**Helbling v Masha & another (Civil Appeal E049 of 2022)**
**[2025] KECA 2250 (KLR) (19 December 2025) (Judgment)**

Neutral citation: [2025] KECA 2250 (KLR)

**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT MALINDI**

**CIVIL APPEAL E049 OF 2022**

**AK MURGOR, KI LAIBUTA & GW NGENYE-MACHARIA, JJA**

**DECEMBER 19, 2025**

**BETWEEN**

**MARGARET KABIBI HELBLING ..... APPELLANT**

**AND**

**KAREMBO ANTHONY MASHA ..... 1ST RESPONDENT**

**LENNOX NZAI CHOGO ..... 2ND RESPONDENT**

***(An appeal from the Judgment of the Environment and Land Court at Malindi (J. O. Olola, J.) delivered on 19th October, 2022) in Malindi ELC No. 157 OF 2016)***

## JUDGMENT

1. The Appellant, Margaret Kabibi Helbling, filed a suit against the 1st Respondent, Karembo Anthony Masha, seeking an order of eviction and a permanent injunction to restrain her from cultivating, putting up structures and in any other way interfering with her enjoyment of the parcel of land known as Kilifi/Mtondia/1116 (the suit property).

2. It was the Appellant's case that she bought the suit property from one Lennox Nzai Chogo, the 2nd Respondent, on 16th July 2008 for Kshs. 300,000, which she paid in full. Thereafter, she was issued with a title deed on 16th July 2009. She claimed that, in 2010, the 1st Respondent invaded a portion of her land, erected structures, and planted eucalyptus trees and then claimed 3 acres from the estate of Karisa Choga Nzai (deceased).

3. In a response set out in a Statement of Defence and Counterclaim as amended on 17th March 2017, the 1st Respondent denied that the Appellant was the lawful owner of the suit property. She enjoined the 2nd Respondent as a defendant to the counterclaim and asserted that she and her family had been in lawful, uninterrupted possession and occupation of three (3) acres within Plot No. Kilifi/ Mtondia/201, from which the suit property was allegedly carved out. It was her case that the land was

bought by her late husband, Anthony Masha Maitha, from the deceased on 25th January 2001, for Kshs. 127,500, of which Kshs. 57,715 was paid before his death in 2004. Payment of the balance of Kshs. 69,786, she alleged, was declined by the vendor's sons, including Lennox Nzai Chogo, the 2nd Respondent.

4. She claimed that since the purchase in 2001, she had extensively developed the property by building residential houses and planting various trees; that the Appellant had previously, through an agent, Tsuma Kenga Mwadzemba, sued her in Malindi ELC Case No. 201 of 2013, where her plaint was struck out on 6th May, 2016. She added that her counterclaim in that suit remains pending for hearing and determination.

5. As stated above, she introduced the 2nd Defendant in her counterclaim and asserted that the sale by the 2nd Respondent to the Appellant was void ab initio, being a duplication and an illegality since her husband had purchased part of the same land earlier.

   She prayed for:

   i. A declaration that the sale of three (3) acres forming part of the suit property to the Plaintiff was void ab initio;

   ii. A declaration that she and other beneficiaries of her late husband were entitled to three (3) acres within Kilifi/mtondia/1116, which they had occupied since 2001;

   iii. Rectification of the land register to register her as owner of the said three (3) acres;

   iv. A permanent injunction restraining the Plaintiff, her servants or agents from interfering with her quiet possession;

   v. Costs of the Counterclaim; and

   vi. Any other relief deemed just by the Court.

6. During the hearing, the Appellant (PW1), testified as the sole witness. She told the court that she had learnt of a parcel of land being sold by the family of Karisa Nzai Chogo, and upon inquiry, she carried out a search at the Kilifi Lands Office. The search confirmed that the land, then registered as Kilifi/Mtondia/201 measuring approximately twelve (12) acres, was registered in the name of Karisa Nzai, the 2nd Respondent's father.

7. PW1 stated that she agreed to purchase six (6) acres from the parcel for a total consideration of Kshs. 300,000 whereupon, the parties executed a written sale agreement on 9th July 2008, and she paid the entire purchase price in cash at the time of execution. Although the registered owner, Karisa Nzai, had since passed away, PW1 testified that the family had already obtained Grant of Letters of Administration to his estate to facilitate the transaction, which was concluded through the 2nd Respondent. Following the execution of the agreement, a surveyor visited the site and placed beacons to demarcate the purchased portion. Upon subdivision and transfer, her portion was registered as Kilifi/Mtondia/1116 (the suit property).

8. PW1 further explained that, in 2010, while she was residing abroad, she received information that a neighbour had trespassed onto her land, constructed a Makuti house and a temporary toilet on the property, hence the suit.

9. Under cross-examination, PW1 acknowledged that the 1st Respondent had another parcel of land adjacent to hers, but maintained that she had never seen her occupying or constructing any homestead on her own portion of land.

10. On her part, the 1st Respondent called two witnesses, namely Karembo Anthony Masha (DW1) and Karisa Mweni Masha (DW2), while the 2nd Respondent, Lennox Nzai Chogo, testified independently as DW3.

11. The 1st Respondent testified that she had resided on the suit property for approximately fifteen (15) years, having entered the land in 2001 when she and her late husband began clearing it and planting crops. She claimed to have started living on the land permanently in 2005. Her late husband, Anthony Masha Maitha, had purchased three (3) acres of the property from Karisa Chogo Nzai on 25th January 2001 and paid part of the agreed purchase price before his death in 2004, and that the 2nd Respondent was aware of that transaction and therefore lacked authority to later sell the same portion to the Appellant.

12. During cross-examination, DW1 admitted she was not present when the sale agreement between her husband and the vendor was executed. She also conceded that the 2nd Respondent's name did not appear anywhere in the Sale Agreement. She explained that her husband had merely shown her the agreement before his death. DW1 further confirmed that no surveyor had visited the land at the time of the alleged purchase, and that the boundaries were pointed out by the seller. The agreed purchase price, she indicated, was Kshs. 127,000 of which her husband had not fully paid before he passed away in 2004.

13. Karisa Mweni Masha, DW2, a clansman of the 1st Respondent, corroborated her evidence. He stated that the late Anthony Masha purchased three (3) acres from his father on 25th January 2001 for Kshs. 127,000, and that he personally witnessed the payment of Kshs 30,000 as a deposit and an additional Kshs 27,500 for the processing of a title deed. DW2 admitted that no surveyor was engaged during the transaction and that no beacons were ever placed on the ground. He explained that the boundaries were pointed out by the seller on foot and that trees were planted to mark a portion approximately 70 by 70 feet in size. On cross- examination, DW2 reaffirmed those figures and confirmed that there was no subdivision or title registration after the alleged sale.

14. The 2nd Respondent and son of the original owner and administrator of the estate testified that he was acquainted with the Appellant, and that he had indeed sold her six (6) acres of land from the larger parcel Kilifi/Mtondia/201. He stated that, following the sale, a surveyor visited the property, placed beacons and subdivided the parcel into Kilifi/Mtondia/1116 and Kilifi/Mtondia/1117. He confirmed that the Appellant's portion was registered as Plot No. 1116 while Plot No. 1117 remained in his own name. Later, he sold 2.5 acres of Plot 1117 to Fredrick Kahiho, which was subsequently subdivided to create Plot Nos. 1912 and 1913.

15. DW3 categorically denied that his late father ever sold any land to the 1st Respondent or to her deceased husband; that his father never mentioned such a sale; and that the 1st Respondent did not live on the Appellant's land. According to him, she only entered onto his own portion (Plot No. 1913) in 2010 where she erected a structure without permission.

16. During cross-examination, DW3 admitted that he sold the land to the Appellant in 2008; and that he had yet to obtain Letters of Administration for his father's estate. However, he denied that the 1st Respondent had been in occupation before the sale and insisted that no sale to her husband had ever taken place. He acknowledged that he and his family had agreed to refund Kshs. 57,000 to the 1st Respondent as a gesture of goodwill—representing the sum allegedly paid to his late father by the 1st Respondent's husband—but clarified that the refund was made without admitting ownership or liability.

17. After considering the pleadings, witness testimonies and documentary evidence, the trial court observed that neither party had filed written submissions as earlier directed. The court observed that the dispute revolved around ownership and possession of six acres of land registered as Kilifi/Mtondia/1116, and that it was originally Kilifi/Mtondia/201, which was later subdivided into Plot No. 1116 (registered in the Appellant's name) and Plot No. 1117 (retained in the 2nd Respondent's name); and that the 2nd Respondent sold the suit property to the Appellant before he obtained Letters of Administration to his late father's estate. The court was mindful that both the Appellant and the 2nd Respondent had confirmed that no grant of representation existed at the time of the transaction.

18. Relying on Section 45 of the *Law of Succession Act*, the Court held that the 2nd Respondent's sale of the land to the Appellant amounted to intermeddling with the property of a deceased person, which is an offence in law, and concluded that the Appellant's title was invalid having been acquired through an unlawful process.

19. Turning to the 1st Respondent's counterclaim, the court found credible evidence that her late husband had indeed entered into a handwritten sale agreement on 25th January 2001 where the deceased had sold three acres of the same land for a consideration of Kshs 127,500. The agreement allowed him to take immediate possession of the suit property and, according to the 1st Respondent, they had begun cultivation and occupation soon thereafter.

20. The court held that the 2nd Respondent's own admission that the family had agreed to refund Kshs. 57,715 to the 1st Respondent was taken to be tacit confirmation that part of the purchase price had indeed been received. The court was satisfied that the 1st Respondent's husband had paid the initial amount, and that the remaining balance of Kshs 69,786 was rejected by the vendor's family, despite her willingness to complete payment.

21. In conclusion, the trial court held that the Appellant had failed to prove her ownership claim, as her title was obtained irregularly through intermeddling, while the 1st Respondent had proved her counterclaim on a balance of probabilities. The court dismissed the Appellant's suit and declared the sale to the Appellant as null and void ab initio. The court further held that the 1st Respondent was entitled to three acres out of Plot No. Kilifi/Mtondia/1116, subject to her payment of the outstanding balance of Kshs 69,786. It further ordered the rectification of the land register to reflect the 1st Respondent's ownership of the three acres and issued a permanent injunction restraining both the Appellant and the 2nd Respondent from interfering with the 1st Respondent's quiet possession. Finally, the 1st Respondent was awarded the costs of both the suit and counterclaim.

22. Aggrieved , the Appellant has filed an appeal to this Court on the grounds that the learned judge was in error in law and fact by not considering all the pertinent evidence of the Appellant and the County surveyor, county Government of Kilifi and his joint report dated 14th October, 2019 and filed in court on 19th November, 2019; in allowing the 1st Respondent's counter claim to the extent that she is entitled to 3 acres of the suit property when the evidence on record, and in particular the joint survey report indicated that the disputed portion of land is only 0.54 Ha while the rest 0.66 Ha is part of Kilifi /Mtondia/1913 belonging to the 2nd Respondent; in declaring the sale transaction of 3 acres by the 2nd Respondent to the Appellant void ab initio and ordering that 3 acres be transferred to the 1st Respondent, yet the whole transaction was declared void; in failing to find and establish that there was no valid contract between the 1st Respondent's late husband and the 2nd Respondent's father as the purported agreement is not compliant or in consonance with the mandatory provisions of Section 3(3) of the Contract Act; in misdirecting himself that there was intermeddling with the deceased's estate only to order for the transfer of the 3 acres from the same estate to be excised from the Appellant's land

yet, the court is not an administrator of the estate; in failing to appreciate that the 1st Respondent's counterclaim was worthless, and that the 1st Respondent was guilty of latches as the case was filed more than 15 years after the purported sale agreement, contrary to the express provisions of the *Limitation of Actions Act*; in giving life to an otherwise non-existent sale agreement between the 1st Respondent and the deceased by virtue of Section 5 and 6 of the *Land Control Act* for want of Land Control Board consent; in issuing a biased and skewed Judgment in favour of the 1st Respondent who clearly did not have good title and/or interest superior to the Appellant's in the suit property; in ordering the 1st Respondent to pay the 2nd Respondent's family Kshs. 69,786; and in considering extraneous matters and circumstantial evidence to the detriment of the Appellant's title and interest in the suit property.

23. Both the Appellant and the Respondent filed written submissions and, when the appeal came up for hearing on a virtual platform, learned counsel Ms. Garama holding brief for Mr. Nyachiro appeared for the Appellant and the 2nd Respondent while learned counsel Mr. Lewa appeared for the 1st Respondent.

24. In her submissions, the Appellant contended that the learned Judge failed to properly evaluate the evidence adduced at the trial, particularly the joint survey report dated 14th October 2019 and filed in court on 19th November 2019. According to the Appellant, this report was a crucial piece of evidence, as it clearly established that the disputed portion of land measured only 0.54 hectares within Land Parcel No. Kilifi/Mtondia/1116, while a further 0.66 hectares fell within Kilifi/Mtondia/1913, registered in the name of the 2nd Respondent. The Appellant argued that, by ignoring this expert report, which was not disputed by any party, the trial court reached an erroneous conclusion that the 1st Respondent was entitled to three acres of her land. She relied on the decisions in Mwangi & Another vs Wambugu [1984] KLR 453; and Abok James Odera t/a A. J. Odera & Associates vs John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR for the principle that a trial court has a duty to consider all the evidence on record, and that an appellate court is entitled to interfere where the trial court fails to do so.

25. The Appellant further submitted that the learned Judge contradicted himself by declaring the 2008 sale transaction between herself and the 2nd Respondent void ab initio for want of letters of administration, while at the same time ordering that the same three acres be transferred to the 1st Respondent; that, if the transaction was void on account of intermeddling with the deceased's estate, then no valid transfer could lawfully result in favour of either party. She argued that, under Section 45 of the *Law of Succession Act*, no person may take possession of, or dispose of, the property of a deceased person without a grant of representation, and that such act amounts to criminal intermeddling. To support this position, the Appellant cited In re Estate of M'Ngarithi M'Miriti (Deceased) [2017] eKLR ; In re Estate of Karanja Gikonyo (Deceased) [2020] eKLR; and Gitau & Two Others v Wandai & Five Others [1989] KLR 231, which affirm that only a duly appointed administrator may deal with a deceased person's estate.

26. The Appellant also challenged the trial court's finding that there existed a valid sale agreement between the 1st Respondent's late husband and the 2nd Respondent's father. She maintains that the alleged agreement of 25th January 2001 was not in compliance with Section 3(3) of the *Law of Contract Act*, which requires that all contracts for the disposition of an interest in land be in writing, signed by the parties, and duly attested. In addition, she argues that the transaction was void for lack of Land Control Board consent as required by Sections 5 and 6 of the *Land Control Act* (Cap. 302). The Appellant submitted that, without such consent, the transaction was a nullity in law. The cases of Silverbird Kenya Ltd vs Junction Ltd & 3 Others [2013] eKLR; Kariuki vs Kariuki [1983] KLR 225; and David Sironga Ole Tukai vs Francis Arap Muge & 2 Others [2014] eKLR, were relied upon to support the contention that failure to comply with statutory formalities renders a land transaction void and unenforceable.

27. On limitation, the Appellant argued that the 1st Respondent's counterclaim was filed outside the statutory period, having been lodged more than fifteen years after the alleged sale of 2001. She submits that, under the *Limitation of Actions Act*, a claim for recovery of land must be brought within twelve years, and that any action filed beyond that period is incompetent. She faulted the learned Judge for failing to consider this point, and for granting relief on a claim that was already extinguished by operation of law. In support, she cited the cases of Bosire Ongero vs Royal Media Services [2015] eKLR; and Gathoni vs Kenya Co-operative Creameries Ltd [1982] KLR 104, which affirm that limitation is a substantive bar that extinguishes both the right and the remedy.

28. The Appellant further submitted that the trial court's findings reveal bias and reliance on extraneous considerations; that the learned Judge gave undue weight to the 1st Respondent's oral testimony while disregarding documentary and expert evidence that supported the Appellant's registered title. In her view, the order directing the 1st Respondent to pay Kshs. 69,786 to the 2nd Respondent's family was baseless and inconsistent with the finding that the transaction was void. In conclusion, the appellant urges this Court to allow the appeal, set asideCthe judgment of the Environment and Land Court, dismiss the 1st Respondent's counterclaim in its entirety and reinstate her title to Land Parcel No. Kilifi/Mtondia/1116 as the lawful and indefeasible owner.

29. In response to the appeal, the 1st Respondent, supported the findings of the learned Judge and submitted that the appeal is devoid of merit. She maintained that the trial court correctly analyzed the evidence and properly applied the law in determining that the 1st Respondent had established her counterclaim on a balance of probabilities.

30. The 1st Respondent argued that the trial court rightly found the Appellant's title to be unlawful, having been obtained through intermeddling with the deceased's estate; that the 2nd Respondent had no grant of letters of administration at the time when he purported to sell the land to the Appellant and. as such, the sale of 2008 was null and void ab initio under Section 45 of the *Law of Succession Act*; and that the learned Judge correctly held that the Appellant's title was rooted in illegality. To support this position, the case of Re Estate of M'Ngarithi M'Miriti (Deceased) [2017] eKLR, was relied on where the court held that intermeddling with a deceased's estate renders the transaction void; and Gitau & Two Others v Wandai & Five Others [1989] KLR 231, which affirmed that no person may lawfully sell or transfer property belonging to a deceased person before obtaining a grant. The Respondent submitted that the learned Judge was therefore right in declining to enforce the Appellant's title, as to do so would have amounted to sanctioning an illegality.

31. The 1st Respondent further submitted that the learned Judge properly considered and upheld the handwritten sale agreement dated 25th January 2001 between her late husband and the deceased; that this agreement was genuine; that possession was handed over immediately; and that her family had been in continuous, open, and uninterrupted occupation of the land since 2001. The 1st Respondent asserted that the court rightly found that her occupation was consistent with a valid purchase, and that her husband paid part of the purchase price, which the seller's family later acknowledged by agreeing before the area chief to refund.

32. On the argument that the 2001 transaction was void for want of Land Control Board consent, the 1st Respondent contended that such consent was not required at the time since the agreement was between members of the same family, and that possession had already passed to the purchaser. She urged that, even if consent were required, the absence of it did not negate the fact that she had been in open and continuous occupation for more than two decades, which gave rise to an equitable interest recognized under Sections 24, 25, and 26 of the *Land Registration Act*.

33. Counsel further argued that the learned Judge rightly found that the 1st Respondent's occupation and possession of the land lent sufficient support to her equitable claim, and that her long occupation effectively ousted the Appellant's subsequent title; that the Appellant's claim was undermined by the illegality having been purchased from a person without authority to sell; and that the Appellant cannot rely on indefeasibility of title under Section 26 of the *Land Registration Act*. The case of Arthi Highway Developers Ltd v West End Butchery Ltd & 6 Others [2015] eKLR was cited in support of the proposition that a title acquired illegally or unprocedurally cannot be protected under the Act.

34. On limitation, the 1st Respondent contended that her claim was not barred under the *Limitation of Actions Act*, as she had been in continuous and uninterrupted possession of the land since 2001; and that the learned judge was right in finding that her occupation was longstanding and unchallenged until 2010 when the Appellant attempted to evict her, which demonstrated that her possession was open and notorious.

35. Finally, the 1st Respondent asserted that the court's order requiring her to pay Kshs 69,786 to the 2nd Respondent's family as the balance of the purchase price could be described as just and equitable resolution and consistent with her obligation to complete the transaction; that the trial court's decision which was sound, well-reasoned, and supported by both fact and law, affirmed her ownership and quiet possession of the three-acre portion of the suit property.

36. The 2nd Respondent did not file any written submissions.

37. Having carefully considered the grounds of appeal, the record of appeal and the written submissions of the parties, we are of the view that the following issues arise for determination by this Court:

    a. whether the learned trial judge properly evaluated the evidence on record, particularly the joint survey report dated 14th October 2019 and adopted by consent of the parties, and whether failure to consider that report affected the outcome of the judgment;

    b. whether the learned trial judge was in error declaring the 2008 sale transaction between the Appellant and the 2nd Respondent void ab initio and yet proceeded to order that three acres of the same land be transferred to the 1st Respondent;

    c. whether a valid and enforceable sale agreement existed between the 1st Respondent's late husband and the 2nd Respondent's deceased father, and whether such an agreement met the requirements of Section 3(3) of the *Law of Contract Act* and the *Land Control Act*;

    d. whether the learned trial judge properly addressed the issue of intermeddling with the estate of Karisa Chogo Nzai (deceased), and whether the 2nd Respondent had lawful authority to sell the land to the Appellant;

    e. whether the 1st Respondent's counterclaim was time-barred under the *Limitation of Actions Act*, considering that it was filed more than fifteen years after the alleged sale transaction; and

    f. whether the learned trial judge was in error in ordering the 1st Respondent to pay Kshs. 69,786 to the 2nd Respondent's family as balance of the purchase price despite having declared the sale transaction void.

38. Turning to the first issue as to whether the learned judge properly addressed the issue of intermeddling with the deceased's estate, and whether the 2nd Respondent had lawful authority to sell the land to the Appellant, the record shows that, sometime in July 2008, the Appellant was informed that a parcel of land belonging to the family of the late Karisa Chogo Nzai was available for sale. She conducted

an official search at the Kilifi Lands Office, and confirmed that the title —then registered as Kilifi/mtondia/201, measuring approximately 12 acres — was in the name of the deceased. The Appellant then entered into a sale agreement dated 9th July 2008 with the 2nd Respondent, the deceased's son and family administrator. The agreement for sale was for 6 acres at a consideration of Kshs. 300,000, which the Appellant said she paid in full upon signing. Thereafter, Kilifi/Mtondia/201 was subdivided and assigned a new title number, Kilifi/Mtondia/1116, which was subsequently registered in the Appellant's name on 16th July 2009. The remaining portion of the original parcel, now designated as Kilifi/Mtondia/1117, was retained in the name of the 2nd Respondent. In his evidence, DW3 conceded that, by the time of sale, subdivision and transfer of the suit property, the late Karisa Chogo Nzai had long been deceased (having died in 2003), and that no grant of letters of administration had been issued authorizing him to deal with the estate.

39. In addressing the manner of dealing with the estate of a deceased person, Sections 45,79 and 82 of the *Law of Succession Act* are pertinent. They provide:

> Section 45. No intermeddling with property of deceased person
>
> 1. Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.
>
> 2. Any person who contravenes the provisions of this section shall—
>
>  a. be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and
>
>  b. be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.
>
> Section 79. Property of deceased to vest in personal representative
>
> "The executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and, subject to any limitation imposed by the grant, all the property of the deceased shall vest in him as personal representative.
>
> Section 82. Powers of personal representatives
>
> Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers—
>
> a. to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative;
>
> b. to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best:
>
>  Provided that—
>
>  i. ...

ii. no immovable property shall be sold before confirmation of the grant...

40. In the case of Trouistik Union International & another vs. Jane Mbeyu & another [1993] eKLR, the Court held that action taken by a party without letters of administration is incompetent at the date of its inception.

41. And this Court in the case of Winnie Kinyua Kaburu vs Ali Juma Abdirahman & another [2018] eKLR similarly stated that:

> A party who has no letters of administration has no legal capacity or authority to transact or deal with the estate of the deceased. In the words of Section 45 of the Act that is tantamount to intermeddling."
>
> See also Kadzo Charo vs Alex Nzai Dzombo [2019] eKLR
>
> On Lord Denning M.R. in the case of Macfoy vs United Africa Co. Ltd [1961] 3 All ER 1169 at pg. 1172 that:
>
> > ...If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse".

42. The above authorities are clear that, in the absence of letters of grant of representation, the 2nd Respondent had no legal capacity to sell the suit property to the Appellant with the result that the sale between the Appellant and the 2nd Respondent was void. So that, by transferring and subdividing the land into new parcels before obtaining letters of administration, the 2nd Respondent had in effect interfered with the due administration of the estate of Karisa Chogo Nzai, thereby depriving other potential beneficiaries of their rights. We find that the trial court rightly concluded that the 2nd Respondent's actions constituted intermeddling with the deceased's estate, and that that conclusion was both legally and factually sound. And, correspondingly, having found that the Appellant's title arose from an unlawful sale of the deceased's property, the trial court was justified in declining to uphold her ownership of the suit property. The ground of appeal on this issue fails in its entirety.

43. As to whether the learned trial judge properly evaluated the evidence, the Appellant contends that the learned Judge failed to properly evaluate the totality of the evidence before the court, particularly the joint survey report dated 14th October 2019 and filed on 19th November 2019. The Appellant submitted that this evidence conclusively disproved the 1st Respondent's claim that she was entitled to three acres of the Appellant's land, yet the trial court did not refer to, or analyze, the report in its Judgment. The omission, it is argued, amounted to a misdirection and failure to evaluate material evidence thereby leading to an erroneous conclusion.

44. It is a settled principle that, while courts must give due regard to expert opinions, such evidence is not binding or conclusive. The weight accorded to expert testimony depends on its consistency with other available evidence and its overall credibility. In Shah and Another vs Shah and Others [2003] 1 EA 290, the court held that expert opinion must be considered alongside other facts, but that a court is not obliged to accept an expert's conclusions if valid reasons exist for rejecting them.

45. In this case, the learned Judge was within his discretion to evaluate the survey report within the context of all the surrounding evidence. A consideration of the report shows that it merely identified the physical boundaries and extent of the suit property; and that it did not, and could not, resolve questions of ownership, possession, or validity of title, which were at the core of the parties' dispute. Accordingly, the learned Judge was entitled to give greater weight to the consistent and credible testimonies of the parties, all of which demonstrated long- standing occupation and part performance of the 2001 sale to the 1st Respondent's husband, rather than to the technical findings of the survey report. Given that the trial Judge concluded, and rightly so in our view, that the Appellant's title was invalid, the existence of the surveyor's report could not in any way validate her title. This ground is without merit.

46. Was the 1st Respondent's counterclaim time-barred? On the issue of limitation, the Appellant submits that the 1st Respondent's counterclaim was time-barred by virtue of Sections 4(1) and 7 of the *Limitation of Actions Act*; that the 1st Respondent's case was founded on a sale agreement made on 25th January 2001 between her late husband and the deceased, Karisa Chogo Nzai. On her part, the 1st Respondent submitted that her counterclaim was not time-barred, as the cause of action did not accrue in 2001, but much later when the Appellant unlawfully interfered with her possession; that the cause of action arose in 2010, and not 2001, and the counterclaim filed in 2016, six years later, was within the limitation period prescribed under Sections 4(1).

47. An interrogation of the record discloses that the issue of limitation of time was not raised during the trial, and neither was it pleaded in the Appellant's defence to the counterclaim or as subject of a preliminary objection. This Court in South Nyanza Sugar Company Limited vs Rankai (Civil Appeal 172 of 2019) [2025] KECA 427 (KLR) held that:

> The statute of limitations, like the doctrine of exhaustion, is an affirmative defence. It must be raised in the first responsive pleading by a party or shortly thereafter or only later in the trial with the leave of the trial court. It is not preserved as a defence if it is not raised during trial and cannot be raised for the first time on appeal. Its jurisdictional bite is lost when a party fails to raise and pursue it at trial; it is considered forfeited or waived. As this Court explained in the Joseph Otiende Adundo Case, the reason for this is one of fairness though jurisdictional, both the doctrine of exhaustion and the statute of limitations are defences which, though statutory bars to a court's jurisdiction, are fact-sensitive unlike subject matter jurisdiction. For these affirmative defences, the adversary can marshall other facts which might displace the application of the affirmative defence. For example, in the case of the statute of limitations, it is an intensely factual question when a cause of action arose. An adversary cannot be expected to respond to the factual claims at the appellate level where an appellant permitted to mount the statute of limitations for the first time on appeal."

48. We agree and adopt the above proposition to hold that the issue of limitation, not having been raised before the trial court, cannot be raised and determined at this stage on appeal.

49. Regarding whether a valid and enforceable sale agreement between the 1st Respondent's late husband and the 2nd Respondent's deceased father existed, and whether such an agreement met the requirements of Section 3(3) of the *Law of Contract Act* and Section 5 and 6 of the *Land Control Act*, for want of Land Control Board consent, the 1st Respondent's case was that her late husband entered into a sale agreement with the 2nd Respondent's deceased father around 25th January 2001 involving the property. The 1st Respondent maintained that her husband paid the purchase price, and that they took possession of the land immediately thereafter, and that she continued to occupy the land peacefully

until the Appellant attempted to sell or interfere with it years later. She produced a copy of the sale agreement.

50. Though Section 3(3) of the *Law of Contract Act* provides that no suit shall be brought upon a contract for the disposition of an interest in land unless the contract is in writing, signed by the parties, and attested, it is instructive that Section 3 (7) of the same Act is clear that the subsection does not apply retroactively to contracts made before 1st June 2003—the date when the amendment introducing the strict writing requirement came into force.

51 . In the case of Patrick Tarzan Matu & Another vs Nassim Shariff Abdulla [2009] eKLR, this Court explained that oral contracts for the sale of land made before the 2003 amendment could still be enforceable if accompanied by part performance, such as possession and payment of the purchase price. Similarly, in Willy Kimutai Kitilit vs Michael Kibet [2018] eKLR, this Court held that equity recognizes part performance and prevents a party from invoking statutory formalities to perpetrate fraud or unjust enrichment.

52. In the present case, the transaction between the 1st Respondent's late husband and the 2nd Respondent's deceased father was made in 2001. From the evidence, the 1st Respondent's husband paid part of the purchase price and took possession. Given this evidence, the agreement was saved by dint of Section 3(7) of the Law of Contracts Act and the doctrine of part performance.

53. As pertains to the *Land Control Act*, while Section 6(1) of the *Land Control Act* renders any transaction involving agricultural land void unless the consent of the Land Control Board is obtained within six months, courts have progressively adopted a more equitable approach to such situations. In particular, where one party has paid the purchase price, taken possession, and developed the land, courts have invoked a constructive trust and proprietary estoppel to prevent the vendor or his successors from relying on the absence of a Land Control Board consent to unjustly dispossess the purchaser.

54. In the case of Macharia Mwangi Maina & 87 Others v Davidson Mwangi Kagiri [2014] eKLR, this Court held that:

> "the absence of consent of the Land Control Board does not bar the court from giving effect to equitable doctrines such as constructive trust or proprietary estoppel where the circumstances of the case demand the intervention of equity."

55. Likewise, in Willy Kimutai Kitilit vs Michael Kibet (supra), the Court affirmed that equity can override the provisions of the *Land Control Act* to prevent a party from benefiting from his own wrongdoing.

56. Accordingly, although there is no evidence that the parties to the sale obtained the requisite Land Control Board consent, the 1st Respondent's continued possession and occupation of the land, coupled with payment of part of the purchase price and long uninterrupted use, created an equitable interest enforceable in law. It would therefore be unconscionable to allow the 2nd Respondent or any subsequent party to rely on the lack of consent to defeat the 1st Respondent's long-standing equitable claim. See Aliaza vs Saul (Civil Appeal 134 of 2017) [2022] KECA 583 (KLR). The two grounds must therefore fail.

57. We now turn to the issue as to whether the learned trial judge erred in law and fact by declaring the 2008 sale transaction between the Appellant and the 2nd Respondent void ab initio and yet proceeded to order that three acres of the same land be transferred to the 1st respondent.

58. As regards the trial court's order transferring three acres to the 1st Respondent, it goes without saying that the order was based on the court's finding that the 1st Respondent had established a prior

equitable right arising from part performance of an earlier sale between her late husband and the 2nd Respondent's deceased father, and was therefore entitled to ownership of the 3 acres of the deceased's property. This ground has no merit, and neither does the ground that the learned judge was wrong when he ordered the 1st Respondent to pay the 2nd Respondent's family Kshs. 69,786 which was the balance of the purchase price due to them which they had earlier rejected.

59. Finally, upon a careful re-evaluation of the evidence on record and the applicable law, it is evident that the learned Judge properly analyzed the evidence, including the nature of the transactions in question and correctly applied both statutory and equitable principles, and rightly declared the Appellant's transaction null and void ab initio as the 2nd Respondent lacked lawful authority to dispose of the deceased's property. Equally, the learned Judge was justified in ordering that 3 acres be transferred to the 1st Respondent based on a prior equitable interest arising from the earlier sale between her late husband and the 2nd Respondent's deceased father. We find that the Appellant's claim that the trial court failed to properly evaluate the evidence to be unfounded.

60. In the end, the conclusion that we have reached is that the trial Judge rightly concluded that the 1st Respondent was entitled to 3 acres of the suit property, and we have no basis upon which to interfere with that decision. The appeal therefore lacks merit and is hereby dismissed in its entirety with costs to the 1st Respondent.

It is so ordered.

**DATED AND DELIVERED AT MOMBASA THIS 19TH DAY OF DECEMBER, 2025.**

**A. K. MURGOR**

**.....**

**JUDGE OF APPEAL**

**DR. K. I. LAIBUTA CArb, FCIArb.**

**.....**

**JUDGE OF APPEAL**

**G. W. NGENYE-MACHARIA**

**.....**

**JUDGE OF APPEAL**

I certify that this is the true copy of the original

Signed

**DEPUTY REGISTRAR**