1992) [1992] KECA 42 (KLR) (29 May 1992) (Ruling).

24. The appellant thus proposed to ask this Court for orders that his appeal be allowed in its entirety and the judgment of the superior court delivered on 24th January 2019 be set aside and the respondent's suit be dismissed with costs of the appeal and in the superior court.

25. Mr. Choge on his part relied on the respondent's written submission with oral highlighting on one issue. Counsel submitted that the initial appellant had since passed on and what was before the Court was not an appeal on the merit of the hearing at the superior court, but rather an attempt by the appellant to reopen a matter that he was present at the time of the hearing but chose not to call any evidence.

26. In the respondent's written submissions, the respondent maintained that there were no particulars of fraud raised against him by the appellant and that in addition, no evidence of fraud was even availed. Relying on the case of Kuria Kiarie & 2 Others vs. Sammy Magera [2018] eKLR the respondent emphasized that the allegation of fraud must be pleaded and strictly proved. The respondent noted that

the appellant claimed that without his knowledge the respondent included his name in the petition and the resultant Certificate of confirmation of Grant and misrepresented to court that he was entitled to a share of the Estate land however, he never listed the same as the particulars of fraud.

27. The respondent further argued that the appellant never contested that he was a co-owner as registered against the suit land; that he never contested the contents of the Certificate of Confirmation of Grant, the search, as well as the letter of consent of Land Control Board to partition the land. Furthermore, no contrary evidence was called.

28. The respondent also asserted that limitation of action was neither pleaded in the defence nor was it raised during the hearing before the trial court. Counsel urged that the same could not therefore be an issue for determination before this Court. The respondent relied on the case of Achola & Another vs. Hongo & Another LLR No. 4007 (CAK).

29. The respondent maintained and emphasized that given the seriousness of the allegation of fraud, then the onus was on the appellant to provide evidence to the court which evidence must have met the standard of proof as underscored by this Court in Central Bank of Kenya Limited vs. Trust Bank Limited & 4 Others [1996] eKLR.

30. Lastly and relying in case of Macharia & Another case (Supra) and In the Matter of the Interim Independent Electoral Commission (Applicant) (Constitutional Application 2 of 2011) [2011] KESC 1 (KLR) (20 December 2011) (Ruling) the respondent submitted that jurisdiction is conferred on the court either by *the Constitution*, the law or both and therefore any action taken by the court without jurisdiction or exceeding jurisdiction would be unconstitutional and illegal.

31. In conclusion therefore, the respondent urged the Court to find no merit in the appeal and dismiss it with costs.

32. This being a first appeal, our mandate is akin to a retrial. Under rule 31 (1)(a) of this Court's Rules, 2022, we are required to re-appraise the evidence and draw our independent inferences and conclusions. This mandate was explained in Abok James Odera T/A A. J Odera & Associates vs. 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 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."

33. We will only depart from the findings by the trial Court if they were not based on the evidence on record; where the said court is shown to have acted on wrong principles of law as held in Jabane vs. Olenja [1986] KLR 661; or if its discretion was exercised injudiciously as held in Mbogo & Another vs. Shah [1968] E.A.

34. We have carefully considered this appeal, submissions by counsel and the record of the trial court. Having done so we find that the issues for determination are fivefold:

    i. Whether the learned trial Judge erred in law to find that the respondent's suit was not barred by imitation;

    ii. Whether the learned Judge erred to find that the appellant did not prove that the respondent acquired title to the suit land through fraud;

    iii. Whether the doctrine of exhaustion was flouted;

iv. Whether the learned trial Judge erred to in law and facts when he found that the respondent proved his case to the required standard; and,

v. Whether the respondent had a good title.

Whether The Learned Trial Judge Erred In Law To Find That The Respondent's Suit Was Not Barred By Limitation.

35. We shall first consider the issue whether the respondent's case was barred by limitation of time as prescribed under section 7 of the *Limitation of Actions Act* [hereinafter LAA]. The merits of the appeal turn solely on the issue of jurisdiction which is capable of trouncing all other issues since jurisdiction is everything and is what gives a court or a tribunal the power, authority and legitimacy to entertain any matter before it. This Court in defining jurisdiction stated thus in Phoenix of E.A. Assurance Company Limited vs. S. M. Thiga t/a Newspaper Service [2019] eKLR:

> "Jurisdiction denotes the authority or power to hear and determine judicial disputes, or to even take cognizance of the same. This definition clearly shows that before a court can be seized of a matter, it must satisfy itself that it has authority to hear it and make a determination. If a court therefore proceeds to hear a dispute without jurisdiction, then the result will be a nullity ab initio and any determination made by such court will be amenable to being set aside ex debito justitiae."

36. In the appellant's narration under his grounds of appeal, he faulted the learned trial Judge of failing to take note that the purported letter of consent to partition the suit premises was given on the 13th December 1994 and the suit filed on 2nd October 2012 a period of more than twelve (12) years for the institution of claim such as this in terms of section 7 of the Limitation Actions Act to the extent that the cause of action was time barred at the time of institution of the suit. For that proposition Mr. Sego relied on the cases of Owners of Motor Vessels "Lillian S" vs. Caltex Oil (Kenya) Limited [1989] eKLR and Macharia & Another Vs. Kenya Commercial Bank Ltd & 2 Others (Application 2 of 2011) [2012] KESC 8 (KLR) (23 October 2012) (Ruling). He submitted that the superior court ought to have ceased acting for lack of jurisdiction.

37. Mr. Choge for the respondent submitted that limitation of action was neither pleaded in the defence nor was it raised during the hearing before the trial court. As noted earlier the appellant was represented by counsel at the trial. Counsel urged that the same could not therefore be an issue for determination before this Court. The respondent relied on the case of Achola & Another vs. Hongo & Another LLR No. 4007 (CAK).

38. The appellant's statement of defence is dated 12th October 2012. Nowhere was the issue of limitation raised. We have also considered the cross examination of the respondent by Mr. Rugut for the appellant and find that he did not raise that issue during the cross-examination of the respondent. The first time that issue arose is in the final submissions filed by the appellant in support of his appeal before us.

39. We have considered the appellant's grounds of appeal as pleaded. He claims that the consent to partition the suit land was given on the 13th December 1994 and that the suit was filed on 2nd October 2012 which was a period of more than twelve (12) years and that therefore it is overtaken by limitation. Section 7 would apply if the respondent was filing suit to claim land. In this case, he is a co-registered owner of the suit land. He is not asserting his proprietorship of the land, his claim is for partitioning of the suit land so that he can have an individual title of the portion of the land that belongs to him. Clearly, limitation under section 7 does not arise. Nothing turns on this point.

Whether The Learned Judge Erred To Find That The Appellant Did Not Prove That The Respondent Acquired Title To The Suit Land Through Fraud.

40. The next issue we shall deal with is that of fraud. Mr. Sego submitted that the inclusion of the respondent as an administrator of the estate of Kogo (deceased) resulted in the unlawful Grant of Letters of Administration. He urged that respondent's said inclusion was incapable of conferring him with lawful ownership of the suit land, and that therefore the purported subsequent registration of the respondent as a tenant in common in Nandi/Kamobo/1427 on 9th December 1994 was fraudulent, corrupt, unprocedural and criminal in nature. The appellant relied on the case of Alice Chemutai Too vs. Nickson Kipkurui Korir & 2 Others [2015] eKLR and emphasized that the respondent could not purport to have a lawful title as a tenant in common in terms of sections 91 and 92 of the *Land Registration Act*.

41. The particulars of fraud are pleaded in the statement of defence and we have included them on the body of this judgment. However, for ease of reference we include them here and they are: misleading the petitioner Jane Kogo, into amending affidavit of confirmation of Grant to show benefit of 1 acre of the suit land to the respondent; failing to disclose that he was not the beneficiary or dependant of the deceased; and failing to produce sale agreement of 1 acre out of the suit land.

42. Mr. Choge in his submissions urged that it is a clear from the defence that no particulars of fraud are pleaded against the respondent because the appellant pleaded that without his knowledge the respondent included his name in the petition and also in the resultant Certificate of confirmation of Grant, and that he misrepresented to court that he was entitled to a share of the Estate land. Counsel urged that what was pleaded in the defence was not what was in the appellant's filed submissions. More importantly, counsel urged, the appellant adduced no evidence to establish fraud. He relied on the case of Kuria Kiarie & 2 Others vs. Sammy Magera [2018]eKLR for the proposition that the allegation of fraud must be pleaded and strictly proved.

43. As this Court stated in the case of Kinyanjui Kamau vs. George Kamau [2015] eKLR:

> "...It is trite law that any allegations of fraud must be pleaded and strictly proved. See Ndolo vs Ndolo (2008) 1 KLR (G & F) 742 wherein the Court stated that: "...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; In cases where fraud is alleged, it is not enough to simply infer fraud from the facts."

44. Earlier in of Vijay Morjaria vs. Nansingh Madhusingh Darbar & Another [2000] eKLR, Tunoi, JA. (as he then was) stated that:

> " It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts." [Emphasis added]

45. We have considered the pleadings of the appellant and his submissions on this issue. We agree with the respondent that what the appellant pleaded as the particulars of fraud is at variance with what is in his submissions, as the record will show. The variation between the submissions and pleadings is a serious

flaw that does not help the appellant's case. However, what destroys the appellant's case is the fact that he called no evidence to establish his allegations of fraud against the respondent and therefore made no attempt to prove his case on this issue. The appellant's case on fraud lacked proof. The appellant left it to the trial court to infer fraud from the pleadings and the facts. That cannot suffice. It is trite that the fraudulent acts or conduct must be distinctly set out and stated to be fraudulent and distinctly proved by the calling of evidence. Just pleading and calling no evidence to substantiate the allegations is a falling far lower than is expected of the party alleging fraud.

46. That notwithstanding, we must mention that from the record the estate of the deceased Kogo was the subject of Kapsabet Succession Cause No 32 of 1989. The respondent purchased the suit land before the death of the deceased Kogo, and therefore before the said succession cause. There seems to have been more court cases over the estate of the deceased. However, from the record, it is clear that the respondent's interest in the suit land was entered in the respective land register on 9th December, 1994, as a co-owner of the suit land with the appellant and Marcela. He was factored in the proceedings and made a co-administrator of the estate of the deceased Kogo as a purchaser of an acre of land.

47. The myriad of issues that the appellant has raised before us are concerned with the succession proceedings, including those of 1989. The appellant should have been raised all his issues in the succession proceedings 36 years ago. The succession court should have determined whether the respondent had any legal interest in the suit property and whether he was entitled to claim within the succession process. There is nothing on the record to show whether the appellant or anyone else challenged the succession proceedings, whether under section 76 of the *Law of Succession Act*, or some other relevant provision to have the decision the appellant is so loath about set aside. Neither is there proof whether any one challenged them before the superior court on appeal. It is 36 years too late for the appellant to introduce issues he never raised before anywhere for the first time on appeal. When he had the opportunity to raise them at the appropriate forum he did not move a muscle. We can do no better but agree with the learned trial Judge that fraud was not proved. Nothing turns on this issue.

Whether The Doctrine Of Exhaustion Was Flouted.

48. We note from the proceedings and the submissions before the trial court that this is not an issue that was raised for the determination of the court. It has been raised for the first time before this Court on appeal. There are a plethora of cases where this Court frowns at attempts by appellant to challenge an issue on appeal that was never canvassed in the superior court or courts below. In the case of Mary Kitsao Ngowa & 36 Others vs. Krystalline Limited [2015] eKLR, this Court has previously dealt with such an issue and pronounced itself thus;

> "...we must also appreciate the fact that, this is not even an issue that was canvassed before the trial court. The issue regarding the interpretation, meaning and application of section 90 of the *Employment Act* was never placed or canvassed before the trial court for determination. The jurisdiction of the appellate court is to look into issues that were presented before the trial court. A court cannot be said to have erred on an issue that was never argued before it. This is what the appellants have sought to do in respect of this ground of appeal. Accordingly, the learned Judge cannot be faulted for not considering or appreciating the concept of continuing injury."

We say no more except to say that this ground lacks basis and fails.

Whether The Learned Trial Judge Erred In Law And Facts When He Found That The Respondent Proved His Case To The Required Standard; And Whether The Respondent Had A Good Title.

49. The remaining two issues go hand in hand and therefore we shall consider them simultaneously. The appellant contends that the trial Judge failed to give due consideration to the entire case and therefore came to the wrong decision, passing as good a title that ought to have been cancelled.

50. The suit was filed by the respondent and all he was asking the court was:

> "a). An order of mandatory injunction compelling the appellant and Raymond to cease and desist from obstructing the intended survey and partition of parcel No. Nandi/Kamobo/1427 failing which the honorable court do issue an order to compel the appellant and Raymond jointly and severally whether by themselves or through their agents, servants, employees or whomsoever acting on their instructions from any act or form of obstruction and or blocking the intended partition."

51. The learned Judge found the issues for determination were three: whether the respondent was entitled to have the suit land partitioned so as to have separate title; whether the respondent acquired one acre of the suit land fraudulently; whether the respondent was entitled to reliefs sought, and the issue of costs.

52. After considering the evidence adduced by the respondent and the pleadings and submissions of the parties the learned trial Judge came to the conclusion that:

> " ...the respondent obtained the one acre through succession process of 1989; that he is already an owner of the one acre; illegality or propriety of the acquisition can only be challenged before the succession court; that there was no evidence of rectification of grant as the appellant pleaded; that there was no evidence of fraud adduced; and that the respondent had proved he had interest in the suit land and was entitled to the relief sought."

53. We find no fault with the learned Judge's findings in this matter. We are satisfied after our own evaluation of the evidence and the submissions together with the law applicable that the learned Judge came to the right decision in this case.

54. The result of this appeal is that it has no merit and must fail. It is very disheartening that the respondent should be made to wait for 36 plus years to get his right by no fault of his or of the courts. We make the following orders:

1. The appellant's appeal has no merit and is dismissed in its entirety.
2. The judgment of the ELC, Angima, J. delivered on the 29th January 2019 in Eldoret ELC Case No. 212 of 2013 is upheld.

DATED AND DELIVERED AT NAKURU THIS 14TH DAY OF FEBRUARY, 2025.

M. WARSAME

.....

JUDGE OF APPEAL

J. LESIIT

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR