



REPUBLIC OF KENYA



Mehu & another v Intertropics Limited & another (Environment and Land Appeal E085 of 2022) [2023] KEELC 22057 (KLR) (22 November 2023) (Judgment)

Neutral citation: [2023] KEELC 22057 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL E085 OF 2022**

**BM EBOSO, J
NOVEMBER 22, 2023**

BETWEEN

ANNE NDUTA MEHU 1ST APPELLANT

ANDREW BOSSIE NJOGU 2ND APPELLANT

AND

INTERTROPICS LIMITED 1ST RESPONDENT

MUHASIBU HOUSING COMPANY LIMITED 2ND RESPONDENT

*(Being an Appeal against the Judgment of Hon C. A OTIENO –
OMONDI, Senior Principal Magistrate, delivered on 30/9/2022 in Ruiru
Senior Principal Magistrate Court MCE & L Case No. E14 of 2020)*

JUDGMENT

Introduction

1. This appeal challenges the Judgment rendered on 30/9/2022 by Hon CA Otieno-Omondi, Senior Principal Magistrate, in Ruiru Senior Principal Magistrate Court Environment & Land Case No E14 of 2020. The appellants were the plaintiffs in the said suit. The two respondents were the defendants in the suit. Through the suit, the appellants sought, among other reliefs: (i) an order directing the 1st respondent to specifically perform their contractual obligations pursuant to the agreement for sale dated 7/4/2020; and (ii) an order directing the 2nd respondent to execute and/or avail completion documents for conveyance of ¼ of an acre to be excised out of a parcel of land described as Theta/Theta Block 4 (Ruiru) 71 [referred to in this Judgment as “the suit property”].
2. Upon conclusion of trial, and upon receiving submissions, the trial court came to the finding that the 1st respondent was not the registered proprietor of the suit property and that the 2nd respondent who was said to be the registered owner of the suit property was not a party to the land sale contract in



relation to which orders of specific performance were sought. Consequently, the trial court declined to grant the plea for orders of specific performance. The trial court instead decreed the 1st respondent to refund the appellants the sum of Kshs 3,000,000 which the 1st respondent had received from the appellants as part-payment of purchase price. The trial court further decreed the 1st respondent to pay interest on the sum from the date of filing the suit and bear costs of the suit.

Appeal

3. Aggrieved by the trial court's decision not to grant them orders of specific performance, the appellants brought this appeal advancing a total of 16 grounds of appeal. In their subsequent written submissions dated 8/7/2023, the appellants condensed their 16 grounds of appeal into the following four verbatim thematic issues/questions:
 - a. Whether the appeal is merited;
 - b. That the learned trial magistrate erred in law and fact in failing to make a declaration directing the first respondent to specifically perform its contractual obligations pursuant to the agreement for sale dated 7th April, 2020, for the sale of quarter (1/4) acre to be hived from Theta/Theta Block 4 (Ruiru)/ 71.
 - c. That the learned magistrate erred in law and in fact in failing to consider and find adequate the unchallenged evidence of the first appellant both in chief and in her written witness statement that the first respondent and the second respondent had a contractual agreement whose consideration was allocation of plots to be severed from Theta/ Theta/ Block 4 (Ruiru)/71 among them the suit plot and allow the appellants' prayers number two and three in their plaint.
 - d. Costs of the appeal.
4. Through the memorandum of appeal dated 4/10/2022, the appellants urged this court to grant them the reliefs that were sought in the plaint. They specifically invited this court to issue an order of specific performance against the 1st respondent and further issue an order compelling the 2nd respondent to avail completion documents for the purpose of conveying the ¼ of an acre out of the suit land to them.

Submissions

5. The appeal was canvassed through written submissions dated 8/7/2023, filed by M/s Mutai Maina Kimeu & Associates Advocates. The respondents did not tender submissions in the appeal. As indicated above, the appellants submitted on four thematic issues/questions. I will briefly outline the gist of their submissions on each of the four thematic issues/questions before I dispose the issues that arise for determination.
6. On whether this appeal is merited and on whether the trial court erred in failing to decree the 1st respondent to specifically perform the contract, counsel for the appellant faulted the trial court for failing "in its attempts to account for certain circumstances in its estimation of evidence", adding that the 1st respondent had in its "statement of defence" and pleadings admitted to the fact of the sale agreement and had prayed for time to complete the transaction. Citing, among others, the pronouncements of the courts in *Gurdev Singh Birdi & Narinder Singh Ghatora v Abubakar Madhbuti* [1997] eKLR and *Reliable Electrical Engineers Ltd v Mantrac Kenya Limited* [2006] eKLR, counsel for the appellant faulted the trial court for not granting the appellants orders of specific performance. Counsel argued that the appellants tendered a duly executed sale agreement which did not suffer from any vitiating factor and which was legally binding, adding that the appellants had



demonstrated that they honoured the sale agreement by paying the full purchase price and that the 1st respondent breached the agreement. Counsel urged the court to re-evaluate the evidence and find that the appellants were entitled to orders of specific performance as against the 1st respondent.

7. On whether the trial court erred in failing to consider and find adequate the 1st appellant's unchallenged evidence that the respondents had a contractual agreement whose consideration was allocation of the plot, counsel submitted that whereas the appellants tendered evidence, both respondents elected not to tender any evidence despite the 1st respondent filing a defence. Counsel added that the 2nd respondent elected not to participate in the proceedings, hence the trial court should not have helped an indolent party.
8. On costs, counsel relied on the general principle that "costs follow the event" and urged the court to award costs of the appeal to the appellants.

Analysis and Determination

9. I have read and considered the record of appeal filed in this appeal; the appellants' submissions; the relevant legal frameworks; and the prevailing jurisprudence on the key issues that fall for determination in the appeal. The appellants itemized 16 grounds of appeal. In their subsequent written submissions, they itemized and submitted on only four thematic issues/questions.
10. Taking into account the grounds of appeal and the submissions that were tendered, the following are the three key issues that fall for determination in this appeal: (i) Whether the appellants proved their case against the 2nd respondent; (ii) Whether the appellants satisfied the criteria for grant of the equitable remedy of specific performance; and (iii) What order should be made in relation to costs of this appeal. I will dispose the three issues sequentially in the above order. Before I do that, I will briefly outline the principle that guides this court when exercising appellate jurisdiction.
11. This is a first appeal. The principle upon which a first appellate court exercises jurisdiction is well settled. The task of a first appellate court was summarized by the Court of Appeal in the case of *Susan Munyi v Keshar 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.”
12. The above principle was similarly outlined in *Abok James Odera t/a A. J 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.”
13. The first issue is whether the appellants proved their case against the 2nd respondent. In the plaint that formed the basis of the trial that culminated in the impugned Judgment, the appellants sought judgment against the two respondents jointly and severally in the following verbatim terms:
 - a. An order directing the 1st defendant to specifically perform its contractual obligations pursuant to the agreement of sale dated 7/4/2020;



- b. An order directing the 2nd defendant to execute and/or avail completion documents to the plaintiffs;
 - i. Original Certificate of lease
 - ii. Duly executed transfer forms (in triplicate) in favour of the plaintiffs or their appointed agent;
 - iii. Consent to Transfer duly obtained from the relevant Land Control Board.
 - iv. Certified copies of vendors certificate of incorporation and Pin certificate;
 - (v) Three (3) coloured passport photos of the directors of the vendors.
 - (vi) Receipts on account of payment of rate (if any) to the relevant authority and rates clearance certificate valid for 30 days.
 - c. In default of the performance by the 1st and 2nd defendant above, the Executive Officer of this honourable court be directed to execute the transfer of the demised property in favour of the plaintiffs and/or their nominees and the plaintiffs be at liberty to procure the completion documents as stipulated in prayers (a) and (b) above and costs there be set off against the balance of purchase price due to the 1st defendant;
 - d. General damages for breach of contract;
 - e. Costs of this suit;
 - f. Interest on (d) above; and
 - g. Any other relief that this Honourable Court may deem just to grant.
14. The appellants did not, however, outline in the body of the plaint the basis upon which they sought the above orders as against the 2nd respondent. The averments in the plaint wholly focused on the 1st respondent. Not a single averment attributing liability on the 2nd respondent was made in the plaint. The 2nd respondent did not, in the circumstances, know the allegation that they were to respond to in answer to the suit. Put differently, there was no adverse allegation in the plaint warranting a specific response from the 2nd respondent.
15. Secondly, under Sections 108 and 109 of the *Evidence Act*, the appellants bore the burden of proving that they were entitled to the orders that they sought against the 2nd respondent. Regardless of whether or not the 2nd respondent tendered a defence and evidence, the appellants had the burden of proving that they were entitled to the reliefs that they sought against the 2nd defendant. Did the appellants discharge the burden?
16. I have looked at both the pleadings and the evidence which the appellants tendered before the trial court. Apart from failing to properly plead their claim against the 2nd respondent, the appellants did not tender evidence of any binding contractual relationship that would warrant grant of the orders which they sought against the 2nd defendant. The single agreement which they tendered was between them and the 1st respondent. The 2nd respondent was not privy to the agreement.
17. Thirdly, the contract which the appellants sought to enforce was a land sale contract between them and the 1st respondent. It was subject to the mandatory requirements of Section 3(3) of the *Law of Contract Act* which provide as follows:

“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.”

- 18. My understanding of the framework in Section 3(3) of the *Law of Contract Act* is that, in the absence of a written and duly executed agreement between the appellant and the 2nd respondent in relation to the 1/4 of an acre, the contract which the appellants sought to enforce against the 2nd respondent could not be enforced against them. Put differently, by dint of the appellant’s failure to satisfy the mandatory requirements of Section 3(3) of the *Law of Contract Act*, they had no cause of action against the 2nd respondent.
- 19. The totality of the foregoing is that, on the balance of probabilities, the appellants did not prove their claim against the 2nd respondent. That is my finding on the first issue.
- 20. The second issue is whether the appellants satisfied the criteria for grant of the equitable remedy of specific performance. The jurisdiction to grant the equitable remedy of specific performance is exercised on the basis of well-settled principles. In their book *The Law Of Real Property, Seventh Edition*, The Rt Hon Sir Roberty Megarry and Sir William Wade set out the following principles that govern the exercise of jurisdiction to grant the equitable remedy of specific performance in land disputes:

“This remedy is purely equitable, and in principle is confined to cases where the common law remedy of damages is inadequate. But land is always treated as being of unique value, so that the remedy of specific performance is available to the purchaser as a matter of course; and even though the vendor is merely concerned to obtain the purchase-money, so that he could be adequately compensated in damages for the purchaser’s refusal to complete, the remedy of specific performance is equally available to him”

- 21. The two authors add thus:

“Like other equitable remedies, specific performance is discretionary. However, the court’s discretion is governed by settled principles. Examples of where the remedy may be refused include the following:

- i. in proper cases where there is mistake or great hardship, even though these do not invalidate the contract at law.
- ii. where there has been delay causing injustice to the other party
- iii. whether the vendor would be required “to embark upon difficult or uncertain litigation in order to secure any requisite consent or obtain vacant possession.



- iv. where the property is being used for illegal purposes, which would make the purchaser liable to prosecution, even though on this ground he has no right to terminate the contract; or
- v. where the vendor's title is doubtful but he has failed to disclose the known cause of that doubt and the purchaser has agreed to accept any defects that there may be.

In these cases the contract will remain binding at law, so that the party in default will be liable in damages, but equity will not assist with a decree of specific performance. On the other hand, specific performance may be decreed before the legal time for performance has arrived if there has been an anticipatory breach, e.g. by repudiation”

22. In *Gurdev Singh Birdi and Marinder Singh Ghatora v Abubakar Mahubuti* Court of Appeal No 165 of 1996, the Court of Appeal outlined the following principle which guides our courts when exercising jurisdiction to grant the remedy of specific performance.

“It cannot be gainsaid that the underlying principle in granting the equitable relief of specific performance has always been that under all the obtaining circumstances in the particular case, it is just and equitable so to do with a view to doing more perfect and complete justice. Indeed...a plaintiff must show that he has performed all the terms of the contract which he has undertaken to perform, whether expressly or by implication, and which he ought to have performed at the date of the writ in the action.”

23. In *Reliable Electrical Engineers (K) Ltd v Mantrac Limited* [2006]eKLR Maraga J [as he then was] summed up the relevant principles as follows:

“Specific performance like any other equitable remedy is discretionary and the court will only grant it on well laid 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 and enforceable. Even when a contract is valid and enforceable, specific performance will however not be ordered where there is an adequate alternative remedy.”

24. The court has made a finding to the effect that there was no evidence of any binding contract for sale of land between the appellants and the 2nd respondent. It therefore follows that as against the 2nd respondent, the appellants did not satisfy the criteria for grant of orders of specific performance.
25. Did the appellants satisfy the criteria as against the 1st respondent? I do not think so. The land subject matter was not registered in the name of the 1st respondent. It was registered in the name of the 2nd respondent. The appellants did not present to the court a compliant tripartite agreement between them and the two respondents, binding the 2nd respondent to convey the ¼ acre to them. They did not present to the court any other written agreement between them and the 2nd respondent satisfying the requirements of Section 3(3) of the *Law of Contract Act* and binding the 2nd respondent to convey the ¼ acre to them.
26. In the above circumstances, granting an order of specific performance against the 1st respondent, as sought by the appellants, would have meant that the 2nd respondent who was not privy to the



agreement dated 7/4/2020 would be compelled to be bound by the agreement, a scenario which Section 3(3) of the *Law of Contract Act* expressly outlaws.

27. It is clear from the foregoing that the appellants' failure to tender evidence of a binding and compliant contract between them and the 2nd respondent who was said to be the registered proprietor of the suit land rendered the plea for an order of specific performance completely untenable as against either of the two respondents. It is therefore my finding that the appellants did not satisfy the criteria for grant of the equitable remedy of specific performance.
28. On costs, this appeal was not defended. There will therefore be no order as to costs of the appeal.
29. In the end, it is the finding of this court that there is no merit in this appeal. The appeal is dismissed with no order as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 22ND DAY OF NOVEMBER 2023

B M EBOSO

JUDGE

In the presence of: -

Mr Kimani for the Appellants

Court Assistant: Hinga/Osodo

