

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ELCA NO E057 OF 2024

DENNIS MAINA KIRATU
ANGELA WANJA MAINA
ANN WACEKE MAKORI
JOSEPH MWANGI KIRATU (Suing as administrators
of the Estate of the late LEAH GACHERU)
APPELLANT

VERSUS

PHILIP MUTURI & OTHERS (Sued on their own behalf
and on behalf of MIA MOJA SELF HELP GROUP)
RESPONDENT

*(Being an Appeal from a Judgment delivered by Hon. B. Ochieng Chief Magistrate
delivered on 26th September 2024 in Nakuru C.M. ELC NO 291 of 2019)*

BETWEEN

PHILIP MUTURI & OTHERS (Suing on their own behalf
and on behalf of MIA MOJA SELF HELP GROUP)
PLAINTIFF

VERSUS

DENNIS MAINA KIRATU & OTHERS.....
....DEFENDANT

JUDGMENT

1. This Appeal arises from a Judgment delivered on 26th September, 2024, in Nakuru C.M ELC No 291 of 2019. The Appellants being aggrieved by the said judgment lodged a Memorandum of Appeal dated 16th October, 2024 and listed the following twelve grounds:

- 1) *That the learned trial magistrate erred in law and fact in holding that the Respondents proved the case on a balance of probability.*
- 2) *That the learned trial magistrate erred in law and fact in failing to appreciate and properly analyze the evidence presented before him and arrived on the wrong conclusion.*
- 3) *That the learned trial magistrate erred in law and fact in failing to properly consider the Appellants' defence and submissions.*
- 4) *That the learned trial magistrate erred in law and fact in failing to hold that the suit was incompetent and time barred under the provision of Limitation of Actions Act despite evidence that the suit was filed more than 6 years from the time of the agreement.*
- 5) *That the learned trial magistrate erred in law and fact in failing to appreciate that the Respondent was in breach of the contract of sale and the principles of equity could not come to their rescue as he who comes to equity must do equity.*
- 6) *That the learned trial magistrate erred in law and fact by purporting that there existed constructive trust when no such evidence was tendered before the court.*
- 7) *That the learned trial magistrate erred in law and fact in purporting to write a contract for the parties before him.*
- 8) *That the learned trial magistrate erred in law and fact in purporting that there was an agreement between the parties herein that the balance in the sum of Kshs 190,000/= would be paid upon the transfer of the suit property to the Respondent herein when there was no such evidence before.*
- 9) *That the learned trial magistrate erred in law and fact in entering judgment in favour of the Respondent herein and*

ordering that a sum of Ksh 170,000/= be paid when the balance due in the agreement was Ksh 190,000/=.

10) That the learned trial magistrate erred in law and fact in holding that the Appellants herein were in breach of contract for failing to avail the title yet there is no such condition in the agreement.

11) That the entire judgment was not properly written and it included evidence not relevant and or related to the suit before the trial court.

12) That the entire judgment was founded on wrong principles and should be set aside.

2. The Appellants prayed for setting aside the entire judgment and order the dismissal of the suit with costs.

3. A brief background to this appeal is that the Respondents filed a suit against the Appellants in the lower court vide a Complaint dated 10th September, 2012, which was subsequently, amended on 5th August, 2019, seeking the following orders:

a) An order for specific performance of the contract herein by directing the defendants to transfer one acre curved out of the parcel of land known as NAKURU MUNICIPALITY BLOCK 17/86 to the plaintiffs herein.

b) A declaration that the written and verbal assurances made by the late Leah Gacheru and her deceased husband precipitated an equity which dictates that the contract should be performed and the land herein ought to be transferred to the plaintiffs.

- c) An order for the cancellation of the title issued in favor of the late Leah Gacheru herein and the rectification of the register to reflect the plaintiffs as the owner of the land.*
- d) Costs of the suit.*

4. The suit was heard and the Trial Magistrate, in his judgment dated 26th September, 2024, entered judgment for the Respondents in the following terms:

- a) An order for specific performance of the contract herein by directing the plaintiffs to pay the outstanding balance of Kshs 170,000/= to facilitate transfer by the defendants of one acre curved out of the parcel of land known as Nakuru Municipality Block 17/86 to the plaintiffs herein.*
- b) An order for cancellation of the title issued in favor of the late Leah Gacheru and the rectification of the register to reflect the plaintiffs as the owner of one acre curved out of the parcel of land known as Nakuru Municipality Block 17/86.*
- c) Costs of this suit to the Plaintiff.*

APPELLANTS' SUBMISSIONS

5. Ms. Wangare, counsel for the Appellants filed submissions dated 14th July, 2025, and identified the following issues for determination:

- a) Whether the suit was time barred?*
- b) Whether the suit was incompetent?*
- c) Whether the court could grant the reliefs sought?*

6. On the first issue, counsel submitted that the Respondent's suit was time-barred as the same was not for recovery of land but for enforcement of a contract by an order of specific performance. Counsel relied on Section 4 (1)

of the Limitation of Actions Act and the case of **Chirchir Arap Ruto vs Nancy Cherotich Koech & another Nairobi ELC No 642 of 2017**.

7. Ms. Wangare submitted that the suit before the trial court was founded on the contract executed on 18th December 2003, which completion date was 30th April 2004 and the 6-year period started running on 1st May 2004. That the suit was filed on 11th September 2012, as Nakuru CMCC NO. 1005 of 2012, which was later transferred to the ELC Court as ELC No. 346 of 2013. Counsel stated that the suit was therefore filed more than 6 years from 1st May 2004 hence the trial court lacked jurisdiction to hear and determine the suit under the provisions of the Limitation of Actions Act.
8. Counsel therefore submitted that the Respondent's suit was time barred, as it was not for recovery of land but for enforcement of a contract by an order of specific performance.
9. On the second issue, counsel submitted that the suit was incompetent for failure to comply with the requirements of Order 1 Rule 13 (1) & (2) of the Civil Procedure Rules, and relied on the case of **Ithenguri Mwireri Women Group vs Virginia Wanjiku Kamundia (2017) eKLR**. It was Ms. Wangare's submission that the Respondents did not produce the authority executed by the members of Mia Moja Self Help Group authorizing them to file the suit and amend the Complaint dated 10th September 2012 and 5th August 2019 respectively.
10. According to counsel, the Respondents produced minutes held on 29th July 2007 of the Self Help Group which did not indicate that it authorized the filing of this suit.

11. On the third issue, counsel submitted that the Respondents failed to prove the case on a balance of probabilities as required by law, as they did not comply with the terms of the contract before filing the suit. Counsel urged the court to allow the appeal and dismiss the Respondent's suit with costs, and relied on the following cases: **Kipsowo Community Self Help Group vs Attorney General and 6 others (2013) eKLR, Senti Kumi Community Self Help Group vs Kenya Maritime Authority & Another (2019) eKLR, Gurdev Singh Birdi and Another vs Abubakar Madhubuti CA No 165 of 1996, Thuo Commercial Agencies Ltd vs Nakuru Workers Housing Co-operative Society KEELC 1329 KLR, Violent Wanjiru Kihika vs Anthony Kanyiri Nakuru ELCA 005 of 2023 and National Bank of Kenya vs Pipe Plastic Sunkolit (K) Ltd & Another (2003) 2EA 503.**

RESPONDENTS' SUBMISSIONS

12. Mr. Githui, counsel for the Respondents, filed submissions dated 22nd July, 2025, and gave a brief background to the suit before the lower court and the genesis of the relationship between the Appellant and the Respondents in respect of the suit parcel of land.
13. Counsel submitted that the suit before the court was a claim for recovery of land following a contract of sale. Counsel submitted that the Respondent's position before the trial court was that they entered into a contract for the sale of land and took possession following the signing of the contract. Counsel submitted that the recovery of land was through the action for specific performance of the contract and the limitation period for such suit is twelve years.
14. Mr. Githui further submitted that the issue of competence of the suit for non-compliance with Order 1 Rule 13 of the Civil Procedure Rules was never

pleaded in the trial court and neither does it arise in the Memorandum of Appeal and cannot be considered by the court. Counsel submitted that even if the court were to consider the same, the plaintiffs sued in their personal and official capacity whereby each of the Respondents executed a verifying affidavit. It was counsel's submission that non-joinder of the members of the Mia Moja self-help group is not a bar to the determination of the rights of the plaintiffs.

15. It was counsel's submission that assuming the Appellants' cause of action accrued on 30th April 2004, this suit was filed within the limitation period in 2012. Counsel also stated that the amended statement of defence consisted largely of bare denials, however, paragraph 7A raised the defence of Limitation while paragraph 7 B raised the defence of Alternative dispute resolution mechanism, which defences were considered by the trial court and found in favour of the Respondent.
16. Counsel submitted that the ground of appeal based on the limitation period lacks merit and should be dismissed. Counsel relied on Sections 4 (1) & 7 of the Limitation of Actions Act and the cases of **Letang vs Cooper [1964] 2 All ER 929**, **Osiemo vs Kenya Commercial Bank Limited (Civil Appeal 552 of 2017)** and **Wainaina vs Sunrise Synthetics Limited (ELC Case No 225 of 2018)**.
17. Mr. Githui further submitted that the Appellants' submissions are misplaced as it fails to appreciate the jurisdictional remit of the trial court and the appellate court. It was counsel's submission that it fails to appreciate the capacity in which the plaintiffs (respondents herein) filed the present suit, hence, based on skewed interpretation of Order 1 Rule 13 of the Civil Procedure Rules, and

relied on the cases: **Levi Simiyu Makali vs Koyi John Waluke & 2 others [2018] eKLR, Pacific Frontier Seas Ltd vs Kyengo & another (Civil Appeal No 32 of 2018) [2022] KECA 396 (KLR), Odd Jobs vs Mubia (1970) EA 476, Juma & 5 others vs Mada Holdings t/a Baobab Sea Lodge Kilifi Limited [2025] KECA 817 (KLR), Frera Engineering Company Limited vs Morris Mureithi Mutembei (Civil Appeal No 329 of 2018), Shadrack Mwamuu Nzioka & 2 others (Suing on their behalf as officials of Crescent Self Help Group) vs Tropical Blooms Limited [2020] eKLR and Diesel Inject Services vs Shajand Holdings Ltd [2024] KEHC 4902 (KLR).**

18. Mr. Githui urged the court to dismiss the appeal with costs and further relied on the cases of Virginia **Ciamati Murage & another vs Stanley Advane Kiriimi [2021] eKLR, Willy Kimutai Kitlit vs Michael Kibet [2018] eKLR, Violet Wanjiru Kihika vs Anthony Kanyiri (Nakuru ELCA 005 of 2023) and Ruth Ndume Mwangangi vs Joseph Mbithi Nthenge & another [2022] eKLR.**

ANALYSIS AND DETERMINATION

19. The issue for determination is whether the appeal has merit. In the case of **Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] e KLR**, the court held as follows:

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze 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”

20. The court is cognizant of the fact that it is sitting as an appellate court which did not have the benefit of taking the evidence and appreciating the demeanor of the witnesses before it. The court's duty is to re-evaluate, re-assess and re-analyze the evidence in the record of appeal and determine whether the conclusions arrived at by the trial court should stand or be set aside and the reasons for the stand taken. The Appellant listed twelve grounds of Appeal which can be condensed into two grounds namely, whether the suit was competent and whether it was time barred as per the provisions of the Limitation of Actions Act.
21. Counsel for the Appellants submitted that the suit was for enforcement of a contract, which was governed by the Contract Act. That the subject matter of the contract was entered into on 18th December, 2003, with a completion date of 30th April, 2004, hence the six-year period started running on 1st May, 2004. It was counsel's submission that this rendered the contract unenforceable due to the provisions of the Limitation of Actions Act.
22. The trial court in determining whether the suit was time barred pronounced as follows:

“The cause of action arose when the defendant failed to perform his obligation under the contract. It is undisputed that the vendor managed to obtain a title deed in 2011, however he declined to execute a transfer in favour of the plaintiff after obtaining the title deed. In the premises, time, for purposes of the Limitation of Action Act is computed from the date when the vendor failed to perform his side of the contract, which in this case is the year 2011. This case having been filed in 2012 it is clear the defense of limitation is unsustainable.”

23. In the case of **Bhogals Garage Limited v Shukhwinder Singh Jutley Purporting to Trade as Sukako Transporters Limited and/or Sukako Limited & 2 others** [2017] KEHC 528 (KLR), the court held as follows:

“In my considered view, it is upon breach of the terms of the contract that the course of action arises, and time starts running from then, not when the contract was entered into, but when there is a default. My view is buttressed by the holdings in not only the earlier authority I have cited but also in the following, Commercial Civil Case No. 16 of 2004(Judgment delivered on the 24th November 2011 where the judge clearly stated when a breach of contract occurs and when time begins to run in breach of contract – Thomas Kibe & 114 Others -vs- K.P.A. (2011) e KLR.

7. Quoting from the book entitled: “Limitation Act 7th Edition 1997” by V.R. Manohar, the learned author stated: “In the case of continuing breach of contract or in the case of continuing tort, a fresh period of limitation begins to run at every moment and time during which the breach or tort as the case maybe, continues.”

Further, in the book “Arsons Law of Contract 28th Edition by J. Beatson, it is stated:

“A distinction is however drawn between a once and for all breach and a continuing breach ---

In the case of continuing breach, the promised duty is considered as persisting and as being forever renewed until that which has been promised has been one a further breach arises every

successive moment of time during which the state or conditions to promised.”

24. Section 4 (1a) of the Limitation of Actions Act provides that actions founded on contract may not be brought after the end of six years from the date on which the cause of action accrued. The agreement dated 18th December, 2023 under clause 10 states as follows: ***“Any party who breaches this agreement shall pay to the other a sum equal to 10% of the agreed purchase price being liquidated damages.”***

25. The issue is when time began to run. Clause 6 of the said agreement stated that:

“The vendor undertakes to do all that is required to have the said parcel of Land transferred to the purchaser by executing all documents and obtaining all the necessary consents.”

26. The agreement was dependent on the action of the Appellant fulfilling his part of the bargain to enable completion of the agreement. The original vendor died and the representatives thought that they would throw the Respondents under the bus and not fulfil what the deceased had already committed to do. The representatives got the title in their name and did not perfect the agreement.

27. This was a continuing breach, as the promised duty was considered as persisting and as being forever renewed until what had been promised has been fulfilled. It therefore follows that the suit was not caught up with the limitation of actions. Conversely, this was an agreement for sale of land whose limitation is 12 years, which had not lapsed by the time the breach, and the suit was filed in 2012.

28. In the case of **Gichari & another v Muchiri (Environment & Land Case E010 of 2023) [2024] KEELC 1519 (KLR) (20 March 2024) (Ruling)** the court observed as follows:

*“The Court earlier had stated that for determination on whether the suit is caught by limitation of action, (sic) the Court has to determine the cause of action herein. The case of Edward Moonge Lenguuranga vs James Lanaiyara & Another (2019) eklr, defined a cause of action as a set of facts sufficient to justify a right to sue to obtain property or enforcement of a right against a party. For a cause of action herein to be determined, it is important to look at the averments and the prayers sought in the **Plaint.**”*

29. The Appellant raised the issue of the competence of the suit before the lower court at the Appellate court. I note that this issue was never raised in the lower court. It is being raised now. It is trite that parties are bound by their pleadings. From the pleadings, it is clear that the Respondents swore verifying affidavits individually and indicated that they were suing on their behalf and on behalf of Mia Moja Self Help Group. It would have been fatal if they had only sued in the name of the Self Help Group, but in this case, they included the members.

30. On the issue of the order of specific performance that the court granted, in the case of **Reliable Electrical Engineers (K) Ltd v Mantrac Kenya Limited [2006] KEHC 2855 (KLR)**, the court held that:

“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.”

31. The Respondents had proved that there was a valid enforceable contract that did not suffer from any defect. The Respondents had fulfilled their part of the bargain and what was remaining was for the Appellant to perfect his part of the agreement.
32. I find that the Trial Magistrate considered the evidence on record and came to the correct conclusion. I find no reason to interfere with the said judgment. Consequently, this appeal is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 29TH DAY OF OCTOBER 2025.

M. A. ODENY
JUDGE