



Richu & another v Kahawa Sukari Limited (Environment and Land Appeal E013 of 2021) [2023] KEELC 16752 (KLR) (23 March 2023) (Judgment)

Neutral citation: [2023] KEELC 16752 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL E013 OF 2021**

**BM EBOSO, J
MARCH 23, 2023**

BETWEEN

JOHNSON MUGO RICHU 1ST APPELLANT

JANE WANJIRU MUGO 2ND APPELLANT

AND

KAHAWA SUKARI LIMITED RESPONDENT

(Being an Appeal arising from the Judgment of Hon C K Kisiangani, Senior Principal Magistrate, delivered on January 21, 2021 in Ruiru MCL&E Case No 143 of 2019)

JUDGMENT

Background

1. This appeal challenges the Judgment of Hon C K Kisiangani, Senior Resident Magistrate, rendered on January 21, 2021 in Ruiru SPMC Environment and Land Case No 143 of 2019. The appellants were the plaintiffs in the said suit. The respondent was the defendant. The dispute in the suit revolved around three plots, two of which the appellants intended to purchase jointly from the respondent. The 1st appellant intended to purchase one of the three plots solely. The intended sale aborted. The appellants sued the respondent for an order of specific performance and general damages, among other reliefs. One of the key issues that fell for determination in the trial court was the question as to whether the appellants were entitled to an order of specific performance. I will outline a brief background to the appeal before I delve into the issues that fall for determination in the appeal.
2. In 2014, the appellants filled plot application forms, expressing their desire to purchase from the respondent three plots designated as Plot Numbers 1786, 1868 and 2108 at a cost of Kshs 2,000,000 per plot. Plot No 1786 was to be purchased by the 1st appellant alone while Plot Nos 1868 and 2108 were to be purchased by the two appellants jointly. On December 2, 2015, the 1st appellant paid Kshs 700,000 as a deposit towards purchase of Plot No 1786, leaving a balance of Kshs 1,300,000. On diverse



- dates between February 2014 and June 2015, the two appellants paid to the respondent a total of Kshs 600,000 as deposit towards purchase of Plot Nos 1868 and 2108, leaving a balance of Kshs 3,400,000.
3. From June 2015 to June 2019, nothing happened towards formalization of the intended purchase in terms of Section 3(3) of the *Law of Contract Act*. No further payment was made to the respondent during that period. The respondent contended during trial that they made formal demands to the appellants to complete the payments. On their part, the appellants denied ever being served with any formal demand. What was not contested is the fact that the appellants wrote to the respondent a letter dated June 13, 2019 intimating to the respondent that they (the appellants) were “ready to complete the transaction” and enquiring whether the respondent was ready to complete the transaction, so that they (the appellants) could pay balance of “the purchase price”. The appellants contended that there was no response to the letter while the respondent contended that they had already made formal demands to the appellants and the appellants had ignored their demands, prompting them to cancel the transaction and sell one of the plots to a different purchaser.
 4. Against the above background, the appellants sued for orders of specific performance and general damages. They did not cite or identify a specific land sale contract in respect of which they sought the orders of specific performance and general damages. The specific performance orders which they sought were framed as follows.
 - “(b) an order for specific performance and transfer of plot No plot No 1786 to the 1st plaintiff.
 - (c) An order for specific performance and transfer of plot No 1868 and 2108 jointly to the plaintiffs”
 5. The respondent filed a defence dated February 17, 2020 in which they admitted that the appellant filled the plot application forms. They added that they issued to the appellants allotment plot certificates showing the plot numbers, the amounts paid, the dates when the amounts were paid and the balance due. They further admitted that the appellants paid a total of Kshs 1,300,000 leaving a balance of Kshs 4,700,000. It was the case of the respondent that the said balance was to be paid within “a reasonable time and in any event in not more than ninety (90) days” The respondent contended that the appellants failed to pay the balance despite them giving the appellant “more time within which to clear the balance”
 6. The respondent added that owing to the appellants’ failure to pay the balance, they issued to the appellants several verbal and written notices requiring them to complete the transaction and when the appellants failed to comply, they decided to exercise their right “to repossess the property.” They urged the trial court to dismiss the suit.
 7. Trial proceeded before Hon C K Kisiangani. The two appellants testified. Their evidence was that they did not pay the balance (Ksh 4,700,000) between June 2015 and June 2019 because they were waiting for a formal letters of allocation from the respondent. They denied receiving any demand letter from the respondent. They further testified that whereas a perimeter wall had been built around plot No 2108, there was no construction inside the plot. They contested the respondent’s contention that there was an implied term that balance of the purchase price was to be paid within 90 days. They added that they were ready and willing to pay the balance of the purchase price.
 8. The respondent led evidence by Alice Wacheke Muiruri. She reiterated the respondent’s case as summarized above. She added that the appellants failed to comply with the terms that were spelt out in the plot allotment forms that they had filled. She added that the appellants having failed to make payments, the plots had “since been sold to other people”.



9. The trial court ultimately rendered the impugned Judgment in which it found that the remedy of specific performance was not available to the appellants. The trial court further found that the appellants were not entitled to “damages” because they had failed to state what damages they suffered. The trial court issued the following award in favour of the appellants:

“a refund of the purchase price with interest at court rate
from the date of filing this suit”

10. On costs the trial court decreed that parties were to bear their respective costs of the suit.

Appeal

11. Aggrieved by the Judgment of the trial court, the appellants brought this appeal, advancing the following verbatim grounds of appeal:
- a. That the learned trial Magistrate erred in law and in fact in finding that the appellants had an obligation to pay the full purchase price for plot numbers 1786, 1868 and 2108 to the respondent before they had been issued with the letters of allocation.
 - b. That the learned trial Magistrate erred in law and fact in finding that the appellants had failed to perform their part in the sale and purchase of plot numbers 1786, 1868 and 2108 whereas there was no evidence in support of the same.
 - c. That the learned trial Magistrate erred in law and in fact in finding that the appellants failed to complete the transaction voluntarily notwithstanding the fact that the court had already found that the appellants were unable to complete the transaction although due to some fault which cannot be attributed to them.
 - d. That the learned trial Magistrate erred in law and in fact in discounting and giving little or no weight at all to the appellants’ letter dated 13th June 2019.
 - e. That the learned trial Magistrate erred in law and in fact in finding that the appellants had a duty to write demand letters to the respondent demanding to be furnished them with Letters of Allocation whereas there was no legal nor factual basis for arriving at this finding. (sic)
 - f. That the learned trial Magistrate erred in law and in fact in finding that for the appellants to succeed in a claim for specific performance, they had to prove that they were willing to pay the balance of the purchase price at the current market value.
 - g. That the learned trial Magistrate erred in law and in fact in rewriting the contract between the parties.
 - h. That the learned trial Magistrate erred in law and in fact in finding that the plot numbers 1786, 1868 and 2108 were not available for allocation to the appellants and/or would lead to protracted litigation with third parties if they were to be allocated to the appellants whereas there was no evidence to support these findings.
 - i. That the learned trial Magistrate erred in law and in fact in making contradictory findings on the issue of sale of the plots to third parties by first finding that there was no proof to show sale of the plots to third parties, only to make a later finding that specific performance would not be appropriate since the plots were not available for allocation to the appellants and/or would lead to protracted litigation with third parties.



- j. That the learned trial Magistrate erred in law and in fact in finding that the remedy of specific performance was not an appropriate one in this case.
 - k. That the learned trial Magistrate erred in law and in fact in failing to issue the appellants with an award of damages after declining to issue the order of specific performance in their favour.
 - l. That the learned trial Magistrate erred in law and in fact in considering extraneous matters in making her decision.
 - m. That the learned trial Magistrate erred in law and in fact in not following the correct and proper legal principles and thereby arriving at a bad decision.
12. The appellants urged the court to allow the appeal in terms of the following orders:
- a. This court be pleased to set aside the Judgment of Hon. Kisiangani, Senior Resident Magistrate dated January 21, 2021.
 - b. This court be pleased to allow prayers (a), (b), (c) and (d) as sought in the plaint dated October 29, 2019.
 - c. In the alternative to prayer (b) above, the court be pleased to allow prayer € as sought in the plaint dated October 29, 2019.
 - d. That this court be pleased to award costs of this appeal and the lower court to the appellants.

Submissions

13. The appeal was canvassed through written submissions dated May 6, 2022, filed by M/s Kinyua Mwaniki & Wainaina Advocates. The respondent filed written submissions dated June 14, 2022 through M/s Ngeresa & Okallo Associates. I have read the said written submissions. I will not rehash them. I will refer to them and analyse them, where necessary, when disposing the key issues that fall for determination in the appeal.

Analysis and Determination

14. I have read the original record of the trial court together with the record relating to this appeal. I have considered the grounds of appeal, the parties' respective submissions, the relevant legal frameworks, and the jurisprudence relevant to the key issues that fall for determination in the appeal.
15. Taking into account the grounds of appeal and the parties' respective submissions, the following are the three key issues that fall for determination in this appeal: (i) Whether the trial court erred in finding that the remedy of specific performance was not available to the appellants; (ii) Whether the trial court erred in failing to award the appellant general damages as prayed in the plaint; and (iii) What order should be made in relation to costs of this appeal. I will make brief sequential pronouncements on the three issues in the above order. Before I dispose the three issues, I will briefly outline the principle that guide this court when exercising appellate jurisdiction.
16. The task of the first appellate court was summarized by the Court of Appeal in the case of *Susan Munyi v Kesbar Shiani* [2013] eKLR as follows:-

“As a first appellate court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyze, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions.”



17. The above principle was similarly outlined in the case of *Abok James Odera t/a AJ Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR 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 re-analyse 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. See the case of *Kenya Ports Authority vs Kustron (Kenya) Limited* 2000 2EA 212.”

18. The first issue is whether the trial court erred in finding that the remedy of specific performance was not available to the appellants. The orders of specific performance were sought in respect of supposed contracts for sale of land. The supposed contracts were neither identified by date nor by any other identifying particulars. Indeed, the prayers relating to orders of specific performance were silent on the details of the contracts that the appellants sought to specifically enforce.

19. It does emerge from the evidence that was tendered before the trial court, and indeed from the pleadings, that there was no enforceable land sale contract relating to the transaction that the appellants and the respondent were involved in. The transaction giving rise to the appellants’ claim took place between February 2014 and June 2015. A contract for the disposition of an interest in land at that time was subject to the mandatory requirements of Section 3 (3) of the *Law of Contract Act* which provided as follows:

(3) No suit shall be brought upon a contract for the disposition of an interest in land unless—

(a) the contract upon which the suit is founded— (i) is in writing;

(ii) is signed by all the parties thereto; and

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the *Auctioneers Act* (Cap 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.

20. Suffice it to state that, for the appellants to successfully mount a claim for orders of specific performance relating to contracts for disposition of interests in land, they were required to place before the trial court written contracts duly signed by all the parties to them and duly attested, to demonstrate fulfilment of the requirements of Section 3 (3) of the *Law of Contract Act*. Having examined the entire record of the trial court, it is clear that there was no enforceable contract in terms of Section 3(3) of the *Law of Contract Act*.

21. There abound sufficient local jurisprudence on the principles upon which an order of specific performance is granted. Maraga J (as he then was) outlined the principles in *Reliable Electrical Engineers Ltd v Mantral Kenya Limited* [2006]eKLR as follows:

“Specific performance, like any other equitable remedy, is discretionary and the court will only grant it on 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 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 of 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.”

22. Although I do not agree with the reasoning of the trial court for declining to grant to the appellants orders of specific performance, it is clear from the evidence that was placed before the trial court that there was no enforceable land sale contract to form the basis of orders of specific performance. Indeed, in their evidence, the appellants testified that they did not make any further payments to the respondent because they were waiting for a document that would set out the terms of payment. It is therefore clear that they knew there was no enforceable land sale contract.
23. For the reason that there was no enforceable land sale contract as required under Section 3(3) of the [Law of Contract Act](#), I have come to the conclusion that the remedy of specific performance was not available to the appellants. That is my finding on the first issue. I would add that although there were errors in the reasoning of the trial court, the ultimate finding of the trial court on the question of availability of the remedy of specific performance cannot be disturbed.
24. The second issue is whether the remedy of general damages was available to the appellants. First, for the remedy of general damages to lie, breach must be established. Secondly, breach must have been pleaded and particularized.
25. The claim giving rise to this appeal related to a transaction that was intended to be a contract for sale of land. I have made a finding to the effect that the transaction did not satisfy the mandatory requirements of Section 3(3) of the [Law of Contract Act](#). On that ground alone, the plea for general damages as pleaded in prayer (e) could not succeed.
26. That is not all. Our courts have umpteen times stated that the relief of general damages is not available in a claim founded on contract. Not too long ago, the Court of Appeal outlined this principle in [Kenya Tourist Development Corporation V Sundowner Lodge Limited](#) (2018) eKLR in the following words:

“With the greatest respect to the learned Judge, we think that the reasoning is quite flawed. We are not persuaded that the authorities cited by the learned Judge support the proposition that in cases of breach of contract there does exist a large and wide-open discretion to the court to award any amount of damages. The opposite is in fact the case: as a general rule general damages are not recoverable in cases of alleged breach of contract and that has been the settled position of law in our jurisdiction, and with good reason. In *Dharamshi vs Karsan* [1974] EA 41, the former Court of Appeal held that general damages are not allowable in addition to quantified damages with Mustafa J A expressing the view that such an award would amount to duplication. And so it would be. See also *Securicor (K) vs Benson Davi Onyango & Anor* [2008] eKLR.”
27. Lastly, the appellants neither pleaded breach of contract nor proved it. There was therefore no basis upon which the trial court would have awarded them any form of damages.
28. Again for the above reasons, which are quite different from the reasoning of the trial court, this court comes to the finding that the remedy of general damages was not available to the appellants.



29. Having come to the above findings on the two substantive issues in this appeal, it follows that this appeal has no merit. This court will in the circumstances, not disturb the award of the trial court.
30. On costs, the non-compliance with the requirements of Section 3(3) of the *Law of Contract Act* which led to the position in which parties to this appeal find themselves in was by all the parties to this appeal. For this reason, parties to this appeal will bear their respective costs of the appeal.
31. In the end, this appeal is dismissed for lack of merit, and parties are to bear their respective costs of the appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 23RD DAY OF MARCH 2023

B M EBOSO

JUDGE

Ms Kerubo for the Appellant

Ms Ngeresa for the Respondent

Court Assistant: Hinga

