



**Thambo v Muketha (Environment and Land Appeal E034 of 2023)  
[2025] KEELC 6041 (KLR) (16 September 2025) (Judgment)**

Neutral citation: [2025] KEELC 6041 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT AND LAND APPEAL E034 OF 2023**

**BM EBOSO, J  
SEPTEMBER 16, 2025**

**BETWEEN**

**COSMAS MURIUNGI THAMBO ..... APPELLANT**

**AND**

**MARK KARUNDU MUKETHA ..... RESPONDENT**

*(Being an appeal against the Judgment of the Principal Magistrate Court at  
Tigania [Hon. P Wechuli PM) rendered on 11/9/2023 in Tigania Principal  
Magistrate Court Environment and Land Case Number E048 of 2021)*

**JUDGMENT**

**Introduction**

1. This Appeal challenges the Judgment rendered on 11/09/2023 by the Principal Magistrate Court at Tigania (Hon. P Wechuli PM) in Tigania PMC E&L Case No. E048 of 2021. One of the key questions that fell for determination in the said suit was whether the appellant had satisfied the criteria for granting an order of specific performance of a contract for sale of land. That is one of the two key issues that fall for determination in this appeal. The second issue that falls for determination in the appeal is whether the appellant proved the alternative plea for refund of the consideration amount that he allegedly paid to the respondent. Before I analyse and dispose the two issues, I will briefly outline the background to the appeal; the grounds of appeal; and the parties' respective submissions in the appeal.

**Background**

2. Vide a plaint dated 03/05/2021, the appellant instituted Tigania PMC E&L Case No. E048 of 2021 against the respondent. He sought an order of specific performance decreeing the respondent to complete the agreement dated 15/06/2016 by transferring to him 2.20 acres out of land parcel number 6988 within Akaiga Adjudication Section. As an alternative to the above relief, the appellant prayed



for 'a refund of the consideration amount at the current land market value with interest from the date of purchase'. Lastly, he prayed for costs of the suit.

3. The case of the appellant was that, he entered into a land sale agreement dated 15/06/2016 with the respondent, pursuant to which he purchased from the respondent 2.20 acres that were to be excised from parcel number 6988 within Akaiga Adjudication Section. He contended that of the 2.20 acres, 1.2 acres was payment for the assistance he gave to the respondent in Meru Misc. Judicial Review Case No. 19 of 2015, adding that the agreed consideration for the remaining 1 acre was Kshs. 80,000/- which he was to pay in instalments.

He stated that upon signing the agreement, he took possession of the purchased land and started developing it. The appellant averred that on 13/12/2020, the respondent trespassed onto the land and destroyed crops/trees that he had planted on the land, with the intention of evicting him.

4. The respondent contested the appellant's claim through a defence dated 12/07/2021. He denied selling 2.20 acres to the appellant, adding that whereas the appellant had the intention of buying land from him, he never did so. He denied the allegation that the appellant took possession nor developed any portion of the land, adding that he (the respondent) was in actual occupation and use of the suit land. He contended that the appellant having failed to meet his part of the bargain, he had 'nothing to claim', adding that the plaintiff (appellant) had 'no locus to pray for specific performance of a contract he never honoured'. He urged the trial court to dismiss the appellant's claim with costs.
5. Upon conclusion of trial and upon receiving the parties' submissions, the trial court rendered the impugned judgment in which it reached a finding that the appellant had failed to prove his case on a balance of probabilities. The trial court dismissed the appellant's case with costs.

## **Appeal**

6. Aggrieved by the findings and decree of the trial court, the appellant brought this appeal, advancing the following five (5) grounds of appeal;
  1. That the learned magistrate erred in the law and the fact by failing to consider the entire evidence of the appellant thus considered extraneous matter therefore arrived at wrong decision against the weight of the evidence.
  2. That the Learned trial Magistrate erred in law and fact by failing to appreciate that the defendant did not have sufficient evidence to deny receipt of funding and that the plaintiff was in (sic) actual ground hence arrived in a wrong decision.
  3. That the Learned Magistrate erred in law and in fact in failing to consider that the agreement complained off had two components one of assistance and one of purchase thus arrived into wrong decision.
  4. That the Learned trial Magistrate erred in law and fact by failing to consider the agreement was attested by a witness who was present, the law does not demand who a witness should be.
  5. That the Learned trial Magistrate erred both in law and in fact deciding a matter on extraneous facts which were not pleaded and failed to apply the law, hence the decision is against the law and evidence.
7. The appellant prayed that the appeal be allowed and the decision of the trial court dated 11/09/2023 be set aside together with all the consequential orders. He also prayed for costs of the appeal.



### **Appellant's Submissions**

8. Acting in person, the appellant filed written submissions dated 10/03/2025. The appellant submitted that PW1, PW2, PW3, DW2 and DW3 all agreed to have been approached by the respondent to look for a buyer, adding that they witnessed the sale of land between the appellant and the respondent. He argued that the trial court heavily relied on technicalities rather than the evidence, and termed this as a miscarriage of justice. He added that he had been in occupation of the suit land 'for a period of time' and had made 'intensive and extensive developments' on the land with full knowledge of the respondent.
9. The appellant submitted that his case in the trial court was simple that he had purchased a portion of land measuring 1 acre at a consideration and that he had been gifted a portion of land measuring 1.2 acres for services and financial assistance given to the respondent during the hearing of Meru High Court Misc. Judicial Review Application No. 19 of 2019 as advocate fee, subsistence and travel expenses. He argued that existence of the agreement dated 15/06/2015 had not been denied, adding that what was contested was payment of the sum of Kshs. 80,000/- and possession of the 2.20 acres. The appellant argued that he proved his case on a balance of probabilities. Lastly, the appellant urged the court to compel the respondent to undergo what he described as 'Ameru oath' if he (the respondent) insisted that the appellant invaded the suit land and that no consideration was paid and no work was ever done for him.

### **Respondent's Submissions**

10. The respondent filed written submissions dated 28/02/2025 through M/s M. G Kaume & Co Advocates. On the first ground of appeal, counsel for the respondent submitted that the trial court exhaustively considered and analysed the evidence before it in arriving at the judgment. Counsel added that the second ground of appeal lacked merit because the respondent's evidence was unchallenged. Counsel pointed out that there was no proof of payment made in terms of the agreement, adding that the agreement was not witnessed as required by the law.
11. Counsel for the respondent further submitted that the third ground of appeal lacked merit because the alleged two components of the agreement had not been proved, adding that there was no supporting documentary evidence. Counsel pointed out that the receipts which the appellant relied upon were from a certain law firm and did not indicate the purpose for which the alleged payments were made. Counsel further pointed out that there was no acknowledgement of receipt of consideration by the respondent.

### **Analysis and Determination**

12. I have read and considered the original record of the trial court; the record filed in this appeal; the grounds of appeal; and the parties' respective submissions in the appeal. I have also considered the relevant legal frameworks and the prevailing jurisprudence on the questions that fall for determination in the appeal. As pointed out in the opening paragraph, the following are the two key issues that fall for the determination in this appeal: (i) Whether the appellant satisfied the criteria for granting an order of specific performance of a contract relating to sale of land; and (ii) Whether the appellant proved the alternative plea for "a refund of the consideration amount at the current land market value with interest from the date of purchase". I will analyse and dispose the two issues sequentially in the above order.



13. The task of a first appellate court was summarized by the Court of Appeal in the case of Susan Munyi Vs 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.”

14. The principle was similarly outlined in Abok James Odera t/a A J Odera & Associates Vs 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.”

15. In Kenya, contracts relating to sale of land are regulated by statutes. For a land sale contract to be enforceable, it must comply with the provisions of the statutes. Section 3 (3) of the [Law of Contract Act](#) contains the following provisions relating to formal requirements that a contract for sale of land must meet for it to be enforceable:

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.

16. Section 38 of the [Land Act](#) echoes similar requirements with minor modifications as follows;

38. Validity of contracts in sale of land.
  1. Other than as provided by this Act or by any other written law, no suit shall be brought upon a contract for the disposition of an interest in land: -
    - 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 was present when the contract was signed by such party.
  2. Subsection (1) shall not apply to: -



- a. a contract made in the course of a public auction;
  - b. the creation or operation of a resulting, implied or a constructive trust; or
  - c. any agreement or contract made or entered into before the commencement of this Act, provided that: -
    - i. the verbal contracts shall be reduced to writing within two years from the date of enactment of this Act; and
    - ii. the Cabinet Secretary shall put a notice of the requirement to reduce the contracts in writing, in a newspaper of nationwide circulation.
17. The prevailing jurisprudential principle on the criteria for grant of an order of specific performance was aptly captured by Maraga J (as he was then) in *Reliable Electrical Engineers (K) Ltd Vs Mantras Ltd* (2006) eKLR as follows;

“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 and an enforceable. Even when a contract is valid and enforceable, specific performance will however not be ordered where there is an adequate alternative remedy.”

18. In *Gurdev Singh Birdi and Marinder Singh Ghatora Vs Abubakar Mahhubuti*, Civil Appeal No 165 of 1996, the Court of Appeal outlined the following principle which guides our courts when exercising jurisdiction to grant the remedy of specific performance.

“It cannot be gainsaid that the underlying principle in granting the equitable relief of specific performance has always been that under all the obtaining circumstances in the particular case, it is just and equitable so to do with a view to doing more perfect and complete justice. Indeed...a plaintiff must show that he has performed all the terms of the contract which he has undertaken to perform, whether expressly or by implication, and which he ought to have performed at the date of the writ in the action.”

19. In their book *The Law Of Real Property*, 7<sup>th</sup> Edition, the Rt. Hon. Roberty Megarry and Sir William Wade have outlined the following principle which guides courts in the Commonwealth when exercising jurisdiction to grant an order of specific performance:

“This remedy is purely equitable, and in principle is confined to cases where the common law remedy of damages is inadequate. But land is always treated as being of unique value, so that the remedy of specific performance is available to the purchaser as a matter of course; and even though the vendor is merely concerned to obtain the purchase-money, so that he could be adequately compensated in damages for the purchaser’s refusal to complete the remedy of specific performance is equally available to him.”

20. Rt. Hon. Roberty Megarry and Sir William Wade added as follows;

“Like other equitable remedies, specific performance is discretionary. However, the court’s discretion is governed by settled principles. Examples of where the remedy may be refused include the following: i. In proper cases where there is mistake or great hardship, even



though these do not invalidate the contract at law; ii. Where there has been delay causing injustice to the other party; iii. Whether the vendor would be required “to embark upon difficult or uncertain litigation in order to secure any requisite consent or obtain vacant possession; iv. Where the property is being used for illegal purposes, which would make the purchaser liable to prosecution, even though on this ground he has no right to terminate the contract; or v. Where the vendor’s title is doubtful but he has failed to disclose the known cause of that doubt and the purchaser has agreed to accept any defects that there may be. In these cases, the contract will remain binding at law, so that the party in default will be liable in damages, but equity will not assist with a decree of specific performance. On the other hand, specific performance may be decreed before the legal time for performance has arrived if there has been an anticipatory breach, e.g. by repudiation.”

21. Did the appellant satisfy the above statutory and jurisprudential criteria? The appellant sought an order of specific performance relating to a land sale agreement dated 15/06/2016. The respondent contested the claim and denied selling the 2.20 acres to the appellant. I have examined the agreement. It is expressed as having been executed by the respondent by way of affixing his finger print on it. There is, however, no signature and name of the witness attesting to the execution of the agreement by the respondent. Appearing below the name “Susan Kathure” is a rubber stamp and printed words, both reading “Meenye & Kirima Advocates”. Also appearing above the said printed name is the signature of an unidentified signatory. The finger print of Mark Karundu Muketha (the respondent) was not attested as required by Section 3(3) of the [Law of Contract Act](#) and Section 38 of the [Land Act](#).
22. Secondly, the person who is expressed as having appended a signature on the sale agreement on behalf of Meenye & Kirima Advocates was not called as a witness. He is not identifiable on the face of the sale agreement.
23. The totality of the foregoing is that, the sale agreement which the appellant relied on during trial did not satisfy the requirements of Section 3(3) of the [Law of Contract Act](#) and Section 38 of the [Land Act](#) in terms of attestation of the respondent’s signature/finger print. Consequently, the said agreement was not enforceable at law.
24. Besides the above fatal defect, Clause 5 of the sale agreement gave specific timelines within which the appellant was to pay purchase price. In his pleadings, the appellant elected not to make any averment relating to payment of full purchase price. During trial, he did not tender evidence proving that he paid full purchase price as required under Clause 5 of the sale agreement that he relied on.
25. Lastly, on the face of the sale agreement, the suit land is located in an area that had been declared to be an Adjudication Section. The appellant did not demonstrate compliance with the requirements of Section 30(1) of the [Land Adjudication Act](#).
26. For the above reasons, it is the finding of this court that the appellant did not satisfy the criteria for grant of an order of specific performance of a land sale contract.
27. Did the appellant prove the alternative claim for a refund? The wording of the appellant’s alternative prayer has been reproduced verbatim. The body of the plaint did not contain pleadings relating to the alternative prayer. No particulars were pleaded in relation to the alternative prayer. The trial court was not told the exact amount which the appellant sought as an alternative relief. No valuation report was tendered during trial. Clearly, without pleadings and without particulars relating to the alternative relief, and without evidence proving the alternative claim, the appellant cannot be said to have proved his alternative claim. That is the finding of this court on the second issue.



28. On costs, the general principle in Section 27 of the *Civil Procedure Act* is that, costs follow the event. No special circumstances have been demonstrated to warrant a departure from the above general principle. Consequently, the appellant shall bear costs of the appeal.
29. In light of the above findings on the key issues in this appeal, the appeal is rejected and dismissed for lack of merit. The appellant shall bear costs of the appeal.

**DATED, SIGNED AND DELIVERED AT MERU THIS 16<sup>TH</sup> DAY OF SEPTEMBER, 2025.**

**B M EBOSO [MR]**

**ELC JUDGE**

