



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ELCLC CASE NO E269 OF 2025

JANET KEMUNTO OGARI.....
PLAINTIFF

-VERSUS-

SAMSON MUTUKU..... 1ST
DEFENDANT

THE CHIEF LAND REGISTRAR NAIROBI..... 2ND
DEFENDANT

JUDGEMENT

Background

1. This matter is in relation to land title No 12661/79 herein referred to as the suit property.
2. The plaintiff avers that she together with the late husband entered into a sale agreement dated 8th October 2010 with the 1st defendant who was the registered owner for the sale of the suit property at a consideration of Ksh.14,000,000/= and that upon receipt and acknowledgement of the same, the plaintiff took possession and even started developing on the same.
3. That the 1st defendant has failed to execute transfer instruments in her name despite constant requests of the same necessitating the filing of this suit seeking for the following orders
 - a) An order for Specific performance of the agreements dated the 8th October, 2010.

- b) An order of declaration that the Plaintiff is the purchaser for value of the property known as land reference number 12661/79 measuring nought decimal three seven naught nought (0.3700) of a hectare and situated in the city of Nairobi within the Republic of Kenya.
- c) A declaration that the Plaintiff is entitled to lien on property known as land reference number 12661/79 measuring naught decimal three seven nought (0.3700) of a hectare and situated in the city of Nairobi within the Republic of Kenya in respect of any damages and costs.
- d) In the alternative an order that the Deputy Registrar do sign the transfer and all other relevant documents necessary to enforce the transfer of the suit property known as land reference number 12661/79 measuring naught decimal three seven nought nought (0.3700) of an hectare and situated in the city of Nairobi within the Republic of Kenya to the plaintiff
- e) An order directed at the 2nd Defendant to register the plaintiff as the owner of the suit property and issue title deed in respect of the suit property to the plaintiff.
- e) Costs and interest of this suit.
- f) Any other relief the court deems fit to grant.

4. The defendants were duly served with summons to enter appearance but only the 2nd defendant entered appearance and filed a defence. The 2nd defendant denied the allegations in the plaint

indicating the plaintiff had no cause of action as against the 2nd defendant

5. The Matter proceeded for hearing on 4th November 2025 where the plaintiff proceeded with no appearance from the 1st defendant. The plaintiff testified as (PW1) relying on her witness statement and bundle of documents dated 25th May 2025. She reiterated that she bought the property after entering into a sale agreement and after paying the consideration of Ksh.14,000,000/= she took possession. That the defendant had failed to transfer the same in her name. On cross examination she indicated that she had not produced any documents to show that she had paid the purchase price of Ksh.14,000,000/=

This marked the close of the plaintiff's case.

The 2nd defendant did not call any witnesses.

Plaintiff 'submissions

The plaintiff filed submissions dated 21st November 2025. They submitted that the 2nd defendant failing to adduce any evidence in support of their defence made the suit uncontroverted.

Counsel submitted upon taking possession of the suit property they found trespassers on the same and hence filed **ELC 769 OF 2023 Atif Mohamed S.Sayed and Janet Kemunto Ogari -Vs- Marcela Omwenga & Timothy Ondieki Beree** where judgement was entered in their favour declaring them as beneficial owners .That upon trying to execute the same judgment and have

the decree registered, the 2nd defendant refused on the account that neither the seller nor them had been parties to the suit necessitating the filing of this suit

2nd defendant submissions

The second defendant submitted that the plaintiff had failed to prove her case as required by Section 107 (1) of the evidence Act that is on a balance of probabilities as she had not proved that she paid the whole consideration for her to acquire title. Having failed to prove her case, counsel submitted she was not entitled to the orders as sought.

Analysis and Determination

6. Having looked at the pleadings filed by the Plaintiffs, the defence by the 2nd defendant, the written submissions, the authorities cited, the issues for determination is

Whether the plaintiffs are entitled to the orders sought in the plaint.

7. It is without contention that the evidence of the plaintiff is uncontroverted. In spite of the fact that the evidence was uncontroverted the court still has to be satisfied that the Plaintiff has proved that the court should grant the orders sought. This was captured in the decision in **Kenya Power & Lighting Company Limited -Vs- Nathan Karanja Gachoka & Another [2016] eKLR**, in which the Court stated *"I am of the opinion that uncontroverted evidence must bring out the fault and negligence of a defendant, and that a court should not take it truthful without*

*interrogation for the reason only that it is uncontroverted. A plaintiff must prove its case too upon a balance of probability whether the evidence is unchallenged or not.’ The same sentiments were echoed in the case of **Gichinga Kibutha-Vs- Carooline Nduku (2018) eKLR** “It is not automatic that instances where the evidence is not controverted the Claimants shall have his way in Court. He must discharge the burden of proof. He must proof his case however much the opponent has not made a presence in the contest.”*

8. From the uncontroverted evidence before the court, it is clear that the Plaintiff did enter into a sale agreement with the 1st defendant after paying the consideration. This is backed by the evidence adduced by the plaintiff being the judgement in ELC **ELC 769 OF 2023 Atif Mohamed S. Sayed and Janet Kemunto Ogari -Vs- Marcela Omwenga & Timothy Ondieki Beree**. At paragraph 57 of the said judgement the court indicated that the 1st defendant herein admitted that indeed the has purchased the suit property and that he had executed a transfer in her favour registered proprietor of suit property. The said judgement at paragraph 81 declared the plaintiff the bona fide owner of the suit property and that title ought to be transferred in their names. The issue of ownership having been declared by a competent court this court therefore is bound by the said judgement and acknowledges that the plaintiff is indeed the beneficial owner of the suit property and entitled to the orders as sought. In **Reliable Electrical Engineers Ltd. -Vs- Mantrac Kenya Limited (2006) eKLR**, the court in

discussing the jurisdiction of specific performance stated as follows:
-“Specific performance like any other equitable remedy is discretionary and the Court will only grant it on well 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 enforceable. Even when 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 when damages are adequate remedy specific performance may still be refused on the ground of undue influence or where it will cause severe hardship to the defendant.”

9. Thus, guided by the decision above and further supported by the plaintiffs’ own reliefs as contained in prayer ((d), this court finds that there exists an alternative adequate remedy and therefore the order for specific performance will not issue as sought

Final disposition

For the foregoing reasons, the plaint dated 26th May,2025 is allowed on the following terms

- i. An order is hereby issued declaring the Plaintiff as the purchaser for value of the property known as land reference

number 12661/79 measuring nought decimal three seven naught nought (0.3700) of a hectare and situated in the city of Nairobi within the Republic of Kenya

- ii. An order is hereby issued declaring that the Plaintiff is entitled to lien on property known as land reference number 12661/79 measuring naught decimal three seven nought (0.3700) of a hectare and situated in the city of Nairobi within the Republic of Kenya in respect of any damages and costs.
- g) The deputy registrar Environment and Land Court Nairobi, is hereby directed to sign the transfer and all other relevant documents necessary to enforce the transfer of the suit property known as land reference number 12661/79 measuring naught decimal three seven naught nought (0.3700) of a hectare and situated in the city of Nairobi within the Republic of Kenya to the plaintiff.
- h) The 2nd Defendant hereby directed to register the plaintiff as the owner of the suit property and issue title deed in respect of the suit property to the plaintiff
- i) Costs of the suit to be borne by the defendants.

It is so ordered.

DATED, SIGNED and DELIVERED virtually at **NAIROBI** on this **16th day** of **April, 2026.**

MOHAMMED N. KULLOW
JUDGE

Judgment delivered in the presence of: -

Mr. Marsoso for the Plaintiff

No appearance for 1st Defendant

Mr. Mwandeje for 2nd Defendant

Philomena W Court Assistant

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