



REPUBLIC OF KENYA



**KENYA LAW**  
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**Odhiambo v Machinji (Suing as the Director of Katiti Builders) (Environment and Land Appeal E024 of 2024) [2025] KEELC 3993 (KLR) (8 May 2025) (Judgment)**

Neutral citation: [2025] KEELC 3993 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT AND LAND APPEAL E024 OF 2024**

**E ASATI, J**

**MAY 8, 2025**

**BETWEEN**

**FREDRICK ONYANGO ODHIAMBO ..... APPELLANT**

**AND**

**MACTILDA KHATITI MACHINJI (SUING AS THE DIRECTOR OF KATITI BUILDERS) ..... RESPONDENT**

*(An appeal from the judgement of Hon. Kimetto Senior Resident Magistrate dated 16th April 2024 and arising from MASENO MC ELC NO. E005 OF 2022)*

**JUDGMENT**

**Background**

1. A brief background of the appeal herein, as can be gathered from the record of appeal, is that the Appellant was the Defendant in Maseno SPMC MCELC NO. E005 OF 2022 (the suit) wherein he had been sued by the Respondent. Vide the plaint dated 17<sup>th</sup> March, 2022, the Respondent who claimed to be the registered owner of a parcel of land known as Kisumu/Kogony/7560 measuring 0.06Ha (the suit land) complained that the Appellant had occupied a portion of the said land unlawfully and sought for an order of eviction of the appellant from the said portion of the suit land. The Respondent also sought for costs of the suit and other relief that the court may deem just.
2. The record shows that through his defence and counterclaim dated 21<sup>st</sup> April, 2022, the Appellant denied the Respondent's claim and averred that despite paying more than 10% of the purchase price to the Respondent for the portion of land in dispute, the Respondent had refused and neglected to transfer the said portion of land to him (Appellant).
3. The Appellant therefore through the counter claim sought for orders of :-



- a. specific performance of the agreement to compel the Plaintiff to transfer land parcel No.Kisumu/Kogony/7560 to the Defendant.
  - b. General damages for breach of contract.
  - c. Refund of Kshs.841,500/- being the deposit of the purchase price so far received by the Plaintiff with the costs of the development of structures erected on the land.
  - d. Interest on the general damages at 14% p.a. from the date of the judgement till payment in full.
  - e. Interest on the refund of purchase price at 14% from October 2015 till payment in full.
  - f. Costs of the suit and interest thereon from the date of filing the suit till payment in full.
4. The record of appeal shows that the suit was heard before the trial court which vide its judgement dated 16<sup>th</sup> April, 2024 found that each party partly succeeded in their respective claims. The court allowed the Respondent's claim for an order of eviction against the appellant and the Defendant's (Appellant's) counter-claim for a refund of the sum of Kshs.841,000/- plus interest at court rates from the time of filing of the counter-claim. Concerning costs, the court ordered that each party bear own costs of the action.

### **The Appeal**

5. Aggrieved by the judgement, the Appellant preferred the present appeal vide the Memorandum of Appeal dated 15<sup>th</sup> May, 2024 and the Supplementary Memorandum of Appeal dated 23<sup>rd</sup> May, 2024 on the grounds that;
- i. The honourable trial court erred in law and fact by holding that the Appellant by being in actual occupation of Kisumu/Kogony/7560 that he was in breach of the agreement between them and could not therefore seek specific performance.
  - ii. The honourable trial Magistrate erred in law and fact by holding that the Appellant was only allowed the sum of Kshs.841,500 plus interest whereas it would be opposite to have a refund raised from the date the agreement was covenanted until payment in full.
  - iii. The honourable trial Magistrate erred in fact and by holding that the Appellant had Kisumu/Kogony/7560 transferred in his favour whereas the determination on the payment of the value of the development especially house and trees and owing to the fact that the Appellant is to relocate from his home.
  - iv. The honourable trial Magistrate erred in fact and in law by failing to appreciate that the Respondent having changed her mind and transferred the intended resultant title into her company's name, then the provisions of the *Land Control Act* came into effect and therefore the rate of interest applicable should be deemed to be as from the date of execution of the sale agreement and not the date of filing the suit hence the honourable trial court arrived at a wrong decision and to which evidence on record was that the Respondent had already transferred the property to a third party – KATITI BUILDERS and herself.
  - v. The honourable trial Magistrate erred in law to hold that each party would bear their costs when on record it is clear the counter claimant/Appellant had succeeded in both trial proceedings.

And as contained in the Supplementary record of appeal;



- vi. ) The honourable trial Magistrate erred in fact and in law failing to appreciate that both the Appellant and the Respondent entered into a sale of land transaction when the title to original land parcel No.Kisumu/Kogony/7130 was in the name of a third party and upon obtaining title in her name, the Respondent unilaterally caused same to be sub-divided and the resultant titles transferred to other parties hence beyond the reach of the Appellant and who had settled and developed part of the original land parcel No.Kisumu/Kogony/7560 and therefore the court in its judgement failed to take into account the value of the Appellant's houses and actual development which the Appellant will have to destroy upon moving out of the suit land.
  - vii. The honourable court erred in fact and law by failing to appreciate the fact that the Appellant took up possession of the Original land parcel No. No.Kisumu/Kogony/7130 on the express authority and permission of the Respondent and upon transfer of title of one of the intended result titles to a third party, the Respondent appreciated the consequences of her actions hence the honourable court was obligated to make a decision has occasioned a miscarried of justice.
6. The Appellant seeks in this appeal for orders that the appeal be allowed with costs and the judgement of the lower court be substituted with an order dismissing it with costs to the Defendant.

### **Submissions**

7. Pursuant to directions given on 28<sup>th</sup> October, 2024, the appeal was canvassed by way of written submissions. Written submissions dated 18<sup>th</sup> January, 2025 were filed on behalf of the Appellant by Enock Anyul O. Dickson Advocates.
8. Written submissions dated 4<sup>th</sup> February, 2025 were filed by Kouko & Odero Advocates LLP on behalf of the Respondent.

### **Analysis and determination**

9. This is a first appeal. The principles guiding handling of a first appeal are well settled. They are that the appellate court has a duty to reconsider the whole evidence produced before the trial court, re-evaluate it and arrive at its own independent conclusion. While doing so, the court keeps in mind the fact that the trial court had the advantage, which the appellate court does not have, of seeing and hearing the parties and their witnesses first hand. In the case of *Gitobu Manyara & 2 others –vs- Attorney General [2016] e KLR* the court held that the principles upon which a first appellate court proceeds are well settled and stated that: -

“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 allowances in this respect.”

(Also see *Selle & another vs Associated Motor Boat Company Ltd & Another (1968) IEA 123*)

10. The evidence placed before the trial court by the Appellant comprised of his own testimony and the exhibits that he produced. The proceedings show that he adopted the contents of his witness statement dated 21<sup>st</sup> April, 2022 and supplementary witness statement dated 25<sup>th</sup> August, 2022 as his evidence in chief. He produced exhibits.
11. On behalf of the Respondent, the evidence placed before the trial court comprised of the testimony of the Respondent and the exhibits that she produced.



12. The issue in the appeal is specific performance. The Appellant pleaded in his Statement of Defence and Counterclaim that he had paid a total of Kshs.841,500/- to the Respondent as part of the purchase price. That however, the Respondent had refused and/or was not willing to transfer the parcel of land, the subject of the purchase to the him. He prayed for an order of specific performance of the agreement so as to compel the Respondent to transfer land parcel No.Kisumu/Kogony/7560 to the Defendant/Appellant.
13. His case was that sometimes in the year 2015, he entered into a sale agreement with the Respondent for the purchase of a portion of land parcel No.Kisumu/Kogony/7130 measuring approximately 0.06Ha at an agreed purchase price of Kshs.1,200,000/-.
14. That as at the time of sale, the land parcel No.Kisumu/Kogony/7130 was still registered in the name of one John Ong’udi Osina from whom the Respondent had bought the land.
15. That immediately he bought the land, he assumed possession of the portion measuring 0.06 Ha and converted it into his matrimonial home. That he developed it and planted trees. That his entry onto the land was with the express knowledge and authority and unequivocal permission of the Respondent. That in view of this, the Respondent should be ordered to execute transfer and conveyance document of the suit land parcel in his favour.
16. The Respondent therefore sought for eviction of the Appellant from the land.
17. The Respondent testified that there was a balance of Kshs.500,000/- still outstanding on the purchase price. That she sub-divided land parcel No.Kisumu/Kogony/7130 to create, inter alia, the suit land herein after disowning, revoking and/or abrogating the agreement and transferred the suit land into her name and later into the name of the Plaintiff (Katiti Builders Limited) after the appellant had defaulted in settling the outstanding sum and after she had exhausted all available avenues to settle the matter amicably.
18. A reading of the trial court’s judgement shows that the court found that the sale agreement was breached by the Defendant (Appellant) who did not adhere to the terms thereof as per the agreed timelines.
19. The court noted that even though the appellant had taken advantage of taking possession of the parcel, developing and deriving benefits from it, he breached the agreement by failing to complete his part of the bargain and he therefore cannot be allowed to benefit from his breach.
20. The Appellant faults the trial court for this finding. It was submitted on behalf of the Appellant that the Appellant had done enough by paying more than half of the purchase price and therefore the Respondent was likewise obligated to do her part. It was further submitted that the Appellant could not have been expected to pay the balance of the purchase price when it was evident that the Respondent never attempted to sub-divide the original title. That as late as 26<sup>th</sup> February, 2022, the Respondent received Kshs.50,000/- towards the balance of the purchase price without disclosing to the Appellant that she had transferred the entire title into her company.
21. On behalf of the Respondent, it was submitted regarding the prayer for specific performance that courts do not rewrite contracts, that parties are bound by the terms and conditions in the sale agreement and that the court will only enforce the terms and conditions unless vitiated by illegality, undue influence, fraud or lack of capacity to enter the agreement.
22. That the Appellant having breached the agreement, cannot have an order of specific performance.



23. Counsel relied on inter alia, the case of Reliable Electrical Engineers Ltd -vs- Matrac Kenya Limited [2006]eKLR where it was held inter alia that the jurisdiction of specific performance is based on 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 requirement or mistake or illegality which makes the contract invalid or unenforceable.

24. I have considered the pleadings, evidence and submissions on this ground of appeal. Specific performance is a contractual remedy in which a court orders a party to fulfil their obligation as promised in the contract. In Black's Law Dictionary, 11<sup>th</sup> Edition (Bryan A. Garner Editor in chief) specific performance is defined as

“the rendering as nearly as practicable of a promised performance through judgement or decree ... a court ordered remedy that requires precise fulfilment of a legal or contractual obligation when monetary damage are inappropriate or inadequate....”In essence the remedy of specific performance enforces the execution of a contract according to its terms ....”

25. The existence of the land sale agreement whose specific performance the trial court was being invited to order was not denied. In this appeal, the agreement has been exhibited at page 23 of the record of appeal.

For its full tenor and effect, I reproduce the same herein below;

“Land Agreement”

26. Land agreement of parcel No. Kisumu/Kogony/7130 Approximate area (1.11)Ha, Agreement dated 21<sup>st</sup> October, 2015 Between Matilda Katiti Machinji ID No.7349977 and Fredrick Onyango Odhiambo I/D No.24124965 parcel of land No.Kisumu/Kogony/7130 in the name of John Ongudi Osina I/D No.9893283 approximate area (1.11)Ha to be sub-divided approximately area of 0.21Ha to Mactilda Katiti Nachinji I/D No.73449977.

27. Mactilda Katiti Machinji is to sell a parcel of land approximate area (0.06) Ha to Fredrick Onyango Odhiambo ID No.24124960 at Kshs.1,200,000/- (One million two hundred thousand shillings only) sub-division cost at Kshs.16,500/- (Sixteen thousand five hundred shillings) to be paid by Fredrick Onyango Odhiambo Dwon payment paid on 21<sup>st</sup> October 2015 Kshs.700,000/- (Seven hundred thousand shillings only).

Balance of Kshs.500,000/- (Five hundred to be paid on or before 18<sup>th</sup> February, 2016.”

28. The agreement was signed by the parties and their respective witnesses on 24<sup>th</sup> October, 2015. It is clear from the agreement that a timeline was set for payment of the balance of the purchase price. There is no evidence that the purchase price has been settled to date. The proceedings show that the Respondent admitted a total amount having been paid to her by the Appellant. That left a balance of about Kshs.359,000 to be paid. The Appellant's argument was that he could not pay the balance of the purchase price to the Respondent when it was evident that the Respondent never attempted to sub-divide the original title. This position is however not supported by the agreement which gave specific time lines on or before which the balance was to be paid. The Appellant was clearly in breach of the sale agreement and hence cannot be entitled to an order of specific performance.



29. In *Mwangi v Kiiru* [1987] eKLR relied on Paragraph 1591 on page 876 of Chitty on Contracts, 25<sup>th</sup> Edition, volume one, under the heading Discharge by Breach states:

“One party to a contract may, by reason of the other’s breach be entitled to treat himself as discharged from liability further to perform his own unperformed obligations under the contract..... The rule is usually stated as follows: Any breach of contract gives rise to a cause of action; not every breach gives a discharge from liability. Thus the question ....is whether a party who admittedly has a claim for damages is relieved from further performance by the other party’s breach. Secondly although sometimes the innocent party is referred to as “rescinding” the contract and the contract as being “terminated” by the breach, it is clear that the contract is not rescinded ab initio. The innocent party or in some cases both parties are excused from further performance of their primary obligations under the contract; but there is then substituted for the primary obligations of the party in default a secondary obligation to pay monetary compensation for his non performance.”

30. Secondly, an order of specific performance is only available where there is a valid contract/agreement to be enforced. In the present case, the Respondent contended that upon breach of the agreement by the Appellant, she proceeded to deal with the land as she pleased.

31. In *Reliable Electrical Engineers Ltd....Vs....Mantrac Kenya Limited* (2006) eKLR, wherein the court held that:-

“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 or unenforceable. Even when 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. Even when damages are adequate remedy specific performance may still be refused on the ground of undue influence or where it will cause severe hardship to the Defendant.”

32. I find that there was no valid agreement capable of enforcement by way of an order of specific performance. Hence the trial court did not err in not making an order of specific performance of the agreement.

The issue in the appeal is the amount of the refund awarded.

33. It is clear from the evidence of the Appellant and from the admission of the Respondent on cross-examination that the total amount paid by the Appellant to the Respondent as purchase price was Kshs.841,000 as follows:

- a. Kshs.700,000 on the date of the agreement which amount was acknowledged in the agreement.
- b. Kshs.91,000 of which the Respondent acknowledged on cross-examination and
- c. Kshs.50,000/- paid via Mpesa.

34. The trial court in its judgement made an order for refund of Kshs.841,000/- together with interest from the date of filing the counter-claim.



35. Counsel for the Appellant submitted that if the Appellant is to vacate the suit land then he is clearly entitled to the full refund of Kshs.841,500 together with interest from 21<sup>st</sup> October, 2015 to date, together with the value of the development at Kshs.860,000/-.
36. The Appellant had prayed in the counterclaim for interest at 14% p.a. on the refund amount from the date of the land sale agreement that is from 21<sup>st</sup> October, 2015 to the date of refund in full. However, it is clear that the entire amount of Kshs.841,000 was not paid on the date of the agreement as only Kshs 700,000/= was paid on the date of the agreement.
37. Secondly, the agreement failed because of breach thereof by the Appellant. The Respondent produced letters from her lawyers showing her willingness to transfer the land upon payment of the balance of the purchase price.
38. In the letter dated 27<sup>th</sup> February, 2017 by Nyanga & Company Advocates, it was indicated that there was no express condition in the agreement that the balance was payable upon transfer of the land. That the agreement required that balance of the purchase price be paid on or before 18<sup>th</sup> February, 2017 to pay the balance.
39. In another letter dated 4<sup>th</sup> April, 2017 from the same firm of Advocates, the Respondent informed the Appellant that she had sub-divided the original parcel into two parcels but could not transfer the sold portion to the Appellant without payment of the balance. She requested for an undertaking from the Appellant's advocates to pay the balance together with interest upon the Respondent availing duly executed transfer forms within 3 days.
40. The evidence shows that the Respondent was willing to complete her part of the agreement but that the Appellant persisted in his breach of the agreement and did not respond to the offers made by the Respondent.
41. I find that the trial court rightly awarded the refund and did not err in so doing.
42. The next issue is that the trial court erred in failing to take into account the value of Appellant's houses and developments which the Appellant will have to destroy upon moving out of the suit land.
43. The Appellant pleaded that he entered the suit land with the express permission of the Respondent, converted it into his matrimonial home, built a house and planted tree.
44. He produced a valuation report as exhibit which gave the value of the improvements on the land at Kshs.860,000/=. He also produced photographs to show the house.
45. Although the Appellant in his counterclaim prayed for the value of his development on the land together with interest, he did not plead the amount of the value of the developments.
46. The Respondent's response to the claim for the value of the developments as contained in the Reply to defence and defence to counter claim dated 9<sup>th</sup> May, 2022 was that the erection of the matrimonial house was illegal since it was not in the agreement, that the developments undertaken could not cost the alleged sum of since the structures erected were a semi-permanent house and latrine and trees. It was her testimony that she made several attempts to have the appellant vacate the land but in vain.
47. I find that the trial court did not err in not awarding the value of the developments. The Appellant had entered the suit land on the basis of an agreement which he breached soon thereafter but nonetheless proceeded to develop. Instead of investing the money in paying the balance of the purchase price and acquire ownership, he proceeded to do the developments. He has himself to blame for it.

The next issue relates to costs



48. The appellant faults the trial court for holding that each party would bear own costs of the suit when it was clear that the counterclaim had succeeded.
49. Having found that the Appellant is the one who breached the agreement and in spite of the several opportunities given to him to pay the balance of the purchase price and get the land transferred to him, persisted in the breach, I find that the trial court was right in making an order that each party bears own costs of the action. Under section 27 of the *Civil Procedure Act*, costs follow the event and in this case each of the parties had lost part of their claim and succeeded partly. The court had discretion to make an order that was appropriate in the special circumstances of the case.
50. For the foregoing reasons, I find that the appeal lacks merit and hereby dismiss it. Costs to the Respondent.
- Orders accordingly.

**JUDGEMENT DATED AND SIGNED AT KISUMU AND DELIVERED THIS 8<sup>TH</sup> DAY OF MAY 2025 VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.**

**E. ASATI,**

**JUDGE.**

In the presence of:

Maureen: Court Assistant.

Anyul for the Appellant

Kouko for the Respondent.

