



**Gakuya v Gatuiku (Environment and Land Appeal E028 of 2023)
[2025] KEELC 3972 (KLR) (20 May 2025) (Judgment)**

Neutral citation: [2025] KEELC 3972 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL E028 OF 2023**

JA MOGENI, J

MAY 20, 2025

BETWEEN

HARRISON MUHIA GAKUYA APPELLANT

AND

JAPHETH MWANIKI GATUIKU RESPONDENT

*(Being an appeal against the Judgment of the Honorable Wilson Rading
SRM delivered on the 4th April, 2023 in CMCC No. 142 of 2019 Kiambu)*

JUDGMENT

1. In the Appeal before me dated 11/04/2023 the Appellant Harrison Muhia Gakuya is asking this Court to find fault with the Judgment and Decree issued by the lower Court because the trial Court through the Learned Magistrate Wilson Rading, PM on 4/04/2023:
 1. Erred in law and in fact by delivering, a Judgment over a property being Title Number: Kiambu/Municipality Block 5 (Kiamumbi)/528 (hereinafter known as “the property”) knowing very well that the Court did not have the required pecuniary jurisdiction as its value was above Kesh 24,500,000 as per a valuation report attached in the pleadings.
 2. Erred in law and in fact by hearing and determining the matter and delivering a Judgment over the property dispute knowing that a similar matter involving the subject property but different parties was heard and determined by this Court in ELC (OS) 48 of 2019 Thika and hence resulting in conflicting decisions.
 3. Erred in law and fact by refusing to allow an adjournment in the proceedings to allow an application which has been filed dated 8th September 2022 before the Superior Court in ELC MISC Application Number 058 of 2022 seeking to transfer the suit to the High Court for



hearing and determination despite having been notified in writing and being given copies of the application vide the Appellants letter dated 4th October, 2022 received the same day.

4. Erred in law and in fact by refusing to dismiss a suit filed after the statutory limitation period of 12 years as per the Law of Limitation Act (Cap 22 of the Laws of Kenya) which had been filed without the leave of the Court.
 5. Erred in law and fact by refusing to dismiss the suit which subject matter was the sale of property which belonged to the deceased at the time of the purported transactions and no transmission or succession was done for the transfer of the same.
 6. Erred in law and in fact by disputing the evidence of one James Kamande Mwangi who swore an Affidavit in ELC (OS) 48 of 2019 Thika where he (James) admitted receiving the funds from the Respondent herein in his paragraph 6 and 7 of the Supporting Affidavit in support of the Originating Summons.
 7. Erred in law and fact by finding that the property was a gift inter vivos which as the fact was the deceased who was the registered owner had died in the year 2000 and the transfer was obtained in 2017.
 8. Erred in law and fact by admitting evidence of a will purported drawn by the Appellant's mother in support of the Plaintiff evidence while the Court was informed by the parties to the suit that the will was challenged in High Court (Milimani) and the Succession Cause was still pending at the time of hearing.
 9. Erred in law and in fact by disregarding the submission and the evidence adduced by the Appellant.
 10. Erred in law and fact when he allowed the Respondent's suit.
2. The Appellant therefore prays for:
- a. The Appeal to be allowed and the Judgment delivered by Hon Wilson Rading on 4/04/2023 be set aside and replaced with an order dismissing the suit.
 - b. The costs of this Appeal.
 - c. Any further or other alternative relief and or order that this Court may deem fit and just to grant.
3. The Respondent herein had filed Civil Suit No. 142 of 2019 in the Chief Magistrate's Court at Kiambu, against the Appellant (Defendant therein). The Respondent has sought for the following Orders against the Appellant (Defendant therein).
- a. Specific performance of the contract and the Defendant be compelled to transfer half parcel of land to the Plaintiff or in alternative the Executive Officer does execute necessary documentation.
 - b. General damages.
 - c. Costs of Suit.
4. The Plaintiff therein had alleged that he entered into an agreement with the Defendant on 8/02/2007 and he avers that the Defendant sold him 50% of property known as LR Kiambu Municipality Block 5/(Kiamumbi) 528 measuring approximately 0.1020 ha which was registered under Jemmimah Nyambura Gakuya (Deceased) who was Defendant's mother.



5. That the agreed price was Kesh 800,000 where he paid a deposit of Kenya Shillings Five Hundred Thousand (Kesh 500,000) leaving a balance of Kesh 300,000 which he paid within ninety (90) days.
6. The Plaintiff avers that the Defendant was to surrender completion documents upon completion of Succession No. 2635 of 2005 of the Estate of Jemmimah Nyambura Gakuya or after getting the title deed under his name. That the Defendant acquired the title deed under his name in April 2017 but did not inform the Plaintiff.
7. It is the Plaintiff's case that upon completion of payment of purchase price in March 2007, he embarked on developing the plot where he has now put up his matrimonial home which is currently valued at many millions and that the development took five years to complete and that he resides on the suit property with his family with the knowledge of the Respondent since 2011.
8. He further avers that the Defendant has refused to honor has totally ignored to fulfill his part of the bargain of the sale. The action of refusal to transfer being one of defrauding him of his hard earned cash. Also it is an action of obtaining by false pretense or breach of contract by the Defendant.
9. The Defendant (Appellant) filed his Defence and stated that though there was a sale agreement it was only entered into to assist his brother in law one James Kamande Mwangi to obtain a loan using the Defendant's property. That it was not for the sale of 50% of the property known as LR Kiambu Municipality Block 5/(Kiamumbi) 528 measuring approximately 0.1020 ha but to assist the said Kamande obtain a loan from Barclays Bank using the Defendant's title deed.
10. That the money that was deposited into his account and the purchase price was returned in full to the said James Kamande Mwangi as per the tripartite agreement between the Plaintiff, James Kamande (his brother inlaw and who was a tenant in the said property) and himself.
11. The Defendant denies all averments in the Plaint and states that he never sought any relevant Land Control Board Consents and avers not to have taken any step since 2007 to further the agreement. He also contends that the brother in law had been allowed to use the Defendant's house built on the suit property for a Church and keshu and that the brother in law also allowed the Plaintiff to build a structure on the suit property without the Defendant's permission which he came to learn was the office for the Church.
12. That all monies were paid to James Kamande Mwangi in full a fact that the Plaintiff is aware of and no money was received by the Defendant for the alleged transaction and since he admitted receiving the money then the Plaintiff should seek a refund from him. He avers that the 3rd party who he sought to enjoin being James Kamande Mwangi and the Defendant have colluded to dispossess him of his land by refusing to pay rent for the Church and offices he had hired from the Defendant and that the proposed 3rd party has filed an Originating Summons in ELC No. 48 of 2019 claiming adverse possession for the same property rented from him and the Plaintiff is claiming the same suit property thus the need to enjoin the 3rd party.
13. The matter was heard before Hon. Wilson Rading SRM, on various dates and the parties therein gave evidence and were cross-examined by their respective Counsels. The Trial Magistrate thereafter gave his determination on 4/04/2023 and held that:-

“In conclusion, I enter Judgment against the Defendant and the Plaint dated 2/04/2019 is allowed in the following terms:



- a. Specific performance of the contract and the Defendant be compelled to transfer half parcel of land to the Plaintiff or in alternative the Executive Officer does execute necessary documentation
 - b. Costs of suit.”
14. The Appellant herein was aggrieved by the above determination and sought to challenge it through the Memorandum of Appeal filed on 11/04/2023 on the grounds listed at paragraph 1 above.
15. The Appeal was opposed by the Respondent. The Appeal was canvassed by way of written submissions. The Appellant who represented himself filed written submissions dated 11/11/2024.
16. The Appellant relied on various provisions of law and decided cases. The Appellant relied on Section 7 of the Limitation of Actions Act which provides that:-

“... An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”
17. The Appellant basing his argument on the above provision of law submitted that the subject matter of the suit was a contract as per the Sale Agreement dated 12/07/2007 and the current suit was filed on the 8/04/2019 which was after over 12 years and outside the statutory limitation period for land cases.
18. He further submitted that the Court failed by terming the property gift intervivos yet it was a deceased person’s that at the time of the sale the property belonged to the deceased. Thus the Respondent could not have authority to confirm a right to the third party who purported to have bought from him the property as he was neither an administrator or executor of the deceased’s estate.
19. He also submits that the instant suit is res judicata since the subject matter was already determined in ELC OS 48 OF 2019 where the Applicant one James Kamande Mwangi sued Harrison Gakuya the Appellant herein and the Originating Summons was dismissed.
20. The Appellant in his submissions relied on the cases of Mombasa Bricks & Tiles Limited & 5 Others vs Arvind Shah & 7 Others [2019] eKLR and Re The Matter of the Estate of David Julius Nturibi M’ithinji (Deceased) [2012] eKLR. In the last case the Appellant submitted on the issue of Section 45 of the Law of Succession Act and stated that the suit property belonged to a deceased person and intermeddling was not permissible. The Appellant urged the Court to allow the Appeal.
21. The Respondents also filed their written submissions through the Law Firm of Kimani Kahete & Co. Advocates, and submitted that the Appellant was sued by the Respondent herein at the trial Court for Specific Performance of a contract for sale of land which the Appellant did not abide by. That the suit was heard and determined by the Honourable Court whereby all the parties participated and Judgment was delivered in favour of the Respondent and the Appellant, being dissatisfied by the said Judgment appealed to this Honourable Court on various grounds.
22. The Respondent raised the following issues for determination however the Court is not limited to these issues and in making a determination the Court will consider but raise what it perceives to be the key issues. Thus the issues raised by the Respondent are:
 - i. Whether the trial Court had jurisdiction to hear and determine the matter.
 - ii. Whether the matter was res-judicata.
 - iii. Whether the suit was time barred.



- iv. Whether funds were received by the Appellant or a third party.
 - v. Whether the Appeal has merit.
23. On the issue of jurisdiction the Respondent relied on Section 1 of the Magistrate's Court which sets out the pecuniary jurisdiction of the Magistrate's Court as follows:-
- “(1) A Magistrate's Court shall have and exercise such jurisdiction and powers in proceedings of a civil nature in which the value of the subject matter does not exceed—
- a. twenty million shillings, where the Court is presided over by a Chief Magistrate;
 - b. fifteen million shillings, where the Court is presided over by a Senior Principal Magistrate;
 - c. ten million shillings, where the Court is presided over by a Principal Magistrate;
 - d. seven million shillings, where the Court is presided over by a Senior Resident Magistrate; or
 - e. five million shillings, where the Court is presided over by a Resident Magistrate.”
24. It is the Respondent's submission that whereas the Appellant allege that the Honourable Magistrate Court erred in fact and in law by delivering a Judgment over property whose value was Kshs. 24,500,000/=. However, in the Appellant's introductory part of his submissions, more specifically under brief facts, the Appellant acknowledges that the Respondent filed a suit against the Respondent on the basis that he was a purchaser of 50% of the land known as Kiambu/Kiamumbi Block 5 (Kiamumbi/528. This automatically translates to half of the suit property. There is therefore no basis for this Ground of Appeal and it fails from the onset.
25. The Respondent further submits that the suit at the trial Court was instituted in 2019 yet the Appellant's valuation was conducted in 2022 which would mean that the valuation report was not accurate and was an afterthought and a calculated move to defeat the Respondent's case. If indeed the valuation report was to be used as a means to challenge the jurisdiction of the trial Court, then it would only have been fair enough for the Appellant to do an estimate of the value of half of the suit property by backdating it to the year when the suit was filed. That would have been the accurate value of the suit property. It was the Respondent's averment that conducting a valuation report 3 years into the suit was misleading and inaccurate.
26. Further that the subject matter of contract that was being enforced is a property bought at Kshs. 800,000/= and the Respondent was seeking for specific performance of the Appellants end of the bargain. That this fact is not disputed by the Appellant who also admitted the jurisdiction of the trial Court in the Defence that he filed in response to the Plaintiff's Plaint.
27. That the value of the property claimed at the trial Court was 50% of the suit property and not whole as per the Sale Agreement. Meaning that if the value of the suit property is Kesh 24,500,000/=:, then 50% of that value is Kshs. 12,250,000/= a value which is well within the jurisdiction of the Honourable Magistrate's Court. The Respondent contends that the value of the property notwithstanding, it is



misleading for the Appellant to go ahead and carry out a valuation report of a property that is not a subject of litigation between the parties herein.

28. It is the Respondent's observation in his submission that the Appellant participated in the trial Court fully without ever raising the issue of jurisdiction of the trial Court and therefore consented to the Jurisdiction of Court. The fact that they allege that the Court lacked jurisdiction is an afterthought and therefore an ill plan to ensure that the Respondent herein does not get what he is entitled to legally. More so, when the issue was raised at the trial Court, the same was dealt with and overruled and the Court itself noted that the Appellant herein was stonewalling the hearing of the Plaintiff's case.
29. Further that the Appellant had even filed a miscellaneous application at the ELC Court seeking transfer of the suit from the trial Court which application was successfully challenged the Plaintiff. Thus, the issue of pecuniary jurisdiction was already been dealt with in ELC Thika Miscellaneous Application E058 of 2022 and that the Honourable Magistrate Court had jurisdiction and the Appeal fails on this ground.
30. On the issue of whether the suit is res judicata the Respondent submitted that Section 7 of the Civil Procedure Act, for res judicata to apply, the following conditions must be met:
 - a. The previous suit was concluded by a Judgment on the merits.
 - b. The parties in both suits are the same or in privity.
 - c. The issues in both suits are directly and substantially the same.
31. Thus the Respondent submits that whereas the Appellant argues that Thika ELC (O.S) No. 48 of 2019 (James Kamande Mwangi vs Harrison Muhia Gakuya) renders this matter res judicata. He submits that the case the Appellant is referring to did not involve same parties and therefore does not meet the threshold for the matter to be declared as Res Judicata. It is his contention that the parties are not the same neither are the prayers sought in the different matters and that trial Court acknowledged this.
32. In his submission the Respondent stated that it is trite law that every party deserves its day in Court and one matter cannot tie down and/ or be used to drag another. That the Respondent has never been a party to another suit with the Appellant and also that the Appellant never tried to consolidate both matters if indeed the issues in both were similar.
33. The Respondent relied on the Supreme Court case of John Florence Maritime Services Limited & Another vs. Cabinet Secretary Transport & Infrastructure & 3 Others [2021] KESC 39 (KLR), to advance his argument on the issue of res judicata being a non-issue in the instant matter.
34. On the issue of whether this suit was time-barred, it was the Respondent's submission that Section 7 of the Statutory Limitations Act provides as follows;

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”
35. He submitted that the date on which the right of action accrued to the Respondent was the date when he discovered that the Appellant despite having obtained a title deed to the suit property, failed to transfer 50% of the land as per their contractual agreement. The Cause of Action in this current case arose when the Appellant failed to meet his end of the bargain as had been agreed by the parties as per their Agreement. The Appellant obtained title in his name in the year 2017 and never sub-divided the land nor did he inform the Respondent of the fact that he already obtained title to the land and when



the Respondent herein realized, he decided to institute the suit at the trial Court. The Cause of Action therefore arose when the Respondent herein realized the fact that the Appellant had already obtained title to the suit property and did not perform his obligations to the contract.

36. It is the Respondent's submission that the time therefore would start to run when the breach of Contract arose and not when the parties entered into an agreement as the contract was dependent on the Appellant obtaining a title deed first. The same we reiterate was obtained in the year 2017. The Respondent to relied on the cases of Pius Kimaiyo Langat v Co-operative Bank of Kenya Limited (Civil Appeal 48 of 2015) [2017] KECA 152 (KLR) (Civ) (1 December 2017), and Letang vs Cooper [1964] 2 All ER 929 at 934, per Lord Diplock. Lord Esher, M. R. and Read vs Brown (1888), 22 QBD 128, to advance his argument on the issue of the suit being time barred or not.
37. In his submissions he contended that since the Respondent sought for specific performance and he will rely on Section 4 of the Statutory Limitations Act which reads as follows:
- “(1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued—
- (a) actions founded on contract;
- (b) ...”
38. That the statutory limitation of time for actions founded on contract is six years from the date on which the Cause of Action arose as per the above reading. The Respondent further submitted that, the Respondent through his Counsel had sought the leave of Court before instituting the suit. Thus the Respondent submits that suit is not time barred and therefore the Appeal fails on this ground.
39. Further that this being a case involving land, the limitation period for an action for recovery of land is 12 years from the date of accrual of the Cause of Action. The Cause of Action arose in the year 2017 and therefore the suit is not time barred.
40. The Respondent also submitted on the issue of funds being received by the Appellant and stated that as per the Agreement dated the 8/02/2007 the Respondent agreed to purchase land from the Appellant at a price of Kshs. 800,000/=. That the Respondent paid a deposit of Kesh. 500,000/= via cheque to the Appellant and later cleared the remaining balance by paying via cheque to the Appellant the sum of Kshs. 300,000/= on the 7/03/2007 a fact that was acknowledged by the Appellant. The Respondent also produced the receipts as per his List of Documents at the trial Court and which are on page 19 and 20 of the Record of Appeal.
41. It is the submission of the Respondent that it is therefore not true that there is a third party who acknowledged receipt of the funds but that the Appellant himself received the funds and even signed an acknowledgement note to show he received the whole amount. Thus according to the Respondent, this Ground of Appeal fails.
42. The Respondent submitted therefore that the Appeal has no merit. Further that the ground advanced by the Appellant that he was denied an adjournment by the trial Court in its proceedings, to allow an application filed in Thika ELC MISC APP No. E058 of 2022, yet there was no order from the Superior Court barring the trial Court from going on with its proceedings is said to be baseless. Since there is no requirement that Court adjourns its proceeding pending determination of a Miscellaneous Application at the Superior Court.
43. In his submissions the Respondent stated that whereas the Appellant also alleges that the property belonged to a deceased person yet the Appellant had with him transfer documents and Land Control



Board Documents which were executed by the deceased in the Appellants favour prior to her death. It is these same documents that the Appellant acknowledged (during trial) to have used in processing the title deed in his name. The Appellant is therefore estopped from denying that he was the owner of the property as at the time of the transaction.

44. It is the Respondent's submission that the same transfer documents the Appellant got from his deceased mother that he used to procure the title under his name in 2017 and there was no need to go through a succession process as the property had already been passed to the Appellant during his mother's lifetime. The Appellant is misleading the Court in arguing that no one could confer proprietary rights of land belonging to a deceased person yet it is evident that the property had already passed to him prior to the demise of Jemmimah Nyambura Gakuya (Deceased), a fact that the Appellant admits in his Defence and witness statement.
45. The Respondent thus submits that the Appeal lacks merit and ought to be dismissed with costs to the Respondent.

Analysis and Determination.

46. The issue of jurisdiction has been raised in the Appeal. Further that the Appellant had not raised it in his Defence and even when the matter commenced hearing on 24/06/2021, the Appellant did not raise the said issue of jurisdiction and the case proceeded for hearing without any objection. On the jurisdiction of the Court, it was the Respondents submissions that the Appellant cannot raise the issue of jurisdiction now because it did not become part of the proceedings and Judgement in the lower Court and therefore the Ground of Appeal on jurisdiction is an afterthought. Further that if the Appellant had really thought that the Court had no pecuniary jurisdiction, he would have stated the value of land claimed which is 50% of the whole piece.
47. Now, Section 16 of the [Civil Procedure Act](#) which states that:

“No objection to the place of suing shall be allowed in the appeal unless such objection was taken in Court of the first instance and there has been subsequent failure of justice.”
48. Thus the issue of jurisdiction cannot be raised at the point of Appeal. Order 2 Civil Procedure Rules provides for matters that must be specifically pleaded and proved. In *Omweri vs Kiptugen* (C.A No. 5 of 2018) (2022) KECA (KLR) (4th March 2022) (Judgment), the Court cited with approval *Kenya Hotel Ltd vs Oriental Commercial Bank Ltd* (2018) eKLR and *Openda vs Ahn Martin* (1984) KLR that Grounds of Appeal must arise from issues that were sufficiently pleaded, canvassed, raised or succinctly made at the trial, with neither of the parties changing their case or facts into a different case at the appellate stage.
49. In his Statement of Defense, the Appellant failed to plead the issue of jurisdiction.
50. The Appellant contended that the suit property belonged to a deceased person however the Respondent proved to the contrary and showed that the suit land was given to the Appellant as a gift inter vivos by his mother. Indeed the Green Card for the suit land shows that the land was registered in the name of the Appellant and consideration was a gift. There was no evidence availed by the Appellant to prove the contrary that this transfer and registration was not as a result of gift inter-vivos by his mother. Infact the claim that the suit property belonged to the deceased fails to hold since it was not in the list of the properties that were succeeded upon the demise of the mother of the Appellant.
51. Under the Section 26 of the [Land Act](#) the Appellant is deemed to be the absolute owner together with all rights and privileges appurtenant thereto and this rights are not liable to be defeated except as



provided by the Act. This position has been repeated in Sections 24 and 25 of the [Land Registration Act](#).

52. Section 26(1) provides as follows:-

“The certificate of title issued by the registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge except:-

- a. On the ground of fraud or misrepresentation to which the person is proved to be a party: or
- b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

53. Therefore, this Court comes to a conclusion that the Appellant herein is the absolute and indefeasible owner of the suit property and therefore the rightful owner. His rights cannot be defeated and the trial Magistrate was not wrong in finding as he did.

54. The Appellant also alleged that the suit was time barred since the Cause of Action arose in 2007. Now the suit land herein was registered in the name of the Appellant in 2017 but the Sale Agreement was entered into in 2007. The conditions for transfer of half the suit property to the Respondent were provided as follows:

- a. Completion of the Succession Cause Number 2635 of 2005; or
- b. Upon payment of the balance whichever comes later.

55. From the record of the trial Court which I have also scrutinized I noted that the suit property was not included in the properties that were to be succeeded for the deceased Jemimah Nyambura Gakuya meaning there was no Succession Cause instituted. Notably thought, the Respondent paid the balance of the purchase price within the timeframe that was provided for and that placed the claim within the period of a contractual obligation which is 10/03/2007 for a Sale Agreement dated 8/02/2007 well within the 90 days period provided for under paragraph 2 of the Sale Agreement. Clause 6 of the Agreement entitled the purchaser to take possession and was allowed to develop the said property. Under paragraph 5 of the Special Conditions the purchaser was at liberty to file a suit for specific performance.

56. The Green Ccard which was produced in the trial Court as proof that the suit property belonged to the Defendant was registered in his name contrary to the allegation that it was the estate of the deceased. The Green Card does give a history of how the Defendant acquired the property by way of transfer from his mother, Jemimah Nyambura Gakuya.



57. It is also not in dispute that the Respondent sought leave from the lower Court to allow him produce the will and which affirmed that the suit property was not part of the estate. Section 7 of the Limitation of Actions Act, Cap 22 Laws of Kenya provides as follows:-
- “An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him and if it first accrued to some person through whom he claim to that person”.
58. It is clear that this action which is for recovery of land was brought to Court after a period of 12 years from the date on which the alleged right of action accrued. The Respondent did obtain the requisite leave to produce documents relating to the suit property dating back to the time of the demise of the Appellant’s mother. However the Appellant only got the suit property transferred to him in 2017 and it is only after 2017 that the Appellant’s right to the suit property accrued to enable him transfer the 50% to the Respondent. It is therefore erroneous to state the Cause of Action accrued in 2007. The Cause of Action accrued in 2017 once the title was issued in the name of the Appellant.
59. In Gregory Mburu vs Thika District Hospital (2018) eKLR, the Court said time starts to run when the Defendant breaches the terms of the contract. In National Bank Kenya vs Pipeplastic Samkolit (K) Ltd & Another (2002) eKLR. The Court said Courts do not rewrite contracts between the parties and are bound by the terms of their contract unless coercion, fraud, or undue influence are pleaded and proved. For the Appellant, time began to run in 2017 the minute he got the title deed to the suit property then time began to run.
60. The Agreement having allowed the Respondent to enter the suit property and undertake developments, then as the Court stated in Steadman vs Steadman (1976) AC 540, the Court held that if one party to an Agreement stands by and leads the other party to incur expenses or prejudice, his position on the faith of the agreement being valued, he will not then be allowed to turn around and assert that the Agreement was unenforceable.
61. Further, in Macharia Mwangi Maina & Others [2014] eKLR, the Court observed that the Respondent having put the Appellants in possession of the suit land created an overriding interest in favor of them concerning the property. Additionally, in Thomas Joseph Openda vs Ahn Martin (1984) KLR the Court held that the typical remedy in a contract for the sale of land was an action for specific performance because damages are frequently inadequate and an unjust remedy for refusal to convey the property concerned.
62. Applying the preceding case law in the instant suit, the Sale Agreement signed by the Appellant and the Respondent was in clear terms. Each party’s duties were defined, and time was of the essence. The consequences of the breach were stated. It was also stated when the Respondent was to take up vacant possession. Both parties duly signed the Sale Agreement. The Appellant never disclosed if there were any overriding interests save for those required by law. The land came under the name of the Appellant while he had honored his part of the Agreement by putting the Respondent into possession and causing him to expend on the land as if it was his. There is evidence that the Appellant, saw the Respondent take up vacant possession and assert his possession and possessory rights without objection.
63. The Appellant willingly entered into the Sale Agreement and has not pleaded any breach on account of coercion, illegality, frustration, or undue influence or fraud. He was, therefore, estopped in law from reneging on the Sale Agreement by pleading unenforceability or impossibility to comply or worse still alleging collusion on the part of a party not before the Court. If anything the Court dismissed the



adverse possession claim suit ELC (OS) 48 of 2019 which was filed by James Kamande Mwangi, the brother in-law to the Appellant but not a party to the instant suit.

64. In this Appeal, the Respondent took possession of the land and caused developments on it with the Appellants' knowledge. Section 120 of the *Evidence Act* provides the doctrine of estoppel. The Appellant is the one who put the Respondent into possession of the suit land. He is estopped from denying those facts. In *Gurdev Singh Birdi CA No.165 of 1996* the Court observed that the Plaintiff had to show he had performed all the terms of the contract which he had undertaken to perform.
65. The upshot is the Appeal fails and is dismissed and the Judgment of the trial Court is upheld. There are no exceptional circumstances for this Court to depart from the general rule that costs follow the event. Therefore the Respondent is entitled to costs for this appeal and in the lower Courts. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 20TH DAY OF MAY 2025
VIA MICROSOFT TEAMS.**

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MOGENI J

JUDGE

In the presence of:

Mr. Harrison – In person

Ms. Thuo holding brief for Kimani for the Respondent

Mr. Melita – Court Assistant

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MOGENI J

JUDGE

