



**THE REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT THIKA**

**CIVIL APPEAL NO E021 OF 2021**

**ANNA GACHAMBI MUCHIRI.....APPELLANT**

**=VERSUS=**

**NAFTALI KANIARU MWANGI.....RESPONDENT**

**ANDREW GATHUO CHEGE.....INTERESTED PARTY**

*(Being an appeal against the entire Judgment and Decree in Ruiru*

*SPMC E & L Case No. 47 of 2019 by Hon. Agonda (PM)*

*delivered on 27th January 2021)*

**JUDGMENT**

**Background**

1. This appeal arose from a judgment rendered on 27/1/2021 by **Hon J A Agonda, PM**, in **Ruriu SPMC E & L Case No. 47 of 2019; Naftali Kaniaru Mwangi v Annah Gachambi Muchiri & another**. Through a plaint dated 10/6/2019, Naftali Kaniaru Mwangi [the respondent in this appeal] sued the appellant [Anna Gachambi Muchiri], seeking the following reliefs: (i) a declaration that he was entitled to 2½ acre portion of Land Parcel Number **Ruiru/Ruiru East Block 3/98** which he had purchased from the appellant; (ii) an order of specific performance of the sale agreement dated 24/6/2010, compelling the appellant to transfer the portion of land to him; (iii) an injunction restraining the appellant against dealing with the 2½ acre portion; (iv) an order of injunction restraining the appellant against interfering with his possession of the 2½ acre portion; (iv) general damages for breach of contract in lieu of or in addition to the order of specific performance; and (v) costs of the suit.

2. The case of the respondent in the trial court was that, vide a land sale agreement dated 24/6/2010, the appellant sold to him 2½ acres which were to be hived out of Parcel Number **Ruiru/ Ruiru East Block 3/98** at a purchase price of **Kshs 375,000**. He paid to the appellant a sum of **Kshs. 350,000**, leaving a balance of **Kshs 25,000** which was to be paid on successful transfer of the said portion of land to him. The appellant gave him possession of the sold portion of land immediately after execution of the sale agreement and after he had paid him the initial instalment of **Kshs 300,000**. He subsequently pleaded with the appellant to transfer the 2½ acre portion to him in vain. He was apprehensive that unless the appellant was restrained from disposing the parcel of land, he stood to suffer irreparable loss of his investment in the land.

3. The appellant filed a statement of defence dated 29/7/2019, in which she admitted that there was indeed a sale agreement between them but contended that the sale agreement was rescinded and the sum of Kshs 350,000 which the respondent had paid her was refunded to him whereupon the respondent returned to her the original title together with copies of her Kenya Revenue Authority Personal Identification Number [PIN], Identity Card, and Passport Size Photos which she had earlier given to the respondent. The appellant further contended that the sale agreement dated 24/6/2010 had been rendered null and void for lack of the consent of the relevant land control board in terms of **Section 6** of the **Land Control Act**. She denied the respondent's contention that he had been in vacant possession of the land, contending that subdivision had never been effected and no beacons had been fixed on the land. It was her case that, as the sole registered proprietor of the land, she had exclusive rights over the land, including the right to sale and transfer the land. She contended that the respondent was a trespasser on the land. She urged the trial court to dismiss the respondent's claim.

4. The record of the trial court shows that one **Andrew Gathuo Chege** was joined to the suit as an interested party on the basis of a subsequent sale agreement and a transfer executed between him and the appellant. During trial, it emerged that the transfer had been presented for registration but registration had not been effected.

5. Upon conclusion of trial, the subordinate court rendered the impugned judgment. The trial magistrate identified the following as the four key issues that fell for determination in the suit: (i) Did the parties to the suit enter into a valid sale agreement; (ii) If so, did any of the parties to the suit breach the terms of the said sale agreement; (iii) Was there lawful termination of the said sale agreement; (iv) Was the plaintiff [respondent in the present appeal] entitled to the prayers sought, and in the alternative, was the interested party entitled to the prayers sought in his counterclaim? and (e) Who was liable to pay costs of the suit?

6. The trial court found that the respondent and the appellant entered into a valid sale agreement and that the appellant had breached the said agreement in that she failed to transfer the suit property to the respondent after receiving a substantial portion of the purchase price. The trial court further found that the material sale agreement had not been lawfully terminated; the interested party was not an innocent purchaser for value hence he was not entitled to any of the prayers sought in his pleadings.

7. Consequently, the trial magistrate granted the respondent the following orders: (i) a declaration that he was the legitimate owner of the 2½ acre portion of land; (ii) an order of specific performance of the sale agreement dated 24/6/2010; (iii) a permanent injunction restraining the appellant against alienating, sub-dividing, transferring, offering for sale, selling or dealing with the 2 ½ acre portion; and (iv) costs of the suit.

### **Grounds of Appeal**

8. Aggrieved by the findings and award of the magistrate court, the appellant brought this appeal, advancing the following nine (9) grounds:

*1. That the learned magistrate erred in law and fact in holding that the plaintiff had proved his case on a balance of probabilities when there was no evidence in support of the same.*

*2. That the learned magistrate erred in law and fact by failing to consider that the transaction between the appellant and the respondent was null and void for lack of land control board consent.*

*3. That the learned magistrate's judgement was a clear violation of Section 6 of the Land Control Board Act cap 302 of the laws of Kenya.*

*4. That the learned magistrate erred in law and fact by implying to validate a transaction touching on an agricultural land while the same was void for lack of land control board consent.*

*5. That the learned magistrate erred in law and fact by failing to consider the candid evidence that was adduced by the appellant at the time of the hearing.*

*6. That the learned magistrate erred in law and fact by introducing new evidence to the case, a clear departure from the pleadings hence arriving at wrong decision.*

*7. That the learned magistrate erred in law and fact by relying on extraneous matters, failed to evaluate the evidence hence arriving at a wrong judgement.*

*8. That the learned magistrate erred in law and fact in failing to consider binding precedents cited by the appellant in her written submissions.*

*9. That the decision of the learned magistrate was biased against the appellant.*

### **Appellant's Submissions**

9. The appeal was canvassed through written submissions dated 4/10/2021, filed through the firm of *G. K. Gatere & Co Advocates*. Counsel for the appellant identified the following as the four issues falling for determination in the appeal: (i) Whether the trial magistrate was right and properly guided by the law and the facts of the case in entering judgment in favour of the respondent; (ii) Whether the trial court introduced new evidence in the proceedings, thereby validating a transaction that was void; (iii) Whether the trial court disregarded the candid evidence adduced by the appellant during the hearing and instead relied on extraneous matters, thereby occasioning a miscarriage of justice; and (ii) Whether the trial magistrate ignored and/or disregarded binding precedents in her judgment.

10. On whether the trial magistrate was right and properly guided by the law and the facts in entering judgment in favour of the respondent, counsel for the appellant submitted that the land sale contract was a transaction regulated by the mandatory provisions of the Land Control Act. It was the submissions of counsel that because no consent of the relevant land control board was procured by the parties in furtherance of the transaction, the transaction became null and void by dint of the provisions of Section 6 of the Land Control Act. Counsel cited the 1988 Court of Appeal decision in **Elijah Shamalla Benjamin Momo v Gerry Chibeu [1988]eKLR**, among others. Counsel added that the sale agreement provided that in case the vendor failed to complete the sale agreement, she would be liable to refund the purchase price paid together with interest at the rate of 25% of the purchase price.

11. On whether the trial court introduced new evidence in the proceedings and thereby validated a transaction that was void, counsel submitted that the issues which the trial court framed and determined were a complete departure from the key issues which were before the court. Counsel submitted that the claim of the respondent in the lower court was for specific performance and the defence of the appellant was that the remedy of specific performance was not available because the parties did not procure the mandatory consent of the land control

board and neither did they attempt to apply for enlargement of time as stipulated under Section 8 of the Act. Counsel contended that the issue as to whether there was breach of contract was irrelevant and extraneous to the real issues at hand. Counsel added that the authorities which the trial magistrate relied on were distinguishable because they related to different types of contracts that did not relate to agricultural land.

12. On whether the trial magistrate disregarded the evidence adduced by the appellant, counsel submitted that the trial court ignored the appellant's candid evidence to the effect that though she had initially entered into a sale agreement with the respondent, she subsequently rescinded the agreement due to the unlawful acts of the respondent. Counsel contended that the fact that the original title together with other completion documents which had been given to the respondent were returned by the respondent was evidence that the agreement had been rescinded. Counsel faulted the trial magistrate for ignoring the evidence of the interested party which demonstrated that the interested party had purchased the entire parcel of land; completion documents had been procured in favour of the interested party; and conveyance documents had been lodged in the Land Registry conveying the suit property to the interested party. Lastly, counsel faulted the trial court for ignoring what he described as binding precedents which had been cited by the appellant.

### **Respondent's Submissions**

13. The respondent opposed the appeal through written submissions dated 28/10/2021, filed through the firm of *Makuno Gacoya & Associates*. Counsel for the appellant identified the following as the seven (7) issues falling for determination in the appeal: (i) Whether the trial magistrate was guided by the law in finding for the respondent even though the parties had not obtained the consent of the land control board; (ii) Whether the trial magistrate considered the evidence adduced by the appellant at the time of the hearing; (iii) Whether the trial magistrate introduced new evidence to the case, departing from the pleadings filed by the parties; (iv) Whether the trial magistrate relied on any extraneous matters, failing to evaluate the evidence adduced by the parties; (v) whether the trial magistrate considered the precedents cited by the appellant in her submissions; (vi) Whether the trial magistrate was biased against the appellant; and (viii) Who should bear the costs of this appeal.

14. On whether the trial magistrate was guided by the law in finding for the respondent even though the parties had not obtained the consent of the land control board, counsel submitted that the respondent had tendered evidence to the effect that the appellant gave him vacant possession of the 2 ½ acres upon remittance of the initial deposit of Kshs 300,000 in tandem with clause 4 of the sale agreement. Counsel argued that grant of vacant possession created an irrevocable constructive trust in favour of the respondent and therefore the appellant was bound to complete the transaction save if the land control board denied the parties the requisite consent. Counsel added that the appellant did not adduce any evidence to suggest that the land control board had declined to grant the parties the requisite consent. Counsel cited the Court of Appeal decisions in (i) *Willy Kimutai Kitilit v Michael Kibet [2018] eKLR*; (ii) *Macharia Mwangi Maina & 7 others v Davidson Mwangi Kagiri [2014] eKLR*; and (iii) *David Ole Tukai v Francis Arap Muge & 2 others [2014]* and submitted that principles of equity are now part of the Constitution and they are to guide the court when reaching a determination. Counsel argued that the appellant could not give the respondent vacant possession of the 2½ acres and still decline to transfer it. Counsel submitted that the doctrine of proprietary estoppel and constructive trust need not be pleaded by a litigant but are to be gathered from the facts and evidence of the case.

15. On whether the trial magistrate considered the evidence adduced by the appellant during trial, counsel submitted that the trial magistrate properly analyzed the evidence adduced during trial and fully addressed the evidence and the law. On whether the trial magistrate introduced any new evidence to the case, departing from the pleadings filed by the parties, counsel submitted that the appellant had not demonstrated before this court that the trial magistrate went on his own frolic and considered evidence which the parties had not adduced.

16. On whether the trial magistrate relied on extraneous matters, counsel for the respondent submitted that the appellant had failed to point out any extraneous matters that the trial magistrate relied on. On whether the trial magistrate considered the precedents cited by the appellant in her submissions, counsel submitted that the trial magistrate had outlined the authorities which the appellant relied on. On whether the trial magistrate was biased against the appellant, counsel submitted that the appellant had failed to demonstrate to this court any element of express or perceived bias on part of the trial court. Counsel contended that the verdict of the trial court was based on evidence, reasoning and principles of law and was justifiable. Counsel urged the court to dismiss the appeal. On costs, counsel urged the court to award the respondent costs of the appeal.

### **Analysis and Determination**

17. I have considered the entire record of the trial court, the grounds advanced in this appeal; the parties' respective submissions; and the relevant legal frameworks and jurisprudence on the key issues in this appeal. The appellant advanced nine (9) grounds of appeal in the memorandum of appeal. In her subsequent written submissions, she condensed the nine grounds of appeal into four issues. On his part, the respondent framed seven issues. Having considered the grounds of appeal together with the parallel sets of issues, the following are, in my view, the four key issues that fall for determination in this appeal: (i) *Whether the trial court erred in finding that the appellant had breached the sale agreement dated 24/6/2010 and that the said agreement was enforceable*; (ii) *Whether the trial magistrate erred in finding that the remedy of specific performance of the land sale agreement dated 24/6/2010 was available and appropriate in the circumstances of this dispute*; (iii) *Is there any merit in this appeal*; and (iv) *What disposal orders should be made in this appeal?*

18. This court is invited to exercise jurisdiction as the first appellate court. The principle that guides a first appellate court when exercising jurisdiction is well settled. The Court of Appeal outlined the principle 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.”*

19. The same principle was 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.***

20. There was common ground that the appellant and the respondent entered into the land sale agreement dated 24/6/2010. There was also common ground that the respondent paid to the appellant a sum of Kshs. 350,000/- leaving Kshs. 25,000/- as the outstanding balance of the purchase price. Thirdly, there was common ground that the requisite consent of the land control board was not obtained in furtherance of the land sale agreement. It is within this context that the court is required to dispose the four itemized issues in this appeal.

21. The first issue is whether the trial court erred in finding that the appellant was in breach of the sale agreement dated 24/6/2010 and that the said agreement was enforceable. The respondent contended that the appellant had breached the contract by failing to transfer the 2<sup>1</sup>/<sub>2</sub> acres to him. The sale agreement did not have a completion date. Secondly, it did not specify the precise obligation of the vendor (appellant). All it provided at Clause 9 was that ***“the vendor shall facilitate transfer to the purchaser’s name.”***

22. Clause 5 of the sale agreement provided that the sale was subject to the Law Society Conditions of Sale [1989 Edition] in so far as they were not inconsistent with the conditions contained in the agreement. The 1989 Edition of the Law Society Conditions of Sale defines ***“completion date”*** in relation to controlled transactions to be forty-two (42) days after receipt by the vendor of the consent to the transaction.

23. In her defence, the appellant contended that she rescinded the agreement. She did not, however, tender evidence of any rescission notices which she issued. The 1989 Edition of the Law Society Conditions of Sale which the parties incorporated into the sale agreement provide a clear procedure for rescinding a land sale agreement. A key component of the procedure is the issuance of the completion notice. There was no evidence of compliance with the rescission procedure. The appellant said she refunded Kshs. 350,000/- but there was, similarly, no evidence to support that contention. What the appellant decided to do was to simply elect not to complete the sale after receiving the sum of Kshs. 350,000/- out of the agreed purchase price of Kshs. 375,000/-. She was therefore in breach of Clause 9 which required her to facilitate transfer of the 2<sup>1</sup>/<sub>2</sub> acres into the name of the respondent. She was also in breach of the Law Society Condition of Sale [1989 Edition] which required her to avail to the respondent necessary completion documents, including the consent to transfer. In the circumstances, this court is in agreement with the trial court in its finding that the appellant was in breach of the agreement dated 24/6/2010.

24. On whether the agreement dated 24/6/2010 was enforceable, the appellant contends that the contract was rendered void for lack of consent of the land control board. She relies on the framework in **Section 6(1) of the Land Control Act** which provides as follows:-

***“1. Each of the following transactions that is to say-***

***(a) the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area;***

***(b) the division of any such agricultural land into two or more parcels to be held under separate titles, other than the division of an area of less than twenty acres into plots in an area to which the Development and Use of Land (Planning) Regulations, 1961 (L.N. 516/1961) for the time being apply;***

***(c) the issue, sale, transfer, mortgage or any other disposal of or dealing with any share in a private company or co-operative society which for the time being owns agricultural land situated within a land control area, is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.***

25. A perusal of Clause 11 of the material sale agreement reveal a clear stipulation on the mode of enforcement available in the event of non-completion by either of the parties. Clause 11 provides thus:

***“11. If the vendor fails to complete this sale she shall refund to the purchaser the total purchase price paid together with interest at the rate of 25% of the purchase price. And if the purchaser fails to complete the sale, he will forfeit 25% of the purchase price.”***

26. It is therefore clear from Clause 11 that whereas the material agreement was enforceable, the mode of enforcing the agreement in the event of non-completion was clearly agreed upon by the parties. The agreed mode of enforcing the agreement in the event of non-completion by the appellant was recovery of the purchase price paid together with interest at 25% of the purchase price.

27. It is therefore the finding of this court that the trial magistrate did not err in finding that the appellant breached the agreement dated 24/6/2010 and that the agreement was enforceable. What remains to be answered is whether the remedy of specific performance was available as a mode of enforcing the agreement.

28. Issue number (ii) is whether the trial court erred in finding that the remedy of specific performance of the land sale contract dated 24/6/2010 was available and appropriate in the circumstances of this dispute. My view on this issue is in the negative. First, the parties to the agreement had expressly and unequivocally agreed on the remedy available to them in the event of non-completion by either party. The remedy available to the respondent in the event of non-completion by the appellant was to seek a refund of the total purchase price paid to the appellant together with interest at 25% of the purchase price. Parties expressly agreed on the remedy of refund of purchase price with interest at 25% while aware that the purchaser was taking possession of the suit property. The remedy of specific performance of the land

sale contract was clearly not contemplated in the sale agreement. Secondly, the respondent had in her statement of claim made an alternative plea for damages. The proper approach which the trial court should have taken was to look at the agreement and award damages aligned to what was agreed by the parties in Clause 11 of the agreement.

29. The third reason why I have come to the conclusion that the trial magistrate erred is that there are well settled principles upon which the remedy of specific performance is granted. **Maraga J** [as he then was] in **Reliable Electrical Engineers Ltd v Mantral Kenya Limited [2006]eKLR** aptly summarized the principle in the following words:-

*“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.”*

30. In the present appeal, the land sale contract had been rendered null and void due to failure of the parties to obtain the mandatory consent of the land control board. Further, there was evidence placed before the trial court demonstrating that the entire parcel of land out of which the 2<sup>1</sup>/<sub>2</sub> acres were to be excised had been sold to the interested party; the sale to the interested party had been sanctioned by the land control board; and all conveyance documents had been executed and presented to the land registrar for registration. The only reason why the conveyance to the interested party had not been effected was the objection by the respondent. In the circumstances, the trial court should have granted the respondent the alternative remedy which he had prayed for as opposed to granting an order which was bound to cause hardships.

31. In light of the above reasons, it is my finding that the trial magistrate erred in finding that the remedy of specific performance of the land sale agreement dated 24/6/2010 was available and appropriate in the circumstances of this dispute.

32. Owing to the error relating to the award of the order of specific performance in the circumstances of this dispute, I find that there is merit in this appeal to the extent of the said error. I will, in the circumstances, set aside the orders of the trial court and substitute them with an order making an award in favour of the plaintiff in **Ruiru SPMC E & L Case No. 47 of 2019** in terms of Kshs. 375,000 [the purchase price] together with interest at 25% per annum from 24/6/2010 till payment. The plaintiff will have costs of the original suit. Because this appeal succeeded only partially, parties will bear their respective costs of the appeal.

33. In summary, this court finds that: (i) the trial court did not err in finding that the appellant was in breach of the sale agreement dated 24/6/2010 and that the said agreement was enforceable; (ii) that the trial court erred in finding that the remedy of specific performance was available in the circumstances of this dispute yet the parties had provided for a different remedy in the event of non-completion by the vendor; and that the respondent had prayed for an alternative remedy in form of damages; and there was evidence that the suit property had been sold to the interested party; and (iii) that to the above extent, there is merit in this appeal.

#### **Disposal Orders**

34. In the end, this appeal partially succeeds and this court makes the following disposal orders:

*(a) The disposal orders of the trial court are set aside and replaced with the following award in favour of the plaintiff in Ruiru SPMC E & L Case No. 47 of 2019.*

*(i) Damages of Kshs. 375,000/- together with interest at 25% per annum from 24/6/2010 to the date of payment.*

*(ii) Costs of the suit in the subordinate court.*

*(b) Parties shall bear their own costs of this appeal.*

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 31ST DAY OF JANUARY 2022**

**B M EBOSO**

**JUDGE**

**In the Presence of: -**

Mr Gatere for the Appellant

Mr Gacoya Ndirangu for the Respondent

Court Assistant: Lucy Muthoni