

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC APPEAL NO. E034 OF 2025

JACOB PARTIMO MUNKE APPELLANT

VERSUS

LANKEU OLKIRAU RESPONDENT

JUDGMENT

Introduction and Background

1. Before this Court is a first appeal emanating from the Judgment and Decree of the Honourable Esther K. Kimilu, Senior Principal Magistrate, delivered on the 14th of May 2025 at the Magistrate's Environment and Land Court at Loitoktok in **MCELC Suit No. E007 of 2023** (*Lankeu Olkirau vs. Jacob Partimu Munke*).
2. The Appellant herein, Jacob Partimo Munke (who was the Defendant/Cross-Plaintiff in the lower court), being aggrieved by the trial court's decision, preferred this appeal vide a Memorandum of Appeal dated 5th June 2025.
3. The appeal is premised on twelve (12) grounds as set out verbatim on the face of the Memorandum of Appeal, namely:

- a. **THAT** the Learned Magistrate erred in law and in fact in holding that the sale agreements dated 15th October 2011 and 12th September 2012 were null and void for want of capacity, despite overwhelming evidence that the respondent was selling his identifiable and undisputed share as a beneficiary of the Deceased's estate.
- b. **THAT** the Learned Magistrate misdirected herself in fact and in law by failing to appreciate that the Respondent had filed *Loitoktok MCELC E007 of 2023 (Lankeu Olkirau Vs. Jacob Partimu Munke)* in his own capacity and not as a legal representative of the Estate of Olkirau Naudo, thereby arriving at an erroneous conclusion that the Suit property is part of the Estate of Olkirau Naudo.
- c. **THAT** the Learned Magistrate misdirected herself and erred in law and fact by disregarding clear and binding judicial precedents from the superior courts which affirm the enforceability of sale agreements entered into by beneficiaries over their identifiable and undisputed entitlements in a Deceased's Estate.

- d. **THAT** the Learned Magistrate misdirected herself and erred in law in misapplying the doctrine of intermeddling under Section 45 of the Law of Succession Act, by failing to appreciate the distinction between unlawful interference with an estate and a civil claim against a known beneficiary selling his own anticipated share.
- e. **THAT** the Trial Court erred in fact and law by holding that the appellant had no valid interest in the suit property, despite full payment being made, subdivision being effected, possession and use for over a decade, and non-contestation from other beneficiaries.
- f. **THAT** the Learned Magistrate erred in law in placing undue weight on the respondent's claim of illiteracy and an alleged oral lease, while disregarding a Forensic Document Examiner's Report confirming the respondent's signature on both sale agreements.
- g. **THAT** the Trial Magistrate erred in failing to properly evaluate and apply the burden of proof under Sections 107 and 109 of the Evidence Act, especially as the respondent admitted

receiving funds but failed to discharge his evidential burden of proving a lease.

- h. **THAT** the learned magistrate erred in concluding that the appellant's possession amounted to intermeddling, despite unchallenged evidence of the Respondent's voluntary involvement in the sale, participation in subdivision, endorsement by family and local leaders during and after the sale.
- i. **THAT** the trial court erred in ignoring the conviction of the respondent in criminal case No. E230 of 2023 for offence of cheating contrary to section 315 of the Penal Code, when he attempted to distance himself from the signatures on the respective sale agreements, as proof that there were valid sale agreements augmented by part performance.
- j. **THAT** the learned magistrate erred in failing to appreciate that the appellant's claim was not against the estate of the deceased, but against the respondent in his personal capacity as a beneficiary.

- k. **THAT** the Trial Court failed to consider that even if the sale agreements were deemed premature, the appellant is entitled in equity to claim against the respondent once succession is finalized, especially as the land had already been subdivided and no objections arose from other beneficiaries.
- l. **THAT** the Learned Magistrate erred in law by failing to exercise her discretion judiciously in declining to grant the counterclaim or make equitable orders or reliefs in favour of the appellant, such as provision for restitution or refund of purchase consideration, thereby unjustly enriching the respondent despite his unconscionable conduct.
4. In the premises, the Appellant implores this Court to set aside the trial court's judgment and substitutes it with the following prayers:
- a) *The appeal be allowed;*
 - b) *The judgment and decree of the subordinate court dated 14th May 2025 be set aside;*
 - c) *Judgment be entered in favour of the Appellant as prayed in the Counterclaim dated 24th July 2023;*

d) Costs of the appeal and of the lower court proceedings be awarded to the Appellant; and

e) Such other or further relief as this Honourable Court may deem just and expedient in the circumstances.

5. The genesis of this appeal traces back to the Plaint dated 22nd June 2023, filed by the Respondent (then Plaintiff) against the Appellant (then Defendant) before the trial court. In the said Plaint, the Respondent averred that he was the owner of a 4-acre parcel of land excised from the original title known as **LR NO. LOITOKTOK/ENTONET/468**, which was registered in the name of his deceased father, Olkirau Naudo.
6. It was the Respondent's case that in the year 2010, he approached the Appellant and they entered into a verbal/oral agreement to lease a 3-acre portion of the suit land for a period of ten (10) years at a consideration of Kshs. 210,000/= . The Respondent acknowledged receiving this sum in installments between November 2010 and August 2011, whereupon the Appellant immediately commenced cultivation.
7. The Respondent further pleaded that in 2012, he requested the Appellant to lease an additional one (1) acre, which the Appellant

agreed to, paying a further Kshs. 90,000/= in cash. This brought the total leased area to four (4) acres for a 10-year period at a cumulative cost of Kshs. 300,000/=.

8. According to the Respondent, upon the expiry of the 10-year lease period, the Appellant adamantly refused to vacate the leased portion, instead claiming that he had bought the land. The Respondent firmly denied entering into any written agreement of sale before an Advocate, maintaining that the arrangement was strictly an oral lease. He further alleged that the Appellant, a former chief, was leveraging his influence with local administration and police to unlawfully retain possession of the subdivided property.

9. Consequently, the Respondent contended that the Appellant's continued occupation and cultivation of the suit property amounted to trespass following the expiry of the lease. He thus instituted the suit seeking the following prayers against the Appellant:

- a) *A mandatory injunction directed against the defendant, his agents, employees and/or servants to desist from interfering with the plaintiff's possession of or dealing with*

the suit property LR LOITOKTOK/ENTONET/468 in any other manner.

b) An order of immediate eviction of the defendant from the suit property LR LOITOKTOK/ENTONET/468.

c) General damages for trespass and unlawful entry into suit land after expiry of lease period.

d) Any other remedy that this court should deem fit and just to grant

10. The record reflects that the Respondent's (Plaintiff's) main suit was subsequently struck out by the trial court on the 8th of November 2023. Consequently, the Appellant elected to prosecute his Counterclaim, wherein he sought the following substantive reliefs against the Respondent:

a) An order dismissing the plaintiff's suit with costs.

b) An order of declaration that the defendant is the legal and beneficial owner of four (4) acres excised from Loitokitok/Entonet/468.

c) An order of permanent injunction restraining the plaintiff whether by himself, his officers, agents, servants and any

other person whatsoever from interfering with the four (4) acres excised from Loitokitok/Entonet/468.

d) An order directing the plaintiff to transfer the four (4) acres excised from Loitokitok/Entonet/468 to the defendant.

e) In default of (iv) above the plaintiff, the executive officer of the Honorable Court to execute all the necessary documents for the transfer of the four (4) acres excised from Loitokitok/Entonet/468 to the defendant.

f) Costs of the suit and the counter claim.

11. The Counterclaim proceeded to full hearing on the 4th of February 2025. In her Judgment delivered on the 14th of May 2025, the Learned Trial Magistrate formulated three primary issues for determination: i) whether there was a sale agreement, ii) whether the cross-plaintiff acquired any lawful interest in the suit property, and iii) whether the cross-plaintiff could be considered a *bona fide* purchaser.

12. In resolving these issues, the trial court found as a matter of fact that the sale agreements were indeed executed, noting that the Respondent had even been convicted of cheating in Criminal Case No.

E230 of 2023 for falsely denying his signature. However, the Learned Magistrate concluded that the agreements were legally null and void *ab initio*. The court reasoned that the Respondent, as a mere beneficiary of the estate of his late father lacked the legal capacity to sell or transfer land belonging to the estate of his late father, Olkirau Naudo, prior to the issuance and confirmation of a grant of letters of administration.

13. Furthermore, the trial court held that the Appellant could not seek refuge as a *bona fide* purchaser for value under Section 93 of the Law of Succession Act, as he entered into the transaction fully aware that the land belonged to the estate of a deceased person. The court deemed this conduct to be intermeddling with the estate.

14. Ultimately, the Learned Trial Magistrate dismissed the Appellant's Counterclaim with no orders as to costs, and issued further orders directing the Appellant to peacefully and quietly vacate the suit property within forty-five (45) days of the judgment, prompting the instant appeal.

15. The appeal before this Court proceeded undefended and was canvassed entirely by way of the Appellant's written submissions.

Analysis of the Appellant's Submissions

16. The Appellant's primary contention is that the trial court fundamentally misdirected itself by reducing a straightforward civil transaction between two private parties into a succession controversy. The Appellant argues that the trial court erroneously treated the Respondent's voluntary and deliberate contractual dealings as prohibited acts of intermeddling under Section 45 of the Law of Succession Act.

17. The Appellant submits that the Respondent, as a beneficiary of the Estate of the late Olkirau Naudo, had a clear, definite, and recognized portion of the ancestral land (Loitoktok/Entonet/486). It was from this identifiable share that the Respondent voluntarily sold four (4) acres to the Appellant via two written agreements dated 15th October 2011 and 12th September 2012.

18. The Appellant highlights that following the execution of the agreements, the Respondent actively facilitated the subdivision of the land, demarcated boundaries, and placed the Appellant in peaceful possession for over a decade. The Appellant points out that this transaction was done with the full knowledge and acquiescence of the

Respondent's family, as evidenced by statements from the Respondent's brother (Moraya Olkirao), the Village Elder (Lenteyo Ole Munke), and the Area Chief (James Temuka Somare).

19. Crucially, the Appellant submits that the trial court paradoxically acknowledged that the Respondent was convicted of cheating in *Criminal Case No. E230 of 2023* for falsely denying his signatures on the sale agreements, yet proceeded to declare those very agreements null and void for want of capacity. The Appellant contends that while the grant of the estate was unconfirmed, the Respondent's capacity to contract over his own identifiable beneficial share was not extinguished, and the agreements remained binding on him personally.

20. The Appellant strongly contests the trial court's finding that the Appellant's possession amounted to "intermeddling". The Appellant argues that Section 45 of the Law of Succession Act is a protective shield meant to prevent unauthorized interference with an estate, not a sword to be used by a fraudulent beneficiary to invalidate a transaction they initiated, benefited from, and sustained for years.

21. To buttress this position, the Appellant relies on several superior court decisions outlining that Section 45 does not bar civil claims arising from contracts between purchasers and individual beneficiaries. The Appellant cited:

- a) *Re Estate of Stone Kathuli Muinde (Deceased) [2016] eKLR*, which held that claims to ownership between an estate and a third party should be resolved through civil processes in a civil court, not merely nullified under succession mechanics.
- b) *Mbaluto v Kasalu [2022] KEHC 12778 (KLR)*, wherein Odunga J. observed that while a purchaser cannot claim to be a creditor of the estate prior to confirmation, he becomes a creditor of the *beneficiary* who sold him the share, and must wait to lay his claim against the part of the estate that is eventually confirmed to that beneficiary.
- c) *Paul Gituma Kiogora v Doris Mukiri Magiri & Another [2017] KEHC 4062 (KLR)*, reaffirming that innocent purchasers are at liberty to pursue their claims against the individual beneficiaries in the appropriate civil court.

22. Ultimately, the Appellant submits that the trial court failed to exercise its discretion judiciously by dismissing the Counterclaim. The Appellant argues that by allowing the Respondent to evade his contractual obligations while retaining the purchase consideration, the trial court sanctioned unjust enrichment. The Appellant asserts an entitlement to equitable reliefs, including the enforcement of the contract augmented by part performance, estoppel, and protection of the Appellant's interest against the Respondent's ultimate share to prevent a "legalized theft".

Issues for Determination

23. This being a first appeal, this Court is under a legal obligation to re-evaluate, re-analyze and reconsider the evidence on record and arrive at its own independent conclusions, while bearing in mind that it did not have the advantage of observing the witnesses testify.

24. This principle was authoritatively stated in **Selle & Another v Associated Motor Boat Co. Ltd & Others [1968] EA 123**, where the Court held that:

“An appeal to this Court from a trial by the High Court is by way of retrial... the Court must reconsider the evidence, evaluate it itself and draw its own conclusions...”

25. Guided by the foregoing, this Court has carefully reviewed the pleadings, evidence, judgment of the trial court, and the Appellant’s submissions. This court finds that the following issues arise for determination:

- i. Whether the sale agreements dated 15th October 2011 and 12th September 2012 were null and void for want of capacity;*
- ii. Whether the transaction constituted intermeddling under Section 45 of the Law of Succession Act;*
- iii. Whether the Appellant acquired any enforceable legal or equitable interest in the suit property; and*
- iv. Whether the Appellant is entitled to the reliefs sought or any equitable remedies.*

Analysis and Determination

26. It is uncontroverted ground that the suit property forms part of the estate of the late Olkirau Naudo and that, at the time of the

alleged transactions, no grant of representation had been issued and or confirmed.

27. The legal position governing dealings with estate property is explicit. Section 45(1) of the Law of Succession Act (Cap 160 Laws of Kenya) provides:

“No person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.”

Further, Section 82(b)(ii) of the Law of Succession Act stipulates that:

“No immovable property shall be sold before confirmation of the grant.”

28. These provisions are couched in mandatory terms and are intended to safeguard the estate of a deceased person from unlawful dissipation. In *re Estate of Stone Kathuli Muinde (Deceased) [2016] eKLR* (High Court at Machakos), the Court emphasized that:

“Any sale of immovable property before confirmation of grant is in contravention of the law and cannot be upheld.”

29. Similarly, in *Mbaluto v Kasalu [2022] KEHC 12778 (KLR)* (High Court at Machakos), the Court underscored that a purchaser dealing

with a beneficiary prior to confirmation of grant does so at his own peril, as no proprietary interest can pass.

30. In re Estate of M’Ajogi M’ikiugu (Deceased) [2017] eKLR, the court, (F. Gikonyo J) stated as follows:

“Courts have said time and again- and I will not be tired of stating it again- that, under section 82(b) (ii) of the law of Succession Act, sale of immovable property of the estate before confirmation of grant is prohibited. Again, under section 55 of the Law of Succession Act, the law has placed restriction on distribution of any capital assets of the estate before confirmation of grant. Therefore, no person shall have any power or legal authority or capacity to sell immovable property of the deceased before confirmation of grant. As such, any such attempted sale of immovable property of the estate before confirmation of grant shall be null and void for all purposes and intents. I need not also state that beneficial interest of a person beneficially entitled to a share in the estate must be identified and be capable of registration in his name before it could be

sold or pledged as security or exchanged with another type of property.”

31. In the present case, the Respondent was admittedly a mere beneficiary with no confirmed grant. His share, if any, had not been identified and was not identifiable. He therefore lacked legal capacity to sell or transfer any portion of the estate property. Any purported sale was in direct contravention of the Law of Succession Act.

32. The Appellant, for his part, was aware or ought reasonably to have been aware that the land belonged to a deceased person's estate. This was not a latent defect; it was apparent from the circumstances, including the fact that the land was ancestral and had not been formally transmitted.

33. This Court finds that the Appellant failed to undertake the requisite due diligence expected of a prudent purchaser of land. The Supreme Court of Kenya in *Dina Management Limited v County Government of Mombasa & 5 Others [2023] KESC 30 (KLR)* underscored the duty of a purchaser to conduct due diligence and verify both the legality of the title and the capacity of the vendor before entering into any land transaction.

34. The Appellant, as a former chief and a person well-versed in local administrative structures, cannot plausibly claim ignorance of these requirements. He ought to have ensured that: a) succession proceedings had been undertaken and a confirmed grant issued; b) consent of the relevant family members and local governance structures had been formally obtained; c) the transaction complied with both statutory and customary regulatory frameworks. His failure to do so renders the transaction legally precarious and disentitles him from equitable protection.

35. Given the clear statutory prohibition under Section 45 of the Law of Succession Act, the Appellant's entry into and continued occupation of the suit property pursuant to an unlawful transaction amounts to intermeddling.

36. The Court in *In re Estate of Stone Kathuli Muinde (Deceased)*

[2016] eKLR reiterated that:

“Intermeddling includes any unauthorized dealing with estate property, whether by sale, lease, or occupation.”

37. The Appellant cannot sanitize an otherwise unlawful transaction by invoking equitable doctrines. Equity does not aid a party who knowingly participates in an illegality.
38. The Appellant has urged this Court to invoke the doctrines of constructive trust, proprietary estoppel, and part performance. While these doctrines are recognized in Kenyan law, as affirmed in Willy Kimutai Kitilit v Michael Kibet [2018] eKLR (Court of Appeal), their application is not automatic and is subject to the overarching principle that equity follows the law. Where a transaction is expressly prohibited by statute, equity cannot be invoked to defeat clear legislative intent.
39. In the present case, the Appellant knowingly entered into a transaction involving property of a deceased person's estate without a confirmed grant. He cannot therefore rely on equitable doctrines to perfect an interest that the law does not recognize.
40. Having found that the transaction was unlawful and amounted to intermeddling, the Appellant is not entitled to the equitable remedies of specific performance or declaration of ownership.

41. However, the question of restitution arises. While the Appellant may have paid consideration, such payment was made pursuant to an illegal transaction. The law is cautious in granting relief in such circumstances.

42. The appropriate remedy, if any, lies not in enforcement of the transaction but in a separate claim for recovery of monies paid, subject to the applicable legal principles governing illegality.

43. The Court therefore finds as follows:

- a. The sale agreements were entered into in contravention of Sections 45 and 82 of the Law of Succession Act and are therefore unenforceable in law.
- b. The Appellant failed to conduct due diligence, including compliance with statutory requirements and local governance structures such as the Dina management directives.
- c. The transaction amounted to intermeddling with the estate of a deceased person.
- d. The Appellant did not acquire any enforceable legal or equitable interest in the suit property.
- e. The trial court properly dismissed the Counterclaim.

44. This case serves as a cautionary reminder to purchasers of land that they must exercise due diligence, particularly where property forms part of a deceased person's estate. Courts will not come to the aid of parties who, whether through ignorance or design, engage in transactions that are plainly contrary to law.

45. I find it appropriate to state that even the property rights guaranteed under Article 40 of the Constitution do not extend to any property that has been found to have been unlawfully acquired.

46. Accordingly, the appeal is devoid of merit and is hereby dismissed.

47. Considering the circumstances of this case, the court exercising its discretion under section 27 of the Civil Procedure Act directs that each party bears its own costs of this appeal and the costs of the suit before the trial court.

It is so ordered.

Dated Signed and Delivered at Kajiado Virtually this 16th Day of April 2026.

M.D. MWANGI

JUDGE

In the virtual presence of:

Mr. Muteti h/b for Mr. Mutua for the Appellant

N/A by the Respondent

Court Assistant: Alex

M.D. MWANGI

JUDGE