



REPUBLIC OF KENYA



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**Mghendi v Pepo & another (Environment & Land Case E190 of 2014)
[2023] KEELC 20282 (KLR) (28 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 20282 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE E190 OF 2014
EK MAKORI, J
SEPTEMBER 28, 2023**

BETWEEN

PATRICK MBOKOMO MGHENDI PLAINTIFF

AND

DAMA LEWA PEPO 1ST DEFENDANT

KALAMA LEWA PEPO 2ND DEFENDANT

JUDGMENT

1. By a plaint dated 16th October 2016, the plaintiff has sued the defendants in this matter seeking the following reliefs:
 - a. An order of specific performance of the sale Agreement dated 7th August 1989 directing the defendants to transfer a six-acre portion of the suit property to the plaintiff failure of which the Deputy Registrar of this Court do sign the transfer forms in favor of the plaintiff.
 - b. An order for extension of the validity of the consent to subdivide and consent to transfer obtained herein.
 - c. In the alternative and without prejudice to prayers (a) & (b) above, an order for a refund of the purchase price of the six - acres portion of the suit property known as Kilifi/Mtwapa/803 at the current market price, or a refund of the purchase price together with accrued interest thereon until payment in full.
 - d. An Order of injunction do issue to restrain the defendants by themselves, their servants, workmen, agents, heirs, personal representatives, or otherwise howsoever from selling, leasing, charging, pledging, offering the title thereof as a lien or any form of security, erecting any permanent structures thereon, and giving possession of the property or any part thereof to



any other person or in any way whatsoever and howsoever interfering with the suit property known as Kilifi/Mtwapa/803 pending the hearing and determination of this suit.

- e. Costs of the suit & mesne profits.
 - f. Any other relief the Court deems fit to grant.
2. The suit is opposed. There is a joint Statement of Defence dated 9th of February 2015. This matter went to full trial with each side calling one witness in support of their respective cases. Parties were directed to file written submissions, which they complied with.
 3. The background of this matter is that the plaintiff herein filed this suit as the only surviving Administrator and/or Legal Representative of the estate of the late Anthony Chari Mzae his son who passed on the 25th of February, 2010.
 4. Before his passing Anthony Chari Mzae had agreed on the sale of land with the Late Lewa Pepo for a parcel of land measuring Six Acres (6) at an agreed purchase price of Kshs 144,000/=. However, at the time of the contract, the suit property originally described as Plot No 507 did not have a title deed. The Late Lewa Pepo passed on or about 22nd August 2003 before he could do the actual transfer.
 5. The defendants' family then took occupation of the suit property allegedly destroying the plantation as well as structures set up by the deceased Anthony Chari Mzae. The defendants later processed the title to the suit property excluding the purchase interest of the estate of the deceased Anthony Chari Mzae.
 6. On 10th July 2015 this Court – Angote J. made a ruling and issued an injunction restraining the defendants from selling, leasing, charging, pledging, offering the title thereof as a lien or any form of security, erecting any permanent structures thereon or in any way whatsoever and howsoever interfering with the suit property known as Kilifi /Mtwapa/803. The defendants however have processed and obtained a new title dated 18th March 2014 resultant of which the suit property was renamed from Plot no 507 to Plot no 803.
 7. The plaintiff has made several demands for recovery of the suit property including but not limited to meetings between the local authorities but the defendants have instead moved to disregard the ADR mechanisms and proceeded to obtain a title deed dated 18th March 2014 negating the plaintiffs' claim.
 8. The case came up for hearing on the 24th of January 2023 when Tobias Patrick Mghendi, PW1 testified. It is his testimony that he is the son of the plaintiff and that he was donated a Specific Power of Attorney dated 21st July 2020 to act on behalf of the plaintiff in respect to the claim filed on 16th October 2014. He adopted his supplementary witness statement dated 17th August 2022 as evidenced in the examination in chief. He further produced the Plaintiffs' list of documents dated 16th October 2014.
 9. In his evidence he stated that he is well aware that his late brother Anthony Chari Mzae purchased a parcel of land from the late Lewa Pepo Masuku for a consideration of Ksh 144,000/= which was to be paid in instalments. He produced the sale agreement concerning the sale dated 7th August 1989 and marked it as Plaintiff. Exhibit 3.
 10. PW1 in his evidence further stated that Plaintiff. Exhibit 3 was duly signed by all parties and it was specific that his brother paid full consideration save for Kshs 10, 000 which was later paid on the 15th of June 1992 through the District Land Adjudication Officer. A cash acknowledgment receipt dated the 6th of March 1992 and a letter dated 2nd June 1992 were produced as Plaintiff. Exhibit 4 and 11 respectively to prove that the consideration was fully paid.



11. He further testified that he had visited the suit property on several occasions with his late brother Anthony Chari Mzae and continued to do so after his passing. In his testimony, he reiterated that the suit property had been developed by his late brother and his family continued to stay there until around the year 2010 when the defendants started trespassing on the suit property leading to the forceful eviction of the family of the late Anthony Chari Mzae.
12. Upon cross-examination by Mr Kenga advocate PW1 stated that the defendants had proposed reimbursing Kshs 144,000/= the consideration paid for the suit property which offer was declined. He confirmed that he could locate the suit property and that despite efforts to develop the suit property the defendants had demolished the house and fence built by his late brother Anthony Chari Mzae. It is his testimony that several efforts have been made by local authorities to resolve the matter but to no avail due to frustrations from the defendants.
13. Kalama Lewa Pepo the second defendant testified on the 24th of January, 2023. He also adopted his statement dated 23rd March 2022 as his evidence in chief. His evidence is that he is the 2nd defendant in this case, whereas the 1st defendant gave him authority to plead on her behalf. According to him, the sale agreement between the late Anthony Chari Mzae and the late Lewa Pepo was never completed since the late Anthony Chari Mzae never completed the consideration for the suit property. He further alluded that the family of the late Anthony Chari Mzae never entered the suit property.
14. On cross-examination, he confirmed that a structure other than their family home was built on the suit property as per the photos produced as Plaintiff. Exhibit 19 but he did not know whom the house belonged to. He confirmed that as per the photos several people among them the plaintiff visited the suit property several times. He has been called to the police to record a statement on allegations of threatening the plaintiffs' family.
15. The plaintiff in submissions stated that the first issue the Court must answer is whether the sale agreement between the Late Anthony Chari and the late Pepo Lewa for the six-acre parcel of land is enforceable. From the evidence on record and the admission by the 2nd defendant. The plaintiff submitted that the agreement is enforceable in accordance with Section 3 (3) of the [Law of Contract Act](#). It has to be in writing signed by both parties and attested.
16. The plaintiff averred that the parties herein entered into a sale of land agreement for the property known as Kilifi/Mtwapa/803 and that the purchaser performed part of his bargain by paying the entire consideration amount but the defendants failed to transfer the suit property and instead proceeded to acquire a title deed for the suit property mischievously in 2014 when the cause of action arose. The plaintiff asserted that there was a valid contract and that the defendants breached the sale agreement dated the 7th of August 1989.
17. The plaintiff stated that the remedy of specific performance is an equitable remedy which is discretionary and Courts must use their discretion judiciously. There would be no hardship caused to the defendants if an order for specific performance were to be granted as this was the intention of the agreement to sell and transfer 6 acres of land to the plaintiff which the late Anthony Chari Mzae paid in full. Failure to transfer the suit property to the rightful and transferring the suit to themselves was aimed at subverting the rule of law. The Court will not allow such injustice to be occasioned by parties who have put their hard-earned money into a project only to be told that the land does not belong to them.



18. The plaintiff cited the case in *Reliable Electrical Engineers Ltd v Mantrac Kenya Limited* [2006] eKLR, where Justice Maraga (as he then was) stated that:

“Specific performance like any other equitable remedy is discretionary and the Court will only grant it on well-laid principles”

“The Jurisdiction of specific performance is based on the existence of a valid enforceable contract. It will not be ordered if the contract suffers from some defect, such as failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or enforceable. Even when a contract is valid and enforceable, specific performance will however not be ordered where there is an adequate alternative remedy. In this respect, damages are considered to be an adequate alternative remedy where the claimant can readily get the equivalent of what he contracted for from another source. Even when damages an adequate remedy specific performance may still be refused on the ground of undue influence or where it will cause severe hardship to the defendant.”

19. The plaintiff submitted that this Court is alive to the doctrine of unjust enrichment. If the orders sought by the plaintiff herein are not granted, then the defendants would be enriching themselves unjustly by retaining the land and the money paid to them by the late Anthony Chari Mzae.
20. Plaintiff further stated that the doctrine of unjust enrichment and the remedy of restitution to counter unjust benefit proceed upon the realization that to allow the defendants to retain such a benefit would result in them being unjustly enriched at the plaintiff's expense, and this, subject to certain defined limits, will not be tolerated by the law.
21. The gist is that the defendants, upon the circumstances of the case as enumerated above are obliged by the ties of natural justice and equity to make restitution. Lord Goff of Chievely and Professor Gareth Jones state in their monumental treatise, *The Law of Restitution*, 5th Edition (1998) at PP 11-12:

“Most mature systems of law have found it necessary to provide, outside the fields of contract and civil wrongs, for the restoration of benefits on grounds of unjust enrichment.”

22. The plaintiff submitted further that in the case of *Willy Kimutai Kitilit v Michael Kibet* [2018] eKLR, the Court of Appeal held inter alia, that:

“The doctrine of equity is part of our laws although Section 3 of the *Judicature Act* subordinates common law and the doctrine of equity to *the constitution* and written law in that order. Section 3(3) of the *Law of Contract Act* and Section 38(2) of the *Land Act*, as amended, stipulate that the requirement that contracts for the disposition of an interest in land should be in writing does not affect the creation or operation of a resulting, implied or constructive trust. The equity of proprietary estoppel is omitted but as the decision in *Yaxley –vs.- Gotts* [2000] ch. 162 (Yaxley's case) on which the Court in *Macharia Mwangi Maina* decision relied, amongst others, shows that the doctrine of constructive trust and proprietary estoppel overlaps and both are concerned with equity's intervention to provide relief against unconscionable conduct.”

23. Flowing from the foregoing the plaintiff submitted that granting a permanent injunction would protect the interest of the plaintiff. The cases of *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR and *Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others* [2003] KLR 125 are cited as leading authorities to consider.



24. On the occupation of land to the detriment of the plaintiff, it was stated that Section 2 of the [Civil Procedure Act](#) Cap 21 of the Laws of Kenya defines mesne profits to mean those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but does not include profits due to improvements made by the person in wrongful possession.
25. The plaintiff averred that the defendants have been in occupation of the suit property for close to 10 years now. The plaintiff prays for mesne profits because of such actions. The Court of Appeal in the case of Attorney General v Halal Meat Products Limited [2016] eKLR considered when mesne profits could be awarded. Where a person is wrongfully deprived of his property, he/she is entitled to damages known as mesne profits for loss suffered because of the wrongful period of occupation of his/her property by another. (See McGregor on Damages, 18th Ed. Para. 34-42.)
26. On the other hand, the defendants submitted that the plaintiff seeks for specific performance of the contract of sale made on 7th August 1989 between the late Lewa Pepo and the late Antony Chari Mzae in respect of the sale of 6 acres on the suit premises, being Plot No. Kilifi/Mtwapa/803, formerly Plot No. 507. The relief sought for the specific performance of the said contract is subject to the application of the provisions of Section 4 (1) (a) of the [Limitation of Actions Act](#) (Cap 22), Laws of Kenya. The said provisions do not allow an action after the expiry of 6 years upon execution of a contract of sale. It was upon the parties herein and more so the plaintiff to conclude the transaction within 6 years after execution of the sale agreement of 7th August 1989 but that never took place up to date. The previously mentioned provision does not allow any excuses for acts of commission and/or omission. On that ground alone, the plaintiff's suit must fail
27. Defendant averred that the late Lewa Pepo passed away on 22nd August 2003, which was 14 years after the execution of the sale agreement of 7th August 1989, while the late Anthony Chari Mzae passed away on 25th February 2010, around 21 years after the execution of the said sale agreement. What is not clear here is, why the parties failed to take positive steps to ensure that they were not caught with limitations and more so, the late Anthony Chari Mzae who stood disadvantaged by such failures or delays. Perhaps, the plaintiff himself could have clarified the reasons for the inordinate delay, had he testified in the matter but he never did, rendering the testimony of PW1 hearsay evidence.
28. On the implications of the default clause contained in the sale, the agreement of 7th August 1989 produced as plaintiff exhibit 3, clause 5 which stated as follows:

“Should the transfer be frustrated for any reason, whatsoever any monies paid by the purchaser shall be refunded to him”
29. The defendant submitted that PW1, Tobias Patrick Mwamburi when cross-examined, admitted that the only available recourse is for a demand for a refund of the monies paid. That was his evidence but shockingly, the plaintiff has sought a refund of monies, equivalent to the current market value of the 6 acres he allegedly bought on the suit premises, Plot No. Kilifi/Mtwapa/803, formerly Plot No. 507.
30. On the position of the law on the contract between parties when there is no evidence of fraud, coercion, and undue influence, the defendant submitted that it has been held in various authorities that parties to a contract are bound by the terms and conditions of the said contract and that a Court of law cannot re-write a contract between parties unless it is proved that there was coercion, fraud or undue influence as pleaded in the suit.
31. The above was the position in the case of National Bank of Kenya Limited v Pipeplastic Samkolit (K) Limited & another [2001] eKLR, where the Court of Appeal held that a Court of law cannot re-write



a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud, or undue influence are pleaded and proved.

32. In the same authority, the learned judges agreed with the findings of Shah J. (Retired) in the case of *Fina Bank Limited v Spares & Industries Limited* [2000] eKLR where it was held in a similar case that equity does not allow a party to escape from a bad bargain unless under special cases where coercion, fraud or undue influence is pleaded.
33. The defendants submitted that when the plaintiff seeks for specific performance of the contract, yet there is a clause on termination and a refund of the monies paid, it amounts to asking the Court to re-write the contract, a request which should be rejected by the Court on the strength of the aforementioned case law.
34. The plaintiff has also sought alternative relief for a refund of the purchase price of 6 acres on the suit premises based on the current market value. The sale agreement of 7th August 1989 and in particular clause 5, thereof as reproduced above, did not make such a provision. The question will be whether the plaintiff is justified in making such a demand, in the absence of such a clause in the sale agreement. The defendant contended that the answer to the above question is found on page 4 of the judgment in the case of *National Bank of Kenya Limited (supra)*, where the learned judges faulted the findings made by the superior Court which substituted an agreed rate of interest with what the learned judge of the superior Court thought to be the proper rate. This is what the learned judges said:

“The learned judge erred not only in substituting what he thought ought to have been the proper rate of interest in place of what was agreed between the parties but.....”
35. The defendants averred that prayer for a refund of monies equivalent to the current market value of the 6 acres of the suit premises, amounts to substituting the agreed terms and conditions on termination of the sale agreement and refund of the actual monies paid in 1989 as the purchase price. This again should be rejected at all as held in the authority cited above.
36. Defendants submitted that analogous findings restraining the Courts from the tendency of re-writing a contract were made in the case of *Paragon Electronics Limited v Fatma Muses* [2022]eKLR at Paragraph 82, where the learned judge while adopting the findings made in the case of *National Bank of Kenya Limited (Supra)*, went ahead to adopt the findings made in the case of the Speaker, Kisii County Assembly & 2 others v James Nyaoga Omariba [2015] eKLR at paragraph 84, which made a comparable finding.
37. The defendant opined that clause 5 of the sale agreement binds the parties and cannot be rewritten. When the plaintiff seeks a refund of monies equivalent to the current market price of the 6 acres allegedly bought on the suit premises and not a refund of the actual monies paid in the transaction and proceeds to tender oral evidence in place of the actual contract, he violates Sections 97 and 98 of the *Evidence Act* (Cap 80), Laws of Kenya and as held in the aforementioned authority, such an attempt should be rejected.
38. The question that emerges from the foregoing is therefore, whether the Court can issue any remedy in line with clause 5 of the sale agreement dated 7th August 1989, which provides for a refund of the actual monies paid in the transaction. Alive to the fact and the law on equity where it is provided that there is no wrong without a remedy but again parties are bound by their pleadings and since the plaintiff went for the wrong remedy on the issue of refund, the Court ought not to grant such a relief a prayer.
39. On the prayer touching on the extension of the Land Board Consent issued on 25th May 1989, the defendants submitted, that a grant of such remedy would amount to re-writing the contract of sale



herein as there is no clause in the agreement, providing for such and in fact, the absence of such a consent is a hindrance or an omission, frustrating the transaction for which a recourse has been provided for in the sale agreement.

40. The defendant submitted that contrary to the allegations that the plaintiff, through the late Antony Chari Mzae, took possession of the suit premises upon purchase of the same, the defendants have denied the said allegations. The denial seems to be fortified by the very sale agreement dated 7th August 1989 which did not allow the late Antony Chari Mzae to take vacant possession of the suit premises Paragraph 2 of the sale agreement of 7th August 1989 is clear as to when possession and ownership of the alleged 6 Acres was to be taken by the Late Anthony Chari Mzae. It was only upon the transfer of the portion of land and not on the execution of the agreement or payment of the deposit. The said Paragraph reads as follows:

“...The Vendor has agreed to transfer and the Purchaser to take possession and ownership of 6 acres of the said land”

41. The defendants contended that as per the said agreement, possession, and ownership could only be taken by the late Anthony Chari Mzae upon transfer of the said 6 Acres. The intentions of the parties to the agreement on the issue of possession and ownership are further made clearer by clause 5 of the sale agreement, which only talks of a refund of the actual monies paid in the event, the transaction is frustrated for whatever reason. There is no mention in the sale agreement on what happens to the developments carried out by the late Anthony Chari Mzae. Whether a valuation of any buildings or other developments was to be done for purposes of compensation or refund. Similarly, the Plaintiff has not produced any Valuation Report for purposes of compensation for his alleged demolished houses on the suit land.
42. The defendants submitted that based on the above, it is undoubtedly clear that the plaintiff, through the late Anthony Chari Mzae, never took vacant possession of the 6 Acres purportedly bought from the late Lewa Pepo and therefore an order for specific performance of the contract of sale should not issue as there was no transfer or vacant possession in favour of the late Antony Chari Mzae.
43. The defendants averred that the plaintiff in the matter is Patrick Mbokomo Mgendi who is the father of the late Antony Chari Mzae as stated vide Paragraph 2 of the plaintiff's statement dated and filed on 16th October 2014. The plaintiff herein did not testify in the matter but donated a Power of Attorney to Tobias Patrick Mwamburi, PW1. The said witness could not offer any reasons why they allowed the transaction to be caught up with limitation, yet the claim herein is for specific performance of the contract of sale executed on 7th August 1989. Similarly, the witness was unable to confirm whether the full purchase price for the portion of land allegedly bought was made. He was also sketchy on the location of the suit premises and could not provide full details on the allegations of vacant possession. Furthermore, the allegations of the existence of the Plaintiff's houses on the suit premises and the alleged eviction of the family of the late Antony Chari Mzae from the suit premises could have been well explained by the plaintiff himself, had he testified.
44. As held in the case of *Brigitie Korn v Kahindi Msanzu Ndurya* [2021] eKLR - a holder of a power of Attorney is not a competent witness if his evidence is based on hearsay.
45. The witness vide paragraph 4 of his statement dated and filed on 17th August 2022 claims to have had full knowledge of the family of the late Antony Chari Mzae having taken possession of the suit premises upon signing the sale agreement. He does not reveal the source of his knowledge nor does he claim to have been present when the alleged possession was taken by the deceased family.



46. There is no evidence tendered by the witness as to whether a report was made to the Police for the alleged illegal eviction of the family of the late Antony Chari Mzae, Neither the plaintiff's statement nor that of the witness mentions when the purported illegal eviction took place as paragraphs 8 and 10 of their respective statements are silent on the date and time of the alleged acts of eviction. This omission would have been sorted out had the plaintiff testified in the matter.
47. It is therefore submitted by the defendants that the testimony of Tobias Patrick Mwamburi (PW1) was full of hearsay evidence and thus has no probative value in the matter, save in strengthening the defence case.
48. From the evidence tendered and the materials presented before me the issues which commend for decision are whether there was a valid contract of sale of land between the parties. Whether this Court can order for specific performance and decree that the plaintiff is entitled to six acres to be carved from land parcel Plot No. Kilifi/Mtwapa/803, formerly Plot No. 507. Whether the Court should order for injunction and mesne profits. In the alternative, a refund can be ordered at the current market rate of the six acres in question or at what rate. Whether this Court can order for the extension of time within which to seek consent from the relevant Land Control Board. Whether the entire claim is statutorily barred. In addition, who should bear the costs of this suit?
49. The parties in their testimonies, materials placed before, and the submissions, have elaborately placed the background of this suit. I need not restate it here.
50. As submitted by the plaintiff to make a finding that there was a valid sale of land, recourse has to be made to Section 3 (3) of the [Law of Contract Act](#).
- (3) No suit shall be brought upon a contract for the disposition of an interest in land unless—
- (a) the contract upon which the suit is founded—
- (i) is in writing;
- (ii) is signed by all the parties thereto; and
- (b) the signature of each party signing has been attested to by a witness who is present when the contract was signed by such party
51. That a valid sale of land agreement has to be in writing, signed by both parties and their signatures attested. In this matter, we have a sale of land agreement dated 7th of August 1989. It is in writing. Both parties signed it. It is attested by Daniel Musinga Advocate. It is a valid sale of land agreement.
52. From the record the consideration for the six acres purchased was Kshs. 144,000 which was payable in installments. What has been disputed is whether the purchaser completed in payment in full. Kshs. 10,000 is contested. From the letter dated 2nd June 1992, a demand was made to the deceased Anthony Chari Mzae by the Land Adjudication and Settlement Officer Kilifi to have the balance paid to avoid rescinding the agreement. An endorsement is made on that letter showing that the said Anthony Chari Mzae appeared before the settlement Officer on 15th June 1992. It is alleged in evidence that that is when the Kshs 10,000 was paid. The side notes handwritten I presume by the Adjudication and Settlement Officer indicate that that Lewa Pepo did not attend that session. I can see in the agreement of sale handwritten side notes on payment of installments. Kshs 10,000 is indicated as having been paid on 16th June 1992. Whether this money was paid then as alleged is not clear because the makers of those documents were never called and the other witnesses who testified cannot with certainty state so. Besides, how the installments were paid is unclear – the vendor and purchaser have long died.



53. From the record, what followed next is an application for consent from the Bahari Land Control Board and consent from the said Board dated 25th May 1989 land allowing Parcel Mtwapa Settlement Scheme Plot No 507 to be subdivided into two parcels of 6 acres each. There is also on record survey done on Plot No 507 for subdivision of the plot into two equal shares of 6 acres each as per the mutation forms on record.
54. With the death of the vendor Lewa Pepo on 22nd August 2003. It will appear no transfer was made of the six acres to Anthony Chari Mzae, who also died on 25th February 2010. What followed next was that the estate of the late Lewa Pepo was distributed, meanwhile, the Settlement Fund Trust wrote a letter informing the whole world that Lewa Pepo had completed the loan he had over Plot No 507. The transfer was effected on the 18th of March 2014 and title was issued to Dama Lewa and Kalama Lewa Pepo excluding the dependents of the deceased Antony Chari Mzae.
55. Evidence was led that the deceased Anthony Chari Mzae took possession of the six acres of land upon signing the agreement. The defendants sued the son of the late Anthony Chari Mzae in Malindi HCCC No 159 of 2012 and forcible eviction followed thereafter. The suit is said to be pending (I cannot tell what reliefs were being sought). From the photographs produced, it is shown and demonstrated that his family was well settled and had developed the land and put building structures on it. The structures are clear from the photographs and the developments that had taken place. The material I have also indicates that the wife of Anthony Chari Mzae and her family have been following up on this matter. She also later died leaving the battle to her children who were later evicted. To me, the evidence I have supports the position that the family of Anthony Chari Mzae took possession of the land. His demise in 2010 heralded a chaotic phase for his family who were later to be evicted from the land hence this suit.
56. Whether to grant specific performance or a refund. On all fronts, the defendants say this is purely a claim of contract, which is statutorily barred. It was extinguished 6 years after the sale agreement of 7th August 1989. Besides, even if a refund were to be ordered - it would be baseless because there is no Valuation Report to show the current market price of the 6 acres.
57. From the material placed before me, the deceased Lewa Pepo and Anthony Chari Mzae entered a valid sale of land agreement. The land in question was under the Settlement Fund Trustee (SFT). Before their demise, all steps had been undertaken to effect the transfer of the six acres to the purchaser. Consent for purchase and transfer had been obtained from the Bahari LCB was applied for. A survey was applied for and relevant mutation was done. What remained was a transfer that did not happen during the lifetime of the duo. The transfer happened in 2014 to the dependents of Lewa Pepo who had long evicted the dependents of Anthony Chari Mzae. There is a contention of the balance of Kshs 10,000. It seems to me it could have been paid but no document to clearly show this payment was produced other than the side notes on the sale agreement which cannot be verified. The witness who testified could not confirm this payment.
58. Then, this is a matter not merely aimed at enforcing a sale of land agreement, but at recovering land and the cause of action started running from 18th of March 2014 when the title passed hands to the dependents of Lewa Pepo excluding the dependents of Anthony Chari Mzae
59. For a claim of specific performance to succeed as quoted by the plaintiffs in the case of Reliable Electrical Engineers Ltd v Mantrac Kenya Limited [2006] eKLR, where Maraga J. (as he then was) stated that:

“Specific performance like any other equitable remedy is discretionary and the Court will only grant it on well-laid principles”



“The Jurisdiction of specific performance is based on the existence of a valid enforceable contract. It will not be ordered if the contract suffers from some defect, such as failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or enforceable. Even when a contract is valid and enforceable, specific performance will however not be ordered where there is an adequate alternative remedy. In this respect, damages are considered to be an adequate alternative remedy where the claimant can readily get the equivalent of what he contracted for from another source. Even when damages an adequate remedy specific performance may still be refused on the ground of undue influence or where it will cause severe hardship to the defendant.”

60. In this particular case whereas the contract in all four corners is perfect, the 10,000 instalment could not be verified due as I have said – documentation and the makers of the documents having died or could not testify. Had we passed that hurdle – I would have ordered a Specific Performance of that contract. I will not. The heirs of Anthony Chari Mzae cannot go home without a remedy - losing their inheritance in the form of land and the purchase money. Equity comes to their aid. Equity does not allow unjust enrichment as in this case. Therefore, the appropriate order would be for a refund of Kshs. 134,000 of the purchase money so far proved to have been paid. Reckon the same from 6th March 1992 when the last installment of Kshs 10,000 was acknowledged as received for purposes of computation of interest.
61. The plaintiff's claim will succeed partially and this Court grants the plaintiff the following final orders:
- a. The Defendants are hereby ordered to refund the plaintiff a sum of Kshs. 134,000 being proved purchase money to be paid with interest at Court rates to be reckoned from 6th March 1992 till payment in full.
 - b. Given the order for a refund, the other prayers for an injunction and mesne profits are not tenable and are declined.
 - c. Costs of this suit to be borne by the defendants.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 28TH DAY OF SEPTEMBER, 2023

E. K. MAKORI

JUDGE

