



**Cheboren v Masai (Environment and Land Case E032 of 2024)
[2026] KEELC 2093 (KLR) (15 April 2026) (Judgment)**

Neutral citation: [2026] KEELC 2093 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT AND LAND CASE E032 OF 2024**

CK NZILI, J

APRIL 15, 2026

BETWEEN

WALTER KIPTALA CHEBOREN PLAINTIFF

AND

LINET CHEPKEMOI MASAI DEFENDANT

JUDGMENT

1. What the plaintiff seeks through a plaint dated 29/8/2024 is specific performance of a sale agreement, which was also admitted through an acknowledgement note dated 18/7/2023. In support of his claim, the plaintiff relied on a witness statement dated 20/3/2025 as his evidence-in-chief.
2. The plaintiff, as PW1 produced P. Exhibits No. (1), (2), and (3) as evidence of the existence of the sale agreement and admission of indebtedness by the defendant. He urged the court to find that the exhibits comply with the requirement of Section 3(3) of the Law of Contract Act, to be entitled to the equitable remedy of specific performance.
3. In support of his testimony, the plaintiff called Mr. Edward Katama Ngeywa, advocate, as PW2, who told the court that he prepared and witnessed the parties execute P. Exhibit No. (2). PW2 stated that P. Exhibit No. (2) complied with Section 3(3) of the Law of Contract Act, and that it was voluntarily signed by all the parties to this suit, who were his known clients.
4. PW2 said that he did not come across the initial agreement made by the parties in 2016 or 2017, save that the defendant had acknowledged receipt of Kshs.3,500,000/= from the plaintiff, on an aborted sale of land.
5. The defendant opposed the suit through a statement of defence dated 15/10/2024. It is pleaded that there was no validly enforceable sale agreement in law, capable of being enforced by way of specific performance. In particular, the defendant pleaded that what was in existence was an anticipated



- transaction that never materialised. The defendant averred that there was no evidence of payment of Kshs.13,500,000/= by the plaintiff as consideration.
6. Other than the statement of defence and a witness statement and cross-examination of the plaintiff's witness, learned counsel for the defendant submitted that the plaintiff has not discharged the burden of proof that he is entitled to the reliefs sought, for lack of a validly enforceable contract in the first instance, and for lack of proof that he had paid the alleged monies to the defendant, in the absence of bank statements and deposit slips in the alleged bank account belonging to the defendant. The parties relied on their respective oral submissions to sustain their claims based on the evidence adduced.
 7. The single issue for my determination is whether the plaintiff is entitled to specific performance. In *Boma -vs- Kabugua & another* (Civil Appeal E019 of 2022) [2026] KECA 50 (KLR) (30 January 2026) (Judgment), the respondent had sought specific performance and, in the alternative, refund of purchase price, damages for breach of contract, loss of income, and vacant possession. The 2nd appellant had not entered an appearance, while the 1st appellant had opposed the same. The suit property had been sold to a third party by the vendor. A refund had been ordered by the trial court and general damages instead of specific performance.
 8. On appeal, the court faulted the trial court for not granting specific performance solely on the basis that it was going to cause potential hardship to the appellant, who stood to benefit from an unenforceable agreement. The court allowed the appeal. The court cited *Manzoor -vs- Baram* [2003] 2 EA, that specific performance is an equitable remedy where equity regards as done what ought to be done.
 9. The court further cited *Gharib Suleiman Gharib -vs- Abdulrahman Mohamed Agil* LLR No. 750 (CAK) Civil Appeal No. 112 of 1998, that the jurisdiction to grant specific performance is based on the existence of a valid and enforceable contract, and that it is granted where a party seeking it cannot obtain sufficient remedy by an award of damages, the focus being whether or not specific performance will be more perfect and complete justice than an award of damages.
 10. In *James Murithi Maina -vs- Shekale Bwana*, Civil Appeal No. E009 of 2022, at issue was an agreement that had been entered into between the appellant and an agent to whom the respondent had donated a power of attorney for Kshs. 1,800,000/=. There was a failure to hand over vacant possession, since the land was sold to a third party in an alleged fraudulent manner. The appellant sought a refund, while the respondent had denied entering into a sale agreement directly or through an agent. The court dismissed the suit for failing to call the advocate who had prepared the agreement or witnessed the payment, or a document examiner to confirm the authenticity of the signatures and the handwriting on the documents.
 11. On appeal, the issue was whether the appellant had proved on a balance of probabilities the existence of a sale agreement and the disputed payment of the purchase price. The court said that the admission of a witness statement as evidence by consent is akin to an admission of a document by consent, as held in *Ken Nyaga Mwige -vs- Austin Kiguta & Others* [2015] eKLR, which does not by itself amount to its proof and its probative value would have to be reached by weighing its contents, the pleadings and other evidence.
 12. Applying the foregoing case law to the instant suit, the plaintiff's case is that he indeed paid monies to the defendant on account of a sale of 22 acres at Kshs. 13,500,000/= in her bank account. The plaintiff's evidence is that after the breach, the defendant acknowledged indebtedness through P. Exhibit No. (2), in the presence of her lawyer, PW2, and again offered to provide alternative land to him by July 2024, in default, a refund, which she had not honored by the filing of this suit.



13. The acknowledgement in writing of the existence of the transaction or indebtedness by the defendant through P. Exhibit No. (2) is not specifically disputed or contested in the statement of defence. PW2 told this court that the defendant willingly and consciously appended her signature to P. Exhibit No. (2).
14. In *Magretville Asami Machio & another -vs- Musa Mwera Athuman & 2 others* [2022] KEELC 1791 (KLR), the court said the principle that contracts freely and voluntarily entered into must be honoured remains central to the law of contract. This is based on the freedom of contract doctrine, which holds that a person, through voluntary exchange, should take responsibility for the promises they make and have their contracts enforced. The court held that every party to a binding contract who is ready to carry out his own obligation under it has a right to demand from the other party, so far as possible, a performance of his undertaking in terms of the contract.
15. The court said that an award of specific performance is, in principle, an equitable relief that is discretionary for the court to enforce the terms of an executed contract. The court cited *Michael Murithi Muthii -vs- Cecilia Wanjiru Cooper & 3 others* [2021] KECA 9641 [KLR], that such a relief will not be granted to a party who does not deserve it, for example, by reason of unclean hands or his failure to do equity. The court cited *Caltex Oil (K) Ltd -vs- Rono Ltd* [2016] KECA 457 [KLR], and *Thomas Openda -vs- Peter Martin Ahn* [1984] KECA 25 (KLR), that a condition precedent for specific performance is that the purchaser must pay or tender at the time and place of completing the sale, the purchase price to the seller or such person as he directs. As to general damages, the court cited *Kenya Tourist Development Corporation -vs- Sundowner Lodge Ltd* [2018] KECA 312 [KLR], that general damages are not recoverable in case of alleged breach of contract.
16. Turning to the facts in this suit, it is trite that parties are bound by their pleadings, and issues for the court's determination flow from those pleadings as held in *Electoral and Boundaries Commission & another -vs- Stephen Mutinda Mule & 3 others* [2014] eKLR. The plaintiff pleads that he made payments while awaiting the completion documents to be provided by the defendant.
17. He blames the defendant for the delay and breach of the terms and conditions of the oral agreement, frustration of the same despite several oral variations, and the defendant's inability to procure the land control board consents to transfer the titles under his name.
18. Further, the plaintiff pleads that following the breach, the parties entered into an acknowledgement note and undertaking on 18/7/2023, for an alternative 22.5 acres of land within the same locality, which was to be availed to him in two batches of 12 acres and 10.5 acres on 1/1/2024 and 20/6/2024, which unfortunately the defendant also breached hence the alternative option of a refund of Kshs.21,375,000/=.
19. The plaintiff now prays for specific performance to have the transfers made for the initial 6 parcels of land measuring 22.5 acres and, in the alternative, compensation for the said parcels of land at the current market value, general damages for breach of contract, mesne profits with effect from 2016 to the date of delivery of the judgment.
20. On the other hand, the defendant denies the existence of any sale agreement for the alleged 6 pieces of her land. The defendant further denies receipt of the alleged sums of money from the plaintiff, on account of any alleged sale of the 6 pieces of land. The defendant denies the alleged breach and or frustration of the alleged agreement, or being party to any alleged verbal variation.
21. The defendant pleads that the alleged sale agreement is against the provisions of Section 3(3) of the *Law of Contract Act* and Section 38 of the *Land Act*. The defendant denies the existence of the



- acknowledgement note and undertaking dated 18/7/2023. She terms it as having no legal effect and that it cannot be enforced.
22. In the alternative and without prejudice to the foregoing, the defendant admits that on various dates, deposits of funds were made by third parties on instructions of the plaintiff for an anticipated transaction which never materialized, no sale agreement was entered into, to purchase any land, no land control board consents were sought or obtained for the said transactions in line with the law being agricultural land.
 23. The defendant says that the only remedy available to the plaintiff is a refund of the deposits made; the alleged undertaking of 18/7/2023 is not a legal instrument capable of passing interest in land, the sum of Kshs. 21,315,000/= . The same is untenable in law. Further, the consideration of Kshs. 950,000/= is not sustained by any sale agreement, the Kshs. 950,000/= mentioned in the undertaking was a projection for the purpose of securing land on account of the deposits made, the deposits made by third parties on behalf of the plaintiff, who are not parties to this suit was for an anticipated transaction which would have culminated to the purchase 22.5 acres of land, and that specific performance is not possible for the 6 parcels of land which are encumbered.
 24. In the reply to defence dated 30/10/2024, the plaintiff avers that an inference can be drawn from the conduct of the parties and the subsequent acknowledgement and undertaking as to their intention, that the parties were clearly aware of what the transactions involved, and the facts are admitted in the said undertaking.
 25. The law is that parties have the freedom to contract, and that courts do not rewrite sale agreements. In *George Njenga Kagai -vs- Samuel Kabi Njoroge & Others* Civil Appeal No. 29 of 2017, the court held that where time is not stipulated in the contract as of the essence, notice must be given to the defaulting party to rectify the default, as held in *Elijah Kipkorir Barmalel & another -vs- John Kiplagat Chemweno & Others* [2020] eKLR. The court cited *William Kazungu Karisa -vs- Cosmus Angore Chanzera* [2006] eKLR, that the basic rule of law of contract is that parties must perform their respective obligations in accordance with the contract executed by them.
 26. The court cited *Cassam & another -vs- Sachania & another* (1982] KLR 191, that if the obligation was on the appellant to execute the transfer after which the balance of the purchase price was to be paid, it was not open to them to declare the agreement as null and void on the ground that the balance was not paid.
 27. The court cited *Gurdev. Singh Birdi -vs- Marinder Singh Ghatora & Another* Civil Appeal No. 165 of 1996, and in *Nabro Properties Ltd -vs- Sky Structures Ltd & Others* [2002] 2 KLR 300, that a party seeking specific performance must show and satisfy the court that it can comply and was ready and able to discharge its obligation. The court held that courts may refuse the relief if it would be oppressive, unjust, and finally injurious to the opposite party, especially if he was not guilty of laches or inordinate delay.
 28. The defendant takes the view that there was no legally executed sale agreement capable of being enforced in law or giving the plaintiff any rights or remedies in law. On the other hand, the defendant is also admitting that there were deposits made to her account by third parties, on behalf of the plaintiff, for an anticipated transaction. The defendant also admits that if the plaintiff has any legal remedies, the same would be for a refund of the deposits made and not specific performance, since the titles to the suit properties are encumbered, as shown by the official search certificates. The defendant also cites the lack of land control board consents, making the agreements null and void.



29. In *Kitilit -vs- Kibet* Civil Appeal No. 51 of 2015, the court cited *Macharia Mwangi Maina & 87 Others -vs- Davidson Mwangi Kagiri* [2014] eKLR, that the appellant's actions of receiving the full purchase price and putting the respondent in possession created a constructive trust in favour of the respondent and hence, the granting of specific performance.
30. In *Kitilit -vs- Kibet* (supra), the court went on to say that Sections 25(2) and 28 of the [Land Registration Act](#) do not relieve a proprietor of its duty or obligation which it is subject to as a trustee. As regards Sections 38(1), 40, 41, and 161(2) of the [Land Registration Act](#) and Section 3(3) of the [Law of Contract Act](#), the court has powers to grant reliefs to the purchaser against a rescission of a contract on the sale of land or its breach.
31. The court also cited *David Ole Tukai -vs- Francis Arap Muge & Others* [2014] eKLR, which differed from *Macharia Mwangi Maina* (supra). In *Kitilit -vs- Kibet* (supra), the court said that the doctrines of equity are part of our laws and that, though Section 3(3) of the [Law of Contract Act](#) and Section 38(2) of the [Land Act](#) require that contracts for disposition of an interest in land should be in writing, the requirement does not affect the creation or operation of a resulting, implied or constructive trust, which doctrines can be invoked to provide relief against unconscionable conduct. The court cited *Yaxley -vs- Gotts* [2000] Chi 162, which held that an oral contract was enforceable under a constructive trust, especially where there was partial performance of the contract.
32. The court, based on Articles 10(2) (b) and 159(2)(e) of [the Constitution](#), held that the doctrines of equity have been elevated to a principle of justice as a constitutional principles, hence superseding the [Land Control Act](#), where a transaction relating to an interest in land is void and unenforceable for lack of a land control board consent.
33. In *Kiprono -vs- Kiprono* (Civil Appeal 100 of 2020) [2026] KECA 331 (KLR) (27 February 2026) (Judgment), an advocate who had direct involvement in drafting and attesting the agreement, like in this suit, was available as a witness. The court found the testimony credible, unrebutted, and of greater weight. Failure to produce receipts, bank slips, and an independent witness to prove the actual handover of the Kshs. 200,000/= was said to hold no water.
34. In *Shah & 7 others -vs- Mombasa Bricks & Tiles Limited & 5 others* (Petition 18 (E020) of 2022) [2023] KESC 106 (KLR) (28 December 2023) (Judgment), the court held that a constructive trust is a doctrine of equity serving the purpose of preventing unjust enrichment. It arises in connection with the legal title to property when a party conducts himself in a manner to deny the other party a beneficial interest in the property acquired or takes advantage for his own benefit. The court said that the doctrine could arise whenever justice and good conscience required it and was capable of defeating in a sale agreement the rights of a registered title holder.
35. The court also affirmed that courts are an integral part of Kenya's judicial system, entrusted with the responsibility of adjudicating disputes and administering justice in accordance with the constitutional ethics, values, and principles, such as those in Articles 10 and 159 of [the Constitution](#). See *Lunak Heavy Industries (UK) Ltd & Anor -vs- Tyburn Film Productions Ltd* [2025] EWCA Civ 1643.
36. In *Boma -vs- Kabugua* (supra), the court said that where a party is given a right to be heard, he cannot turn around to say that his right was violated under Article 50(1) of [the Constitution](#).
37. In this suit, the defendant was granted the opportunity to attend court. The record shows that on 28/10/2025, the defendant's counsel sought an adjournment since his client had travelled out of Kenya. The matter was given another date by consent on 3/2/2026. The defendant failed to attend to ventilate her defence, allegedly attending morning athletics training at Iten. Learned counsel for her tried to adopt a witness statement as her evidence, which the plaintiff declined. Her defence was



marked as closed. So, the failure to attend court to prove and substantiate that there was neither a valid sale agreement, an oral variation, a breach, nor any frustration.

38. What is before this court is a case where the defendant has denied receipt of the payment deposits either directly or through third parties on behalf of the plaintiff, and more importantly, denied that there was a valid acknowledgement and undertaking made before her lawyer, PW2.
39. The court in the circumstances and in the absence of evidence to the contrary in support of the defense find that the evidence of the plaintiff and his witness is unshaken, that there was an intention to enter into a sale agreement with the defendant when valuable consideration was paid to the defendant directly or through third parties, which the defendant later acknowledged receipt of, and before PW2 and executed P. Exhibit No. 2 on 18/7/2023.
40. In P. Exhibit No. 2, the defendant admits owing Kshs. 13,500,000/= to the plaintiff, being consideration for the purchase of a portion of land comprised of L.R. Nos. Kiminini/Kinyoro Block 2/Chumek/52, 53, 58, 59, 60, and 61. The acknowledgement was a clear admission of the earlier oral agreement in 2016, the receipt, and the consideration.
41. The defendant opted to look for an alternative land in Clauses No. 1 and 2, in default of refund by 15/7/2024, of Kshs. 13,500,000/= with interest at market rates. PW1 said that he filed this suit on 2/9/2024, two months after the expiry of the deadlines. The defendant has not pleaded that the plaintiff was the cause of the second default as per P. Exhibit No. (2). P. Exhibit No. (2) complies with Section 3(2) of the [Law of Contract Act](#).
42. Courts do not rewrite contracts but enforce them, unless vitiated by illegality or fraud. The defendant has not attacked the acknowledgement note and undertaking on account of fraud, illegality, or made through duress, undue influence, or any unconscionable means.
43. In Stanbic Bank Kenya Ltd -vs- Santowels Ltd SCOK Petition No. E005 of 2023, the court held that general words should not be read in isolation, but in their context. The court, guided by Gatirau Peter Munya -vs- Dickson Mwenda Kithinji & Others [2014] eKLR, held that statutes should be purposively interpreted to reveal the intention of the legislature and the statutes themselves. Courts should not aid parties to a contract to escape their obligations. The defendant, as held in National Bank of Kenya Ltd -vs- Pipe Plastic Samkolit (K) Ltd & Another [2001] KLR 112, is bound by the terms of P. Exhibit No. (2).
44. The defendant consciously signed the agreement and must abide by it. The defendant took Kshs. 13,500,000/= from the plaintiff for an anticipated transaction, the terms of which she never delivered or honoured. Though the defendant pleads that the order for specific performance is not reasonable, she does not offer to refund the sum due, as she had agreed in P. Exhibit No. (2). Through the doctrine of proprietary estoppel, the defendant cannot plead through the statement of defence that she is not aware of the Kshs. 13,500,000/= or did not receive it. The court wonders why, if the said amount did not reflect in the defendant's bank account, she acknowledged receipt of the same in an agreement dated 13/7/2023.
45. A year after signing the acknowledgement note, the defendant had not availed alternative land or refunded the sum of Kshs. 13,500,000/=. It would be unjust for the defendant to keep both the land parcels and the consideration.
46. The court finds the plaintiff entitled to Kshs. 13,500,000/= plus interest at the market rates, with effect from 15/7/2024 until payment in full.
47. Prayers (a), (c) and (d) are declined.



48. Costs are granted to the plaintiff.

49. Orders accordingly.

**JUDGMENT DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT
AT KITALE ON THIS 15TH DAY OF APRIL 2026.**

In the presence of:

Court Assistant - Dennis

Mbetera for Nyaberi for the plaintiff present

L.O.K. for the defendant absent

HON. C.K. NZILI

JUDGE, ELC KITALE.

