



**Omwanda & another v Okongo (Environment and Land Appeal
E031 of 2023) [2025] KEELC 3731 (KLR) (13 May 2025) (Judgment)**

Neutral citation: [2025] KEELC 3731 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND APPEAL E031 OF 2023**

DO OHUNGO, J

MAY 13, 2025

BETWEEN

SELPHANO OSUNDWA OMWANDA 1ST APPELLANT

STELLA AGNES ATITI 2ND APPELLANT

AND

SAMUEL OTURI OKONGO RESPONDENT

*(Being an appeal from the judgment of the Chief Magistrate's Court at Kakamega (Kithinji
A.R, Chief Magistrate) delivered on 6th April 2022 in Kakamega MCELC No. 6 of 2020)*

JUDGMENT

1. The background of this appeal is that the Respondent moved the Subordinate Court through Plaintiff dated 7th January 2020 in which he averred that he entered into a sale agreement pursuant to which the First Appellant sold to him 2.5 acre portion of the parcel of land known as Butsotso/Shibeye/164 (the suit property) at a consideration of KShs 925,000 out of which he paid KShs 700,000. That the balance was to be paid upon completion of the conveyance process which was to be undertaken by the First Appellant.
2. The Respondent further averred that the portion that he purchased had a sugarcane plantation and that sometime in the year 2014, he learnt that the First Appellant had sold the portion to Stella Atiti and that the sugarcane plantation had been harvested. The Respondent therefore prayed for judgment against the First Appellant for an order of specific performance to compel the First Appellant to transfer the 2.5 acre portion to him "or in the alternative" the Executive Officer of the Subordinate Court to sign the necessary on the First Appellant's behalf, refund of the consideration "at the current market value," general damages, costs and interest.



3. The First Appellant neither entered appearance nor filed defence. As a result, judgment in default was entered against him on 20th February 2020. Although the Subordinate Court set aside the judgment on 18th December 2020 and ordered that a draft defence which he had filed be deemed duly filed upon payment of court fees and thrown away costs of KShs 10,000, he did not pay the fees. Pursuant the said ruling, the Subordinate Court allowed Stella Agnes Atiti, the Second Appellant herein, to join the suit as Second Defendant.
4. The Second Appellant filed Statement of Defence dated 11th January 2021 through which she denied the Respondent's allegations and urged the Subordinate Court to dismiss the suit.
5. Upon hearing the matter, the Subordinate Court (Kithinji A.R, Chief Magistrate) delivered judgment on 6th April 2022 and found merit in the Respondent's case. The Court entered judgment in the Respondent's favour as follows:
 - i. That the 1st Defendant to transfer a portion of Land Parcel No. Butsotso/Shibeye/164 measuring 2 ½ acres to the Plaintiff within 30 days from the date of this judgment. I further order that the Executive Officer of the Honourable Court is hereby authorized to sign the document for and on behalf of the 1st defendant which will be necessary to give effect to the order of specific performance in the event that the 1st defendant fails to do so.
 - ii. That in the alternative to order (i) the 1st defendant to pay the plaintiff the current market value of the suit property, Land parcel No. Butsotso/Shibeye/164 measuring 2 ½ acres.
 - iii. The Plaintiff is also awarded costs of the suit plus interest thereon from the date of filing of the suit till payment in full.
6. Dissatisfied with the outcome, the Appellants filed ELCMISC No. E027 of 2022 (Kakamega) wherein an order extending time within which to appeal against the judgment was granted to them on 13th June 2023. Subsequently, they filed this appeal on 14th June 2023, through Memorandum of Appeal dated 13th June 2023. They prayed that the appeal be allowed with costs.
7. The following are the grounds of appeal as listed on the face of the Memorandum of Appeal:
 - a. That the learned Magistrate erred in law and fact in holding that the contract entered between the parties was not time barred under *Limitation of Actions Act*.
 - b. That the learned Magistrate erred in law and fact in holding that the contract entered between the parties was not void and hence could not be enforced by the court.
 - c. The Learned Magistrate erred in law and fact in holding that the plaintiff had proved his case on a balance of probability.
 - d. The judgment allows the plaintiff to get both the land and a refund which is un-equitable.
8. The appeal was canvassed through written submissions. The Appellants filed submissions dated 8th March 2024. They argued that the cause of action accrued on 15th January 2012, yet the suit was filed eight years later and that the learned Magistrate erred in not holding that the suit was brought out of time in view of Section 4 of the *Limitation of Actions Act*. The Appellants further argued that the agreement between the First Appellant and the Respondent was a controlled transaction and that since no consent of the Land Control Board was obtained, the transaction became illegal and unenforceable in view of the provisions of Sections 6 and 8 of the *Land Control Act*. That in the circumstances, the decree of specific performance was unlawful. The Appellants also faulted the Subordinate Court



for ordering specific performance despite the Respondent admitting that he had not fully paid the purchase price.

9. The Appellants went on to submit that the learned Magistrate erred in finding that the Respondent had proven his case since the Respondent did not have a cause of action as of February 2020 due to limitation and further considering that the contract was void. They faulted the Subordinate Court for ordering a refund at market rates yet that was not a term of the contract and that since the decree was silent on how the market rates were to be determined, there was bound to be anarchy. They therefore urged this Court to allow this appeal with costs.
10. In reply, the Respondent filed submissions dated 8th April 2024. On the issue of limitation, he submitted that the cause of action accrued in the year 2014 and that the applicable provision is Section 7 of the *Limitation of Actions Act*. That the claim was one for recovery of land and that the limitation period applicable is 12 years which had not lapsed by the time the suit was filed. The Respondent further submitted that the contract was not void and that a party to a contract should not be permitted to frustrate it then contend in court that the contract is void.
11. The Respondent went on to submit that he proved his case on a balance of probabilities by demonstrating the existence of a contract, payment of part of the purchase price and having placed a caution against the suit property. The Respondent also argued that the Appellants' contention that the decree allowed him to have both the land and a refund is misleading since the decree is specific that the order for payment of the current market value is in the alternative. Arguing that the Second Appellant was reckless when she attempted to purchase the suit property despite the existence of a caution, the Respondent contended that the doctrine of priority favours him over the Second Appellant since he had prior dealings with the suit property. He therefore urged this Court to dismiss the appeal with costs.
12. This is a first appeal. The remit of a first appellate court was restated by the Court of Appeal in *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR thus:

This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse 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. See the case of *Kenya Ports Authority versus Kuston (Kenya) Limited* (2009) 2EA 212 wherein the Court of Appeal held inter alia that:

“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence”

13. I have carefully considered the grounds of appeal, the entire record and the parties' submissions. The issues that arise for determination are whether the suit was barred by *Limitation of Actions Act*; if not, whether the transaction was void for want of consent of the Land Control Board; and whether the reliefs sought were available.
14. The Appellants have faulted the learned Magistrate erred for not holding that the suit was brought out of time in view of Section 4 of the *Limitation of Actions Act*. I have perused the only defence that was filed in the matter, that of the Second Appellant. I note that limitation was not pleaded in it. Nevertheless, the Appellants raised the issue in their final submissions in the Subordinate Court.



Although the learned Magistrate discussed the issue in the judgment, his finding on the issue that “As such, I am not satisfied by the submissions by Defendants’ Counsel that the plaintiff’s claim is not time barred” left more questions than answers. One cannot tell whether he upheld or dismissed the Appellants’ contention that the suit was barred by the *Limitation of Actions Act*.

15. Limitation is a question that goes to the jurisdiction of the Court. The Supreme Court discussed the meaning and scope of “jurisdiction” in *R v. Karisa Chengo* [2017] eKLR where it held:

By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the Court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics... where a Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.

16. Given its centrality, the issue of jurisdiction can be raised at any point of proceedings, including at the appellate stage. Further, every Court is duty bound to satisfy itself that it has jurisdiction, even in instances where parties do not raise the issue.

17. There is divergence between the parties as to which provision of the *Limitation of Actions Act* is applicable to the dispute at hand. Whereas the Appellants contend that the applicable provision is Section 4, the Respondent maintains that Section 7 is the appropriate provision.

18. Section 4 (1) (a) of the *Limitation of Actions Act* provides as follows:

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 ..

19. On the other hand, Section 7 of the same statute provides:

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.

20. The rationale behind statutes of limitation was restated by the Court of Appeal in *The German School Society & another v Ohany & another* [2023] KECA 894 (KLR) thus:

The statutes of limitations are enacted as a matter of public policy to fix a limit within which an action must be brought, or the obligation is presumed to have been paid, and is intended to run against those who are neglectful of their rights, and who fail to use reasonable and proper diligence in the enforcement thereof. The underlying purpose of statutes of limitation is to prevent the unexpected enforcement of stale claims concerning which persons interested have been thrown off their guard by want of prosecution.



21. Once a claim is barred on account of limitation, the Court cannot entertain such a suit. The Court of Appeal emphasised as much in Divecon v Samani (1995 – 1998) I EA 48 where it stated:

No one shall have the right or power to bring after the end of six years from the date on which a cause of action accrued, an action founded on contract. The corollary to this is that no court may or shall have the right or power to entertain what cannot be done namely, an action that is brought in contract six years after the cause of action arose or any application to extend such time for the bringing of the action. A perusal of Part III shows that its provisions do not apply to actions based on contract.

22. Time does not stop running merely because parties are engaged in an out of court negotiations or discussions about the dispute. See Rift Valley Railways (Kenya) Ltd v Hawkins Wagonza Musonye & another [2016] KECA 213 (KLR).

23. The question that then arises is whether the Respondent's suit was an action founded on contract or a claim for recovery of land. A reading of paragraphs 4, 5, 8 and 12 of the Respondent's Plaint as well as the prayers in the Plaint leaves no doubt that the suit was brought to enforce an agreement for sale of land. The prayers for specific performance and "refund of the consideration at the current market value" further reinforce that position. It cannot be a claim for recovery of land since the Respondent was yet to obtain title to the purchased portion. In those circumstances, the applicable provision is Section 4 (1) (a), and the limitation period is six years from the date on which the cause of action accrued.

24. The Respondent's case being one to enforce a contract, accrual of the cause of action must be based on the point at which the alleged breach of the contract occurred. This is in line with the definition of the word "accrue" in Black's Law Dictionary (10th Edition) to mean "to come into existence as an enforceable claim or right." Thus, the six years limitation period is to be calculated from the date of the alleged breach.

25. The Appellants have argued that the cause of action accrued on 15th January 2012. On the other hand, the Respondent has contended that it accrued in the year 2014. I have perused the agreement dated 15th October 2012, between the First Appellant and the Respondent. It does not specify the date by when the First Appellant was to complete the transaction by passing title to the Respondent. Nevertheless, clause 3 provides that the Respondent was to pay the balance of KShs 225,000 by the end of February 2013. As of 8th January 2020 when he filed the suit, the Respondent had not completed paying the purchase price. Equally, the First Appellant had not passed title to him.

26. According to the Respondent's testimony, he learnt in the year 2014 that the portion he was in the process of purchasing had been purportedly sold to the Second Appellant. Among the exhibits that he produced was a letter dated 25th March 2014 from the Assistant Chief Shibuli Sub-location which was written upon his lodging a complaint with the said office concerning the First Appellant's failure to complete the transaction. The letter constitutes the earliest record of the dispute. In the circumstances, I find that the cause of action accrued on 25th March 2014 and that the suit having been filed on 8th January 2020, was within the six year window allowed by Section 4 (1) (a) of the Limitation of Actions Act. The suit was not time barred.

27. I now turn to the question of whether the transaction was void for want of consent of the Land Control Board. A perusal of the sale agreement between the First Appellant and the Respondent shows that the Respondent paid KShs 700,000, which translates to 75.67% of the purchase price, on the date of execution of the agreement. Pursuant to clause 4, the Respondent was entitled to possession immediately upon execution of the agreement. In the meantime, in line with clauses 5 and 6, the



- First Appellant was under obligation to facilitate conveyance of the portion to the Respondent and to sign all necessary documents towards that end. There was no requirement in the agreement that the conveyance be effected upon full payment of the purchase price.
28. Having received the lion's share of the purchase price and having given the Respondent possession, equitable doctrines of constructive trust and proprietary estoppel are applicable to and supersede the Land Control Act in the circumstances of the dispute. Even the fact that the Respondent did not plead constructive trust does not preclude the Court from inferring such a trust. See *Aliaza v Saul* [2022] KECA 583 (KLR) and *William Kipsoi Sigei v Kipkoech Arusei & another* [2019] KECA 446 (KLR).
 29. Despite receiving KShs 700,000 from the Respondent, the First Appellant went ahead and purported to sell the portion to the Second Appellant. He stated in his witness statement that "I cannot refund the purchase price because this case is time barred." The First Appellant wants to keep both the land and the sum paid by the Respondent. That is precisely the kind of unjust enrichment that equitable doctrines of constructive trust and proprietary estoppel seek to put an end to. I find that the contract was enforceable notwithstanding the provisions of the Land Control Act.
 30. The last issue for determination is whether the reliefs sought were available. The Respondent sought an order of specific performance to compel the First Appellant to transfer the 2.5 acre portion to him and a refund of the consideration "at the current market value."
 31. Specific performance is an equitable relief and does not therefore issue routinely. The Court considers all the circumstances of the case including the conduct of the parties and whether in the totality of the circumstances the claimant deserves equitable relief. See *Mangi v Munyi & another* [1991] KECA 13 (KLR).
 32. The ingredients of specific performance were distilled by the Supreme Court of Uganda in *Manzoor v Baram* (2003) 2 E.A. 580 as follows:

Specific performance is an equitable remedy grounded in the equitable maxim that "equity regards as done, that which ought to be done". As an equitable remedy, it is decreed at the discretion of the court. The basic rule is that specific performance will not be decreed where a common law remedy such as damages, would be adequate to put the plaintiff in the position he would have been but for the breach. In that regard, the courts have long considered damages an inadequate remedy for breach of a contract for the sale of land, and they more readily decree specific performance to enforce such contract as a matter of course.
 33. As the Court of Appeal stated in *Gurdev Singh Birdi & Narinder Singh Ghatora as Trustees of Ramgharia Institute of Mombasa v Abubakar Madhbuti* [1997] eKLR, the underlying principle in granting the equitable relief of specific performance is 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. The Court went on to state:

Where a condition or essential term ought to have been performed by the plaintiff at the date of the writ, the court does not accept his undertaking to perform in lieu of performance, but dismisses the claim.
 34. Payment of the purchase price is an essential term of the contract. It was a term of the agreement that the Respondent was to pay the sum of KShs 225,000 being the balance of the purchase price by February 2013. The Respondent did not comply with the term either by February 2013 or even by the date of filing the suit. The balance remains unpaid. In those circumstances, the Appellants are right when they contend that specific performance was not available. The injustice of the situation



is manifest since the learned Magistrate granted specific performance without making any order as to payment of the balance of the purchase price. I find that the learned Magistrate erred on both accounts.

35. Pursuant to clause 8 of the agreement, the First Appellant was under a duty to refund the deposit together with interest at Court rates if he failed to transfer the portion to the Respondent. Although the Respondent claimed refund at current market value, he did not lead evidence that would form a basis for such an award. In any case, such an award would be in conflict with clause 8 of the agreement. I further note that the alternative award made by the learned Magistrate for a refund at current market value without specifying the quantum of current market value or the means of determining the quantum left the parties at a loss as to how to proceed.
36. In view of the foregoing discourse, I find merit in this appeal and I allow it in part. I set aside the judgment of the Subordinate Court and replace it with the following orders:
- a. Judgment is entered in favour of the Respondent and against the First Appellant for KShs 700,000 (Seven Hundred Thousand) being refund of the deposit.
 - b. The Respondent is awarded costs of the suit before the Subordinate Court. The First Appellant shall bear the said costs.
 - c. Interest in respect of (a) and (b) above at Court rates. Interest in respect of (a) above shall be calculated from 15th October 2012.
 - d. Parties shall bear own costs in respect of this appeal.

DATED, SIGNED, AND DELIVERED THROUGH MICROSOFT TEAMS, AT NYAMIRA, THIS 13TH DAY OF MAY 2025.

D. O. OHUNGO

JUDGE

Delivered in the presence of:

No appearance for the Appellants

Mr Odhiambo for the Respondent

Court Assistant: B Kerubo

