

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ELC APPEAL E006 OF 2023

STANELY MIRITI NABEA.....APPELLANT

VERSUS

ISAAC KOOME LIRUTI.....RESPONDENT

*[Being an appeal from the judgment of F.K Munyi – PM delivered in Tigania
on 16/12/2022 in PMELC No. 73 of 2019].*

JUDGMENT

1. The appellant herein [*was the Plaintiff in the subordinate court*] filed the
Plaint dated **8th October 2019**; and wherein same sought the following
reliefs;-

*a. An order of eviction directing the defendant to vacate the
plaintiff's parcel of land, namely LR No. TIGANIA/
THANANGA/723*

b. Cost and interests of the suit.

2. The respondent duly entered an appearance and thereafter filed a
statement of defence and counterclaim. The respondent sought the
following reliefs at the foot of the counter-claim:-

*a. An order for survey/ excision and transfer of a portion
measuring 40 feet by 100 feet from LR No. TIGANIA/
THANANGA/723 and the plaintiff failing to do so the
executive officer of this court be authorized to sign and
execute all consents and transfer documents in that regard.*

*b. An order of permanent injunction restraining the
Plaintiff[defendant in the counterclaim] either by himself,
family members, employees, agents, servants or anybody else
claiming under him from in any way interfering with the
Defendants peaceful possession, user and enjoyment of the*

portion measuring 40 feet by 100 feet occupied by the defendant out of LR No. TIGANIA/ THANANGA/ 723.

In the alternative

c. Liquidated damages, cost costs incurred and mesne profit as per paragraph 5 above from the date of entry.

d. Cost of the counterclaim and interest.

3. The suit in the subordinate court was heard and disposed of *vide* Judgment delivered on 16th December 2022; and whereupon, the learned magistrate [**Hon. F.K Munyi -PM**] found and held that the appellant herein had failed to prove his claim to the requisite standard. In this regard, the learned trial magistrate proceeded to and dismissed the appellant's suit with costs.
4. On the contrary the learned trial magistrate found and held that the respondent had proved his counterclaim. To this end, the magistrate ventured forward and granted reliefs in terms of prays (a) (b)and (e) at the foot of the counterclaim dated **5th November 2019**.
5. It is the said Judgment and the consequential decree which has aggrieved the appellant, thus provoking the subject appeal. The appellant has highlight various grounds of appeal.
6. The grounds are as hereunder:-
 - i. THAT the learned magistrate erred in law and in fact in dismissing the appellant's suit.*
 - ii. The learned magistrate erred in law and in fact in finding that the respondent had proved the counter-claim against the appellant.*
 - iii. That the learned magistrate erred in law and fact in failing to find that the respondent's counterclaim was time-barred and offended the provisions of section 4(a) of the limitation of Actions Act Cap 22 Laws of Kenya*

- iv. *That the learned magistrate erred in law and fact in failing to find that the transactions between the parties was null and void for want of land control board consent.*
- v. *That the learned magistrate erred in law and fact in failing to make any finding on the issue of the requirement for the land control board consent.*
- vi. *That the learned magistrate erred in law and fact in failing to appreciate that lack of land control board consent restores the parties to status quo, ante.*
- vii. *That the judgment of the learned magistrate is against the weight of the evidence adduced before him.*

7. The appeal beforehand came up for directions on 21st may 2025, whereupon learned counsel for the appellant confirmed having filed and served the record of appeal. Furthermore, the counsel for the appellant intimated to the court that the record of appeal was complete; and in this regard, counsel sought directions pertaining to the hearing and disposal of the appeal. Moreover, both counsel agreed to canvass the appeal by way of written submissions.
8. Learned counsel for the appellant filed written submissions dated 19th June 2025; and wherein same has highlighted four [4] key issues, *namely*: whether the appellant proved his case on a balance of probabilities; whether the counterclaim was merited; whether the counterclaim was statue barred under the provisions of section 4 of the limitations of actions act, Chapter 22, Laws of Kenya; and whether lack of land control board consent rendered the sale agreement between the parties null and void.
9. Regarding the first issue, learned counsel for the appellant has submitted that the appellant and the respondent herein entered into and executed a sale agreement dated 19th February 2013. In addition, it was submitted

that the sale agreement was in respect of a portion of LR No. TIGANIA/THANANGA/723[the suit property].

10. Furthermore, learned counsel or the appellant has submitted that the subject sale agreement contained various terms and conditions which were agreed upon by the parties. In particular, it was submitted that in the event of failure by either party to conclude the sale agreement, the party in default was to pay liquidated damages. Besides, it was also submitted that if the party involved was the vendor; then same shall be liable to refund the purchase price along side the liquidated damages.
11. It was the further submission by learned counsel for the appellant that the appellant duly informed the respondent of the objection raised by his [appellant's family] to the sale of the suit land. To this end, counsel submitted that the appellant thereafter offered to refund the purchase price; and also to pay liquidated damages to the respondent. For good measure, counsel referenced a demand notice that was issued/ written on 10th January 2019.
12. Arising from the foregoing, learned counsel for the appellant has therefore submitted that the appellant placed before the learned trial magistrate plausible evidence demonstrating inability to proceed with the sale agreement; and that the appellant therefore proved his case to the requisite standard. In this regard, it was posited that the learned trial magistrate was therefore in error in finding and holding that the appellant had not proved his case to the requisite standard.
13. Turning to the second issue, learned counsel for the appellant has submitted that the learned trial magistrate erred in fact and in law in finding; and holding that the respondent had proved his counterclaim. In particular, it was submitted that the terms of the sale agreement allowed a party to repudiate the agreement subject to payment of liquidated damages.

14. In this regard, it was submitted that in so far as the appellant offered to refund the purchase price and liquidated damages [which offer was refused by the respondent], it cannot be said that the respondent had proved his counterclaim. Further and in any event, it was contended that the counterclaim by and on behalf of the respondent was filed after lapse of six years from the date of the execution of the sale agreement; and thus same was unenforceable.
15. Next is the issue as to whether the counterclaim was time-barred. In respect of this ground, learned counsel for the appellant has submitted that the sale agreement was entered into on 19th February 2023; while the counterclaim was filed in court on 6th November 2019. In this regard, learned counsel for the appellant has submitted that by the time the counterclaim was being filed, the statutory six-year period had lapse.
16. Based on the foregoing, learned counsel for the appellant has submitted that the counterclaim by the respondent was incapable of being entertained by the court. In particular, it was submitted that the counterclaim was defeated by the provisions of **Section 4 (1) of the Limitation of Actions Act Chapter 22 Laws of Kenya.**
17. Regarding the fourth issue, learned counsel for the appellant has submitted that the sale of the portion of the suit property was a controlled transaction. In this regard, it has been submitted that the parties were enjoined to procure and obtain the requisite land control board consent within six months from the date of execution of the sale agreement. However, counsel ventured forward and submitted that no land board control consent was ever obtained in respect of the suit transaction. To this end, it has been contended that the sale agreement was rendered *null and void*.

18. Flowing from the foregoing submissions, learned counsel for the appellant has therefore invited the court to find and hold that the appeal before hand is meritorious. The court has therefore been implored to allow the appeal, set aside the impugned judgment and in lieu therefore to grant the relief[s] sought at the foot of the Plaint dated **8th October 2019**.
19. Learned counsel for the respondent filed written submissions dated 28th July 2025; and wherein same has highlighted three [3] key issues, *namely*; whether the respondents counterclaim was statute barred and offended the provisions of Section 4(1) of the Limitation of Actions Act; whether the learned magistrate erred in fact and in law in failing to find that the transactions between the parties was null and void for want of the land control board consent; and whether the learned magistrate was justified to granted the prayers in the respondent's counterclaim.
20. Regarding the first issue, learned counsel for the respondent has submitted that the respondent's counterclaim was not time-barred, was neither time barred either as contended by the appellant or at all. In particular, it has been submitted that the cause of action for breach of contract [the sale agreement] only arose when the appellant sent the demand letter dated 10th January 2019; and wherein same signalled his intention[s] to renege/ resile from the sale agreement. In this regard, it has been contended that the counterclaim was timeously filed.
21. To buttress the forgoing submissions, learned counsel for the respondent has cited and referenced the decision[s] in the case of ***Diana Katumbi Kiiro vs Ruben Musyoki Muli [Civil appeal No. 211 of 2018] eKLR*** where the Court of Appeal held that the cause of action for breach of contract occurs when the contract is breached and not the date when the contract was executed.

- 22.As concerns the second issue, learned counsel for the respondent has submitted that the finding and holding by the learned trial magistrate that the transaction[s] between the parties was not defeated by lack of land control board consent was well grounded. To this end, it has been submitted that the appellant and the respondent willingly and voluntarily entered into and executed the sale agreement with the clear intention to perform their respective obligations. Furthermore, it was submitted that the appellant herein covenanted to procure and execute all the instruments of conveyance to facilitate the transfer and registration of the designated portion to the respondent.
- 23.Moreover, it has been submitted that the respondent proceeded to and paid out the entire purchase price to the appellant. Further and in any event, it has also been posited that the appellant had retained the entire purchase price and thus created a basis to infer trust.
- 24.Other than the foregoing, learned counsel for the respondent has also submitted that upon the entry into and the execution of the sale agreement, the appellant allowed the respondent to enter upon, take possession of and to develop the sold portion of the suit property. It has been contended that the appellant has since developed this designated portion of the suit property by planting assorted tea bushes; and wherefore the respondent derives income of Kshs.60,000/- annually.
- 25.Based on the foregoing, it has been posited that the learned trial magistrate was right in decreeing specific performance. Furthermore, learned counsel for the respondent has cited and referenced the decision in the case of **Macharia Mwangi Maina & 87 others versus Davidson**

Mwangi Kagiri [2014] eKLR; where the Court of Appeal invoked and deployed the concept of constructive trust in a similar situation.

26.Regarding the third issue, learned counsel for the respondent has submitted that the decision by the learned trial magistrate to allow the counterclaim was based on the circumstances of the transaction that was entered into by the parties. Moreover, it was contended that equity does not suffer a wrong without a remedy. In this respect, learned counsel has submitted that the obtaining circumstances warranted the grant of specific performance. In addition, counsel has relied on the decision in the case of **Thrift Homes Limited vs Kenya Investment Limited 2015 eKLR**, where the doctrine of specific performance was highlighted and deployed.

27.In view of the foregoing, learned counsel for the respondent has contended that the appeal beforehand is not meritorious. On the contrary, it has been submitted that the appeal is bereft of merits; and thus same ought to be dismissed.

28.Having reviewed the record of appeal; the evidence tendered [both oral and documentary] and upon taking into consideration the written submissions filed on behalf of the respective parties, I come to the conclusion that the determination of the subject appeal turns on Four [4] key issues, *namely*; whether the counterclaim by the respondent was statute barred or otherwise; whether the sale agreement between the appellant and the respondent was enforceable or whether the grant of specific performance was legally tenable; whether the appellant established his claim to the requisite standard or otherwise; and what reliefs [if at all] ought to be granted.

29. Before venturing forward to analyse the issue[s] that have been highlighted, it is imperative to observe that the Appeal beforehand is a first appeal from the decision of the court of first instance, *namely*, the Subordinate Court. By virtue of being a first appeal, this honourable court is vested with the requisite jurisdiction to scrutinise; review; re-evaluate; and re-analyse the findings of the court of first instance and thereafter to arrive at independent conclusions; taking into account the pleadings filed, evidence on record and the applicable laws. ***[See the provisions of Section 78 of the Civil Procedure Act, Chapter 21, Laws of Kenya].***

30. Nevertheless, it is imperative to underscore that even though this court is clothed with jurisdiction to scrutinise; review; re-evaluate; and re-analyse the findings and observations of the trial court, this court is, however, called upon to exercise necessary caution and circumspection. In addition, the court is called upon to defer to the findings of the trial court unless the findings of the trial court are informed by extraneous factors; based on mis-apprehension of the evidence; or, better still, are perverse to the evidence on record.

31. The scope and jurisdictional remit of this court whilst entertaining a first appeal has been elaborated upon and underscored in various decisions. In the case of **Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123**, the Court of Appeal for Eastern Africa [EACA] elaborated on the applicable principle[s] and stated thus;

"...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that this court must 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 this respect..."

32. Likewise, the extent and scope of the Jurisdictional remit of the first appellate court was also elaborated upon in the case of *Abok James Odera T/A A.J Odera & Associates versus John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR*, where the Court of Appeal held thus;

We also wish to be guided by the reasoning of this court in the case of *Mwana Sokoni versus Kenya Business Limited (1985) KLR 931 page 934,934* thus:-

*“Although this court on appeal will not lightly differ from the Judge at first instance on a finding of fact, it is undeniable that we have the power to examine and re-evaluate the evidence on a first appeal if this should become necessary. As was said by the house of Lords in *Sottos Shipping versus Sauviet Sohold, the Times, March 16,1983.**

“It is uncertain whether their Lordships should have reached the same conclusion on the evidence, but it is important that, sitting in the appellate court they should be over mindful of the advantages enjoyed of the trial Judge who saw and heard the witnesses and was in a comparably better position than the Court of Appeal to assess the significance of what was said, how it was said, and equally impotent what was not said”

Again, in *Peters versus Sunday Post Limited (1958) EA424*, a decision of the Court of Appeal for Eastern Africa, Sir Kenneth O'Conner, *P* said at page 429:

“It is a strong thing for an appellate court to differ from the finding on a question of fact of the Judge who tried the case and who has had the advantage of seeing and hearing and the witnesses”

33. Without endeavoring to exhaust the case law that elaborates on the scope and extent of jurisdiction of the first appellate court, it is apposite to take cognizance of the holding of the Court of Appeal in the case of *Gitobu Imanyara & 2 others v Attorney General [2016] eKLR*, where the court held as hereunder;

As we discharge our mandate of evaluating the evidence placed before the High Court, we keep in mind what the predecessor of this Court said in Peters –vs- Sunday Post Ltd [1958] EA 424. In its own words: -

“Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide ...”.

34. Duly guided by the principle[s] espoused in the various decisions cited in the preceding paragraphs, I am now well disposed to revert to the instant matter and to discern whether the findings and conclusions arrived at by the trial court accord with the totality of the evidence on record.

Furthermore, I will also be able to ascertain whether the conclusions are founded on the relevant legal principles or otherwise.

35. I beg to address the issues sequentially.

36. Regarding the first issue, it is important to recall that learned counsel for the appellant contended that the counterclaim by the respondent was statute-barred and thus defeated by dint of **section 4(1) of the Limitations of Actions Act**. According to the appellant, the sale agreement was entered into on 19th February 2013, while the counterclaim was filed on **6th November 2019**. To this end, it was posited that the counterclaim was filed outside the statutory six-year period.

37. It is instructive to highlight that the appellant herein has computed the duration for filing the counterclaim from the date of entry into and execution of the sale agreement [the contract]; however, it is common ground that the cause of action for breach of contract does not accrue from the date when the contract was entered into.

38. On the contrary, the cause of action for breach of contract accrues when the contract is breached or when one of the parties signals an intention to renege; repudiate; and/ or resile from the contract.

39. The Court of Appeal in the case of *Diana Katumbi Kiio v Reuben Musyoki Muli [2018] eKLR - Civil Appeal 211 of 2015*; stated thus:-

16. Both provisions refer to the date on which 'the cause /right of action accrued'.

A 'cause of action' is:

"... every fact which is material to be proved to entitle a party to succeed and every fact which the defendant would have a right to traverse." per Aldous LJ in Ord vs Upton [2000] 1 All ER 193. Lord Esher, M.R. in the case of Read vs Brown (1888), 22 QBD 128, defined it as:-

"Every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court".

while Lord Diplock in Letang vs. Cooper [1964] 2 All ER 929 at page 934 opined:-

"A cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person."

We defer to those definitions.

17. A cause of action in contract arises from breach of the contract and not at the time it is executed. According to the author in the Journal of International Banking and Financial Law: "What's the Limit" (2007) 11 JIBFL 642:-

"In contract the cause of action accrues when the breach occurs, but in tort the cause of action accrues when damage is first sustained. The cause of action, whether in tort or contract, arises regardless of whether or not the claimant could have known about the damage."

We agree with that exposition.

40. Back to the facts of this case. It is common ground that the sale agreement was entered into and executed on 19th February 2013. It is also not disputed that following the execution of the sale agreement, the respondent herein was allowed to enter upon and indeed entered upon; took possession; and developed the sold portion of the suit property.

Moreover, it was conceded that the respondent is still in occupation of the designated portion of the suit property.

41. Additionally, evidence abounded that the appellant herein generated and issued a demand notice/ letter dated 10th January 2019; and wherein the appellant signalled his intention to renege, repudiate and or resile from the terms of the sale agreement. Furthermore, it is at the foot of the said letter that the appellant intimated to the respondent that same [appellant] was willing to refund the purchase price and pay the liquidated damages.

42. From the foregoing, there is no gainsaying that the breach of contract and or signal that the appellant was no longer willing to perform his part of the bargain arose on 10th January 2019. To this end, the cause of action for breach of contract arose/ accrued on the said date; and not otherwise.

43. In the circumstances, I find and hold that the respondent's counterclaim was not barred by the provisions of section 4 (1) of the Limitations of Actions Act. On the contrary, the cause of action for breach of contract was timeously lodged and or mounted.

44. Turning to the second issue, whether the sale agreement between the appellant and the respondent was enforceable or whether the grant of specific performance was legally tenable, it is imperative to observe that the appellant herein has contended that the sale agreement [contract] concerned a controlled transaction. In this regard, the appellant contended that it was incumbent upon the parties to procure and obtain the land control board consent in accordance with the provisions of **section 6 of the Land Control Act, Chapter 302 Laws of Kenya.**

45. Nevertheless, the appellant contended that the requisite land control board consent was neither sought nor obtained. Consequently, and in this regard, it has been posited that the sale agreement touching on and concerning a portion of the suit property was rendered null and void.

46. *Put differently*, learned counsel for the appellant has submitted that the learned trial magistrate committed an error; and breached the Law; when same found and held that the impugned transaction was enforceable.

47. On his part, the respondent has posited that the parties willingly entered into and executed the sale agreement and thus evinced their intention to be bound by the terms of the agreement. Furthermore, it was contended that the appellant even allowed the respondent to enter upon, take possession and to develop the said portion of the land.

48. To this end, the respondent has invited the court to find and hold that the contract was enforceable. Moreover, the respondent has also invoked the holding of the Court of Appeal in the case of **Macharia Mwangi Maina & 87 others versus Davidson Mwangi Kagiri, (2014) eKLR.**

49. I beg to break down and discuss the subject issue into two perspective[s]. Firstly, there is no dispute that the sale of the subject portion of the suit property was a control transaction. In fact, both parties agree that land control board consent was to be procured and obtained. Furthermore, there is agreement that the land control board consent was not obtained.

50. What is the consequence of the failure to obtain the land control board consent in terms of section 6 of the Land Control Act, Chapter 302 Laws of Kenya? In my humble view, the failure to procure and obtain the land

control board consent renders the sale agreement/ contract null and void. In this regard, the impugned sale agreement could not form the basis of specific performance. The Sale agreement was dead and rendered otiose, for failure to obtain the consent.

51. In the case of *Karanja & 3 others (As Legal Representative of the Estate of the Late Walter Karanja Muigai) v Kirundi & another (Civil Appeal 172 of 2010) [2016] KECA 292 (KLR) (29 July 2016) (Judgment)*

53. In Karuri v Gituru [1981] KLR 247 this Court held that:

“ The court is not precluded from inquiring into the validity of the consent to determine whether it was regularly and properly given. As the Land Control Board did not have the power to grant consent after six months when the same became void the purported consent cannot be interpreted to have given life to the sale. The same was dead and the consent could not revive it.”

54. We have therefore come to the conclusion that the consent obtained on 16th December, 1993 was not valid and the purported validation of a consent obtained outside the stipulated period is without the force of law. The upshot of the above is that the sale of the suit property being agricultural land became null and void on expiry of six months from the date of the agreement i.e. 26th October, 1990.

55. However, this is not to say we are unsympathetic to the respondents but this being a Court of Law, our sympathies have no place. Suffice to state that the provisions of the Land Control Board Act are harsh, but regrettably, equity cannot be of any help.

In Karuri v Gituru (Supra), this Court held that:

“ The provisions of the Land Control Board Act are of an imperative nature; there is no room for the application of any doctrine of equity to soften its harshness.”

52. Notwithstanding the forgoing, I am alive to the decision in the case of *Maina & 87 others v Kagiri (Civil Appeal 6, 26 & 27 of 2011 (Consolidated)) [2014] KECA 880 (KLR) (22 January 2014) (Judgment)* where the Court of Appeal held that lack of consent cannot be deployed to defeat a claim for trust.

53. For coherence, the Court of Appeal expounded the position as hereunder:-

25. The transaction between the parties is to the effect that the Respondent created a constructive trust in favour of all persons who paid the purchase price. We are of the considered view that a constructive trust relating to land subject to the Land Control Act is enforceable. Our view on this aspect is guided by the Overriding Objectives of this Court and the need to dispense substantive and not technical justice

54. However, it is not lost on me that in the Macharia Mwangi decision [supra] the claimant had invoked and relied upon the concept of constructive trust. In respect of the instant matter, the respondent's case was purely based on specific performance. For good measure, the respondent merely sought to have the appellant compelled to sub-divide the suit land and thereafter execute the transfer instrument. There was no claim based on constructive trust, or such other trust at all.

55. I beg to point out that the respondent herein was bound by his pleadings. To this end, the respondent cannot now seek to invoke and deploy the spirit of the decision in **Macharia Mwangi** [supra] in an endeavor to vindicate the impugned Judgment. Such an attempt flies in the face of the doctrine of departure; and same is frowned upon by the Law.

56. The second aspect of this issue touches on the grant of the orders of specific performance. The orders that the learned trial magistrate granted effectively amounted to specific performance. Suffice it to underscore that the appellant was directed to perform his part of the bargain; and that in default, the instrument of conveyance and related form[s] were to be executed by the executive officer of the court.

57. I am afraid that the orders pertaining to specific performance were granted in vacuum. Quite clearly, there was no lawful agreement / contract which could underpin the issuance of such an order. Moreover, the sale agreement dated 19th February 2013 was vitiated for lack of land control board consent.

58. The law as pertains to specific performance was succinctly expounded by the court in the case of **Reliable Electrical Engineers (K) Ltd v Mantrac Kenya Limited [2006] eKLR - Civil Case 190 Of 2005**, where it was stated thus:

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.

59. Absent a valid and lawful contract, the orders of specific performance cannot issue. In this regard, and taking into account the erudite Legal principle in the cited decision; I come to the conclusion that the judgment of the learned trial magistrate which effectively decreed specific performance, is laced with errors. Simply put, the learned trial magistrate failed to apprehend and properly apply the legal principle underpinning the doctrine of specific performance.

60. Next is the issue as to whether the appellant proved his claim to the requisite standard, *namely*; on a balance of probabilities in the manner prescribed vide the provisions of sections 107 & 108 of the Evidence Act Cap 80 Laws of Kenya. It is instructive to posit and highlight that the burden of proof, *namely*; proving the claim laid on the appellant.

61. Did the appellant place before the court plausible evidence to demonstrate entitlement to the orders of eviction or otherwise? To start with, it is common ground that the appellant herein was and remains the registered proprietor of the suit property. Moreover, it is not in dispute that the

appellant entered into a sale agreement dated 19th February 2013 with the respondent.

62. The sale agreement, which was entered into between the appellant and the respondent contains various terms. The terms included a default clause whereby a party who breached and or failed to complete the sale agreement was to pay liquidated damages. Furthermore, if the party at default was the vendor [appellant herein] then same would be obligated to refund the purchase price paid.

63. The appellant herein was unable to conclude/complete the sale agreement. In fact, the appellant wrote to the respondent *vide* letter dated 10th January 2019; and wherein the appellant intimated to the respondent that his [appellants] family had objected to the transfer of the sold portion of the suit property.

64. In addition, the appellant also intimated to the respondent that same was ready and willing to refund the purchase price paid as well as the liquidated damages. For good measure, the appellant's letter was duly received by the respondent who thereafter instructed his counsel, *namely*; Ayub K. Anampiu to respond to the letter. [See Exhibit D4].

65. On the other hand, it is important to recall that the sale transaction between the appellant and the respondent required a land control board consent. Suffice it to recall that no land control board consent was obtained. To this end, the sale transaction was impacted upon; and affected by the provisions of **section 6 of the Land Control Act Cap 302 laws of Kenya.**

66. The foregoing position was not controverted by the respondent. In any event, it is important to highlight that the respondent had himself calculated and communicated [sic] the quantum of award claimable from the appellant.

67. Flowing from the foregoing, it is my finding and holding that the appellant tendered before the learned trial magistrate credible evidence to demonstrate the following;

- (a) Same was still the registered owner of the suit property.**
- (b) That the sale of the suit property did not accrue land control board consent.**
- (c) That same was ready and willing to refund the purchase price.**
- (d) That the transaction had collapsed.**

68. To my mind, and based on the various ingredient[s] shown herein; the appellant proved his case on a balance of probabilities. In this regard, I do not agree with the learned trial magistrate when same found and held that the appellant had failed to prove his case. Moreover, I beg to state that the conclusion by the learned trial magistrate was based on and or arrived at contrary to the weight of evidence on record.

69. In the premises, and having taking into account the guiding principles espoused in the case of **Mwanasokoni vs Kenya Bus Services (1985) eKLR and Jabane vs Olenja (1986) eKLR**; I am minded to and do hereby depart from the conclusions of the learned trial magistrate.

70. Turning to the final issue, *namely*; what reliefs [if at all] ought to be granted, it is important to recall that the appellant herein had sought an order of eviction of the respondent from the portion measuring 40ft by 100ft out of the suit property. In addition, the appellant had also sought for costs.

71. While dealing with the third issue, I have found and held that the appellant placed before the trial court plausible and cogent evidence proving his claim. Moreover, there is no gainsaying that the appellant remains the registered owner of the suit property. To this end, it is common ground that the appellant is entitled to partake of and benefit from the statutory rights and privileges attendant to ownership of landed property. [See Sections 24 and 25 of the Land Registration Act]. [See also the decision in the case of *Moya Drift Farm Ltd vs Theuri (1973) E.A.*]

72. Without belabouring the point; and having reviewed the entire evidence on record, I come to the conclusion that the appellant is entitled to an order of eviction. Nevertheless, given the duration of occupation of the disputed portion by the respondent, it is prudent that same be accorded a reasonable timeline to vacate. In my humble view, a duration of **120 days** would suffice.

73. Turning to the claims by the respondents, I beg to state that the respondent herein had been offered refund of the purchase price plus liquidated damages. Even though the respondents had declined the offer; and sought to pursue specific performance, there is no gainsaying that the sale transaction was *voided*.

74. Nevertheless, I wish to point out that the appellant had offered to refund the purchase price. In this regard, it shall be unjust and unconscionable to allow the appellant to retain his land as well as the purchase price.

75. Equity demands that the appellant be compelled to refund the purchase price. Similarly, the appellant is obliged to pay the liquidated damages.

Further and in any event, the appellant had made representations to that effect. Same is accordingly bound.

FINAL DISPOSITION.

76. Having analysed the thematic issues that arose from the instant appeal, it must have become apparent that the Judgment of the learned trial magistrate was coloured with errors of omission and commission. In this regard, the Judgment under reference lends itself to variation; and or setting aside.

77. Simply put, the appeal is meritorious.

78. In the upshot, the final orders that commend themselves to the court are as hereunder;

- (a) **The Appeal be and is hereby allowed.**
- (b) **The Judgment of the learned trial magistrate rendered on 16th December 2022 and the consequential decree be and are hereby set aside.**
- (c) **In lieu thereof, I proceed to make the following orders;**
 - (i) **The Appellant's suit in the lower court be and is hereby allowed.**
 - (ii) **The Respondent be and is hereby ordered to vacate and to hand over vacant possession of the suit property or the portion thereof to the appellant within 120 days from the date hereof.**
 - (iii) **In default by the respondent to comply with clause [ii] above, the appellant shall be at liberty to evict the respondent and in this regard an eviction order shall issue.**

- (iv) In the event of the respondent being evicted in terms of clause [iii]; the costs/expenses of eviction shall be certified by the Deputy Registrar and same shall be borne by the respondent.
- (v) The Appellant shall refund to the respondent the entire purchase price, *namely*; Kshs.90,000/= only, plus the agreed liquidated damages of Kshs.180,000/= only, making an aggregate total of Kshs.270,000/= only.
- (vi) The Refund in terms of clause [v] above shall attract interest at court rate [14%] per annum with effect from February 2013 until payment in full.
- (vii) Each party shall bear own costs of the appeal.
- (viii) Each party shall bear its own costs of the proceedings before the subordinate court.

79.It is so ordered.

**DATED, SIGNED AND DELIVERED AT MERU THIS 25TH DAY OF
SEPTEMBER, 2025**

OGUTTU MBOYA, FCIArb; CPM [MTI-EA].

JUDGE

In the presence of:

Hussein – Court Assistant

Mr. Harun Gitonga for the Appellant

Mr. Ngeera Muriuki for the Respondent