



**Kone & another v Masese & another (Civil Appeal 38 of 2018)
[2024] KECA 1808 (KLR) (20 December 2024) (Judgment)**

Neutral citation: [2024] KECA 1808 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL 38 OF 2018
PO KIAGE, F TUIYOTT & JM NGUGI, JJA
DECEMBER 20, 2024**

BETWEEN

PACIFICA KWAMBOKA KONE 1ST APPELLANT

JOHN O. KONE 2ND APPELLANT

AND

STEPHEN R. MASESE 1ST RESPONDENT

JUSTINE MASESE MOCHACHE 2ND RESPONDENT

*(Being an appeal from the Judgment of the Environment and Land
Court at Kisii (Kullow, J.) dated 19th October, 2017 in ELC Cause
No. 1149 of 2016 FORMERLY KISII HCCC No. 104 of 2010)*

JUDGMENT

JUDGMENT OF JOEL NGUGI, JA

1. The appellants are the legal administrators of the estate of Kone Oyugi (deceased) who died on 11th August, 2003. The 1st appellant was the wife to Kone Oyugi, whilst the 2nd appellant is a son to the deceased. They filed a suit on behalf of and for the benefit of the estate of the said deceased, before the Environment and Land Court (ELC) sitting at Bungoma, seeking the following orders against the respondents:
 - a. An order for specific performance by putting the plaintiffs on a quiet and peaceful occupation of the parcel no. Nyaribari Chache/B/B/Boburia/3345.
 - b. Alternatively, an order directing the defendants to retransfer parcel no. Nyaribari Chache/B/B/Boburia/4112 to the plaintiffs on behalf of the estate of Oyugi Kone and in like manner



the plaintiffs retransfer parcel no. Nyaribari Chache/B/B/Boburia/3345 to the name of the 1st defendant.

- c. A declaration that the said contract of exchange of the two parcels of land was frustrated and is uncomfortable.
 - d. Costs of the suit.
 - e. Any other further relief as the Court may deem fit to grant.
2. In their Complaint dated 19th April, 2010, the appellants case was that sometime in 1985, the deceased entered into a land exchange agreement between himself and the 1st respondent. Specifically, the terms of the land exchange agreement were that the deceased was to exchange and transfer his land parcel no. Nyaribari Chache/B/B/Boburia/4112 (“Plot 4112”) to the 1st respondent. On the other hand, the 1st respondent was to exchange and transfer his land parcel no. Nyaribari Chache/B/B/Boburia/3345 (“Plot 3345”) to the deceased. Further, it was agreed that the deceased was to transfer Plot 4112 directly to the son of the 1st respondent, who is the 2nd respondent.
 3. The appellants averred that the exchange and transfer of titles to the two land parcels was duly effected. However, there was a condition between the parties that each was to put the other into a quiet and peaceful occupation of the exchanged parcel. This condition, the appellants stated, was not fulfilled by the respondents, as the deceased was violently chased away by people who claimed to be owners of Plot 3345 when he tried to take possession of the land. The appellants averred that the respondents did not disclose to the deceased that Plot 3345 had a serious ownership dispute at the time he entered into the contract with the deceased.
 4. For these reasons, the appellants claimed that the respondents failed to put the deceased into vacant, peaceful occupation and possession of Plot 3345 as per the agreement between the deceased and the 1st respondent. To their mind, therefore, the contract between the parties was not completed and was materially frustrated as each party continued to hold mere title deeds, but neither has ever taken possession and occupied their respective land parcels as per the contract.
 5. The appellants averred that in view of the situation, the deceased demanded that the respondents do a re-transfer of Plot 4112, to his name; whilst the deceased was ready and willing to re-transfer Plot 3345 to the 1st respondent’s name.
 6. The appellants further averred that until the time of the deceased’s death on 11th August, 2003, the dispute between the two families (family of the appellants and respondents) over the two land parcels persisted, and the same has remained to date.
 7. On their part, the respondents denied the appellants’ allegations through their Amended Defendants’ Statement of Defence and Counter claim dated 28th January, 2014.
 8. First, it was their case that upon signing the land exchange agreement dated 31st May, 1984, the deceased immediately took vacant occupation and possession of Plot 3345. The respondents averred that there has been no dispute regarding Plot 3345 as alleged. In their view, therefore, there was no case made for the order for specific performance against them. Further, the respondents denied that the deceased had ever made a demand for a re-transfer of the two parcels to their respective former owners as claimed by the appellants. Additionally, they averred that the 2nd respondent, and not the 1st respondent, is the title holder of Plot 4112.
 9. Second, the respondents filed a counterclaim in which the 2nd respondent averred that the appellants were in occupation of Plot 4112, without his consent or permission; and without any colour of right.



In the premise, the 2nd respondent prayed for orders of eviction of the appellants by themselves, and/or their agents, and/or servants, and/or any persons claiming on their behalf, from the said land parcel and upon eviction, a permanent injunction to issue to restrain themselves, their agents, and/or servants, and/or persons acting on their behalf, from entering into, cultivating, titling, erecting any structures and/or in any manner interfere with Plot 4112.

10. Thirdly, the respondents questioned the jurisdiction of the trial court, on the ground that the matter had earlier been filed in the Land Dispute Tribunal Kisii Municipality, and was still pending there. In their defence, the respondents also averred that the appellants' claim was statutorily time-barred.
11. In their response to the respondents' Amended Defendants' Statement of Defence and Counterclaim, the appellants reiterated the contents of their plaint; and denied the respondents' averment that the deceased took possession of Plot 3345. The appellants argued that the failure by the 1st respondent to put the deceased in possession of Plot 3345 was the reason he (the deceased) demanded for the re-transfer of both land parcels to the parties; and that there had been a dispute in that regard until his demise.
12. In response to the respondents' counterclaim, the appellants averred that they lawfully remained in occupation of Plot 4112, due to the respondents' failure to put the deceased in a peaceful occupation and possession of Plot 3345. For this reason, they averred that the respondents were not entitled to the orders of eviction as prayed.
13. During trial, the appellants and one other witness, testified in support of their case; whilst the respondents were the only witnesses who testified in support of their case. They all adopted the contents of their pleadings and documentary evidence.
14. The 1st appellant was the first to testify. She admitted the land exchange agreement between the deceased and the respondents was mutual. She, however, insisted that when they went to take over occupation and possession of Plot 3345, they were chased away and told never to return. She also testified that the people who chased them away are still in occupation of the land. Afterwards, they reported the matter to the District Commissioner and the 1st respondent was asked to revert Plot 4112 back to the deceased; but he had not done so to date. Thus, they filed the suit at ELC to enable them get back Plot 4112. Additionally, the 1st appellant testified that, as the legal administrator of the deceased's estate, she was willing and ready to surrender Plot 3345 back to the 1st respondent.
15. The 2nd appellant similarly testified that when they went to take over occupation and possession of Plot 3345, they were chased away by people on the farm who told them that they could not live there. Thereafter, they returned to the land parcel with the respondents to talk to the people on the farm but they did not succeed in their efforts. He conceded that they have not allowed the 1st respondent to take possession of Plot 4112; and they too could not go to Plot 3345, as they would be killed if they went there. Additionally, he said that they were ready to return the 1st respondent's title deed. He was the 2nd witness.
16. Ochwari Oyugi, a brother to the deceased, was the third witness. He testified that the deceased wanted to sell his land but the 1st respondent approached him and told him that he had a plot for exchange. The two agreed to exchange their respective land parcels but when the deceased and his family went to the 1st respondent's land, they were chased away and have never taken possession thereof. He further testified that the exchange was done between the deceased and the 1st respondent, and not the 2nd respondent. He also said that the 1st respondent does not live on Plot 4112 and has never settled there.



17. On his part, the 1st respondent, DW1, testified that in 1985, he and the deceased mutually agreed to exchange their respective land parcels. Thereafter, they both went to the Ministry of Lands and transferred the same to each other. He added that before the transfer, they both took their families to the respective land parcels, as a way of informing them “what was happening.” Thereafter, the deceased got the title to Plot 3345, and he (1st respondent) got the title to Plot 4112, which he later transferred to the 2nd respondent. He further testified that he fenced the entire land with barbed wire and cedar posts. Meanwhile, the appellants were cultivating Plot 3345; whilst he had not done any cultivation on Plot 4112. He claimed that the dispute only arose after the death of the deceased. He denied being chased away from Plot 3345 and stated that he was not willing to retransfer Plot 4112 back to the estate of the deceased.
18. During cross examination, the 1st respondent admitted that the deceased wrote to him a letter dated 27th October, 2000, complaining about his inability to take possession of the land. However, the 1st respondent claimed that they had a meeting with the chief and clan elders at the farm to resolve the claim that had been made by other people.
19. The 2nd respondent, DW2, testified that Plot 4112 was registered in his name. He claimed that, they took possession and fenced Plot 4112 and have been cultivating it while the deceased’s family moved to Plot 3345 and started cultivating it. However, in 1999, the deceased’s family came and told them that they had been chased away. It was during this time that a dispute arose. He could not permit the re-exchange of the parcels because this was more 16 years after the land exchange agreement. He further testified that he wrote a letter dated 20th December, 1999, to the chief, Bosongo location, seeking intervention; and told him that the deceased had trespassed on his land and built a kiosk.
20. During cross examination, he said that the problems regarding Plot 3345 related to Menge Menge’s wife (the family from whom the 1st respondent had initially bought the land). He contended that the deceased’s family enjoyed occupation of the land from 1984 to 1999. He conceded that he tried to gain entry to Plot 4112 but was denied entry in 2000 after which he complained to the chief. He denied knowledge of any tribunal proceedings related to the transaction between his father and the deceased.
21. Upon considering the pleadings, oral testimonies and written submissions from all parties, the learned judge made the following findings:
 1. The plaintiffs had not shown any act of fraud, misrepresentation or incapacity on the part of the deceased and the 1st defendant when they contracted to exchange their respective land parcels.
 2. The plaintiffs commenced the suit in 2010 when the transaction which formed the substratum of the suit was concluded in 1984. Hence the length of time in which the plaintiffs sought the intervention of the court was long and no explanation was given for the inordinate delay.
 3. Since the land transaction between the deceased and the 1st respondent was done in 1984 and the deceased died in 2003, the learned judge was of the view that the deceased ought to have brought the proceedings to claim his land by himself, as had been stated by the plaintiffs.
22. In view of the above stated findings, the learned judge was of the considered opinion that the suit as instituted offended section 4 of the Limitation of Actions Act. He further held that the plaintiffs had not proved their case on a balance of probability, with respect of the contract entered into by the parties, and shown that the court ought to intervene and have the contract declared as frustrated. He opined that even though the contract was entered into over 25 years ago, the same was entered freely



and there was no evidence of coercion, fraud or misrepresentation that had been placed before the court to revoke it. For these reasons, he dismissed the plaintiffs' case with costs.

23. As regards the counter claim, the learned judge was satisfied that the defendants had proved their claim and accordingly allowed it. He, however, directed that the enforcement of the eviction orders he had granted commence after 120 days from the date of the judgment and in strict compliance with section 156(a) to (g) of the Land Act as amended in 2016.
24. Aggrieved by the decision of the trial court, the appellants filed a Notice of Appeal dated 30th October, 2017, and a Memorandum of Appeal dated 19th April, 2018, in which they raised five (5) grounds of appeal. These were that the learned judge erred in law and fact:
 1. By not properly analyzing the evidence and come to a finding that the contract of exchange of lands between the late Kone Oyugi and the 1st defendant was frustrated from the beginning as the defendant was unable to give vacant and peaceful occupation of parcel of land no. Nyaribari Chache/B/B/Boburia/3345 to the late Kone Oyugi.
 2. By failing to make a finding that the 1st defendant was giving the late Kone Oyugi parcel of land no. Nyaribari Chache/B/B/Boburia/3345, which he knew was being claimed by third parties and was trying to defraud the late Kone Oyugi and hold that said contract was frustrated and cancel the same.
 3. By failing to make a finding that if indeed the 1st defendant had good title to parcel no. Nyaribari Chache/B/B/Boburia/3345, then it was his legal obligation under the contract of exchange of land to put the appellants in peaceful possession and occupation to the same, and if he was unable to do so then contract of exchange of land had been frustrated and hence cancel the same.
 4. By not making a finding that the plaintiffs were entitled to specific performance as prayed in their claim.
 5. In failing to appreciate the appellants evidence or failing to give reasons for disregarding the evidence.
25. Consequently, the appellants prayed that: the appeal be allowed; the judgment and decree of the superior court be set aside and such suitable orders be made as this Honourable Court may deem fit; there be substituted judgement in favour of the appellants; and the respondents bear the costs of this appeal.
26. During the virtual plenary hearing of the appeal, learned counsel, Mr. Adawo held brief for learned counsel Mr. Ochoki for the appellants. Whereas learned counsel Mr. Soire appeared for the respondents. Both parties filed written submissions and relied entirely on them.
27. The appellants in this case raised several legal issues with the trial court's decision regarding a land exchange agreement between the parties, which they believed was mishandled in terms of jurisdiction, application of the law, analysis of the evidence, and fairness.
28. In summary, the appellants raised five issues as follows.



29. First, the jurisdictional issue: The appellants contended that the issue of jurisdiction was crucial and should have been resolved before proceeding with the main suit. They cited legal precedents, including the famous *Owners of the Motor Vessel “Lillian S” vs. Caltex Oil (Kenya) Ltd* 1989 KLR 1, which emphasized that without jurisdiction, a court cannot proceed with a case. They argued that the trial court’s decision was null due to the unresolved jurisdiction issue, making any further actions by the court legally invalid. This is because, they argued, the respondents had raised the jurisdictional issue in their statement of defence and it behooved the court to resolve that issue first.
30. On this issue, the respondents countered that jurisdiction was never an issue before the trial court: while they had raised it in the defence, they abandoned the issue and did not pursue it. On the other hand, they countered, the ELC has jurisdiction to hear all land-related matters under Article 162 of the Constitution and the Environment and Land Court Act.
31. Second, the disparate application of the Statute of Limitations: The appellants charged that the ELC was contradictory in its application of the law – on the one hand dismissing the appellants’ claim based on the statute of limitations; but, on the other hand, upholding the respondents’ counterclaim, yet both claims were based on the same land exchange agreement.
32. The respondents contended that they had explicitly raised the statute of limitations in their defence to the appellants’ claim but the appellants did not so raise a defence to their counterclaim hence the disparate treatment of the statute of limitations to the two claims.
33. Third, the question of frustration of Contract: The appellants claimed that the respondents failed to ensure peaceful possession of the land as promised in the land exchange agreement between the deceased and the 1st respondent, thus frustrating the contract from the beginning. They argued that the trial court ignored this and unfairly allowed the respondents’ counterclaim while denying the appellants’ request for specific performance or equitable relief.
34. The appellants argued that the trial court disregarded key pieces of evidence, such as letters from the deceased written in 2000 and 1999, showing the long-standing dispute over the land exchange agreement. They contended that the deceased had sought alternative dispute resolution, which should have been factored into the court’s decision. The appellants also pointed out that the trial court’s judgment lacked detailed analysis of the evidence which, they argued, contravened procedural requirements.
35. Fourth, the Legal Obligation to Provide Vacant Possession and Fraudulent Misrepresentation: The appellants asserted that the 1st respondent had a legal duty to ensure the appellants received peaceful and vacant possession of Plot 3345. Failure to do so should have resulted in the cancellation of the land exchange contract. The appellants claimed the trial court erred by not considering this failure when allowing the respondents’ eviction counterclaim.
36. The appellants argued that property sellers have a duty to disclose all relevant information about the property, including its boundaries and any competing claims. Failure to disclose such material information constitutes misrepresentation, which can amount to fraud. They emphasized that if a buyer suffers a loss due to relying on false statements by the seller—whether those statements were the sole or partial reason for the purchase—the seller is liable for misrepresentation.
37. To support their argument, the appellants cited *Morrel & Another vs. Stewart & Another* (2015) EWHC 962 (CH), where sellers were held liable for fraudulent misrepresentation after failing to disclose drainage problems. Applying this principle, the appellants contended that the respondents’



failure to disclose competing claims over the property and the difficulty of granting vacant possession made them liable for misrepresentation, ultimately frustrating the transaction.

38. On their part, the respondents contended that they gave vacant possession of Plot 3345 to the appellants way back in 1984; and the appellants did, in fact, take possession and remained thereon until 1999 when issues arose. They, thus, had complied with the terms of the land exchange agreement. They denied any knowledge of any defect in the title or any dispute thereon before doing the exchange; and asserted that the appellants needed to assert their rights over Plot 3345 because it was legally transferred to the deceased pursuant to the land exchange agreement way back in 1984.
39. Fifth, Unaddressed Issues and Procedural Errors: The appellants also criticized the trial court for not addressing the issues listed in their statement of agreed issues, which they argued violated procedural rules. They believed that this oversight rendered the judgment invalid and should lead to its reversal. In particular, the appellants argued that the trial court's judgment failed to consider all the evidence presented, thereby violating Order 21, Rules 4 and 5 of the Civil Procedure Rules, 2010, which require judgments in defended suits to include: a concise statement of the case; points for determination; and decisions on each issue with reasons therefor.
40. They argued that their agreed statement of issues filed on 14th August 2016 outlined the matters they expected the court to address, but these were ignored. As a result, they claimed the trial court's judgment was fundamentally flawed and should be set aside for justice to be served.
41. The respondents supported the learned Judge's treatment of the issues finding it thorough, fair and judicious.
42. This being a first appeal, I am required to re-evaluate and re-analyze the evidence presented before the trial court in order to arrive at my own independent conclusions of law and fact, bearing in mind that the trial judge had the advantage of seeing and assessing the demeanor of witnesses. (See *Selle vs. Associated Motor Boat Co. Limited* (1968) EA 123). In addition, I am obligated to be cognizant of the fact that I should not interfere with the findings of fact by the trial court unless they were based on no evidence or on a misapprehension of the evidence or the trial judge is shown demonstrably to have acted on wrong principles in reaching his findings. (See *Jabane vs. Olenja* (1968) KLR 661).
43. Having considered the pleadings in the record of appeal, the judgment of the trial court, the appellants grounds of appeal and the rival submissions of the parties, five issues present themselves for determination in this appeal:
 - a. First, whether it was an error for the trial court not to have decided the case on jurisdictional grounds in the circumstances of the case; and whether the jurisdictional question has been preserved for determination on appeal.
 - b. Second, whether the appellants should have prevailed on breach of contract grounds;
 - c. Third, whether the appellants made out a case on grounds of negligent or fraudulent misrepresentation;
 - d. Fourth, whether the judgment was structurally defective in a fatal sense by failing to take into consideration all the evidence and for being in contravention of the mandatory provisions of Order 21 Rule 4 and 5 of the Civil Procedure Rules, 2010; and
 - e. Fifth, whether the learned Judge erred in finding that the appellants suit offended section 4 of the Limitation of Actions Act while simultaneously finding for the respondents on the counterclaim on the same facts.



44. The appellants are right: jurisdiction is everything. The Lillian S Case (supra), famously added:
- “Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”
45. The question is whether the jurisdictional question was an issue for the trial court to pursue as the appellants now claim. It is true that the respondents included the following paragraph in their amended statement of defence and counterclaim at paragraph 11:
- “The jurisdiction of the court is denied for the matter having been filed in Land Dispute Tribunal Kisii Municipality yet undetermined.”
46. As both the appellants and respondents agree, the issue of jurisdiction never arose again in the trial. The appellants did not address it in their reply to defence and counterclaim; and the respondents did not raise it as a preliminary issue or at all during the trial. Neither parties led any evidence to persuade the trial court that the matter was, in fact, sub judice before the “Land Disputes Tribunal Kisii Municipality.” Indeed, it is unclear what that entity is. The appellants produced minutes of a meeting held on 7th June, 2000, between the chief and the parties where a ruling was adjourned to 28th June, 2000. That ruling was not submitted by either party to the controversy. In any event, the chief, sitting as an Alternative Justice Systems mechanism, is different than the Land Disputes Tribunal – which was a statutory creature under the Land Disputes Tribunal Act, 1990. In fact, there was an express denial by the 2nd respondent, in his testimony, that there were any tribunal proceedings between the parties.
47. In the face of this, it is unclear how the trial court could have raised the issue of jurisdiction suo sponte; and it would certainly have been impermissible for it to reach a finding that the matter was pending before a competent tribunal. There was simply not enough factual material for the court to have come to that conclusion.
48. Additionally, the appellants did not preserve the jurisdictional question for review by this Court since they not only failed to raise it during trial but they, also, did not raise it as a ground of appeal in their memorandum of appeal. This is a clear indication that it is merely an afterthought; and it would offend the principle of fair trial to suddenly spring it against the respondents. In any event, as it will become clear shortly, this disposition is inconsequential to the outcome of this appeal.
49. Turning to the second issue, the question is whether the appellants should have succeeded on their claim for specific performance or rescission. As both parties agree, the appellants’ claim here was based on breach of contract. The parties agreed that there was a contract entered into between the deceased and the 1st respondent sometime in 1984 or 1985. The actual agreement, if it was ever in writing, was not produced by either party. However, both parties agreed that the major negotiated part of the contract was that there would be an exchange of land between the deceased and the 1st respondent: the deceased, who owned Plot 4112 until then, would transfer his ownership of that parcel to the 1st respondent (or his designee) and the 1st respondent, who owned Plot 3345 until then, would transfer his ownership of that land to the deceased. The parties also agree that it was an incidental part of the contract that each party would deliver vacant possession of their respective former parcels to the other.
50. The parties further agree that each party kept their side of the bargain respecting the first major negotiated term of the contract: they each transferred their respective parcel to the other. Consequently, Plot 4112 is now registered in the 2nd respondent’s name while Plot 3345 is now registered in the deceased’s name pursuant to the execution of the contract. However, the parties



diverge on whether either party adhered to the part of the contract where they were to put the other in vacant possession of the exchanged parcel: the appellants say they could not take vacant possession because they were attacked on their first attempt to do so; while the respondents claim that the appellants have simply refused to give them vacant possession yet the 1st respondent gave vacant possession of Plot 3345 to the deceased who peaceably took it and remained on it until 1999 – more than fifteen years.

51. The legal question is whether the appellants established their claim on a balance of probabilities. In a word, they did not. This is because, however differently one parses the claim; and however finely one tunes the facts, the claim the appellants brought before the court was, by their own admission, a claim for breach of contract. They claimed that the respondents had totally breached the contract and that they were either entitled to specific performance or the radical remedy of rescission of the contract. Either way, their main claim was based on a theory of breach of contract. If so, that claim needed to be brought within six years from the date of breach. By their own admission, the terms of the contract were that the contract was to be executed immediately or at least within reasonable time. It, therefore, follows that bringing the claim in 2010 – at least 25 odd years after the contract was entered into was way beyond the statutory period for bringing the claim.
52. This same weakness stalks the appellants' other major claim based on negligent or fraudulent misrepresentation. The claim is that the respondents knew that the 1st respondent's title to Plot 3345 was contested; and, therefore, fraudulently induced the deceased to enter into the contract without disclosing the dispute. Even without going into the facts of the case to determine if the appellants actually established that claim in fact, that claim is slayed by the same sword of statute of limitations. That claim can either be comprehended as a contractual claim – in which case it should have been brought within six (6) years; or worse, as a tortious claim – in which case it should have been brought within three (3) years.
53. The appellants would not be rescued even if I were to be overly judicially charitable in their favour and considered an unpleaded (but potentially implied) claim in unjust enrichment. An independent restitutionary claim based on unjust enrichment is also said to be regarded as founded on simple contract and, therefore, with a limitations period of six (6) years from the date of accrual of the cause of action. See, for example, *Aspect Contracts (Asbestos) Ltd v Higgins Construction plc* [2015] UKSC 38; [2015] 1 WLR 2961 per Lord Mance at [25]; *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1994] 4 All ER 890, 942-943, per Hobhouse J, which was approved by the House of Lords in *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349. See also Goff & Jones on Unjust Enrichment (10th edition) at para. 33- 17; and *A Restatement of the English Law of Unjust Enrichment*, (Burrows) at p.145.
54. Even if one were to assume that the cause of action arose at the first instance that the appellants felt that the respondents had obtained a real and incontrovertible benefit, the latest that could be read from the facts of the case is some time in 1999 when the deceased first raised a complaint. Yet, the suit at the ELC was not filed until 2010 – more than eleven (11) years since that time.
55. The result would be the same even if the case was taken as one for a claim over land – in which case the limitation period would be twelve (12) years. This is because, in that case, by the appellants' own narrative, the cause of action for that claim would have arisen either in 1984 or 1985 at the latest as that is when the land exchange agreement was to be executed.
56. Differently put, whichever way one parses the factual circumstances of this case, the appellants were caught up by the statute of limitations.



57. The appellants raised another technical salvo against the ELC judgment: that it is structurally deficient; and that it does not meet the technical requirements of Order 21, Rules 4 and 5 of the Civil Procedure Rules, 2010. It is true that the judgment delivered by the learned Judge was terse; and probably not a traditional model of a judgment given the nature of the case. But it is to stretch the technical requirements of the Rules to claim that its brevity and style are of such nature that they defy its name as a judgment. The judge grappled with the eminent questions that arose from the trial and made conclusions about them. Indeed, he did so well enough for the appellants to find four specifically tailored substantive areas of disagreement. In any event, as a first appellate court, in line with our remit, this Court has subjected the judgment to a de novo review. In other words, nothing turns on this ground of appeal.
58. The final issue to consider is whether it was open to the learned Judge to grant relief to the respondents based on the same facts while simultaneously dismissing the claims by the appellants on the strength of the statute of limitations. It is clear that the learned Judge's disparate treatment of the application of the statute of limitations to the two sets of claims is so lopsided as to amount to plain injustice intolerable to a court of law. In my judgment, it would be the ultimate apotheosis of talismanic and formalist jurisprudence to say that the counterclaim succeeds based on the same facts, case and analysis and merely because there was no formal defence to it raised by the appellants. The issue of limitations of action was squarely an issue raised by the parties as an issue before the trial court. The analysis cannot be disparate: what is good for the goose must be good for the gander. If the appellants could not enforce a land exchange agreement entered into in 1984 because it was statute-barred; the respondents could similarly not enforce it for the same reason. The same set of facts and circumstances cannot produce two different legal implications based on talismanic and formalistic inclusion of technocratic phraseology. In this case, both the appellants and the respondents sought to rely on an ill-fated contract for the exchange of land.
59. The upshot is that the appeal herein, in my view, partly succeeds. The appellants have failed to persuade this Court that they should have prevailed on the merits at the trial court; but they have succeeded in persuading this Court that the respondents should not have succeeded in their claim either. To that extent, I would dispose of the appeal as follows: both the plaint and the counterclaim before the trial court are dismissed with the order that each party to bear their own costs both at the trial court and in this Court.
60. I realize that this outcome would leave the parties in limbo. Perhaps that is not as tragic as it might, at first blush, look.

There are two avenues for resolution of the underlying dispute.

The first one would be to pursue the complaint or process at the land disputes tribunal both parties spoke of at the trial court, if it is still viable. The second, and potentially more productive one, is to subject this dispute to an Alternative Justice Systems mechanism which is acceptable to both parties. This could either be an autonomous third-party Alternative Justice System or a Third-Party-based Alternative Justice System (see Judiciary of Kenya, Alternative Justice Systems Baseline Policy: Justice as Freedom: Traditional, informal and other mechanisms used to access justice in Kenya (2020), https://ajskenya.or.ke/mooxowhi/filr/3584/AJS_Baseline_Policy_2020_Kenya.pdf). It is clear that if both parties moved from a conflict and competition mode to a resolution and mutual accommodation mode, a solution to the unenviable situation they both find themselves in could be possible. It is yet possible for them to end up in a transformative mutually satisfying resolution. Alternative Justice System Mechanisms often provide a modality for that process. The choice is theirs.



JUDGMENT OF KIAGE, JA

1. I have had the benefit of reading in draft the judgment of Joel Ngugi, JA. I entirely agree with it and have nothing useful to add.
2. As Tuiyott, JA also agrees, it is so ordered.

JUDGMENT OF TUIYOTT, JA

1. I have had the advantage of reading in draft the judgment of Joel Ngugi, JA, with which I am in full agreement and have nothing useful to add.

DATED AND DELIVERED AT KISUMU THIS 20TH DAY OF DECEMBER, 2024.

JOEL NGUGI

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

