



# LEGAL ALERT

## DEAD-HAND CONTROL: CAN A WILL RESTRICT PROPERTY TRANSFERS FOREVER?

WRITTEN BY: MARJORIE KIVUVA AND VALENTINE GAYA

It's not uncommon to find wills with statements like: "This property must never be sold" or "It shall remain in our family lineage forever." This is a classic example of **"dead-hand control"** where a testator attempts to dictate what happens to their property long after their death. While such clauses are often intended to protect family wealth and keep property within the bloodline, Kenyan law sets clear limits on how far these restrictions can go.

So, can a testator truly bind future generations to their wishes? Not indefinitely. Let's explore how Kenyan law balances a person's right to structure their legacy against public policy and beneficiaries' rights.

### The Place of Property Restrictions in Kenya

The legal framework on future interests in property is governed by the **Perpetuities and Accumulations Act, Cap 161**. The act whose application is on wills drafted applies to after 30th June 1981 and covers dispositions of immovable property such as land left under a will.

The implementation of the Act is primarily meant to safeguard every person's right to acquire and own property as provided under Article 40 of the Constitution, while reinforcing land use principles under Article 60(1) - that land must be used efficiently, productively, and sustainably. In respect to succession law, the act reinforces **Paragraph 44 of the First Schedule to the Law of Succession Act** which invalidates any clause in a will that is "contrary to law, morality or public policy" or violates rules on perpetuities and remoteness.

The **Perpetuities and Accumulations Act** allows a testator to guide property use for a while, but they cannot lock it up forever. These restrictions mirror the common law principle as was laid out in **Duke of Norfolk's Case (1682)**, where the court refused to uphold a future interest that extended indefinitely beyond the lives of people alive at the time. In his reasoning, Lord Nottingham held that allowing such a restriction would be contrary to the public policy principle that property should remain freely alienable and should not be indefinitely restricted by the dead hand of the testator.

The principle was later refined in **Cadell v Palmer (1833)** which birthed the famous rule: "a life in being plus 21 years. Here the House of Lords held that no interest in property is valid unless it vests within 21 years after the death of a relevant life in being.



These rules were later applied in **Re Villar (1928)**. In the case, a will tried to delay vesting until 20 years after Queen Victoria's last descendant alive at the testator's death passed away. Though reluctantly upheld, the case underscored courts' unease with complex, far-reaching restrictions.

These precedents illustrate a consistent judicial philosophy that property should remain part of the economic stream, not frozen in time by one individual's wishes.

### Kenyan Law in Action

The **Perpetuities and Accumulations** Act codifies these concepts and provides the following limitations in respect to restrictions:

- **Section 2(3):** Future interests vest only if:
  - (1) beneficiaries are ascertained and alive,
  - (2) the property or interest is certain, and
  - (3) all conditions precedent are fulfilled.
- **Section 3:** Voids any clause that indefinitely prevents beneficiaries from selling or charging their property.
- **Section 5:** Sets the perpetuity period at a maximum of 80 years. If unspecified, it defaults to the beneficiaries' lifetime plus 18 years, or simply 18 years if no lives are tied to it.
- **Section 6:** Declares restrictions beyond these time limits void for remoteness.

It is therefore clear from the above provisions of the Perpetuities Act that the law plays a supervisory role in ensuring public interests and the principles of sustainability are enforced by limiting a testator's freedom insofar as restrictions as involved. This does not however, negate enforcements of restrictions so long as they are in compliance with the act and constitutional provisions.

Should you have any questions on this legal alert, please do not hesitate to contact us,



**Marjorie Kivuva**

Private Wealth Partner  
E: [partners@tarraagility.com](mailto:partners@tarraagility.com)



**Valentine Gaya**

Private Wealth Associate  
E: [partners@tarraagility.com](mailto:partners@tarraagility.com)

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### Headquarters

- P** Mitumi Business Park, 6th Floor  
Office No, 605 Muthithi Road  
Westlands, Nairobi, Kenya.
- W** [www.tarraagility.com](http://www.tarraagility.com)
- E** [partners@tarraagility.com](mailto:partners@tarraagility.com)

### Dubai

- P** Office 20, Level 22, Tower 2  
Boulevard Plaza, Downtown Dubai.  
United Arab Emirates
- W** [www.tarraagility.com](http://www.tarraagility.com)
- E** [partners@tarraagility.com](mailto:partners@tarraagility.com)

### Tanzania

- P** 1st Floor, Delta House -  
Kinondoni Biafra  
Dar es salaam, Tanzania
- W** [www.tarraagility.com](http://www.tarraagility.com)
- E** [partners@tarraagility.com](mailto:partners@tarraagility.com)