



REPUBLIC OF KENYA



**Mwangi v Kaurrai & another (Land Case Appeal E010 of 2025)
[2026] KEELC 1854 (KLR) (25 March 2026) (Judgment)**

Neutral citation: [2026] KEELC 1854 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
LAND CASE APPEAL E010 OF 2025**

MD MWANGI, J

MARCH 25, 2026

BETWEEN

GENDEVER WAIRIMU MWANGI APPELLANT

AND

JOHN SENERWA KAURRAI 1ST RESPONDENT

COUNTY GOVERNMENT OF KAJIADO 2ND RESPONDENT

(Being an Appeal arising from the judgment of Hon. Charles Ariba Kutwa (SPM) at Ngong Chief Magistrate's Court MCELC/E006/2020 delivered on 6th February, 2025)

JUDGMENT

Introduction

1. The Appellant has approached this court through a Memorandum of Appeal dated 24th February 2025, challenging the judgment of Hon. Charles Ariba Kutwa (SPM), delivered on 6th February 2025 at the Ngong Chief Magistrate's Court (MCELC/E006/2020) in its entirety. Through the memorandum, the Appellant has raised 17 grounds of appeal, alleging as follows:
 - a. That the learned trial magistrate erred in law and fact in failing to find and hold that, having accepted and confirmed both in his written pleadings and oral evidence that he had received the full purchase price for the suit premises being Plot No. 151 (old number) (A607 new number) Ongata Rongai Trading Centre, the Respondent was obliged in law to transfer the plot to the Appellant; and is estopped from stating that the purchase price was only for a portion of the suit premises.
 - b. That the learned trial magistrate erred in law and fact when he found and held that there was no evidence of the parties entering into a sale agreement for the entire Plot No. 151 (old number) (A607 new number) Ongata Rongai Trading Centre, whereas the Respondent never denied



the agreement and even acknowledged in writing that he had received the whole of the purchase price in respect of the sale agreement for Plot No. 151 (old number) (Plot No. A607 new number) Ongata Rongai Trading Centre.

- c. That the learned trial magistrate erred in law when he shifted the onus of his claim that he sold only a portion of the suit premises from the Respondent to the Appellant, whereas the acknowledgment notes signed by the Respondent clearly stated that the sale was in respect of Plot No. 151 (old number) (A607 new number) Ongata Rongai Trading Centre and not for a portion of the suit premises.
- d. That the learned trial magistrate erred in law and fact when he failed to consider that because the Respondent had averred that he had sold only a portion of the suit premises, the onus of proving that fact was on him and not on the Appellant, and in the process went contrary to the provisions of Sections 107, 109, and 112 of the Evidence Act (Cap. 80) on the burden of proof.
- e. That the learned trial magistrate erred in law and fact in finding and holding that the Appellant's evidence centered on hearsay as she was neither present when the agreement was signed nor witnessed the same, and in the process failed to appreciate that the Appellant produced acknowledgment notes he had signed of payments of the full purchase price for the sale of the suit premises pursuant to a sale agreement which, in any event, the Respondent, both in his written pleadings and oral evidence in court, admitted existed.
- f. That the trial magistrate erred in law and fact when he applied Section 3(3) of the amended Law of Contract Act to the facts of this case and found and held that the agreement relied on was not signed and/or witnessed.
- g. That the learned trial magistrate erred in law and fact when he failed to realize that Section 3(3) of the Law of Contract Act was amended by the Statute Law (Miscellaneous Amendments) Act No. 2 of 1990, which only became operational on 1st July 2003 by Legal Notice No. 188 of 2002 and which, therefore, did not apply to the transaction between the Appellant and the Respondent which predated it.
- h. That the learned trial magistrate erred in law and fact in failing to appreciate that Section 3(3) of the Law of Contract Act (Cap. 23) as amended could not apply to contracts that predated it, and in particular, the learned magistrate erred in law and fact when he found and held that the Appellant's cause of action was barred by the Limitation of Actions Act, yet the Appellant's cause of action was founded, inter alia, on the equitable principle of Constructive Trust, the Appellant's husband having paid the full purchase price for the suit premises, a fact which the Respondent admitted.
- i. That the learned trial magistrate erred in law and fact when he failed to realize and appreciate that a Constructive Trust arises where the property the subject of a constructive trust is held by a person in circumstances where it would be inequitable to allow him to assert full beneficial ownership of the property.
- j. That the learned trial magistrate erred in law and fact in failing to appreciate that soon after paying the full purchase price in 1995, the Appellant's husband constructed a permanent building on part of the suit premises which she has been leasing to date, and the Respondent admitted in his evidence in court that he got the tenant for the Appellant from whom she continues to receive monthly rent.
- k. That the learned trial magistrate erred in law and fact in failing to appreciate that the Respondent admitted in his written and oral evidence that the Appellant was the widow of



one of his best friends and he had no intention of depriving her of what her husband had purchased.

- l. That the learned trial magistrate erred in law and fact in failing to address himself on the fate of the purchase price paid and admitted by the Respondent and the permanent building built by the Plaintiff's late husband on part of the suit premises which the Plaintiff leases to a tenant, and thus went contrary to the spirit and intention of the provisions of Article 40 of *the Constitution*.
 - m. That the learned trial magistrate erred in law and fact when he failed to be guided by the legal position espoused in the Court of Appeal decisions in William Kipsoi Sergei V Kipkoech Arusei [2019] Eklr And Willy Kimutai Kitilit V Michael Kibet [2018] eKLR that where a buyer has paid the full purchase price and been in possession for over 14 years, a constructive trust has been created.
 - n. That the learned trial magistrate erred in law and fact when he failed to holistically consider the circumstances surrounding the sale and purchase of the suit premises - Plot 151 (old number) (A607 new number), and as a result arrived at a wrong decision and in all circumstances failed to do justice to the Appellant.
 - o. That the learned trial magistrate erred in law and fact in failing to appreciate that during the validation of ownership exercise which gave a new number A607 to the suit premises, the Respondent, who was present either by himself or his proxy, did not say he had sold a portion of the plot so as to be given two numbers; hence Plot No 151 (old number) was numbered as Plot A607 (new number) as one plot.
 - p. That the learned trial magistrate erred in law and fact in failing to appreciate that if the Respondent had sold a portion of the suit premises, nothing could have been easier than to explain to the officials of the County Government of Kajiado who carried out the plot owners' validation exercise that there were two plots within Plot No. 151 (old number Plot No. A607 new number).
 - q. That the learned trial magistrate's decision went against the weight of the evidence.
2. Premised on the above grounds, the Appellant seeks the following orders:
 - a) The Appeal be allowed.
 - b) The judgment in favor of the Respondent be set aside.
 - c) This Honorable court be pleased to grant judgment to the Appellant as prayed in her Plaint.
 - d) The Appellant be accorded the costs of this appeal.
 3. The Appellant commenced her legal proceedings against the Respondents on 19th November 2020 at the Ngong Chief Magistrate's Court through a Plaint dated 5th October 2020, later amended on 15th December 2021. Through the Amended Plaint, the Appellant affirmed that on 16th May 2019, she requested the 1st Respondent to transfer Plot No. A607 (Formerly Plot No. 151) Ongata Rongai, situated within Kajiado, to her as the legal representative of her late husband's estate, Peter Mwangi Munyiri. It was the Appellant's case that her husband, a friend to the 1st Respondent, died before the transfer of the Plot was effected in his name despite the 1st Respondent's promises. She alleged that after the purchase of the Plot from the 1st Respondent, the Appellant and her husband constructed permanent and semi-permanent structures therein and through a joint agreement, the 1st Respondent was allowed to operate a butchery and restaurant business on a portion containing semi-permanent structures, with rent being collected by the Appellant.



4. Through a letter dated 29th May 2019, the 1st Respondent requested to be furnished with a copy of the sale agreement and a sketch plan. Although the Appellant responded by forwarding a sketch plan through a letter dated 15th August 2019, she asserts that she did not receive any feedback from the 1st Respondent thereafter. Furthermore, efforts to have the 1st Respondent execute the transfer in her name, despite the Appellant's personal visit to his home, did not bear any fruits. The Appellant then concluded that the 1st Respondent was not willing to execute the transfer and subsequently instituted legal proceedings seeking judgment for the following orders: An order to transfer Plot No. A607 (Formerly Plot No. 151) Ongata Rongai to the Plaintiff; removal of any structures on the plot put up by the Respondent or through his authority; a declaration that the Appellant is the legal owner of Plot No. A607 (Formerly Plot No. 151) Ongata Rongai through purchase by her late husband and/or through adverse possession having been in uninterrupted occupation of the plot since 1995; general damages; costs of the suit, and interest until full payment.
5. Through an amended statement of defence dated 27th April 2022, the 1st Respondent called for the dismissal of the suit with costs, arguing that it was filed 25 years late, contrary to Sections 4(1) and 7 of the *Limitation of Actions Act*. The 1st Respondent alleged that he only sold 25 feet by 12 feet of the Plot to Peter Mwangi Munyiri for Ksh. 70,000/=, where they constructed permanent structures from which the Appellant collects rent. Although no written agreement existed with respect to the transaction, he vilified the Appellant for relying on hearsay and assumptions to demand the entire plot, yet she was not a party to the oral transaction between him and her deceased husband. The 1st Respondent dismissed the Appellant's plot ownership claim based on adverse possession by alleging that it cannot survive if there was a sale agreement. In any event, the Appellant contended that the 1st Respondent only occupied and operated a bar and restaurant on a portion of the plot where semi-permanent structures had been constructed; not the whole plot. Additionally, the Appellant was faulted for her failure to prove that her continuous occupation of the plot was actual, hostile, open, uninterrupted, notorious, and exclusive.
6. Replying to the 1st Respondent's amended defence through a reply to defence dated 29th July 2022, the Appellant accused him of taking advantage of the fact that he was their close relative to deprive them of the plot by invoking the *Limitation of Actions Act* to contend that she was indolent and that the suit was time-barred. This was in spite of his acknowledgment that he was paid the whole purchase price for the entire plot. The hearsay assertions were dismissed by stating that though the Appellant was absent when they entered into the agreement, she was well aware of the transaction, the construction undertaken therein, and the deceased and 1st Respondent's plan to operate a restaurant business on semi-permanent structures developed on a portion of the plot. Though the agreement may have been misplaced, its existence was demonstrated by written acknowledgment notes. Given that they had possessed the plot since 1995, the Appellant maintained she was entitled to claim it through adverse possession since the 1st Respondent confirmed that she was collecting rent from it. Additionally, the hostility by the 1st Respondent was demonstrated when he refused to transfer the plot in the Appellant's favor upon her request.
7. Through a statement of defence dated 1st December 2020, the 2nd Respondent reacted to the Appellant's claim by seeking a dismissal against it because no cause of action was between it and the Appellant, neither did the Appellant seek any orders against it. Additionally, it denied the Appellant's allegations against it by arguing that they constituted an action in personam between the Appellant and the 1st Respondent.
8. Vide a judgment delivered on 6th February 2025, the Learned Magistrate dismissed the Appellant's case with costs to the Respondents. This decision was informed by the finding that no evidence was adduced showing that the parties entered into a sale agreement with respect to the entire Plot.



Court's Directions

9. In concurrence with counsel for the parties, the appeal was dispensed with through written submissions.

Submissions

10. Through submissions dated 4th November 2025, the Appellant implores the court to reconsider and re-evaluate all the evidence presented before the trial court before arriving at its own conclusion, since the learned magistrate failed to objectively review it. The Appellant argues that the 1st Respondent testified that he only sold 12 feet by 25 feet of the Plot to the deceased for Ksh. 70,000/=. Going by this testimony, the learned Magistrate is censured for shifting the burden of proof to the Appellant to demonstrate that only a portion of the suit property was sold, yet this factual assertion lay squarely within the 1st Respondent's knowledge.
11. The Appellant opines that shifting this burden contradicts Sections 107, 108, and 109 of the *Evidence Act* (Cap. 80). The Appellant maintains that she discharged the burden of proof by showing that possession of the plot was attained when the 1st Respondent confirmed receipt of the whole purchase price, as envisaged under Section 3(3) of the *Law of Contract Act* (Cap. 23) before it came into force. The learned Magistrate is faulted for making a finding that the suit property did not meet the requirements of Section 3(3) of the *Law of Contract Act* (Cap. 23), which dictates that land disposition agreements be in writing, signed by all parties, and attested to. The Appellant opines that this was a misdirection because, at the time the parties entered into the agreement, this proviso was not applicable according to Section 3(7) of the Act.
12. The doctrine of equity emanating from implied and constructive trusts is invoked to argue that the invocation of the *Limitation of Actions Act* and Section 3(3) by the 1st Respondent is an abuse of the court process. Furthermore, allowing the 1st Respondent to keep the full purchase price, the suit property, and the building constructed therein by the deceased—which is leased to tenants who pay rent to date—amounts to unjust enrichment by him. After obtaining possession of the plot in 1995, the deceased constructed a house on it and initially entered into a business venture with the 1st Respondent over the remaining portion to continue the operation of a restaurant, thus signifying substantial part performance of the contract.
13. It is submitted that the dismissal of the suit by the learned Magistrate violates Article 40 of *the Constitution* because the Appellant was deprived of her right to own property. The contention that the suit is time-barred under the *Limitation of Actions Act* is described as misconceived in law and fact. This is so because the possession and occupation of the plot by the deceased in 1995, after payment of the entire purchase price, was not adverse but was done with the full consent and permission of the 1st Respondent in anticipation of a formal transfer of the title. It is maintained that the suit is not time-barred because time began to run when the 1st Respondent hostilely responded to the Appellant's request for transfer. Accordingly, his refusal to transfer the plot to the Appellant amounts to a breach of trust and is a fraudulent attempt to deprive the deceased's estate of its rightful property despite payment of the entire purchase price.
14. Consequently, the 1st Respondent became the constructive trustee of the title for and on behalf of the deceased. On trusts, it is argued that time began to run when the 1st Respondent declined to transfer the plot to the Appellant, as the widow and administrator of the deceased's estate following his death. At the time of his demise, he had already acquired it through adverse possession since the 1st Respondent's right to recover the land expired in 2007 by operation of law from 1995, when the deceased had open and continuous occupation of the plot.



15. The 1st Respondent, in his submissions dated 19th January 2026, argues that the Appellant did not prove the entire plot was bought, since the deceased's intent was to purchase 25 feet by 12 feet of the Plot for Ksh. 70,000/=, after which he constructed permanent structures therein. It is argued that during the deceased's lifetime, the 1st Respondent constructed on the remaining portion and operated a restaurant, and that its utilization was not challenged, opposed, or interfered with by the deceased during his lifetime, neither did he claim it. Additionally, ownership disputes never existed with respect to the plot, as he and the 1st Respondent knew the terms and conditions of the oral agreement, unlike the Appellant. Based on the evidence tendered, it is submitted that the possession and occupation of the plot by the Appellant and the deceased was limited only to 25 feet by 12 feet, hence the non-protestation by the 1st Respondent when they developed that fraction. Thus, the Appellant did not demonstrate on a balance of probabilities how partial purchase of the plot translated into her claim for the entire plot, yet she did not call any witnesses to support her case.
16. It is submitted that the deceased and his estate cannot acquire any transferable interests over the plot because an allotment letter does not confer any legal rights or interests in property to its bearer or a third party until specified conditions are fulfilled and a title is issued. It is maintained that the deceased's intent was only to own a portion of the plot acquired by the 1st Respondent through the issuance of a letter of allotment. These arguments are buttressed through reference to *Torino Enterprises Limited v Attorney General* (Petition 5 (E006) of 2022) [2023] KESC 79 (KLR) (22 September 2023) and *Molia v Jirma & 2 others* [2025] KEELC 3298 (KLR). Accordingly, a constructive trust or a claim for adverse possession or otherwise cannot be espoused by the deceased or his estate over the plot. The 1st Respondent calls upon this honorable court to make a finding that he allowed the deceased and his estate permissive development and possession of the suit property in good faith.
17. Reference is made to *Samuel Miki Waweru vs. Jane Njeru Richu*, Civil Appeal No. 122 of 2001 to submit that the Appellant's claim for the entire plot through adverse possession is legally and factually untenable because their occupation of its portion based on the oral agreement was with the 1st Respondent's permission. Furthermore, the remaining portion was openly occupied by the 1st Respondent without any interference from them. The 1st Respondent submits that this Appeal cannot be adjudicated upon by this court because the Appellant's lawsuit before the trial court was time-barred based on Sections 4(1)(a) and 7 of the *Limitation of Actions Act*. Given that the cause of action accrued to the deceased in August 1995, the institution of legal proceedings 25 years later demonstrates the non-existence of a reasonable cause of action.
18. The 2nd Respondent, in its submissions dated 29 January 2026, argues that the relief sought by the Appellant, plus the pleadings filed in the trial court, do not demonstrate any cause of action against it, nor will the orders affect it. This is because it was wrongfully enjoined in the proceedings, yet it was not a party to the contract, is not connected with it, neither does it have any interest in it. In making its determination, the 2nd Respondent implores the court to be guided by judicial authorities in *Isaiah Ondiba Bitange & 3 Others v Institute of Engineers of Kenya* (2017) eKLR and *Youth Limited v Kihiko & another; Kenya Railways Corporation (Intended Defendants)* {2024} KEELC 1413 (KLR) and proceed to dismiss the appeal against it with costs.

Issues for determination

19. As I make my findings, I am conscious of the obligation vested upon an Appellate court on the need to independently arrive at its own decisions after re-evaluating and re-analysing the entire trial court's record. The power of an appellate court as defined in Section 78 of *Civil Procedure Act* (Cap. 21) was



summarized by the Court of Appeal in *Kenga & 12 others v Mohamed* [2025] KECA 2219 (KLR) as follows:

“The Court must therefore reconsider the entire evidence, re-evaluate it independently and draw its own conclusions while bearing in mind that it neither saw nor heard the witnesses. The appellate court will not ordinarily interfere with factual findings unless the trial judge failed to consider material evidence, misapprehended the facts, or applied the wrong legal principles.”

20. The key issues for determination based on the record of Appeal, memorandum and parties' arguments in their respective submissions and the cited case law and statutes in the court's opinion are as follows:
- i. Whether the Appellant's suit at the trial court was time-barred under the *Limitation of Actions Act*.
 - ii. Whether the Appellant discharged the burden of proving that her late husband purchased the entire Plot No. A607, as opposed to the 25 by 12 feet portion admitted by the 1st Respondent.
 - iii. Whether a constructive trust or a claim for adverse possession arose in favor of the Appellant over the entire suit property.
 - iv. Whether the 1st Respondent can introduce the issue of unfulfilled allotment letter conditions for the very first time at the appellate stage.
 - v. Whether a valid cause of action exists against the 2nd Respondent (County Government of Kajiado), or if it was wrongly enjoined in the suit.
 - vi. Whether the appeal is merited and what final orders/reliefs should be granted by the court.

Determination

Whether the Appellant's suit at the trial court was time-barred under the *Limitation of Actions Act*.

21. The 1st Respondent invoked the *Limitation of Actions Act* (Cap. 22) to argue that the trial court lacked jurisdiction to adjudicate the Appellant's claim, asserting that the suit was filed 25 years out of time. He relied on the following statutory provisions quoted verbatim:

Section 4(1)(a): "The following actions may not be brought after the end of six years from the date on which the cause of action accrued— (a) actions founded on contract;"

Section 7: "An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person."

22. Relying on these provisions, the learned trial Magistrate reasoned and found as follows: "The 1st Defendant submitted that the contract had lapsed by effluxion of time and the remedy for specific performance was barred by statutory limitation. If the cause of action is taken to be in congruence with the sale agreement entered into on 5 August 1995, then one would be right to imply that the cause of action arose in 1995. Applying Section 4(a) of the *Limitation of Actions Act*, an action founded on contract cannot be brought after 6 years, whereas a claim for ownership of land cannot be brought after 12 years since the right of action has accrued to a party as provided under Section 7 of the *Limitation of Actions Act*. Thus, the suit herein was filed out of time."



23. This court must determine whether the learned Magistrate misapprehended the law as to when time began to run. The factual matrix shows that the deceased and the 1st Respondent mutually entered into an oral agreement for the purchase of the plot in August 1995 for Ksh. 70,000/=. The Appellant averred that the 1st Respondent continuously promised the deceased during his lifetime that the transfer would be effected, an arrangement built on their close friendship. It was only upon the deceased's demise that the Appellant, acting as the administrator of the estate, formally demanded the transfer via a letter dated 16th May 2019. The 1st Respondent requested a sketch plan and the agreement on 29th May 2019, to which the Appellant responded on 15th August 2019. When personal visits and demands failed, the Appellant filed suit on 19th November 2020.
24. The jurisprudence on the accrual of a cause of action is settled. In *Ruto & 2 others v Tesot & 2 others* [2026] KECA 321 (KLR), the Court of Appeal held verbatim:
- “ Thus, a cause of action arises when the plaintiff becomes aware of the act complained of. It is then that time starts running.”
25. This was further expounded in *Mukuru Munge v Florence Shingi Mwawana & 2 others* [2016] KECA 54 (KLR):
- “ It is axiomatic that a cause of action founded on contract accrues when a breach takes place and not when damage is suffered. (See *Chitty On Contracts*, Sweet & Maxwell, 23rd Ed. Vol. 1 page 732 and *Mwangi V. Kiiru* [1987] KLR 324). And a breach of contract occurs when one or both parties fail to fulfill their obligations under the terms of the contract.”
26. Applying these principles to the facts of this case, the breach of contract did not occur in August 1995 upon the payment of the purchase price. The occupation by the deceased was with the consent of the 1st Respondent in anticipation of a formal transfer. The breach occurred in 2019 when the 1st Respondent unequivocally failed to honor the Appellant's formal demand to execute the transfer. Consequently, the computation of time commenced in 2019. The suit, instituted on 19th November 2020, was well within both the 6-year limitation for contracts and the 12-year limitation for land recovery. The trial Magistrate's finding that the suit was time-barred was factually and legally erroneous.

Whether the Appellant discharged the burden of proving that her late husband purchased the entire Plot No. A607

27. The central factual dispute is the extent of the land purchased. The Appellant pleaded that her late husband purchased the entirety of Plot No. A607 (Formerly Plot No. 151). To support this, she produced acknowledgment notes of the full purchase price and a police abstract reporting the loss of the original written agreement. Conversely, the 1st Respondent averred in his amended defence dated 27 April 2022 that the oral agreement strictly pertained to a 25 feet by 12 feet portion of the plot, sold for Ksh. 70,000/=.
28. The burden of proving that the entire plot was purchased lay squarely on the Appellant. Sections 107, 108, and 109 of the *Evidence Act* (Cap. 80) state verbatim:
- Section 107: "Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."
- Section 108: "The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."



Section 109: "The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

29. The Supreme Court of Kenya restated this mandate in *Gwer & 5 others v Kenya Medical Research Institute & 3 others* [2020] KESC 66 (KLR) verbatim:

"Section 108 of the *Evidence Act* provides that, "the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side;" and section 109 of the Act declares that, "the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

30. The undisputed fact is that the Appellant was not physically present when the oral agreement was struck between her late husband and the 1st Respondent. Furthermore, despite alleging that one J.W. Wangombe witnessed the handover of the monies for the entire plot, the Appellant failed to call him as a witness to corroborate her claim. Without the original written agreement or corroborating eyewitness testimony, the Appellant failed to discharge her legal and evidential burden of proof on a balance of probabilities. Consequently, the only factual extent of the sale proven before the court is the 25 feet by 12 feet portion expressly admitted by the 1st Respondent.

Whether a constructive trust or a claim for adverse possession arose in favor of the Appellant over the entire suit property

31. The Appellant sought a declaration of ownership over the entire plot through either a constructive trust or adverse possession. Factually, it is undisputed that the deceased constructed permanent structures on a portion of the plot, from which the Appellant currently collects rent. It is also undisputed that the 1st Respondent operated a butchery and restaurant on another portion containing semi-permanent structures.
32. Regarding adverse possession, first and foremost a Magistrate's court would have no jurisdiction to determine a claim for adverse possession. Secondly, adverse possession requires occupation that is hostile, open, continuous, uninterrupted, notorious, and exclusive. The deceased's entry onto the land was permissive, rooted in an agreement and the 1st Respondent's consent. Furthermore, the 1st Respondent remained in concurrent occupation of the remaining portion (operating the restaurant).
33. Permissive and shared occupation defeats the requisite hostility and exclusivity required for adverse possession.
34. Regarding the creation of a constructive trust, the Court of Appeal in *Hatayan & another v Al-Heidy & 5 others* [2015] KECA 713 (KLR) held verbatim that:

"A constructive trust is an equitable remedy imposed by the court against one who has acquired property by wrong doing. (see *Black's Law Dictionary*) (Supra). It arises where the intention of the parties cannot be ascertained. If the circumstances of the case are such as would demand that equity treats the legal owner as a trustee, the law will impose a trust. A constructive trust will thus automatically arise where a person who is already a trustee takes advantage of his position for his own benefit (see. *Halsbury's Laws of England supra* at para1453). As earlier stated, with constructive trusts, proof of parties' intention is



immaterial; for the trust will nonetheless be imposed by the law for the benefit of the settlor. Imposition of a constructive trust is thus meant to guard against unjust enrichment."

35. Applying this equitable doctrine to the proven facts: the 1st Respondent admitted receiving Ksh. 70,000/= for the 25 feet by 12 feet portion. Allowing the 1st Respondent to retain the legal title to this specific portion, alongside the purchase price and the permanent structures erected by the deceased, would amount to gross unjust enrichment. Therefore, equity imposes a constructive trust upon the 1st Respondent, holding the 25 feet by 12 feet portion in trust for the deceased's estate. Because the Appellant failed to prove the purchase of the entire plot, the constructive trust does not extend to the whole of Plot No. A607.

Whether the 1st Respondent can introduce the issue of unfulfilled allotment letter conditions for the very first time at the appellate stage

36. In his submissions on appeal dated 19th January 2026, the 1st Respondent argued that the deceased could not acquire transferable interests because the plot was held under a mere allotment letter whose conditions were unfulfilled, citing *Torino Enterprises Limited v Attorney General and Molia v Jirma*. A meticulous review of the trial court record reveals that this specific defense was never pleaded in the 1st Respondent's amended statement of defence dated 27th April 2022.

37. The law explicitly bars the litigation of unpleaded issues, particularly on appeal. In *David Sironga Ole Tukai v Francis Arap Muge & 2 others* [2014] KECA 155 (KLR), the Court of Appeal decreed verbatim:

"In an adversarial system such as ours, parties to litigation are the ones who set the agenda, and subject to rules of pleadings, each party is left to formulate its own case in its own way. And it is for the purpose of certainty and finality that each party is bound by its own pleadings. For this reason, a party cannot be allowed to raise a different case from that which it has pleaded without due amendment being made... A decision given on a claim or defence not pleaded amounts to a determination made without hearing the parties and leads to denial of justice."

38. This stricture against metamorphosing an appeal into a fresh trial was reaffirmed in *Kenya Hotels Limited v Oriental Commercial Bank Limited* [2018] KECA 692 (KLR) verbatim:

"Where the applicant seeks to introduce an entirely new point, there are well known strictures that seek to ensure firstly, that an appellate court does not, in disguise, metamorphose into a trial court and make first-instance determinations without the benefit of the input of the court from which the appeal arises. ...Due to these fundamental concerns, the Courts has developed fairly elaborate principles that guide it in determining whether or not to allow a new point on appeal... a new point which has not been pleaded or canvassed in the trial court should not be allowed to be taken on appeal, unless the evidence establishes beyond reasonable doubt that the facts before the trial court, if fully investigated, would support the point..."

39. Guided by these authorities, this court declines the invitation to adjudicate on the legal efficacy of the allotment letter. It is worth pointing out that the allotment letter that was the subject of discussion in the *Torino* case was an allotment letter issued by the defunct local government that had explicit terms and conditions to be complied with by the allottee. It was a very different scenario from the "allotment" in this case which involved a transaction between two individuals.



40. Entertaining an ambush defense at the appellate stage violates the Appellant's right to a fair hearing under Article 50 of the Constitution. This ground of the Respondent's argument cannot be entertained at this stage.

Whether a valid cause of action was disclosed against the 2nd Respondent (County Government of Kajiado), or if it was wrongly enjoined in the suit

41. The 2nd Respondent filed its statement of defence on 1st December 2020, seeking dismissal on the grounds that the pleadings disclosed no reasonable cause of action against it. A review of the Appellant's Amended Complaint confirms that this dispute is strictly an action in personam arising from a private, oral sale agreement between the deceased and the 1st Respondent. The Appellant sought no specific substantive orders against the County Government of Kajiado, nor was the County Government privy to the contract. The 2nd Respondent was thus improperly and unnecessarily enjoined to these proceedings. The appeal against the 2nd Respondent must fail.

Whether the appeal is merited and what final orders/reliefs should be granted by the court

42. The appeal possesses partial merit. The learned Magistrate erred in law by finding the suit time-barred, improperly calculating time from the date of the 1995 agreement rather than the 2019 breach. However, the trial court's ultimate factual finding that the Appellant failed to prove the purchase of the entire plot was sound based on the evidence tendered. The Appellant is legally and equitably entitled only to the 25 feet by 12 feet portion admitted by the 1st Respondent.
43. Premised on the comprehensive analysis above, the court hereby proceeds to issue the following orders:
- a. The judgment of Hon. Charles Ariba Kutwa (SPM) delivered on 6th February 2025 at Ngong Chief Magistrate's Court (MCELC/E006/2020), which dismissed the suit in its entirety, is hereby set aside.
 - b. An order is hereby issued directing the 1st Respondent to formally transfer the 25 feet by 12 feet portion of Plot No. A607 (Formerly Plot No. 151) Ongata Rongai, situated within Kajiado, to the Appellant.
 - c. The suit and the appeal as against the 2nd Respondent (County Government of Kajiado) are hereby dismissed for misjoinder and lack of a cause of action.
 - d. Each party shall bear its own costs of the appeal and the suit before the trial court Ngong Chief Magistrate's Court case MCELC/E006/2020.

It is so ordered.

Orders accordingly.

DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 25TH DAY OF MARCH 2026

M.D. MWANGI

JUDGE

In the virtual presence of:

Ms. Kemunto h/b for Mr. Nyakwana for the 2nd Respondent

Mr. Mumo h/b for Mr. Kimemia for the Appellant



Mr. Kuria h/b for Mr. Taliti for the 1st Respondent

Court Assistant: Alex

