



**Kahawa Sukari Limited v Munene (Environment and Land Appeal  
34 of 2019) [2022] KEELC 13435 (KLR) (11 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 13435 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT AND LAND APPEAL 34 OF 2019**

**BM EBOSO, J**

**OCTOBER 11, 2022**

**BETWEEN**

**KAHAWA SUKARI LIMITED ..... APPELLANT**

**AND**

**JOYCE NJERI MUNENE ..... RESPONDENT**

*(Being an Appeal arising from the Judgment of Hon G. Omodho (Senior Resident Magistrate) delivered at Thika Chief Magistrate Court on 27/3/2019 in Thika Chief Magistrate Court Environment and Land Case No 17 of 2018)*

**JUDGMENT**

**Background**

1. This appeal arose from the Judgment rendered on March 27, 2019 by Hon G Omodho, Senior Resident Magistrate, in Thika Chief Magistrate Court Environment and Land Case No 17 of 2018. The respondent, Joyce Njeri Munene, was the plaintiff in the said case. The appellant, Kahawa Sukari Limited, was the defendant in the case. I will outline a brief background to the appeal before I dispose the issues that fall for determination in the appeal.
2. Through a plaint dated March 9, 2018, the respondent sought against the appellant: (i) an order of specific performance relating to Plot Number 2213 Kahawa Sukari [the suit property] (ii) Mesne profits for 'loss of delayed performance from the month of April 2012;' (iii) costs of the suit; and (iv) interest on the above. The case of the respondent was that, by virtue of Plot Application Form Reference No A 337, the appellant agreed to sell to her and she agreed to purchase the suit property at Kshs 1,500,000. The said form contained the conditions of sale that formed the basis of the agreement between the parties. She accepted the offer and paid a total of Kshs 900,000, leaving a balance of Kshs 600,000. She added that the appellant subsequently issued to her Plot Allotment Certificate No 72516 dated 14th November [the year was not captured]. She further contended that parties to the said sale



agreed that payment of the purchase price would be made on a staggered basis at the discretion of the respondent. It was the respondent's case that subsequently, the appellant declined to receive balance of the purchase price, prompting her to initiate the suit in the trial court.

3. The appellant filed a statements of defence dated April 11, 2018 in which it admitted issuing the Plot Application Form and the Plot Allotment Certificate to the respondent. It also admitted receipt of Kshs 900,000 from the respondent. It contended that the plot allotment certificate was merely an acknowledgement that the respondent would be granted ownership of the suit property upon payment of the full purchase price. It was the case of the appellant that the respondent failed to pay the balance of the purchase price and after several verbal and written notices, the appellant exercised its right to repossess the suit property. The appellant contested the respondent's plea for mesne profits. It urged the trial court to dismiss the respondent's suit.
4. At trial, the respondent testified as PW1. She reiterated her case as summarized above. She produced four exhibits: (i) Copy of Plot Application Form Ref No A337; (ii) Copy of Allotment Certificate; (iii) Various copies of receipts and allotment advices from the appellant; and (iv) Copy of a Bankers Cheque dated May 29, 2011 for Kshs 100,000.
5. On its part, the appellant led evidence by its director, Alice Wacheke Muiruri. Her evidence was that the appellant was the registered proprietor of Land Reference Number 10901/20 which it had subdivided into several plots. The respondent offered to purchase and the appellant agreed to sell to her Plot No 2213 at a purchase price of Kshs 1,500,000. The respondent paid Kshs 900,000 leaving a balance of Kshs 600,000. She added that it was an implied term in the application form that the balance would be cleared within a reasonable time, and in any event, within 90 days as provided for in the 'Law Society Conditions of Sale.' She further contended that the appellant issued the respondent with completion notices but the respondent neglected to clear the balance of the purchase price. Consequently, the appellant repossessed the plot and sold it to a third party.
6. Upon conclusion of trial, and upon filing and exchange of submissions, the trial magistrate rendered the impugned Judgment in which it made findings in favour of the respondent. The trial court granted the respondent's plea for an order of specific performance together with costs of the suit. The trial court, however, declined to award the respondent the plea for mesne profits.

## Appeal

7. Aggrieved by the Judgment of the trial court, the appellant brought this appeal, advancing the following verbatim grounds of appeal.
  - 1) The trial court erred in law and in fact by failing to find that there was no contract in writing, signed by each party and the signature of each party attested as provided for in section 3(3) of the Law of Contract Act Cap 23 Laws of Kenya.
  - 2) The trial court erred in law and in fact by finding that there was an implied trust from the actions of the parties.
  - 3) The trial court erred in law and in fact by finding that the defendant was guilty of breach of contract, if any, and by not giving the plaintiff notice before terminating the contract, if any.
  - 4) The trial court erred in law and in fact having found that the payment had to be within reasonable time and not finding that the plaintiff was guilty of breach



of her duties and obligations, by failing to pay the balance of the purchase price within reasonable time.

- 5) The trial court erred in law and in fact by failing to find that the plaintiff was guilty of laches and therefore not entitled to an order of specific performance which is an equitable remedy.
  - 6) The trial court erred in law and in fact by finding that damages would not be a sufficient remedy to the plaintiff and by making an order of specific performance.
  - 7) The trial court erred in law and in fact by making an order of specific performance even though exceptional circumstances did not exist in the case.
  - 8) That the trial court erred by ultimately finding in favor of the plaintiff.
8. The appellant urged this court to make the following orders:
- (i) The appeal be allowed.
  - (ii) The Judgment and/or Order and /or decree and all sequential Orders of the Chief Magistrate Court in Thika MCL & E Number 17 of 2018 dated 27th March 2019 be set aside.
  - (iii) Cost of this appeal be borne by the respondent.

#### **Appellant's Submissions**

9. The appeal was canvassed through written submissions dated February 24, 2022, filed by M/s Ngeresa & Okallo Associates. Counsel for the appellant condensed the eight (8) grounds that were set out in the Memorandum of Appeal into the following four (4) grounds that were subsequently canvassed:
- (i) The learned magistrate erred in law and in fact in finding that there was a valid and enforceable contract of disposition of interest in land which the appellant breached.
  - (ii) The learned magistrate erred in law and in fact by finding that there was an implied trust on the part of the parties in the suit.
  - (iii) The learned magistrate erred in law and in fact by not finding that the respondent's failure to pay the balance of the purchase price within reasonable time and/or at all amounted to repudiatory breach of any contractual engagement she had with the appellant and that the doctrine of laches precluded her from any equitable remedy such as specific performance; and
  - (iv) The learned magistrate erred in law and in fact by finding that the award of damages in the circumstance would not be sufficient and proceeded to issue an order of specific performance when the conditions for granting the latter relief had clearly not been met.'
10. On the contention that the trial magistrate erred in finding that there was a valid and enforceable contract of disposition of an interest in land which the appellant breached, counsel for the appellant submitted that whereas the trial court correctly found that the plot allocation form did not meet the requirements of Section 3(3) of the *Law of Contract Act*, she contradicted herself and made an error when she held that the same was valid and enforceable. Counsel argued that to the extent that the



plot allocation form was found not to be in consonance with Section 3(3) of the [Law of Contract Act](#), the remedy of specific performance was not available. Counsel contended that, at most, all the trial magistrate could award was compensation in damages or refund of the portion of purchase price that had been paid, to restore parties to their original positions.

11. Counsel faulted the trial magistrate for finding breach on part of the appellant and for exonerating the respondent of any breach, contending that the findings were not based on evidence. Counsel argued that the respondent had for seven (7) years failed to pay the purchase price stipulated in the plot allocation form, despite having the bank details of the appellant.
12. On the contention that the trial court erred in finding that there was an implied trust on the part of the parties to the suit, counsel for the appellant argued that the trial magistrate misconceived the law and the facts relating to the dispute at hand. Counsel faulted the trial court for relying on this court's [Omollo J] decision in [Solomon Amiani v Salome Mutenyo \[2016\]eKLR](#) to infer an implied trust, contending that the facts of the said case were different from the facts in the case at hand. Counsel contended that in the Solomon Amiani Case (Supra), both parties had signed the sale agreement; the purchase price had been paid in full; the land control board consent had been obtained on time; the instruments of transfer had been executed; and the purchaser had been given possession of the suit property. Counsel contended that in the Solomon Amiani case, it was clear that the vendor was pursuing unjust enrichment by seeking to vitiate the sale agreement, hence the need to invoke the equitable principle of implied trust. Counsel observed that in the case at hand, the purported contract had not been executed by both parties; the respondent had not paid the balance of the purchase price; the land control board consent had not been obtained; and the transfer had not been executed.
13. Counsel cited the Court of Appeal decision in [Twalib Hatayan & another v Said Saggah ahmed AlHeidy & 5 others \[2015\]eKLR](#) and submitted that the principle of implied (constructive) trust could not apply in the case at hand.
14. On the contention that the trial magistrate erred in not finding that the respondent's failure to pay the balance of the purchase price within reasonable time and/or at all amounted to repudiatory breach of any contractual engagement she had with the appellant and that the doctrine of laches precluded her from any equitable remedy such as specific performance, counsel submitted that 'the deposit of the purchase price was paid way back in November 2011' and despite the respondent being in possession of the appellant's bank details, she did not bother to settle the balance of the purchase price. Counsel observed that as at the time of filing the suit in the trial court, a period of seven (7) years had lapsed since the deposit was paid. Counsel contended that a period of (7) years could not be said to be reasonable.
15. Counsel for the appellant further submitted that the material transaction incorporated the 'Law Society of Kenya Conditions of Sale' which clearly stipulated the timelines for paying balance of the purchase price. Citing Section 58 of the [Interpretation and General Provisions Act](#), counsel argued that in the absence of a prescribed period for payment of balance of the purchase price, the same ought to have been paid without unreasonable delay.
16. On the contention that the trial magistrate erred in finding that the award of damages in the circumstances would not be sufficient, counsel relied on the decision in the High court decision in [Reliable Electrical Engineers Ltd v Mantral Kenya Limited \(2006\) eKLR](#) and submitted that upon finding that the plot allocation form did not meet the requirements of Section 3(3) of the [Law of Contract Act](#), the trial court had no basis for granting the relief of specific performance. Counsel submitted that all the trial magistrate was required to do was 'possibly order refund of the portion of purchase price that had been paid. Counsel urged this court to allow the appeal.



## Respondent's Submissions

17. The respondent filed written submissions dated April 11, 2022 through M/s Morara Apiemi & Nyangito Advocates. Counsel for the respondent submitted that ground nos 1 and 2 in the Memorandum of Appeal raised the following two verbatim issues that fell for determination: (i) Whether there was a valid contract between the appellant and the respondent in the sale of plot 2213; and (ii) Whether there was an implied trust between the parties.
18. On whether there was a valid contract between the appellant and the respondent in the sale of Plot No 2213, counsel for the respondent submitted that the three essential elements of a valid contract namely offer, acceptance, and consideration, were present in the transaction leading to this appeal. Citing the decision in (i) *Stancam Sacco Society Limited v Alliance One Tobacco Limited [2018] eKLR*, counsel submitted that the appellant and the respondent had a common intention which was 'communicated through the plot application form' and which was relied upon by the appellant to receive the purchase price from the respondent. Counsel urged the court to find, on the above basis, that there was a valid contract created by the parties to this appeal in relation to Plot No 2213.
19. On whether there was an implied trust between the parties to this appeal, counsel submitted that based on the terms contained in the plot application form and on the conduct of the parties, a trust was implied. Counsel submitted that the appellant could not rely on the plot application form in enforcing the clause on payment against the respondent and at the same time contend that there was no contract between the parties.
20. On the contention that the trial magistrate erred in finding that the appellant was guilty of breach of contract by not giving the respondent notice before terminating the contract, counsel submitted that there was a valid contract and that whereas the appellant had claimed that it issued a termination notice, the notice was not produced as evidence during trial.
21. On the contention that, having found that payment of balance of purchase price was to be made within reasonable time, the trial magistrate erred in failing to find that the respondent was guilty of breach of her duties and obligations by failing to pay the balance of the purchase price within reasonable time, counsel submitted that the trial magistrate did not make a finding to the effect that the said payment had to be done within reasonable time. Counsel added that there was no evidence that the transaction was subject to the Law Society of Kenya Conditions of Sale. Counsel contended that the respondent had demonstrated that she was willing to complete the purchase but the appellant had unilaterally rescinded the contract without notice to the respondent.
22. On the contention that the trial magistrate erred in: (i) failing to find that the respondent was guilty of laches hence not entitled to the equitable remedy of specific performance; (ii) finding that damages were not a sufficient remedy; and (iii) making an order of specific performance in the absence of exceptional circumstances, counsel for the respondent submitted that the doctrine of laches was never raised in the trial court hence it could not be raised in this appeal. Counsel added that the respondent demonstrated that she performed her 'requirements' by paying the purchase price and by 'following up to pay the balance', hence she was entitled to the remedy.
23. Lastly, counsel submitted that the trial court did not err in finding in favour of the respondent. Counsel urged this court to dismiss the appeal.



## Analysis and Determination

24. I have perused the original record of the trial court together with the record of appeal. I have considered the parties' respective submissions, the legal frameworks applicable to the issues falling for determination, and the relevant jurisprudence on those issues. The appellant advanced eight (8) grounds of appeal in the memorandum of appeal dated April 25, 2019. In its subsequent written submissions dated January 24, 2022, it condensed the eight (8) grounds of appeal into four (4) grounds and submitted on the four (4) grounds. That being the position in this appeal, I will focus on the four (4) grounds of appeal that the appellant submitted on.
25. Based on the four (4) grounds of appeal that were argued before this court, the following are the four issues that fall for determination in this appeal:
- (i) Whether the trial court erred in finding that there was a valid and enforceable contract of disposition of an interest in land;
  - (ii) Whether the trial court erred in finding that there was an implied or constructive trust between the parties.
  - (iii) Whether the trial court erred in not finding that the respondent's failure to pay the balance of the purchase price within reasonable time and/or at all amounted to repudiatory breach of any contractual engagement she had with the appellant and that the doctrine of laches precluded her from any equitable remedy such as specific performance; and
  - (iv) Whether the trial court erred in finding that the award of damages, in the circumstances of the case, was not sufficient and in issuing an order of specific performance.
26. This is a first appeal. The principle upon which a first appellate court exercises jurisdiction is well settled. The task of the first appellate court was summarized by the Court of Appeal in the case of *Susan Munyi v Keshar Shiani [2013]eKLR* as follows:-
- ' As a first appellate court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyze, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions.'
27. The above principle was similarly outlined in *Abok James Odera t/a AJ Odera & Associates v John Patrick Machira t/a Machira & Co Advocates [2013] eKLR* as follows:
- ' This being a first appeal, we are reminded of our primary role as a first appellate court, namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way.
28. The first issue that falls for determination is whether the trial court erred in finding that there was a valid and enforceable contract of disposition of an interest in land. There is no dispute that the contract which the respondent sought to enforce related to disposition of an interest in land. The respondent contended that the contract was contained in an undated Plot Application Form, serialized as No A337. She further contended that, in furtherance of the contract, the appellant issued to her



an Allotment Certificate dated 14th November [the year was not indicated], reflecting the purchase price [Kshs 1,500,000]; the deposit paid; and the outstanding balance of the purchase price. The first instalment of Kshs 100,000 is reflected as having been paid on May 27, 2010 while the last instalment of Kshs 500,000 is reflected as having been paid on November 14, 2011. Up to that point the respondent had paid Kshs 900,000. The outstanding balance was therefore Kshs 600,000. The respondent contended that the appellant declined to accept the balance of the purchase price. The appellant disputed that allegation. There was, however, no documentary evidence placed before the trial court to suggest that the sum of Kshs 600,000 was tendered to the appellant by the respondent between November 2011 and March 2018 when the suit in the trial court was filed.

29. Was there a compliant land sale contract capable of enforcement through an action? The current framework in Section 3(3) of the Law of Contract Act came into force in June 2003. Consequently, any land sale contract entered into between May 2010 and March 2018 was subject to the mandatory requirements of Section 3(3) of the Law of Contract Act, which provides as follows:

- ' (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 by a witness who is present when the contract was signed by such party:  
Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act (Cap 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.'

30. The legal implications of the framework in Section 3(3) of the Law of Contract Act is that no suit can be brought to enforce a contract for the disposition of an interest in land unless the contract is in writing; the contract has been signed or executed by all the parties to it; and the signature of each contracting party has been attested by a witness who is presented when the contract is signed by the contracting party. It is to be noted that certain specified contracts are exempted from the above framework. However, in this appeal, neither of the two parties to the appeal contends that the material contract was exempted.

31. Both the Plot Allocation Form and the Allotment Certificate did not satisfy the requirements of Section 3(3) of the Law of Contract Act in that they were not signed /executed by both contracting parties. Further, there was no attestation. Indeed, the trial magistrate considered the implications of Section 3(3) of the Law of Contract Act and came to the finding that the Plot Allocation Form did not meet the requirements of Section 3(3) of the Law of Contract Act. She rendered herself thus:

' I note that the copy of Plot Application Form produced in court was only signed by the defendant's officer. The plaintiff on her part did not sign the form. The answer to my question therefore is that the Plot Application Form is not a contract as per the requirements of Section 3(3) of the Law of Contract Act. I do not however make a conclusion that there was no contract between parties capable of being enforced as money exchanged hands.'



32. The trial magistrate proceeded to quote an excerpt from the decision of this Court (Omollo J) in *Solomon Amiani v Salome Metenyo* [2016] eKLR. She thereafter contended that because the Plot Application Form was the basis upon which the appellant received money from the respondent, there was an implied trust from the actions of the parties as the appellant intended to pass title to the respondent.
33. I do not agree with the conclusion made by the trial magistrate. The issue before the trial magistrate was whether there was a valid and an enforceable contract relating to the disposition of an interest in land. Having found that there was none, and in the absence appropriate pleadings and evidence, she had no basis for inferring one.
34. The respondent did not plead implied or constructive trust. Neither did the respondent pray for a declaration that the appellant held the suit property in trust by dint of payment of purchase price in full. In the absence of pleadings and prayers relating to an implied or constructive trust, the trial magistrate was wrong in circumventing a mandatory requirement of the law and purporting to specifically enforce a transaction that she had already adjudged as not being a valid land sale contract.
35. There is ample jurisprudence on the legal validity and enforceability of a land sale contract that does not meet the formal requirements in the *Law of Contract Act*. In *Kukal Properties Development Limited v Tafazzal H Maloo & 3 Others* [1993] eKLR the Court of Appeal pronounced itself on a similar dispute where only one party had signed the agreement for sale of land. Commenting on the legal framework in Section 3 of the *Law of Contract Act*, Muli JA held as follows:
- ' With the greatest respect, the learned trial judge misdirected himself completely. In the first place it matters not what the parties or one of them believed or was made to believe. The real issue was whether the agreement was duly executed by the parties, and if not, was the agreement binding and enforceable against any of the part. It is trite law on this point and is made beyond doubt under Section 3(3) of the *Law of Contract Act* (cap 23) Laws of Kenya)
- I hold that the intended agreement between the appellant and the Porbunderwallas was inoperative and therefore unenforceable for lack of execution by the appellant; the sum total was that there was no valid agreement enforceable in law'
36. Kwach JA pronounced himself on the same legal framework and issue as follows:-
- ' The agreement in question was not signed by the appellant or anyone authorized by the appellant to sign it. The Porbunderwallas could not rely on the provision because they had not taken possession of the maisonette. It is therefore plain beyond argument that there was no concluded agreement both in fact and in law between the appellant and the Porbunderwallas which could be enforced by a decree for specific performance. And as to the judge's holding that the appellant was estopped from denying the validity of the agreement, this is quite clearly erroneous on the authority of *Patterson v Kanji* [1956] 23 EACA 106, where the Court of Appeal for East Africa held that there can be no estoppel against an Act of Parliament. The result is that the order for specific performance in favour of this couple should never have been made at all because it clearly had no legal basis'
37. The above pronouncements by the Court of Appeal were made when the oxygen provisions relating to part-performance and possession were still in force. The subsequent amendments removed them, thereby making the requirements in Section 3(3) of the *Law of Contract Act* even more compelling.



38. The rare circumstances under which our courts have had to invoke the equitable doctrine of implied or constructive trust to uphold a land sale transaction from the express requirements of a statute are well known. Foremost, the purchaser must have paid purchase price in full and thereby acquired an equitable interest in the suit property. [See (i) *Macharia Mwangi Maina & 87 others v Davidson Mwangi Kagiri [2014] eKLR*; and (ii) *Willy Kimutai Kitilit v Michael Kibet [2018] eKLR*. That was not the case in the dispute before the trial court. The respondent paid Kshs 900,000 and went to slumber.
39. I entirely agree with counsel for the appellant that the circumstances in *Solomon Amiani v Salome Mutenyo [2016] eKLR* were different and the finding of Omollo J in that case was informed by the fact that the vendor had received purchase price in full and had given vacant possession to the purchaser. Further, the vendor had, in furtherance of the sale, consented to the development of the suit property by the purchaser and the construction had progressed. Further, the vendor had conveyed the suit property into the name of the purchaser and the property was at that point registered in the name of the purchaser. The vendor's suit seeking a nullification of the sale agreement on the ground that it was not witnessed was found untenable. That is not the scenario in this appeal.
38. I think I have said enough on the first issue. My finding on the first issue is that the trial court erred in finding that there was a valid and enforceable contract of disposition of an interest in land.
39. The second issue is whether the trial court erred in finding that there was an implied or constructive trust between the parties in this appeal. Existence of a trust is a factual question that calls for proof through evidence. Was there evidence of a crystalized trust to justify the inference of an implied or constructive trust. An examination of the record of the trial court does not disclose any evidence that would justify the inference of a trust. First, the respondent had paid only Kshs 900,000 out of the purchase price of Kshs 1,500,000 that was stated in the unsigned Plot Allotment Form and in the Plot allotment Certificate. Second, the respondent had not been given vacant possession of the suit property and had not occupied it. Third, there was evidence that following the respondent's failure to complete paying the sum of Kshs 1,500,000, the suit property had been sold to a third party.
40. Quite clearly, the circumstances which existed in *Macharia Mwangi & 87 others v Davidson Mwangi Kagiri [2014] eKLR* where a constructive /implied trust was inferred did not exist in the suit giving rise to this appeal. Similarly, the circumstances which justified the inference of an implied/constructive trust in *Kimutai Kitilit v Michael Kibet [2018] eKLR* did not exist in the suit giving rise to this appeal. Had the respondent demonstrated that he paid the sum of Kshs 1,500,000 in full and that he was given possession, there would have been a proper basis for finding that upon receipt of the purchase price in full, constructively or impliedly, the appellant became a trustee in relation to the suit property. That was not the position in the suit giving rise to this appeal. Consequently, my finding on the second issue is that the trial court erred in finding that there was an implied trust between the parties in this appeal.
41. The third issue is whether the trial court erred in failing to find that the respondent's failure to pay the balance of the purchase price within reasonable time and/or at all amounted to repudiatory breach of any contractual engagement. Parties to this appeal, wittingly or unwittingly, elected not to translate their common intention into a compliant and enforceable land sale contract. The plot allotment form which was exhibited did not contain a completion framework. Neither did it contain any framework relating to default by either party to the transaction. There was therefore nothing to form the basis of a finding of breach. Further, no evidence of any completion notice was exhibited. In my view, non-compliance with a reasonable completion notice is what would form the basis of a finding of breach. No such notice was exhibited by either of the parties to this appeal. A perusal of the plot allotment form does not disclose any incorporation of any edition of the Law Society Conditions of Sale. The



result is that there was no evidence upon which the trial court would have found the respondent to have been in breach of her contractual engagement with the appellant.

42. The fourth issue is whether the trial court erred in finding that the award of damages in the circumstances of the case would not be sufficient and in issuing an order of specific performance. The principle upon which our courts exercise jurisdiction to grant the equitable remedy of specific performance are well-settled. Maraga J [as he then was] summarized the principle in *Reliable Electrical Engineers Ltd v Mantrac Kenya Limited* [2006]eKLR as follows:

' Specific performance, like any other equitable remedy, is discretionary and the court will only grant it on the well settled 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 unenforceable. Even where 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 where damages are not 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.

It is clear that the agreement suffers from defects which the parties have not remedied and as such specific performance cannot be granted.'

43. In the suit leading to this appeal, there was no enforceable land sale contract capable of attracting the equitable remedy of specific performance. Secondly, the appellant had indicated to the court that the suit property had been sold to a third party. In the circumstances, the equitable remedy of specific performance was clearly not available.
44. In my view, there being common ground that the respondent had paid to the appellant Kshs 900,000 in furtherance of the ill-fated transaction, the trial court should have granted an appropriate alternative relief as prayed for in prayer (e) which reads as follows:

' (e) Other and further relief that the court may deem fit and just to grant.'

45. Bearing in mind that there was no proof of breach of a valid land sale contract, the appropriate alternative relief would be an order for refund of the sum of Kshs 900,000. Further, given that the appellant did not tender to the respondent nor deposit the sum of Kshs 900,000 in court at the time they were sued, they would be liable to pay interest at court rate from the date of filing the suit in the trial court.
46. The result is that this court agrees with the appellant that the trial court erred in issuing an order of specific performance in the circumstances of the dispute before it.
47. On costs of the suit in the trial court, it is clear from the evidence that the two parties to the suit co-authored the dispute through their mutual non – compliance with the mandatory requirements of the law governing contracts relating to disposition of interests in land. In the circumstances, there was no basis for condemning the appellant to bear costs of the suit in the trial court.



48. In the end, this appeal succeeds on the above grounds and is disposed in the following terms:

- a) The Decree of the Trial Court in Thika Chief Magistrate Court Environment and Land Case No 17 of 2018 are hereby set aside and is substituted with an order directing the defendant in the said suit to refund to the plaintiff in the said suit the sum of Kshs 900,000 together with interest at court rate from the date of filing the said suit.
- b) An order that parties to the said suit shall bear their respective costs of the suit.

49. Lastly, because the errors culminating in this appeal were committed by the trial court, parties to this appeal shall bear their respective costs of the appeal.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 11TH DAY OF OCTOBER 2022**

**B M EBOSO**

**JUDGE**

**In the Presence of: -**

Ms Ngeresa for the Appellant

Ms Muthiani for the Respondent

**Court Assistant: Sydney**

