



Gakuru v Henwa Investments Limited (Environment and Land Appeal E003 of 2021) [2025] KEELC 3491 (KLR) (29 April 2025) (Judgment)

Neutral citation: [2025] KEELC 3491 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL E003 OF 2021**

JM ONYANGO, J

APRIL 29, 2025

BETWEEN

BESSIE KARIMI GAKURU APPELLANT

AND

HENWA INVESTMENTS LIMITED RESPONDENT

JUDGMENT

1. This appeal is prompted not by mere dissatisfaction, but by a sense of disillusionment with a judgment (Thika CMCC No. 636 of 2015 -hereinafter ‘the judgment’) that, though rendered in the language of justice, left the Appellant with a remedy that, in their view, falls short of meaningful relief.
2. Vide the judgment delivered by the Honourable Senior Resident Magistrate, V. Kachuodho on 14th December 2020, the trial court found in favour of the Appellant, holding that she had proved her case on a balance of probabilities. The court ordered specific performance of the agreement for sale dated 22nd December 2009, to be effected within 90 days, failing which clause 8 of the said agreement would apply. It further directed that each party bear its own costs.
3. The Respondent, by the Appellant’s account, is fundamentally incapable of procuring and transferring title to the suit property, rendering the order for specific performance not only futile but legally untenable. The Appellant now turns to this Court, urging it to reckon with the reality that a right without a remedy is no right at all.
4. The Appellant further challenges the denial of costs, contending that having prevailed on merit, she ought not to have been left to shoulder the financial burden of enforcing her rights. The questions raised strike at the heart of equitable relief and the principled exercise of judicial discretion.
5. The Appellant’s case is anchored in a Memorandum of Appeal dated 13th January 2021, advancing seven grounds of challenge, each of which stands unanswered. Though the Respondent was duly served through substituted service, it did not participate in the appeal.



6. In the instant appeal, the Appellant seeks the following orders:
 - a. The appeal be allowed.
 - b. This Court does order the Respondent who is in default to compensate the Appellant for the suit property at the current market value as pleaded in paragraph 21 of the Plaint.
 - c. In the alternative to prayer (c) the Court does order the Respondent to refund the Appellant the sum of Kenya Shillings Three Hundred Thousand (Ksh. 300,000) paid as the purchase price plus 25% of the purchase price at Kenya Shillings Seventy Five Thousand (Ksh. 75,000).
 - d. The Order made by the Learned Magistrate in the Subordinate Court directing each party to bear their own costs be set aside.
 - e. The Appellant be awarded the costs of this Appeal and in the Subordinate Court.
7. The Appeal was canvassed by way of written submissions which the Appellant duly filed on 10th February 2025.

Issues for Determination

8. Having perused the Memorandum of Appeal, the record before this court and the Appellant's submissions, the following issues emerge for determination:
 - i. Whether the trial court erred in granting an order of specific performance
 - ii. Whether the trial court erred in failing to award costs to the Appellant
 - iii. Whether the Appellant is entitled to the reliefs sought in the Appeal

Analysis and Determination

9. This being a first appeal, this Court bears a solemn and deliberate duty: to re-evaluate the entire body of evidence presented before the trial court and to determine, with measured scrutiny, whether the decision rendered was sound in fact and in law.
10. The appellate function is not a perfunctory endorsement of the lower court's conclusions, but rather a careful, independent reappraisal of the record. This guiding principle was eloquently set out in the seminal case of *Selle & Another v. Associated Motor Boat Co. Ltd & Others* [1968] EA 123, where the Court of Appeal stated:

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”
11. Thus, in discharging its appellate mandate, I must walk a careful line; approaching the record with fresh eyes, yet remaining conscious of the trial court's unique advantage in observing witness demeanour and evaluating credibility firsthand. It is against that standard that this appeal must now be weighed.



i. Whether the trial court erred in granting an order of specific performance

12. A perusal of the evidence on record reveals that both parties acknowledged that the Appellant purchased Plot Numbers 4, 5 and 6 which were later converted to plots 1, 2, and 3 Githima/munyuon Parcel Number 1272 Thika Municipality vide an agreement for sale dated 22nd January 2009. At the hearing, the Respondent testified that they were unable to process individual title deeds for the subject plots. They attributed this inability to a directive by the County Government, which, according to their evidence, had ceased the processing of title deeds for parcels measuring 40 by 80 feet. In essence, the Respondent's position was that an external administrative constraint had rendered them incapable of fulfilling a core obligation under the agreement.
13. In the judgment delivered by the trial court, the Honourable Magistrate notes that having determined that the Appellant herein had proved her case on a balance of probabilities, she were entitled to either specific performance of the agreement or a refund of the monies paid for the said plots. The trial court then proceeded to issue orders in the following terms:
- a) Specific performance of the contract within the next 90 days, failure to which clause no. 8 of the agreement of sale dated 22nd December 2009 to apply.
 - b) Each party to bear own costs.”
14. However, with the Respondent's admitted inability to procure and transfer individual titles, the efficacy of an order of specific performance is brought into serious question. The law does not command the impossible, nor does equity lend its hand to compel a party to perform what lies beyond their reach. Specific performance is not a hollow ritual; it is a decree of substance, grounded in the certainty that the promise made can, in fact, be fulfilled.
15. In *Reliable Electrical Engineers (K) Ltd v Mantrac Kenya Limited* [2006] eKLR Maraga J (as he then was) addressed the remedy of specific performance in the following terms:
- “Specific performance, like any other equitable remedy, is discretionary and the court will only grant it on the 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 as 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 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.”
16. It follows, then, that where the subject matter of the contract cannot be delivered, whether due to legal infirmity, administrative impossibility, or the contracting party's own incapacity, then the court cannot, in good conscience, wield the sword of equity to enforce specific performance. To do so would be to elevate form over substance and compel the pursuit of a phantom, rather than the realization of a right.
17. In the instant case, the Respondent, by invoking the cessation of title processing by the County Government, concedes a critical truth; the very heart of the contractual obligation is beyond their power to deliver. To maintain an order of specific performance in these circumstances is not merely



an exercise in judicial optimism, it is to breathe life into a remedy that is already stillborn. Justice must speak with more than ceremonial force; it must effectuate that which is just, practicable, and real.

18. However, it is imperative to note that an appellate court does not sit as a robed overseer to second-guess every judgment rendered by the trial court; rather, it intervenes only when the exercise of judicial discretion has strayed beyond the bounds of reason and principle. This position was espoused in the case of *Mbogo and another v Shah* [1968] EA 93, where the Court of Appeal stated:

“...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

19. Thus, appellate jurisdiction is not a license for substitution of judgment, but a safeguard against injustice; unless the discretion exercised below is shown to have been manifestly unreasonable, tainted by misdirection, or arrived at through omission of material considerations, this Court must remain slow to disturb it.
20. As earlier observed, the trial court was alive to the Respondent’s own admission; it lacked the capacity to process and transfer individual titles to the suit property. This was not a matter of conjecture or disputed fact; it was a concession from the very party upon whom the burden of performance rested.
21. Yet, notwithstanding this fundamental impediment, the trial court proceeded to grant an order of specific performance; a remedy whose entire efficacy depends upon the feasibility of compliance. In doing so, the court effectively sanctioned the enforcement of a contract it knew could not be fulfilled, rendering the order not only impractical but devoid of legal utility. Such a course undermines the very rationale of equitable relief, which demands not only that justice be done, but that it be capable of being done.
22. Additionally, in the event that the order of specific performance was not complied with within 90 days, the trial court directed that clause 8 of the agreement would take effect. That clause reads as follows:

“Provided Always any party breaching the stipulates of this agreement shall pay the innocent party a penalty of 25% pegged at the original price together with outgoings and which may further be enhanced by the right to sue”

23. This clause, couched in the language of contractual penalty, was intended to operate as a deterrent and a fallback in the event of breach. However, the invocation of this clause presupposes a finding of culpability on the part of one party and the resulting harm to the other. It is not a substitute for meaningful relief, nor does it cure the deeper defect inherent in granting specific performance where performance is, by the Respondent’s own admission, impossible.
24. Clause 8 of the agreement may offer a measure of reparation, but it does not absolve the court of its duty to grant relief that is coherent, lawful, and responsive to the realities placed before it.
25. Learned Counsel for the Appellant implored this Court to find that the trial court misapprehended both the evidence and the factual matrix placed before it, thereby falling into error and ultimately arriving at a decision that was not only legally unsound but plainly unjust.
26. Having carefully scrutinised the record and weighed the evidence with the measured hand of reason, I find myself in agreement with Learned Counsel for the Appellant. The trial court, though no doubt



striving to dispense justice, strayed from sound judicial principle when it granted an order of specific performance in the face of clear, unequivocal evidence that the Respondent could not deliver what it had promised. The Respondent's own admission, that it lacked the capacity to process and transfer individual titles to the suit property, ought to have extinguished any hope that specific performance remained a viable or just remedy.

ii. Whether the trial court erred in failing to award costs to the Appellant

27. On the issue of costs, the general rule is that costs follow the event. This principle is encapsulated in Section 27 (1) of the *Civil Procedure Act* which provides as follows:-

“(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and give all the necessary directions for the purposes aforesaid; and the fact that the court has no jurisdiction to try the suit shall be no bar to the exercise of those powers; provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise direct.”

28. In essence costs are not merely ornamental in litigation; they are the judicial acknowledgment of where justice has ultimately settled. Unless compelling reasons dictate otherwise, they follow the event, ensuring that a successful party is not burdened with the very cost of vindicating their rights.

29. In the instant case, the trial court found that the Appellant had proved her case on a balance of probabilities. However, the court failed to explain its departure from the general rule. I find no compelling reason to deny the Appellant the costs of the suit.

iii. Whether the appellant is entitled to the reliefs sought in the Appeal

30. What must first be acknowledged is that reliefs, however fervently prayed, must rest upon the twin pillars of law and evidence.

31. Turning to the relief of compensation at the current market value, the same though valid, would be incapable of enforcement in the absence of an independent valuation report tendered to reflect the amount payable based on the current market value of the suit property.

32. With regard to the Appellant's claim for a refund amounting to Ksh. 300,000/- plus 25% of the purchase price (Ksh. 75,000/-) the same is unsubstantiated. The agreement between the Appellant and the Respondent for the purchase of the suit land was for a consideration of Ksh. 180,000/-; payment of which was duly acknowledged by the Respondent. The Appellant's claim for a refund of Kshs 300,000 plus 25% of the purchase price is uncorroborated and must fail to that extent.

Determination

33. As established in *Mbogo v Shah* (supra), it is not enough that the appellate court might have arrived at a different conclusion, or even a better one; the threshold for interference is higher. It must be shown that the trial court's decision was not merely arguable, but plainly unjust, reached through a misapprehension of the law or a failure to apply it properly to the facts.



34. In light of this rigorous standard and the discernible misapprehension of both law and fact by the subordinate court, this Court respectfully finds it necessary to vary the decision in order to ensure that justice is served in a manner that is both sound and equitable.
35. Accordingly the appeal succeeds and it is hereby allowed. I set aside the Judgment of the lower court and in its place, I grant the following reliefs:
- i. The Respondent shall pay to the Appellant monetary compensation equivalent to the current market value of the three plots, to be assessed by a government valuer.
 - ii. The Respondent shall refund all sums expended by the Appellant in the demarcation and establishment of beacons on the suit property, subject to proof by receipts or other admissible evidence.
 - iii. The costs of both the trial and this appeal are awarded to the Appellant, the trial court's order that each party bear its own costs is hereby vacated.

It is so ordered.

DATED, SIGNED AND DELIVERED, AT THIKA THIS 29TH DAY OF APRIL 2025

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J. M. ONYANGO

JUDGE

In the presence of:

Mr Kimani for Miss Musyoka for the Appellant

No appearance for the Respondent

Court Assistant: Hinga

