



**Morusoi & another v Maritim (Environment and Land Appeal
E007 of 2023) [2025] KEELC 443 (KLR) (6 February 2025) (Judgment)**

Neutral citation: [2025] KEELC 443 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT AND LAND APPEAL E007 OF 2023
LA OMOLLO, J
FEBRUARY 6, 2025**

BETWEEN

GRACE CHELANGAT MORUSOI 1ST APPELLANT

BEATRICE CHEROTICH MORUSOI 2ND APPELLANT

AND

JOSEPH KIPROTICH MARITIM RESPONDENT

JUDGMENT

Introduction.

1. By way of a Memorandum of Appeal dated 17th March, 2023 the Appellants challenge the decision of Hon. C. Obulutsa CM in Kericho CM ELC Case No. 23 of 2020 delivered on 7th February, 2023.

Factual Background.

2. The Respondent filed a plaint dated 23rd June, 2020 against the Appellants seeking the following orders;
 - a. A declaration that the Plaintiff herein is the legal purchaser of 2.5 acres hived off land parcel No. Kericho/Cheborge/270, now Kericho/Cheborge/1137 and 1138.
 - b. An order that the Defendant herein do transfer to the Plaintiff 2.5 acres hived off land parcel No. Kericho/Cheborge/270, now Kericho/Cheborge/1137 and 1138 within 30 days of the judgement and in default the Executive Officer of the Court to execute on their behalf.
 - c. An order of permanent injunction restraining the Defendants herein by themselves, their agents, servants, and/or employees from interfering with the Plaintiff's quiet possession and from trespass on the suit property.



- d. General Damages.
 - e. In the alternative to prayers (a; b and c) above, the Defendants be ordered to reimburse the Plaintiff the purchase price at the current market rates.
 - f. Costs of the suit.
3. The Appellants filed their statement of Defence dated 6th July, 2020 wherein they sought that the Respondent's suit be dismissed with costs.
 4. The Trial Magistrate delivered judgement on 7th February, 2022 and ordered as follows;

“Having considered the Plaintiff's case, Defendant's case, written submissions and authorities cited by the advocates, it is clear that the deceased validly sold 2.5 acres to the Plaintiff who then took possession of his portion. The Defendants had no right to evict him. Whereas general damages was pleaded by the Plaintiff, he did not address this in his evidence. It was also not raised in the submissions.

On a balance of probability, the Court is satisfied that the Plaintiff has proved his case. Judgement will be entered in terms of prayers a), b), c) and f) of the Plaintiff.

Right of appeal of 30 days.”
 5. The Appellants being aggrieved by the said judgement approached this Court by way of Appeal.

The Appeal.

6. The grounds of appeal are as follows;
 - a. That the Learned Trial Magistrate erred in law and in fact in holding that the Respondent was a legal purchaser of 2.5 acres of land parcel No. Kericho/Cheborge/270 now Kericho/Cheborge/1137 and 1138 when both the evidence on record and the circumstances of the case militated against. (sic)
 - b. That the Learned Trial Magistrate erred in law and fact in holding that the Appellants evicted the Respondents from the subject parcel of land when the evidence on record shows that he had never been in occupation.
 - c. That the Learned Trial Magistrate erred in law and in fact in failing to make a finding that the Respondent's suit was statutorily time barred thus occasioning a miscarriage of justice.
 - d. That the Learned Trial Magistrate erred in law and fact in failing to consider in totality the Appellants' written submissions and in so doing put a lot of reliance on the Respondents.
 - e. That the Learned Trial Magistrate erred in law and fact in failing to take into account all the issues in controversy thus rendering an inconclusive judgement.
 - f. That the Learned Trial Magistrate erred in law and fact in awarding costs to the Respondent.
 - g. That the Learned Trial Magistrate erred in law and fact in finding in favour of the Respondent contrary to the evidence on record.
7. The Appellants pray for orders that;
 - a. That this appeal be allowed and the judgement of the Hon. C. Obulutsa dated 7th February, 2023 be varied, set aside and/or reviewed accordingly.



- b. That the costs of this appeal and in the subordinate Court be provided for.
8. On 11th July, 2024 the Court gave directions that the appeal be disposed by way of written submissions. The Appellants filed their submissions on 21st August, 2024 while the Respondent filed his submissions on 2nd October, 2024.

Issues for Determination.

9. The Appellants submit on the following issues;
- a. Whether the Learned Trial Magistrate erred in law and fact in holding that the Respondent was a legal purchaser of 2.5 acres of land comprised in Kericho/Cheborge/270 now Kericho/Cheborge/1137 and 1138 when both the evidence on record and circumstances militated against.
 - b. Whether the Learned Trial Magistrate erred in law and fact in holding that the Appellants evicted the Respondents from the subject parcel of land when the evidence on record shows that he had never been in occupation.
 - c. Whether the Learned Trial Magistrate erred in law and fact in failing to make a finding that the Respondent's suit was statutorily time barred thus occasioning a miscarriage of justice.
 - d. Whether the Learned Trial Magistrate erred in law and fact in awarding costs to the Respondent.
10. In their submissions, the Appellants set out the background of the suit and submit that the Respondent in his claim filed before the trial Court alleged that on 14th October, 1977 he purchased a 2-acre piece of land from Elija Morusoi (deceased) which portion was to be hived off from land parcel No. Kericho/Cheborge/270.
11. The Appellants also submit that it was the Respondent's case that the deceased took a loan facility from Kenya Commercial Bank which he was not able to repay and so he approached the Respondent to assist him clear the loan balance of Kshs. 2,800/= in exchange of an additional 0.5 acres to be hived off land parcel No. Kericho/Cheborge/270 to make a total of 2.5 acres.
12. The Appellants further submit that the Respondent sought, among other orders, a declaration that he was a purchaser of 2.5 acres to be hived off land parcel No. Kericho/Cheborge/270.
13. The Appellants submit that in their evidence before the trial Court, they denied that their husband ever sold any piece of land to the Respondent and further stated that the Respondent's claim was statute barred as the suit was filed to enforce an agreement dated 14th October, 1977.
14. The Appellants submit that this being a first appeal, the Court has to thoroughly review and analyze all the evidence adduced before the trial Court and make its own determination.
15. The Appellants rely on Section 78 of the *Civil Procedure Act*, the judicial decisions of Peter M. Kariuki v Attorney General [2014] eKLR, Selle & another v Associated Motor Boat Co. Ltd 7 others [1968] EA 123 and Mursal & another v Manese (Suing as the legal administrator of Dalphine Kanini Manesa) (Civil Appeal E20 of 2021) [2022] KEHC 282 (KLR) (6 APRIL 2022) (Judgement) in support of their submissions.
16. With regard to the first issue, the Appellants submit that the Respondent produced a document dated 14th October, 1977 as Exhibit P1. The Appellants submit that the purported agreement was not signed by the parties and that the 1st Appellant had never seen it. They add that the agreement did not indicate



- the property being sold and even though the purchase price is stated to be kshs. 9,000/=, no evidence was adduced to show that he fully paid the consideration.
17. The Appellants also submit that the Respondent did not adduce evidence to show that he helped repay the loan and further no document was produced for the sale and purchase of the additional 0.5 acres of land.
 18. The Appellants further submit that for an agreement for sale to be binding, it must comply with Section 3(3) of the *Law of Contract Act*. The Appellants rely on the judicial decisions of Patrick Tarzan Matu & another vs Nassim Shariff Abdulla & 2 Others [2009] eKLR, Silverbird Kenya Limited vs Junction Ltd & 3 Others [2013] eKLR and submit that the contract produced by the Respondent is not enforceable as it was not in writing.
 19. It is the Appellants submissions that the Respondent failed to prove his claim to the expected standards and they rely on Section 107 of the *Evidence Act*.
 20. It is also the Appellants submissions that the Respondent produced applications for consent of the Land Control Board dated 2nd December, 1978 (Exhibit P4) and a consent dated 18th December, 1978 (Exhibit P5) before the trial Court. The Appellants submit that the Respondent was aware that it was a controlled transaction but made an application for the consent from the Land Control Board one year after they had allegedly entered into the land sale agreement.
 21. The Appellants rely on the judicial decisions of Hirani Ngaithe Githire v Wanjiku Munge [1979] KLR 50, Githu v Katibi [1990]eKLR and Macfoy vs United Africa Co. Ltd [1961]3 ALL Er 1169 in support of their submissions.
 22. The Appellants submit that the Respondent produced an application for consent dated 22nd April, 2009 (Exhibit P14) and a consent dated 22nd April, 2009 (Exhibit P15) that allowed for the transfer of land parcel No. Kericho/Cheborge/1080. They submit that the Respondent also produced a copy of the green card for land parcel No. Kericho/Cheborge/270 as Exhibit P16 and another green card (Exhibit P17) which showed that the said parcel of land was closed.
 23. It is the Appellants submissions that the green card for land parcel No. Kericho/Cheborge/270 shows that a restriction had been registered between 3rd September, 2008 and 3rd September, 2011 and therefore there was no way a consent could be issued for the transfer of land.
 24. It is also the Appellants submissions that at the time the consent was being issued, land parcel No. Kericho/Cheborge/1080 was non-existent. They add that land parcel No. Kericho/Cheborge/270 was closed upon sub division on 14th February, 2012 to give rise to land parcel No's 1137 and 1138 and is not related in any way to land parcel No. Kericho/Cheborge/1080.
 25. It is further their submissions that the 2nd Appellant in her evidence denied that the late Elijah Morusoi ever informed her that he had sold the land to anyone.
 26. The Appellants submit that the Respondent also produced an award of the tribunal in Dispute No. 3 of 2008 as Exhibit P18 among other documents which show the land was subdivided equally among the wives of the late Elijah Morusoi.
 27. The Appellants rely on Section 83(f) of the *Law of Succession Act* and submit that the Respondent tried to raise an objection to the succession proceedings which was dismissed.
 28. The Appellants also submit that the Respondent initially claimed 2 acres of land parcel No. Kericho/Cheborge/1080 but he later changed tune to claiming 2.5 acres of land parcel No. Kericho/Cheborge/1137 and 1138.



29. With regard to the second issue, the Appellants submit that the Respondent alleged that he had been in occupation of the suit property from the year 1977 to 2013 when he was allegedly evicted from the land.
30. The Appellants also submit that the Respondent however instituted proceedings before the Court in 2020 which was seven years after he was allegedly evicted. They further submit that this shows that the Respondent was never in occupation of the suit property.
31. It is the Appellants submissions that the Respondent did not produce any evidence to show that he has been in occupation of the suit property and therefore the trial Court erred in finding that the Respondent was in occupation.
32. With regard to the third issue, the Appellants submit that the Respondent's suit is founded on an alleged contract of sale of land between Elijah Murusoi and the Respondent. The Appellants also submit that according to Section 4(1) of the *Limitation of Actions Act*, the suit ought to have been instituted within a period of six years from the date when the cause of action accrued.
33. The Appellants also submit that the trial Court held that the suit was not time barred as the consent to transfer the land was issued in the year 2009 and the transfer forms signed after the consent was issued which position they submit is erroneous. They add that the said transfer forms were never produced as evidence and therefore it is unclear how the Court arrived at that finding.
34. The Appellants reiterate that the cause of action arose on the date of the agreement for sale of land which was 14th October, 1977 and submit that the Respondent also produced a consent dated 18th December, 1978 and therefore the cause of action ought to start running from the said date.
35. It is the Appellants submissions that the application for consent dated 22nd April, 2009 produced as Exhibit P14 and the consent dated 22nd April, 2009 was with respect to land parcel No. Kericho/Cheborge/1080 which has no relation with land parcel No's Kericho/Cheborge/270, 1137 and 1138.
36. The Appellants rely on the judicial decisions of Michael Benhardt Otieno v National Cereals & Produce Board [2017]eKLR, Iga v Makerere University [1972] EA 65 as was cited in Haron Onyancha v National Police Service Commission & another [2017]eKLR, Gathoni vs Kenya Co-operative Creamery Ltd (1982) KLR 104, Rawal vs Rawal [1990] KLR 275, Bosire Ogero v Royal Media Services [2015]eKLR, Lemita Ole Lemein v Attorney General & 2 Others [2020] eKLR and submit that the suit was time barred and therefore the Respondent was guilty of trying to prosecute stale claims.
37. With regard to the fourth issue, the Appellants submit that the Learned Trial Magistrate erred in awarding the Respondent costs as he ought to have dismissed his (Respondent) suit with costs.
38. The Appellants conclude their submissions by urging the Court to allow the appeal as prayed.
39. The Respondent submits on the following issues;
 - a. Whether the trial magistrate erred in law and fact in holding that the Respondent was a legal purchaser of 2.5 acres hived off land parcel No. Kericho/Cheborgei/270 now Kericho/Cheborgei/1137 and 1138.
 - b. Whether the trial magistrate erred in law and in fact in holding that the Appellants evicted the Respondent from the subject property.
 - c. Whether the trial Magistrate erred in law and fact in finding that the Respondent's suit was not statutorily time barred.



- d. Whether the trial magistrate erred in law and fact in failing to consider the Appellant's submission and all issues in controversy.
- e. Whether the trial magistrate erred in law and fact in awarding costs to the Respondent.
40. The Respondent submits that a first appellate Court has the duty to examine matters of both fact, law and subject the evidence to fresh and exhaustive scrutiny.
41. The Respondent relies on the judicial decision of *Peter M. Kariuki v Attorney General* [2014]eKLR in support of his submissions.
42. The Respondent submits that his evidence before the trial Court was to the effect that he had entered into a land sale agreement dated 14th October, 1977 with the deceased after which he took possession.
43. The Respondent also submits that the deceased tried to transfer the said property to him and applied for consent of the land control board. Further, the Respondent submits that the 2nd Appellant conceded that her deceased husband had sold to him 2.5 acres of his land.
44. The Respondent further submits that the Appellants merely denied the allegations in the plaint and during the hearing, they failed to produce any documents.
45. With regard to the first issue, the Respondent relies on Section 3(3) of the *Law of Contract Act* and submits that the agreement he entered into with the deceased met the standards of a land sale agreement.
46. The Respondent relies on the judicial decisions of *Nelson Kivuvani vs Yuda Komora & another* Nairobi HCC No. 956 of 1991, *Peter Mbiri Michuki v Samuel Mugo Michuki* [2014] eKLR and submits that even though the Appellants argue that the sale agreement he produced was not signed, the Courts have taken note that prior to the amendment of Section 3(3) of the Law of Contract, an agreement for sale of land could be done orally.
47. The Respondent also submits that the deceased took steps to effect the agreement as he made an application for consent to subdivide, filled mutation forms and signed a transfer form in his favour. He adds that this points to the deceased's intention to execute his part of the agreement and the Appellants should therefore be compelled to finish this execution.
48. The Respondent reiterates that the 2nd Appellant admits to the existence of the said agreement in an affidavit sworn on 22nd November, 2013 but now denies the existence of the said agreement with the intention of misleading this Court.
49. With regard to the second issue, the Respondent submits that he was in occupation of the said portion from the time he entered into the sale agreement until the year 2013 when the deceased died.
50. The Respondent also submits that after the death of the deceased, the Appellants evicted him from the said portion of land. After the eviction, he cited the Appellants and later joined the succession proceedings as a protestor.
51. The Respondent further submits that this sequence of events led to the filing of the suit before the trial Court and the present appeal. The Respondent adds that the Appellants merely deny that he ever lived on the suit property but failed to call evidence in support of their claims.
52. With regard to the third issue, the Respondent relies on Section 7 of the *Limitation of Actions Act* and submits that the cause of action arose in the year 2013 when he was evicted from the suit property.



53. The Respondent reiterates that the deceased had applied to the Land Control Board to subdivide land parcel No. Kericho/Cheborge/270 in the year 2007 which consent was granted on 26th September, 2007.
54. It is the Respondent's submissions that after the deceased was given the consent, he instructed the District Surveyor to subdivide the land into three portions which were land parcel No's 1078, 1079 and 1080 measuring 2.5 acres.
55. It is also the Respondent's submissions the deceased applied for a consent to transfer which was granted by the board vide the consent dated 22nd April, 2009 and the deceased signed a transfer form in his favour. He adds that he produced the said documents before the trial Court.
56. It is further the Respondent's submissions that even though the Appellants contend that the suit violated Section 7 of the *Limitation of Actions Act*, the cause of action arose in the year 2009 when the deceased obtained the consent to transfer parcel No. 1080.
57. The Respondent submits that since he filed the suit in the year 2020, it was not statutorily time barred and therefore Sections 4 and 7 of the *Limitation of Actions Act* were not violated.
58. With regard to the fourth issue, the Respondent relies on Sections 107 and 108 of the *Evidence Act*, the judicial decision of Jackson Ndwiga v Elizabeth Thara Ngahu [2021] eKLR and reiterates that the Appellants did not adduce any documentary evidence before the trial Court to counter his evidence.
59. On the fifth issue, the Respondent submits that costs follow the event and the trial Court did not depart from this dictum.
60. The Respondent urges the Court to dismiss the appeal with costs to him.

Analysis and Determination.

61. In my view, the issues that arise for determination are as follows;
 - a. Whether the Learned Trial Magistrate erred in holding that the Respondent had entered into a valid land sale agreement with Elijah Kipkosgei Morusoi for the purchase of 2.5 acres to be hived off land parcel No. Kericho/Cheborge/270 now Kericho/Cheborge/1137 and 1138.
 - b. Whether the Learned trial magistrate erred in failing to make a finding that the Respondent's suit was statutorily time barred.
 - c. Whether the fact that consents for transfer were obtained 1 year 2 months after the sale agreement was entered into (consent dated 2/12/1978) and 31 years 6 months after the sale agreement was entered into (consent dated 22/4/2009) can be determined in this Appeal.
 - d. Whether the learned Trial Magistrate erred in making a finding that the Appellants evicted the Respondent from the subject parcel of land.
 - e. Whether the learned trial magistrate erred in awarding the Respondent costs of the suit.
 - f. Who should bear costs of the appeal.



A. Whether the Learned Trial Magistrate erred in holding that the Respondent had entered into a valid land sale agreement with Elijah Kipkosgei Morusoi for the purchase of 2.5 acres to be hived off land parcel No. Kericho/Cheborge/270 now Kericho/Cheborge/1137 and 1138.

62. The role of the Appellate Court in hearing and determining Appeals was stated by the Court of Appeal in the judicial decision of *Gitobu Imanyara & 2 others Vs Attorney General* [2016] eKLR. It as follows;

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect.”

63. In *Abok James Odera T/A A.J Odera & Associates Vs John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR the Court held as follows;

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

64. The Appellants contend that the Respondent did not purchase a portion of land parcel No. Kericho/Cheborge/270 measuring 2.5 acres.

65. The Appellants submit that the alleged agreement for sale of land that was produced by the Respondent to support his contention that he purchased the said land was not signed by the parties to the agreement and did not therefore meet the requirements of Section 3(3) of the *Law of Contract Act*.

66. The Appellants also submit that the Respondent produced copies of applications for land control board consent dated 2nd December, 1978 and 18th December 1978 which were not made within one year after they entered into the land sale agreement.

67. The Appellants further submit that the Respondent also produced another application for consent dated 22nd April, 2009 and a consent dated 22nd April, 2009 for land parcel No. Kericho/Cheborge/1080 which is alleged to be a parcel resulting from the subdivision of land parcel No. Kericho/Cheborge/270. The Appellants contend that at the time the Respondent was allegedly obtaining the consent dated 22nd April, 2009 land parcel No. Kericho/Cheborge/270 was yet to be subdivided.

68. The Applicants also contend that land parcel No. Kericho/Cheborge/270 was subdivided into land parcel No's Kericho/Cheborge/1137 and 1138. They therefore submit that land parcel No. Kericho/Cheborge/1080 is non-existent.

69. In response, the Respondent submits that he entered into a land sale agreement dated 14th October, 1977 for the purchase of 2.5 acres to be hived off land parcel No. Kericho/Cheborge/270.

70. The Respondent also submits that the deceased took steps to transfer the land to him and had even obtained a consent to transfer from the Land Control Board dated 22nd April, 2009.

71. The Respondent had in his claim before the trial Court sought that the Appellants as administrators of the estate of the deceased be compelled by the Court to complete the said transaction.



72. In response to the Appellants contention that the land sale agreement was not signed, the Respondent submits that prior to the amendment of Section 3(3) of the Law of Contract Act, an agreement for sale of land could be done orally.

73. The Respondent also submits that the 2nd Appellant swore an affidavit on 22nd November, 2013 wherein she admitted that the deceased had sold a portion of land parcel No. Kericho/Cheborge/270 to him and was now only denying it so as to mislead the Court.

74. The Learned Trial Magistrate in his judgement delivered on 7th February, 2022 held as follows;

“The sale agreement has been seen and is said to have been done on 14 October 1977. The Plaintiff said he had to move the Court after the Defendants forcefully evicted him from the land in the year 2013 after the deceased passed away. It is noted from the evidence and documents presented by the Plaintiff that after the sale agreement the deceased took steps to effect transfer of the portion of land to the Plaintiff. He applied for consent from the land control board to subdivide the land to hive off the Plaintiff’s portion. The deceased also applied for mutation forms which were filled by the District Surveyor. It is also confirmed that the deceased sign (sic) the transfer form in favour of the Plaintiff after consent was given by the land control board on 22nd April, 2009. All along the Plaintiff said he had been in possession of his portion of land since 1977...The Defendant had also argued that the sale agreement did not meet the requirements of Section 3(3) of the law of Contract Act since the agreement was not signed by all the parties...as has been stated above, the sale agreement shows the seller signed his part but there is no signature appended where the name of the Plaintiff, as the buyer, appears. Of the three witnesses it is only two who signed. It was argued by counsel for the Plaintiff that Section 3(3) of the Act came into force in the year 2003 as was stated in the authority of Peter Mbiri Michuki cited by the Plaintiff’s advocate. That being so it would not apply to this case since the agreement was entered into in 1977 long before that section came into force and it cannot operate retrospectively.

It was argued also that despite the holes being poked in the agreement, the Plaintiff took possession of the land and the deceased seller took steps to effect the agreement. It has been shown that the deceased seller took steps to effect the agreement. It has been shown the deceased applied for consent from the land control board to subdivide the land. Mutation forms were prepared and the deceased applied for consent to transfer to the Plaintiff his portion, which application was allowed by the land control board and the transfer signed by the deceased in favour of the Plaintiff for land reference number Kericho/Cheborge/1080. The agreement in substance was completed and implemented by the deceased. In the affidavit presented by the Plaintiff said to have been made by the second defendant, the sale transaction by the deceased in favour of the Plaintiff is in fact admitted. The Defendants are estopped from now challenging the said agreement.

Having considered the Plaintiff’s case, Defendant’s case, written submissions and authorities cited by the advocates, it is clear that the deceased validly sold 2.5 acres to the Plaintiff who then took possession of his portion...”

75. The Respondent produced a copy of a land sale agreement dated 14th October, 1977 before the trial court. The said agreement is between Elijah Kipkosgei Morusoi the seller and Joseph Kiprotich Maritim the purchaser. It is for sale of 2 acres and each acre is being sold for Kshs. 4500/=. The total amount is shown as Kshs. 9,000/= and the advance payment is Kshs. 4,500/=.



76. The witnesses to the said agreement are Maritim Chumo, Grace Chelangat and Rael Chepterer. The agreement is signed by the seller and Maritim Chumo.
77. As stated in the preceding paragraphs, the Appellants submit that the said land sale agreement is invalid as it was not signed. They also submit that the said agreement cannot be enforced as it does not meet the requirements of Section 3(3) of the Law of Contract Act.
78. In response, the Respondent contends that at the time the agreement was being entered into, Section 3(3) of the Law of Contract Act was not applicable.
79. Section 3(3) of the Law of Contract Act provides as follows;

No suit shall be brought upon a contract for the disposition of an interest in land unless—

- (a) the contract upon which the suit is founded—
 - (i) is in writing;
 - (ii) is signed by all the parties thereto; and
- (b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.

80. In the judicial decision of *Mary Muthoni Theuri v Nelson Ndomo & 2 others* [2019] eKLR the Court observed as follows;

“ 102. On the second issue as to whether there was a sale agreement between the parties, Section 3(3) of the Law of Contract Act provides that no suit based on a contract of disposition of interest in land can be entertained unless the contract is writing, executed by the parties and attested. Section 3(7) of the Law of Contract Act excludes the application of Section 3(3) of the said Act to contracts made before the commencement of the subsection. Section 3(3) of the Law of Contract Act, came into effect on 1st June, 2003. There having been no dispute to the fact that Eustace Ndomo claimed ownership of the suit land by virtue of having purchased it in the year 1977 and thereafter took possession of the same, I find that Section 3(3) of the Law of Contract Act was not applicable in the circumstance as this transaction was made prior to the amendment of Section 3(3) of the Law of Contract Act in 2003, the subsection read as follows:

- (3) No suit shall be brought upon a contract for disposition of an interest in land unless the agreement upon which, the suit is founded, or some memorandum or note thereof, is in writing and is signed by the party to be charged or by some person authorized by him to sign it;

Provided that such a suit shall not be prevented by reason only of the absence of writing, where an



intending purchaser or lessee who has performed or is willing to perform his part of a contract-

- (i) Has in part performance of the contract taken possession of the property or any part thereof; or
- (ii) Being already in possession, continues in possession in part performance of the contract and has done some other act in furtherance of the contract.” [Emphasis Mine]

81. Similarly, in the judicial decision of Joseph Owiti Odema v James Okoko Kadu [2020] eKLR the Court held as follows;

“(e) That it is apparent that the sale agreement between the Defendant and the late Paul Opolo Odema was of (sic) before the amendment of Section 3(3) of the Law of Contract Act Chapter 23 of Laws of Kenya in 2003, which came into effect on 1st June, 2003 to provide that no suit based on a contract of disposition of interest in land can be entertained unless the contract is in writing, executed by the parties and attested. That in any case subsection (7) excludes the application of subsection (3) to contracts made before the commencement of the subsection. That the court of Appeal in Peter Mbiru Michuki Vs Samuel Mugo Michuki [2014] eKLR pronounced itself on a related matter as follows:

“25. We find that notwithstanding the fact that the sale agreement made by the parties in 1964 was not in writing, the Plaintiff/Respondent had to satisfy the trial Court that he either took possession of the suit property in part performance of the said oral contract, or that being already in possession of the suit property, he continued in possession in part performance of the oral contract. Having re-evaluated the evidence, we concur with the finding of the learned Judge that the Plaintiff/Respondent proved that he had actual and or constructive possession of the suit property since 1964 and the possession was open, uninterrupted and continuous...”

82. As was held in the above cited judicial decision, Section 3(3) of the Law of Contracts Act does not apply to contracts made before the commencement of the said sub section. The said sub section came into effect on 1st June, 2003.

83. In the present case the Respondent entered into the sale agreement on 14th October, 1977 which was way before the said sub-section took effect. That being the case, the Learned Trial Magistrate was right in finding that Section 3(3) of the Law of Contract Act is not applicable in this case.

84. This meant that oral evidence as to the fact of sale was admissible.



85. In my evaluation of the evidence before the trial court, I have established that the Respondent called two witnesses. Kibet Arap Soi who testified as PW2 and Charles Cheruiyot who testified as PW3. They both adopted their Witness statements dated 23rd June, 2020.
86. In their witness statements, they both state that they were aware that the deceased (Morusoi) sold the suit property to the Respondent and used the proceeds from the sale to purchase another property in Tinderet area in Nandi County. They also state that the deceased moved to the said property but later came back to Cheborgei after a few years.
87. Upon cross examination, PW2 confirmed that he did not sign the agreement but he had loaned the Respondent Ksh. 2,000/= which he paid to the late Elijah Kipkosgei Morusoi.
88. Upon cross examination PW3 stated that he was not a party to the sale agreement between the Respondent and the Elijah Kipkosgei Morusoi but he was aware of it. He also admitted to have seen the agreement though he had forgotten about it.
89. The second issue touching on the question of sale and/or validity of the sale agreement is that the Appellants deny that a portion of the suit property was sold to the Respondent.
90. The Respondent submits that the 2nd Appellant swore an affidavit admitting that a portion of the suit property was sold to him (the Respondent).
91. Upon perusal of the proceedings before the trial Court, I have ascertained that the Respondent produced a copy of an affidavit sworn by the 2nd Appellant (Beatrice Cherotich Morusoi) on 22nd November, 2013 in Nakuru HCC Citation Case No. 585 of 2013 In the matter of Elijah Kipkosgei Morusoi (Deceased). The parties are Joseph Kiprotich Maritim who is the citor and Grace Chelangat Morusoi & Beatrice Cherotich Morusoi who are the citees. The citor in the said matter is the Respondent herein while the Citees in the said matter are the Appellants herein.
92. At paragraph 4 of the said affidavit, the 2nd Appellant deposes as follows;

“ That my late husband told me he sold 2.5 acres to Maritim Joseph to offset a loan which was owing to the bank; this helped to save the land and my co-wife Grace Chelang’at Marusoi approved this.”
93. A further perusal of the proceedings before the trial Court shows that the 2nd Appellant denied in her evidence that their late husband sold a portion of the suit property to the Respondent.
94. The Learned Trial Magistrate observed in his judgment at page 20 line 11 that since the 2nd Appellant admitted to the sale transaction between her deceased husband and the Respondent, she is estopped from challenging the said agreement. This paragraph has been highlighted in the preceding paragraphs of this Judgment.
95. Taking this into consideration, I find that the Learned Trial Magistrate was justified in finding that the Respondent had entered into a valid land sale agreement with Elijah Kipkosgei Morusoi (deceased) for the purchase of 2.5 acres to be hived off land parcel No. Kericho/Cheborge/270 now Kericho/Cheborge/1137 and 1138.
96. This ground of the appeal, therefore, lacks merit.



B. Whether the Learned trial magistrate erred in failing to make a finding that the Respondent's suit was statutorily time barred.

97. Having established that there was a valid land sale agreement between the Respondent and the late Elijah Kipkosgei Morusoi, I will now consider the question of whether the Learned Trial Magistrate erred in failing to make a finding that the Respondent's suit was statutorily time barred.
98. The Appellants submit that the Respondent's claim before the trial Court was based on an agreement for sale of land that was entered into on 14th October, 1977.
99. The Appellants also submit that the Respondent filed the matter before the trial Court on 23rd June, 2020 after a period of forty-three years.
100. The Appellants further submit that the Learned Trial Magistrate erred in finding that the suit before him was not time barred because the consent to transfer was issued in the year 2009 and yet the said transfer forms were never produced as evidence.
101. The Respondent's response is anchored on two counter arguments. First, that the cause of action arose in the year 2013 when the Appellants evicted him. Second, that the deceased acquired the consent to transfer land parcel No. Kericho/Cheborge/1080 which was a portion subdivided from land parcel No. Kericho/Cheborge/270 sometime in the year 2009 and that is when the cause of action arose.
102. The Learned Trial Magistrate at Page 17 line 12 of his judgement observed and held as follows;
- “In the submissions the Defendants seem to be raising a preliminary objection as to the claim being time barred. In the statement of Defence at paragraph eight they admitted the jurisdiction of the Court. In the defence the allegation that the claim was time barred was raised in paragraph 7. It was submitted that if the transaction was entered into by the Plaintiff and the deceased in 1977, the Plaintiff was expected to file the suit within 12 years as provided under Section 4 of the *Limitation of Actions Act*...All along the Plaintiff said he had been in possession of his portion of the land since 1977. Clearly from the above because (sic) of action cannot be said to have started running in 1977 since the deceased had been given consent to transfer the land to the Plaintiff in the year 2009. If any dispute were to arise the entire monster training (sic) from the year 2009 and would have lapsed in the year 2021.”
103. I note that the consents to transfer of 1978 and 2009 were in fact produced as Plaintiff's Exhibits 5 and 15 respectively. The allegations by the Appellants that they were not produced is therefore misleading.
104. The year 2009, in my view, is important in resolving the question of whether the suit was time barred. The year 2013 is also relevant and I will explain why in the subsequent paragraphs.
105. The Plaintiff's prayers as set out in paragraph 42 of the plaint are hereby reproduced for ease of reference:
- a. A declaration that the plaintiff herein is the legal purchaser of 2.5 acres hived off land parcel No. Kericho/Cheborge/270, now Kericho/Cheborge/1137 and 1138.
 - b. An order that the Defendants herein do transfer to the Plaintiff 2.5 acres hived off land parcel No. Kericho/Cheborge/270, now Kericho/Cheborge/1137 and 1138 within 30 days of the judgement and in default the Executive Officer of the court to execute on their behalf.



- c. An order of permanent injunction restraining the Defendants herein by themselves, their agents, servants, and/or employees from interfering with the Plaintiff's quiet possession and from trespass on the suit property.
 - d. General damages.
 - e. In the alternative to prayers (a, b, and c) above, the Defendants be ordered to reimburse the Plaintiff the purchase price at the current market rates.
 - f. Costs of the suit.
106. In the judicial decision of *Kiarie v Kiratu* (Environment and Land Appeal 77 of 2019) [2023] KEELC 18081 (KLR) (5 June 2023) (Judgment) the Court held as follows;
- “ 18. The issue as to whether the suit filed in the trial Court was statute barred must be determined by examining whether the material placed before the trial Court was sufficient to warrant the decision it arrived at. This Court, being an appellate Court, has the duty to re-evaluate the evidence placed before the trial Court and establish whether the conclusions made on the evidence before the Court below and the findings arrived at by that Court were justified.
 - 19. The question as to whether the suit filed in the trial Court was statute barred can only be answered after determining when the parties entered into an agreement, when the plaint was filed and what the cause of action was...” (Emphasis mine)
107. As was held in the above cited judicial decision, when the Court is considering the question of whether a suit is statute barred it takes into account what the cause of action is.
108. My analysis of the pleadings and evidence tendered is that until the year 2013, there was no dispute. In the year 2009 the deceased Elija Kipkoske Morusoi made attempts to transfer a portion of the suit parcel to the Respondent but that attempt was frustrated due to the fact that the 1st Appellant had registered a restriction on the suit parcel. The said restriction was registered on 3rd September, 2008. Evidence of the attempt to transfer are exhibited by the consent to transfer executed by the deceased and it is produced as Exhibit P15.
109. Elija Kipkoske Morusoi died in the year 2013 and evidence adduced is that after his death the Appellants evicted the Respondent from the suit parcel.
110. The Respondent in his Plaint filed before the trial Court is essentially seeking declaratory orders that he is the legal purchaser of the suit parcel and orders to compel the legal representatives of the estate of Elija Kipkoske Morusoi (Deceased) to transfer a portion of the suit parcel measuring 2.5 acres to him.
111. This dispute can be traced back to 2013 when the Respondent was forcefully evicted from a portion of the suit parcel after the death of Morusoi. This suit was filed in the year 2020.
112. Section 7 of the *Limitation of Actions Act* provides that a person may not commence an action to recover land after the period of twelve years from the date on which the right of action accrued to him. Taking the year 2009 and 2013 into consideration, it is apparent that twelve years have not lapsed and the suit was therefore not statutorily time barred as alleged by the Appellants.
113. This ground of appeal, also fails.



C. Whether the fact that consents for transfer were obtained 1 year 2 months after the sale agreement was entered into (consent dated 2/12/1978) and 31 years 6 months after the sale agreement was entered into (consent dated 22/4/2009) can be determined in this Appeal.

114. Before the Trial Court, the Respondent produced a copy of the Land Control Board consent dated 18th December, 1978 which was issued one year two months after they entered into the land sale agreement.
115. The Appellants contend that the said consent was obtained after a period of one year had lapsed from the date of the agreement. It is important to note that the issue of whether or not the said land control board consent was obtained within the requisite period was not raised before the trial Court. The Appellants merely denied that the Respondent had purchased land from their deceased husband.
116. The Court of Appeal in the judicial decision of Republic v Tribunal of Inquiry to Investigate the Conduct of Tom Mbaluto & others Ex-Parte Tom Mbaluto [2018] eKLR held as follows;

“It is in the discretion of the Court to allow a party to raise a new point on appeal, depending on the circumstances of the case. (See also George Owen Nandy v. Ruth Watiri Kibe, *CA No. 39 of 2015* and Openda v. Ahn [1983] KLR 165). In this case we have stated that the appellant never raised the issue in his judicial review application, neither party addressed the issue in the High Court, the learned judge, quite properly did not address the issue and, to make the matters worse, the appellant did not raise the issue in his memorandum of appeal in this Court. The Attorney General is entitled to complain, as he does, that he has been taken by surprise and denied a fair opportunity to respond to the new issue. As has been stated time and again, there is a philosophy and logical reason behind our appellate system, which except in exceptional cases and upon proper adherence to the prescribed procedure, restricts the appellate Court to consideration of the issues that were canvassed before and decided by the trial Court. If that were not the case, the appellate Court would become a trial Court in disguise and make decisions without the benefit of the input of the Court of first instance. (See North Staffordhire Railway Co. v. Edge [1920] AC 254).” [Emphasis Mine]

117. It is my view that since the issue of whether or not the various consents to transfer were obtained within the requisite period and the legal effect that it may have was not raised before the trial Court, the Appellants are precluded from raising the same before this Court.
118. This ground of appeal also fails.

D. Whether the Learned Trial Magistrate erred in making a finding that the Appellants evicted the Respondent from the subject parcel of land.

119. The Appellants submit that even though the Respondent alleges to have been in possession of the suit property from the year 1977 to 2013, he failed to produce any evidence to show that he had been in possession.
120. In response, the Respondent submits that he took possession of the said portion of land upon completion of payment of the consideration and lived peacefully on it until the year 2013 when the deceased died and the Appellants evicted him.
121. The Respondent also submits that he called witnesses who gave evidence that he had taken possession of the land. He further submits that the Appellants merely denied evicting him as they did not call witnesses to confirm their assertions.



122. The Learned Trial Magistrate in his Judgement delivered on 7th February, 2022 held as follows;
- “Having considered the Plaintiff’s case, Defendant’s case, written submissions and authorities cited by the advocates, it is clear that the deceased validly sold 2.5 acres to the Plaintiff who then took possession of his portion. The Defendants had no right to evict him...”
123. A perusal of the proceedings before the trial Court shows that during cross examination, the Respondent admitted to being in possession of the portion of land that he had allegedly purchased before he was evicted by the Appellants.
124. In support of his case, the Respondent called Kibet Arap Soi who testified as PW2 and Charles Cheruiyot who testified as PW3. They both adopted their witness statements as part of their evidence.
125. In his witness statement dated 23rd June 2020, Kibet Arap Soi states that the Respondent took possession of the suit property from the time he purchased it until the year 2013 when the Appellants forcefully evicted him.
126. A further perusal of the proceedings before the trial Court shows that the Appellants gave their evidence as DW1 and DW2 respectively. They adopted their witness statements and denied that their late husband ever sold a portion of land parcel No. Kericho/Cheborge/270 to the Respondent.
127. At the trial court, the issue whether or not the Respondent was evicted from the suit property was not responded to by the Appellants. The Appellants merely denied the existence of the agreement for sale of land and the allegations that the repayment of the loan was in exchange of half an acre portion.
128. It is evident that the Respondent’s evidence that he was evicted from a portion of land parcel No. Kericho/Cheborge/270 was not controverted and therefore the Learned Trial Magistrate was justified in finding and holding that the Respondent was evicted from the suit parcel.
129. This ground of the appeal lacks merit and also fails.

C. Whether the learned trial magistrate erred in awarding the Respondent costs of the suit.

130. The Appellants submit that the Learned Trial Magistrate erred in awarding the Respondent costs of the suit and yet he had filed his suit forty-three years after the cause of action arose. The Appellants also submit that the Learned Trial Magistrate ought to have dismissed the Respondent’s suit with costs.
131. In response, the Respondent submits that costs follow the event and therefore the trial magistrate rightly awarded him costs.
132. Upon perusal of the judgement delivered on 7th February, 2022, it is indeed true that the Respondent was awarded costs.
133. Section 27 of the *Civil Procedure Act* provides as follows on the general rule on costs;
- “(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the Court or judge, and the Court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the Court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:



Provided that the costs of any action, cause or other matter or issue shall follow the event unless the Court or judge shall for good reason otherwise order.

- (2) The Court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.”

134. In the judicial decision of *Shiloah Investment Limited v Evana Wafula t/a Fabulous Flowers* (Civil Appeal E135 & E139 of 2023 (Consolidated)) [2024] KEHC 7597 (KLR) (25 June 2024) (Judgment) the Court while considering whether the trial Court erred in awarding costs of the suit held as follows;

- “26. From the above provisions, although costs follow the event, they are awarded at the discretion of the Court, which discretion must be exercised judiciously and not capriciously. In the case of *Supermarine Handling Services Ltd vs Kenya Revenue Authority, Civil Appeal No. 85 of 2006*, the Court of Appeal explained the circumstances that would lead an appellate Court to interfere with the trial Court’s exercise of discretion thus:

“Costs of any action or other matter or issue shall follow the event unless the Court or Judge shall for good reason otherwise order. It is well established that when the decision of such a matter as the right of a successful litigant to recover his costs is left to the discretion of the Judge who tried his case, that discretion is a judicial discretion, and if it be so its exercise must be based on facts. If, however, there be, in fact, some grounds to support the exercise by the trial Judge of the discretion he purports to exercise, the question of sufficiency of those grounds for this purpose is entirely a matter for the Judge himself to decide, and the Court of Appeal will not interfere with his discretion in that instance...Thus, where a trial Court has exercised its discretion on costs, an appellate Court should not interfere unless the discretion has been exercised unjudicially or on wrong principles. Where it gives no reason for its decision the Appellate Court will interfere if it is satisfied that the order is wrong. It will also interfere where the reasons are given if it considers that those reasons do not constitute “good reason” within the meaning of the rule...”

27. In the instant case, it is my opinion that the appellant has not demonstrated to this Court that the trial magistrate in awarding costs exercised her discretion unjudicially or on wrong principles.” [Emphasis Mine]

135. As was held in the above cited judicial decision, even though costs follow the event, they are awarded at the discretion of the Court which discretion must be exercised judiciously. Further, where a trial Court has exercised its discretion on costs, an appellate Court should not interfere unless the discretion was exercised injudiciously.

136. In the matter under consideration, the Learned Trial Magistrate found that the Respondent had proved his case and therefore awarded him costs.



137. Other than alleging that that the Learned Trial Magistrate erred in awarding the Respondent costs, the Appellants did not demonstrate that the trial magistrate injudiciously exercised his discretion in awarding the said costs.

138. I find that this ground of the appeal lacks merit.

F. Who should bear costs of this Appeal?

139. It is now settled that costs shall follow the event. This is in accordance with the provisions of Section 27 of the Civil Procedure Act (Cap. 21). A successful party should ordinarily be awarded costs of an action unless the Court, for good reason, directs otherwise.

Disposition.

140. In the result, I find that this Appeal lacks merit and it is hereby dismissed with costs to the Respondent.

141. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO THIS 6TH DAY OF FEBRUARY, 2025.

L. A. OMOLLO

JUDGE.

In the presence of: -

Mr. Kiprono for the Appellants.

Mr. Langat for the Respondent.

Court Assistant; Mr. Joseph Makori.

