



REPUBLIC OF KENYA



**KENYA LAW**  
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**Diba v Sharaiye (Environment and Land Appeal 1 of 2023)  
[2024] KEELC 3337 (KLR) (22 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 3337 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ISIOLO  
ENVIRONMENT AND LAND APPEAL 1 OF 2023  
PM NJOROGE, J  
APRIL 22, 2024**

**BETWEEN**

**ELEMA GODANA DIBA ..... APPELLANT**

**AND**

**ADAN ABDI SHARAIYE ..... RESPONDENT**

*(Being an Appeal from the Rulings of Hon. E. Ngigi, Principal Magistrate  
in Isiolo ELC Case No. E015 of 2021 dated 6<sup>th</sup> September, 2022)*

**JUDGMENT**

1. The Memorandum of Appeal in this suit takes the following format:

**Memorandum of Appeal**

1. That the learned magistrate erred in law and in fact in dismissing the Appellant's suit based on a preliminary objection that did not raise pure points of law.
2. That the learned magistrate erred in law and in fact in dismissing the appellant's suit based on the plaint alone without looking at the other documents which formed part of the pleadings.
3. That the learned magistrate erred in law and in fact in entertaining the preliminary objection yet the plaint raised complex disputes on facts of the case which ought to have been resolved by normal full trial.
4. That the learned magistrate erred in law and in fact in allowing the preliminary objection yet the issues raised therein could only be ventilated and determined in the course of trial.



**Dated at Meru this 11<sup>th</sup> Day of January 2023 For: J. Nelima Associates & Co. Advocate for the Appellant**

2. The appeal was canvassed by way of written submissions.
3. The appellant has submitted that the respondent did not file submissions in support of his assertions as contained in the Memorandum of Appeal. The Appellant's advocate argues that for this reason alone the Preliminary Objection should have been dismissed. I note that this assertion that the respondent had not submitted submissions is denied by the respondent who says that his submissions were filed on 27/5/2022. I however do note that on 23/8/2022 both parties informed the court that they had filed submissions. Indeed advocate Nyasani who was holding brief for the Appellant's Advocate told the court in the advocates own words: "Coming to confirm filing of submissions. The defendant had filed a Preliminary Objection and submissions. We can take a ruling date". Miss Wangechi, for the defendant, who is now the respondent, confirmed that the respondent had filed submissions. As a result of the affirmations made by the parties, the court gave a date for ruling as 6/9/2022. I, therefore, find that submissions had been filed by both parties.
4. The Appellant has submitted that the apposite Preliminary Objection had not raised pure points of law and gave the example of the respondent's claim that the description of the suit land was vague. The advocate proffered the case of Mukisa Biscuits Manufacturing Co. Ltd versus West End Distributors, (1996) Ea 696 and Oraro versus Mbaja (2005) eKLR for the assertion that a point of law is straight forward and self-explanatory and ought not to be blurred by factual details.
5. The appellants advocate also argued that whether or not an order for specific performance can be issued where title number of the disputed land has not been specified is an issue that invited arguments and was not a pure point of law. The advocate said that the respondent in entering into an agreement which did not specify the title of the suit land was equally to blame and should not be allowed to eat his cake and have it and especially since he has received money from the appellant. At this point I wish to point out that in his ruling, the Learned Magistrate in the lower court had pointed out that the appellant in the plaint in the lower court had not sought an order for refund of the purchase price.
6. The respondent has submitted that an order for specific performance cannot be issued where the suit land is not specified. He says that the appellant in the plaint in the lower court only referred obliquely to an allotment letter which did not have a reference number. He says that in the list of documents dated 7/7/2021 the appellant (The Plaintiff in the lower court) did not include any allotment letter. He says that the agreement alleged to be signed by the parties indicated at clause 3 (a) that the land was situated in Tigania East Meru, whereas the allotment letter was issued by Isiolo County Council. He seems to suggest that the agreement was grossly vague. He also says that the parties have not disputed that the subject land is unregistered.
7. The respondent submits that even had the lower court found in favour of the appellant, the order of specific performance would not have been tenable as it would be in vain without any reference to an identifiable and specific property.
8. The respondent concludes that the lower court had properly upheld the Preliminary Objection.
9. I have considered the assertions made by the parties in their submissions which in some instances are veritably incongruent.
10. I agree with the respondent that courts ought not to issue orders in vain. An order for Specific Performance cannot be issued where it cannot be implemented. There should be unequivocal specificity before it is issued. I am, therefore, inclined, to uphold the decision of the Learned Magistrate



in the lower court to uphold the apposite Preliminary Objection. The non-applicability regarding issuance of an order for specific performance is a pure point of law.

11. In the circumstances, the following orders are issued.

- i. This appeal is dismissed.
- ii. Costs shall follow the event and are awarded to the respondent.

**DELIVERED IN OPEN COURT AT ISIOLO THIS 22<sup>ND</sup> DAY OF APRIL, 2024 IN THE PRESENCE OF:**

Court assistant: Balozi/Rahma

Nelima present for the Appellant.

Mwirigi Mbaya present for the respondent.

**HON. JUSTICE P.M NJOROGE**

**JUDGE**

