



Kembo (Appealing as the Administrator of the Estates of Agustino Okwahela Kembo - Deceased) v Namukuru (Suing in Her Capacity as the Administrator of Joshua Mukeny Mutokaa - Deceased) (Environment and Land Appeal E006 of 2024) [2025] KEELC 6770 (KLR) (8 October 2025) (Judgment)

Neutral citation: [2025] KEELC 6770 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT AND LAND APPEAL E006 OF 2024**

CK NZILI, J

OCTOBER 8, 2025

BETWEEN

CHARLES MAIHERI KEMBO (APPEALING AS THE ADMINISTRATOR OF THE ESTATES OF AGUSTINO OKWAHELA KEMBO - DECEASED) APPELLANT

AND

MIRIAM NAMUKURU (SUING IN HER CAPACITY AS THE ADMINISTRATOR OF JOSHUA MUKENYA MUTOKAA - DECEASED) RESPONDENT

(An Appeal from the Judgment delivered by Hon. S.K. Mutai (SPM) dated 12/02/2024 in Kitale CMC Land Case No. 110 of 2022)

JUDGMENT

1. The appellant, who was the plaintiff at the lower court had sued the respondent, the respondent, as the defendant at the lower court through an amended plaint dated 21/8/2023. His reliefs were:
 - (a) A declaration that any entry by the respondent to parcel No. Trans Nzoia/Mito Mbili/243 amounted to trespass.
 - (b) Declaration that the late John Mutokaa Mukeya's registration of Title No. Trans Nzoia/Mito Mbili/243 and subsequent registration in favour of his estate were subject to a trust in favour of the late Agostino Okwahela Kembo, and his estate represented by the appellant.
 - (c) Transfer and registration of the Land Parcel No. Trans Nzoia/Mito Mbili/243 to the estate of the late Agostino Okwahela Kembo, by the respondent, in default, the Executive Officer of the Court, to execute the transfers and registration of documents.



- (d) Declaration that the respondent has no right to bury the remains of John Mukeya Mutokaa on parcel No. Trans Nzoia/Mito Mbili/243.
 - (e) Temporary and permanent injunction restraining the respondent from trespassing onto and or burying the remains of one John Mukeya Mutokaa in the appellant's land parcel No. Trans Nzoia/Mito Mbili/243 within the Mito Mbili Scheme.
2. The appellant contended that the late John Mukeya Mutakaa, as the owner of plot No. 140 within Mito Mbili Scheme, sold 5 acres of the said land to the late Agostino Okwahela Kembo, handed over vacant possession, wherein he settled his family. Before both the seller and purchaser passed on, the appellant averred that the seller had subdivided the portion into two equal portions as title Nos. Trans Nzoia/Mito Mbili/243 and 244, the former being the portion occupied by the late Agostino Okwahela Kembo, with his family to date, while the latter was sold to James Makokha, before he relocated to Maliki, Bungoma County.
 3. The appellant averred that the seller unfortunately processed the title for Trans Nzoia/Mito Mbili/243, under his name, leading to a claim at Cherangani Land Disputes Tribunal, which eventually was adopted in Kitale PMC Land Case No. 20 of 2006, but was later quashed on 19/3/2013 by the High Court for want of jurisdiction to hear disputes over registered land.
 4. The appellant averred that upto the demise of the seller, no proceedings were initiated to evict the family of the late Agostino O. Kembo from the land by the registered owner, hence a trust was created out of the sale in 1976, payment of the consideration, possession and occupation thereof to date, and later on the interment of the remains of the late wife to the seller.
 5. The respondent opposed the suit through a further amended statement of defence and counterclaim dated 21/8/2023. The respondent denied that the appellant had the capacity to sustain the suit after the limited grant issued in his favour lapsed after 6 months. The respondent denied any alleged sale of land or the title to the same, being registered or held in trust for the late John Mukeya Mutoka or in favour of his estate as alleged or at all, since the land belonged to the defunct Settlement Fund Trustees until 15/9/2003, who did not expressly consent in writing to the validity of the said sale agreement.
 6. The respondent denied that the alleged taking over of possession, occupation, and or burial on the alleged unnamed parcel of land by the late Agostino Okwahela Kembo, his late wife, and family, had any legal relevance in view of the status of the land up to 15/9/2002.
 7. The respondent denied the alleged particulars of trust otherwise, after the adoption of the Land Disputes Tribunal award, the same was severally forcefully executed against the deceased and his family between 2009 and 2013, were forcefully evicted from the land but the deceased would illegally and secretly sneak back onto the suit land despite court orders, leading to Kitale ELC No. 32 of 2014, between the deceased person, which was never determined on merits. The respondent insisted that the appellant, in the circumstances, cannot enjoy any protection of the land.
 8. The respondent averred that the appellant had no interest recognizable in law against the estate of the late John Mukeya Mutokaa; otherwise, the cause of action remains speculative, and the remains of the late John Mukeya Mutokaa ought to be interred on the suit land.
 9. The respondent averred that the appellant merely took advantage of the deceased's ill-health to remain on the suit land, who, after his death and burial on the suit land, subsequently, illegally and unprocedurally, the appellant or their hired goons, with the assistance of government officials, exhumed the same. The respondent, nevertheless, termed the suit as statute-barred, being based on a contract allegedly entered into sometime in 1976.



10. By way of a counterclaim, the respondent sued the appellant for:
 - (a) Declaration that Title No. Trans Nzoia/Mito Mbili/243 belonged to the deceased's estate.
 - (b) An eviction of the defendant and all those claiming through him and/or the estate of Agostino Okwahela Kembo from all the parcel of land known as Trans Nzoia/Mito Mbili/243.
 - (c) Meeting of mortuary charges at the rate of Kshs. 700/= per day from 29/10/2022.
 - (d) Damages and trespass.
 - (e) Permanent injunction.
11. The respondent contended that the appellant had unjustifiably continued occupying the land, which acts were termed as amounting to trespass and infringement of the constitutional right to ownership of property.
12. The appellant opposed the counterclaim through a reply to the defence and defence to the counterclaim dated 11/4/2023. The appellant reiterated that there was a sale of the suit land in 1976, taking possession and peaceful occupation thereof, which has continued undisturbed to date. The appellant termed the counterclaim as statute-barred.
13. At the trial, Charles Maiheri Kembo testified as PW1. He relied on a witness statement dated 12/2/2023 as his evidence-in-chief. Briefly, he told the court that the late John Makeya Mutokaa, in 1976, sold 5 acres of land to his late father for Kshs. 6000/=, gave or took possession, started extensive developments thereof by fencing off the land, planting crops, fruit trees, erecting ten semi-permanent houses, and buried 11 members of the family therein, including his late father, who had died on 15/2/2021, and his mother on 28/5/2015.
14. PW1 told the court that the late John Mukeya Mutokaa and his family eventually moved out of the remaining portion in 1982 until October 2022, when they allegedly tried to inter the remains of the late father on the land. PW1 told the court that the seller had subdivided the land into two equal portions, namely No. 243 and 244, which he later sold to John Makokha before the seller relocated to Maliki village.
15. PW1 said that the title held by the respondent is under trust; otherwise, a complaint was lodged with the Charangani Land Disputes Tribunal, which went up to the High Court. In the long period of occupation, PW1 said that the deceased seller did not evict them from the land.
16. PW1 relied on the sale agreements dated 15/3/1978 and 23/8/1987, a copy of the title deed, letters dated 25/10/2022 and 27/10/2022, order, decree dated 12/3/2013, copy of the green card limited grant of letters of administration as P. Exhibits. No. 1-10.
17. PW1 called Lawi Omoiti Otwane, who relied on a witness statement dated 13/2/2023 as his evidence-in-chief, corroborating the appellant's testimony.
18. Miriam Namukuru testified as DW1. She relied on a witness statement dated 13/2/2023 as her evidence-in-chief. Her testimony was that she obtained letters of grant on 11/11/2022, and the appellant had already sued her in her personal capacity on 28/10/2022, regarding Title No. Trans Nzoia/Mito Mbili/243, which her late husband had been the registered owner with effect from 15/9/2003. DW1 told the court that her late husband was allocated the land as plot No. 140 in Mito Mbili Settlement Scheme by the Settlement Fund Trustees on 1/7/1976 and was provided with a loan of Kshs. 6, 509/= by the Settlement Fund Trustees to purchase the plot, which he secured with a charge dated 1/7/1976.



19. DW1 told the court that the late husband single-handedly repaid the loan until a discharge of the charge and a transfer of the land to him were effected. DW1 told the court that the late Agostino O. Kembo was known to her as a landless friend of her late husband, who had permitted him to occupy a portion of the land on a friendly basis, in exchange for acting as a farm hand since they were undertaking small-scale farming on the land.
20. DW1 said that the late Agostino Kembo turned greedy and hatched a plan to grab the land by raising a complaint with the Cherangani Land Disputes Tribunal, which he lost and was ordered to vacate the land.
21. DW1 said that the complainant was indeed evicted from the suit land in November 2009, but sneaked back in 2010, 2011, 2012, and 2013, and later in 2015, when her late husband became sick, taking advantage of the illness.
22. Further, DW1 denied the alleged sale agreement, which she termed as a scheme to defraud her of the land, without evidence of the same; otherwise, the deceased and her family have no recognizable legal interest in the suit land, more so when the land belonged to Settlement Fund Trustees until 2003. DW1 termed the events of 23/10/2022 when the burial of her late was delayed as unfortunate based on a frivolous claim or suit by the appellant, following the family to incur mortuary charges which the appellant should be ordered to defray.
23. DW1 relied on a limited grant of letters dated 23/11/2023, allotment letter dated 1/7/1976, charge dated 1/7/1976, letter dated 18/11/1980, certificate of posts dated 20/8/1984, receipt dated 16/8/1976 and 2/2/1982, letter and acceptance certificate dated 5/2/1981, receipts dated 10/2/1988 and 17/1/1984, statement dated 19/6/1984, letter dated 9/6/1988, discharge of charge, transfer of land in settlement scheme letter dated 18/9/198, receipt dated 14/12/2005, copies of title, order dated 9/7/2012, amended eviction order dated 3/11/2019, letter dated 10/8/2005, photographs and billings from the mortuary as D. Exhibits. No. 1-28 respectively.
24. DW1 told the court that it was true that the land was subdivided into 2 portions. Title No. 244 belongs to one Makokha. DW1 confirmed that though she was born on parcel No. 243, her late father left the land in 1985 and went to Eldoret up to 2022, leaving the late Agostino occupying the land measuring 5 acres. DW1 was unable to explain the basis of entry into the land by the late Agostino. Similarly, DW1 confirmed that the late Agostino and his wife were buried on the land.
25. DW1 confirmed that even when the Land Disputes Tribunal case was going on up to 2014, her late father was not on the land, but the late Agostino. Again, DW1 confirmed that between 2016 and 2022, her late father took no action to drive out the late Agostino from the land, save for D. Exhibit. No. 24, since he was sickly, his suit at the High Court was dismissed for want of prosecution. She denied that her late father had sold the land to the deceased Agostino.
26. Rodgers Simiyu Nadidia testified as DW2. He relied on the witness statement dated 13/2/2023 as his evidence-in-chief. He confirmed being a witness in the Land Disputes Tribunal case. As a brother-in-law to John Mokeya Mutukaa, he confirmed that there was an eviction from the suit land in November 2009. Further, he said that he was not aware that the late Agostino had placed a caution on the title claiming interests as a licence.
27. According to DW2, the late Agostino, at the tribunal, was demanding a transfer of the suit land to his name, yet there was no such sale agreement. DW2 confirmed that his late brother-in-law left the suit land in 1985, and up to 2022, he had never lived on the said land.



28. After reviewing the evidence tendered, the trial court, by a judgment dated 12/2/2024, dismissed the appellant's case and allowed the counterclaim. The appellant through memorandum of appeal dated 11/3/2024, relies on 11 grounds of appeal faulting the trial court for failing to find that there was a trust created in favour of the deceased, since the entry into the land was as a result of a sale agreement, payment of Kshs.3,000/=, the possession remain continuous and exclusive, the sale agreement was valid, overwhelming evidence was available to support claim based on trust, which does not need to be recorded in the register, and for failing to consider all the evidence and the binding case law relied on.
29. The appellant relies on written submissions dated 23/9/2025. He submitted that a trust was created when John Mukenya accepted payment from Agutino and subsequently put him in possession of 5 acres of the suit land. The appellant further submitted that the trial court erred in law by concluding that no trust existed due to the use of the word licensee.
30. On whether there was a proper agreement between the parties in 1978, the appellants submitted that the trial court erred in law for not appreciating the legal position at the time that it was sufficient for an acknowledgment by the land owner and giving possession, which requirements were met.
31. He relied on Section 28 of the Registered Land Act and Section 28 of the Land Registration Act and submitted that the late John Mukenya, as the registered proprietor of the suit land, was holding the same in trust. The appellant also relied on the authorities in his written submissions at the trial court on pages 98-141 of the record of appeal.
32. On the other hand, the respondents rely on written submissions dated 23/9/2025. It is submitted that the record of appeal does not support the grounds of appeal before this court; otherwise, the appellant did not prove the ingredients of trust.
33. The respondent urged the court to also rely on the written submissions dated 23/10/2023 at the lower court. The respondent at the lower court had submitted that, though the suit was premised on an alleged trust, it was a disguised attempt to enforce a contract of sale of land, with a view to evading the statute of limitations.
34. The respondent submitted that a sale agreement entered into in 1976 was time-barred as held in *Otieno v National Cereals & Produce Board* [2021] KECA 23 [KLR] (23rd September 2021).
35. In this case, the respondent submitted that the type of trust that the appellant sought was not pleaded or specified. Further, the respondent, relying on *John Kamunya & Another v John Nyingi Muchiri & Others* [2015] eKLR, submitted that even if there was an alleged sale agreement, such an agreement was invalid for the land at the time vested with the Settlement Fund Trustees, under Section 167(2) of the Agriculture Act (repealed).
36. On whether the counterclaim was statute-barred, the respondent submitted that since the late John M. Mutukaa became the registered owner on 15/9/2003, the time for limitation could only start running from the said date, for purposes of any eviction orders. The respondent submits that the appellant only placed a caution on 11/3/2013.
37. As to whether the counterclaim was proved, the respondent submitted that, as the administrator of the estate, she had the capacity to do so. Reliance is placed on *Tony Justus Ongale v Catherine Lorna Mariati* [2021] eKLR.
38. The role of an appellate court of the first instance is to re-appraise, review, rehearse, and re-establish the facts and evidence of the trial court, come up with independent findings as to facts and the law,



- while giving credit to the trial court, which had the occasion to see and hear the witnesses firsthand. See *Mwana Sokoni v Kenya Bus Services Ltd* [1985] KRL 931 and *Peter v Sundays Post Ltd* [1958] EA 424.
39. Having reviewed the entire record and supplementary record of appeal, the grounds of appeal, written submissions both before this court and at the lower court, the issues calling for my determination are:
1. Whether the two parties had the capacity to institute their respective claims.
 2. If the appellant pleaded and proved the creation of and existence of a trust.
 3. Whether the appellant deserved the relief sought.
 4. If the respondent pleaded and proved any trespass and infringement on his right to property, to deserve eviction orders.
 5. If the respondent was entitled to the reliefs sought in the counterclaim.
 6. Whether the appeal has merit.
40. It is trite law that parties are bound by their pleadings, and issues for the court's determination flow from the pleadings. See *Independent Electoral and Boundaries Commission & another v Mule & 3 others* [2014] KECA 890 (KLR)
41. A court of law has no business to engage on issues not pleaded or where no evidence has been led by the parties. There is no room for any other business in an adversarial system, for parties are left to fashion their claims in the manner they wish to and to present evidence in support of those claims or defences. See *Dakianga Distributors [K] Ltd v Kenya Seed Co. Ltd* [2015] eKLR.
42. The basis for parties being bound by their pleadings is Order 2 Rule 3 of the Civil Procedure Rules. In *S.K. v Attorney General, Civil Appeal E248 of 2024* [2025] KECA 498 [KLR] (21st March 2025) (Judgment), the court cited *Kutima Investments Ltd v Muthoni Kihara & Commissioner for Mines and Geology* [2005] KEHC 2739 (KLR) and *Stephen Onyango Achola v Edward Hongo Sule & Another* [2004] eKLR, that a defendant who wishes to rely on limitation as a defence must plead the same in his defence, and that cases must be decided on the issues pleaded.
43. The court cited *Mohamed Fugicha v Methodist Church of Kenya & Others* [2016] eKLR, that the primary purpose of pleadings is to communicate with an appreciable degree of certainty and clarity the complaints that a pleader brings before the court and to serve as a sufficient notice to the party impleaded to enable him to know what case to answer.
44. A cause of action refers to an action on the part of the defendant that gives a plaintiff a cause to complain. See *D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another* [1980] KECA 3 (KLR). In this appeal, the cause of action as pleaded by the appellant is that in 1978, the late Agostino Okwahela Kembo bought 5 acres at Kshs. 3,000/=, from the late John Mukeya Mutukaa, took vacant possession, developed the same, until the initial parties passed on, and were buried therein, the seller before he died subdivided the land into two portions, birthing parcel No. 243, which was occupied by the deceased and his family and continued with exclusive occupation without any eviction till October 2022 when the respondent allegedly trespassed into and purported to bury the remains of the seller, who had relocated from the land in 1985. The appellant termed the circumstances as creating a trust whose particulars were pleaded in paragraph 12 of the amended plaint dated 21/8/2023.
45. Opposing the claim, the respondent relied on an amended defence and counterclaim dated 13/7/2023, denying the alleged sale or trust. While admitting the alleged possession, living and burial over the unnamed land, the respondent averred that the same had absolutely no legal significance in the land



- upto 15/9/2003, was in the name of the defunct Settlement Fund Trustees and that legal proceedings were all along initiated to evict the deceased from the land, who despite forced eviction between November 2009 – 2013, sneaked back into the property after 2013.
46. The respondent termed the cause of action sounding in contract for the sale of land as time-barred by 46 years; otherwise, the appellant had no recognizable interest in law against the deceased or his estate after the dispute was resolved in case No. 20 of 2006. The respondent termed the re-entry to the suit property after eviction as illegal and unprotectable in law, after having taken advantage of the illness of the alleged seller.
 47. The respondent admitted that there were previous proceedings involving the deceased person up to the High Court in Kitale; otherwise, he termed the continued occupation of the suit parcel as an act of trespass and infringement of the property right.
 48. By way of a reply to the defence and defence to the counterclaim, the appellant reiterated that there was a valid sale, handing over of vacant possession, payment of consideration, and continuous occupation since 1978 to the present without any eviction, hence the creation of a trust.
 49. From the pleadings by the parties, it is obvious that the cause of action as pleaded by the appellant was based on constructive trust. In *Shah & 7 Others v Mombasa Bricks & tiles Ltd & 5 Others*, Petition 18 (E020) of 2022 [2023] KESC 106 [KLR] (28th December 2023) (Judgment), the court held that a constructive trust was an equitable instrument aimed inter alia at preventing unjust enrichment.
 50. The court held that it is a right traceable from the doctrines of equity under Section 3(1) of the *Judicature Act*, where a party conducted himself in a manner to deny the other party a beneficial interest in the property acquired. The court said that the doctrine is included under Article 40 of *the Constitution* in view of the limitation in Article 24 thereof and as an overriding interest under Sections 25, 26, and 28 of the *Land Registration Act*.
 51. The court was emphatic that constructive trust could arise in various circumstances, including in land sale agreements to defeat registered title whenever justice and good conscience require it, especially where the circumstances would demand that equity treats the legal owner as a trustee, or as a remedy against unconscionable conduct, or where a trustee takes advantage of his position.
 52. In *Macharia Mwangi Maina & Others v Davidson Mwangi Kagiri* [2004] eKLR, the court said that justice is the conscience of the whole of humanity, which would not allow an individual to receive a purchase price and later plead that the agreement is void. The court said that in such a case, the conscience of humanity would dictate that constructive trust and proprietary estoppel shall apply in such cases, for there to be restitution to the person who has advanced the money.
 53. The ingredients of constructive trust were discussed in *Kabui v Kabui*, Civil Appeal No. 415 of 2018 [2024] KECA 1396 [KLR] (11th October 2024) (Judgment). Trust is a matter of fact to be proved through evidence. The court held that there was a trail of actions supporting the appellant's version of facts, that the parties intended the land would eventually be transferred in favour of the appellant. The court observed that upon the settlement of the purchase price, the respondent held a constructive trust in favour of the appellant, and therefore, it was imperative upon her to secure the interest of the purchaser when she obtained title to the land on 15/12/1997.
 54. In *Macharia Mwangi Maina & Others v Davidson* (supra), the court took the view that the legal status and relationship between the seller and the purchaser, who had received the full purchase price for the individual plots, created an implied or constructive trust in favour of the purchasers. A fact in law is proved when, after considering the matter before it, the court believes that it exists or considers



- its existence so probable that a prudent man would have believed in its existence. The burden under Section 107 of the *Evidence Act* is on the person who wishes the court to give a right based on those facts.
55. In *Mburu v Wainaina*, Civil Appeal No. 143 of 2019 [2025] KECA 187 [KLR] (6th February 2025) (Judgment), the court cited *M’Inanga Kiebia v Isaya Theuri M’Lintari & Another* [2018] eKLR, that the concept of a trust may take several forms. The court said that the rights of a person in possession or actual occupation of land are subsumed under Section 25(b) of the *Land Registration Act*.
 56. Further, the court held that each case on trust must be determined on its own merits and on the quality of the evidence tendered. In *Kinuthia Wainaina v Kiarie Wangugi & another* [2022] KEELC 13336 (KLR), the court said that what is essential is the nature of the holding of the land and the intention of the parties.
 57. Equity follows the law. In the suit before the trial court, the appellant relied on two sale agreements dated 15/3/1978 and 23/8/1987, followed by vacant possession, exclusive possession, and developments on the suitland from 1985 or thereabouts up to 2022 when the respondent allegedly came calling with an intention of interring the remains of the true owner.
 58. The appellant claimed being on the suit land as a beneficial owner, after the deceased received the purchase price, handed over vacant possession, subdivided the land into two, with an intention to transfer the share occupied by him, allowing him to continue occupying the land exclusively, until the initial purchaser and his wife passed on and were buried on the suit land. Further, the appellant took the view that even though the deceased seller passed on before transferring the title, he had never evicted him from the suit land.
 59. In all these circumstances, the appellant sought the trial court to find them manifesting trust otherwise there was linkage, assurance that the deceased would live, improve, and occupy the land out of the common intention, more so the conduct of the seller during his lifetime showing that he had acted on the sale agreement and left the land to the exclusive use by the appellant as of right.
 60. The respondent attacked the alleged claim based on trust on account of the time limitation and lack of proof of the sale agreements. Section 20 of the *Limitation of Actions Act*, Cap 22, provides that the period of limitation prescribed under the Act does not apply to an action by a beneficiary under a trust in trust property, or on fraudulent breach of trust. In *Mburu v Wainaina* Civil Appeal No. 143 of 2019 [2025] KECA 187 [KLR] (6th February 2025) (Judgment), the court cited *Macharia Kihari v Ngigi Kihari* [1994] KECA 108 (KLR) that Section 20(2) of the *Limitation of Actions Act* does not apply to a customary trust.
 61. Regarding sale agreements executed before June 2003, the court in *Peter Mbiri Michuki v Samuel Mugo* [2014] eKLR, observed that Section 3(7) of the *Law of Contract Act* makes an exception to oral contracts for the sale of land coupled with part performance.
 62. In this appeal, the appellant produced evidence of the acknowledgment notes for the purchase price, coupled with exclusive and uninterrupted vacant possession from 1985 till 2022. The respondent and her witnesses before the court confirmed that the initial owner of the land had indeed vacated the land in 1985. The respondent admitted that the entry into the suit land by the appellant’s late father was initially sanctioned by her late father, since the deceased was a landless person, who was also acting as his farm hand in small-scale farming.
 63. DW1 said in her testimony that the deceased turned greedy and started asserting superior interests over the land, hence the reason that he complained to the Cherangani Land Disputed Tribunal, leading to an award directing the claimant to vacate the land. Unfortunately, the respondent said that the award was eventually quashed by the High Court. From D. Exhibits. No. 1, 3, 4, 5, 6, and 7, there is evidence



- of occupation of the deceased on the suit land. That explains the reason the late John Mukoya Mutukaa was seeking the eviction of the appellant's late father from the land.
64. At paragraph 16 of the plaint, the deceased had admitted that other than the Land Disputes Tribunal case, he had not filed any eviction proceedings against the alleged trespasser between 2006 and 2013.
 65. The amended eviction order dated 3/11/2009 was issued before the Cherangani LDT proceedings, and the award by the Kitale CM Court was quashed by the High Court. A court decree expires after 12 years as per Section 4(4) of the Limitation of Actions Act. In *M'ikiara M'rinkanya & Another v Gilbert Kabeere M'mbijiwe* [2007] KECA 115 [KLR], the court held that all post-judgment proceedings are statute-barred after 12 years, including on recovery of land. In view of Section 4(4) of the Limitation of Actions Act, I find the defence by the respondent was incompetent or lacking merit; otherwise, such a decree had either become statute-barred or was quashed by a valid superior court order.
 66. Still, the suit in D. Exhibit. No. 1 was never prosecuted by the deceased during his lifetime. Even looking at the said pleadings, it is obvious that the amended statement of defence and counterclaim is at variance with the deceased's own pleadings during his lifetime. For instance, the deceased had pleaded that after 2009, up to 2013, he had not taken any land recovery proceedings against the intruder. Equally, there was no specific, valid court order produced by the respondent to sustain or substantiate the claim for re-entry after there was a lawful eviction from the land.
 67. Under Section 3(3) of the Trespass Act, trespass refers to unjustified entry and commission of destructive acts.
 68. It refers to a violation of the right to property. A claimant has to prove immediate exclusive possession, which was interfered with. See *M'ikiara M'rinkanya & Another v Gilbert Kabeere M'mbijiwe* (supra).
 69. The deceased was asserting overriding interests arising out of constructive trust, hence the reason he had complained to the Cherangani Land Disputes Tribunal and later lodged a caution. Evidence of a notice of eviction issued to the appellant and the late father between 2006 and 2022 is lacking. Recovery proceedings between 2013 and 2022 are lacking. The deceased, from the evidence of DW1, was consensually put into possession of the land by her late father. The late father left the land under the exclusive use, possession, and occupation of the appellant's father in 1985, until he obtained title in 2003. Between 2003 and 2013, the respondent's late father did not take any successful recovery proceedings to evict the appellant's late father from the suit land.
 70. In my considered view, the sale agreements produced by the appellant, coupled with undisputed evidence of the exclusive occupation of the land by the deceased after the registered owner vacated in 1985, demonstrate the elements of proprietary estoppel and constructive trust, namely, promise, reliance, detriment, unconscionability, confidential relationship, and unjust enrichment.
 71. My finding is that the trial court erred in law and in fact in dismissing the appellant's claim and allowing the respondent's counterclaim. The appeal is hereby allowed. Costs of the appeal and at the lower court to the appellant.
 72. Orders accordingly.

JUDGMENT DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT KITALE ON THIS 8TH DAY OF OCTOBER 2025.

In the presence of:

Court Assistant – Dennis

Malanga for the respondent present



Ndarwa for Kiarie for the appellant present

HON. C.K. NZILI

JUDGE, ELC KITALE.

