



REPUBLIC OF KENYA



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**Giesen v Wamukowa (Environment and Land Appeal E007 of 2023)
[2025] KEELC 4627 (KLR) (11 June 2025) (Judgment)**

Neutral citation: [2025] KEELC 4627 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND APPEAL E007 OF 2023**

**A NYUKURI, J
JUNE 11, 2025**

BETWEEN

CAREN AMIRA GIESEN APPELLANT

AND

JESSICA ANDOLA WAMUKOWA RESPONDENT

*(Appeal is against the judgment of Hon. B. Ojoo (SPM) made on
the 7th February, 2023 in Butere CMC ELC Case No. 43 of 2021.)*

JUDGMENT

Introduction

1. This appeal is against the judgment of Hon. B. Ojoo (SPM) made on the 7th February, 2023 in Butere CMC ELC Case No. 43 of 2021. In the impugned judgment the trial court found that the plaintiff had no cause of action against the defendant and dismissed the plaintiff's claim for specific performance and in the alternative refund of the consideration paid and general damages for breach of contract.

Background.

2. By a plaint dated 23rd September, 2021 the plaintiff averred that on 8th September, 2018 and 15th October, 2019 she entered into land sale agreements for purchase of land parcel No. Marama/Shinamwenyuli /1333 in Butere at a consideration of Kshs. 500,000/- which the plaintiff paid in full. She averred that the plaintiff was obligated to conduct a succession process as the purchased land was in the name of the late Melicen Ayoyi. She stated that the defendant failed to undertake succession and or give the plaintiff the purchased land and that the defendant's family members objected to the plaintiff getting the purchased land but the defendant failed to protect the plaintiff's interest. She sought for specific performance and, in the alternative, refund of the purchase price, as well as damages for breach of contract. She also sought costs.



3. In a defence dated 30th June, 2022, the defendant denied the plaintiff's claim. The defendant admitted that parties entered into the sale agreements stated and that she received the sum of Kshs. 500,000/- from the plaintiff being purchase price. She also stated that the plaintiff used the purchased portion for a period of two years. The defendant further alleged that succession in respect to the late Melicen Ayoyi was done vide Butere Succession Cause No. 452 of 2018. That when the plaintiff was given her portion, but that she refused and sought refund.
4. It was the defendant's averment that the plaintiff further destroyed the boundaries upon demarcation of the purchased portion. The defendant alleged to have ignorantly entered into a voidable agreement for sale of land belonging to a deceased person which actions amounted to intermeddling. That the plaintiff was allocated her portion of 1 ¼ acres but after using the same for two years sent her father to destroy the boundaries creating misunderstanding and thereafter vacating the land. She accused the plaintiff of breaching the land sale agreement by unreasonably refusing to take possession of the purchased land and allowing her father to destroy the boundaries thereof.
5. On close of pleadings, the matter proceeded to hearing by way of oral testimony. Both the plaintiff and the defendant presented two witnesses each.

Plaintiff's evidence

6. PW1 was Caren Amira Gielsen. She adopted her witness statement dated 23.09.2021 as her evidence in chief. It was her testimony that she entered into two land sale agreements with the defendant whereof she purchased 1¼ acres to be excised from parcel No. Marama/Shinamwenyuli/1333 at a consideration of Kshs. 500,000/=, which she paid in full.
7. She further stated that at the time of purchase of the suit property, the same was in the name of the late Melicen Ayoyi and that the defendant and her family were to undertake succession and thereafter transfer the purchased portion to her. She complained that upon receiving the purchase price in full, the defendant failed to take necessary steps to transfer the purchased portion to the plaintiff. Further, that the defendant's family members opposed the transaction but the defendant did nothing to protect the plaintiff's interests.
8. On cross examination, she stated that her father was using the land until the defendant's son began threatening him. That her father was ordered out of the land. She stated that she was not aware that the defendant offered to refund the consideration to her.
9. PW2 was William Otieno, the plaintiff's father. He stated that he witnessed the transaction of purchase of land between the plaintiff and the defendant. That the full purchase price was paid. That the surveyor curved out the purchased portion and that he started using the land in 2019 and that after one year the defendant's son told him to move to another section of the land where there were graves. That he declined and informed the plaintiff. That the chief was informed of the matter and that he was summoned by the chief.
10. The witness informed court that the defendant began claiming that the plaintiff was claiming more land than what she had purchased and that the defendant's son came and reduced the acreage. That later he was asked to stop using the land by the defendant's son who began threatening him.
11. In cross examination, he stated that the surveyor curved out the purchased portion before he began using the land but that the defendant's son became hostile to him. He stated that the surveyor curved out the purchased portion in the defendant's presence. He maintained that it was the plaintiff who purchased the land but he was using it because she was away. That marked the close of the plaintiff's case.



Defendant's evidence

12. DW1 was Jessica Andola Wamukowa, the defendant in the case. She adopted her statement dated 30th June, 2022 as her evidence in chief and produced the filed documents. It was her testimony that on 8th September, 2018 and 15th October, 2019 the plaintiff and the defendant's family entered into a land sale agreement for purchase of 1 ¼ acres at a consideration of Kshs. 500,000/-. That the plaintiff used her parcel for two years and stopped and was interrupted awaiting succession process to ascertain her portion. That she was unaware that her actions amounted to intermeddling. That she carried out the succession process. That she was allocated the entire parcel No. Marama/Shinamwenyuli/1333 vide Succession Cause Butere No. 452 of 2018.
13. The witness insisted that she did not breach the sale agreements as the plaintiff was aware of the succession process. She stated that a dispute arose after the plaintiff's surveyor attempted to allocate the plaintiff a larger portion than what she had purchased. That new demarcation was done which the plaintiff's father disputed as the new portion had a grave. That the plaintiff's father destroyed the boundaries. That the chief and other witnesses were involved in the demarcation. That after demarcation, instead of waiting for succession, the plaintiff changed her mind and sought refund of the consideration paid of Kshs. 500,000/- . That the plaintiff's parents failed to state the exact refund that they wanted. That the matter was before the area Chief but no agreement was reached. Further, that the plaintiff and her mother demanded a refund of the purchase price of Kshs. 500,000/- but she did not have the amount and needed time to pay. She stated that the plaintiff was not entitled to the orders sought due to the fact that she had breached the land sale agreement.
14. In cross examination, she stated she received the sum of Kshs. 500,000/- from the plaintiff when she sold her a portion of her land which was in the name of her late mother Melica Ayoyi who died in 1996. That she had not done succession. That she filed succession in 2018 and the same was finalized in 2019. That the problem between her and the plaintiff's parents began in 2021. That after succession she transferred the land to herself and got title on 5th December, 2021. That she was to transfer the purchased portion to the plaintiff but the plaintiff's father interrupted the process by removing the boundary. She confirmed that she had not effected transfer of the land to the plaintiff, and stated that the plaintiff had brought bad blood between them by filing this case.
15. DW2 was Wamanai Alogio Edwin, the chief of Shinamwenyuli area. He stated that the disputed land was in his area of jurisdiction and that he knew the parties as they appeared before him on 23rd April, 2022. That the size of the land had been agreed by the parties and that he was present when the same was measured. That later the plaintiff's parents showed dissatisfaction with the portion they were shown and sought refund.
16. In cross examination, he stated that he visited the site in 2021 but does not know when the parties entered into an agreement. That he was not aware the plaintiff's parents had used the land since 2019. That he was requested by the parties to witness the survey process. That there was a misunderstanding about the size of the portion sold. That they failed to agree. That marked the close of the defendant's case.
17. Upon consideration of the pleadings, evidence and submissions, the learned trial magistrate found that as the land was sold when it was registered in the name of the defendant's late mother, the sale was contrary to section 45 of the *Law of Succession Act* and therefore the defendant had no capacity to sell the same. The lower court further found that the sale agreements by the parties dated 8th September, 2018 and 15th October, 2019 respectively are null and void and that therefore the claim for specific performance cannot issue. Further, the court found that as there was no consent of the Land Control



Board, the transaction was void. The court stated that as the agreements between the parties were void ab initio and contrary to the Law of Succession Act and the Land Control Act, the plaintiff was not entitled to the reliefs sought as she had no cause of action against the defendant. Consequently, the learned trial magistrate dismissed the plaintiff's case and ordered that each party shall bear its costs of the suit.

18. Aggrieved with the judgment of the trial court, the appellant who was the plaintiff in the lower court, filed this appeal vide the Memorandum of Appeal dated 20th February, 2023 citing four grounds of appeal as follows:
 - a. That the Learned Magistrate erred in law and in fact in deciding the whole case against the law and weight of evidence.
 - b. That the Learned Magistrate erred in law and in fact in failing to grant the prayer for specific performance when the appellant deserved the same.
 - c. That the Learned Magistrate erred in law and in fact in finding and holding that the sale agreement was void ab initio and therefore the appellant had no course of action.
 - d. That the Learned Magistrate erred in law and in fact in failing to grant the alternative remedy of refund of the purchase price even when the defendant had admitted to have received the purchase price in full.
19. Consequently, the appellant sought the following orders:
 - a. That this appeal be allowed.
 - b. That judgment and decree against the appellant delivered by Hon. B. Ojoo in Butere ELC No. 43 of 2021 dated 7th February, 2023 be set aside.
 - c. That the appellant be awarded the costs of this appeal.
20. The appeal was disposed by way of written submissions. On record are the appellant's submissions dated 15th February, 2024 and the respondent's submissions dated 18th March, 2024.

Appellant's submissions.

21. Counsel for the appellant submitted that parties entered into two land sale agreements for a sale of a portion of Marama/Shinamwenyuli/ 1333 at a consideration of Kshs. 500,000/- which was paid in full as acknowledged by the respondent. Counsel relied on Section 33 of the Law of Contract Act and the case of Ndegwa Kuria v Peter Nditu Gitau (2019) eKLR for the proposition that for a contract to be valid, it must state the names of parties, the number of the property, the purchase price, terms of agreement, and signed by parties and their witnesses is a valid contract. Counsel maintained that the agreements herein were valid contracts but it was the defendant who breached them by failing to transfer the land to the plaintiff.
22. On whether the appellant was entitled to the reliefs sought in the plaint, counsel relied on the case of Reliable Electrical Engineers Ltd v Mantract Kenya Limited (2006) eKLR and submitted that the defendant having breached the contract, the court was supposed to order specific performance. Counsel argued that the factors listed by the trial court as capable of rendering a contract null and void were not applicable in this case. Counsel wondered why the respondent having acknowledged receipt of the purchase price the court failed to order a refund of the same. Counsel submitted that the decision of the trial court occasioned unjust enrichment on the part of the respondent and cited the



cases of Stephen Kwanja Kabuku v Safaricom Limited (2018) eKLR and Joe Mwanganyi Kitwire v Priscah Muko Vimburi (2022) eKLR.

Respondent's submissions

23. Counsel for the respondent submitted that the respondent had no capacity to sell the suit property as at the time of purchase, the land was registered in the name of the late Melica Ayoyi. Reliance was placed on Section 45 of the *Law of Succession Act* which bars intermeddling with a deceased person's property. Counsel argued that since the respondent lacked capacity to sell the suit property the two land sale agreements were null and void and that the trial court was right in arriving at that conclusion.
24. Citing sections 6 and 8 of the *Land Control Act*, counsel argued that as the sale transactions between the parties herein were not blessed with consents of the Land Control Board, the same were null and void. The court was referred to the decision in Willy Kimutai Kitilit v Michael Kibet (2018) eKLR for the proposition that where there is no consent of the Land Control Board, a land sale transaction becomes void. On validity of contract, counsel referred to the case of African Cotton Industries Limited v Rural Development Services Limited (2021) eKLR on the vitiating factors that may render a contract invalid. Counsel sought for the dismissal of the appeal.

Analysis and determination

25. The court has carefully considered the appeal parties' rival submissions and the entire record. This being a first appeal, the duty of this court is to re evaluate, reanalyze and reassess the evidence before the trial court and make its own independent conclusions bearing in mind that it had no advantage of seeing or hearing witnesses and therefore make due allowance for that (See *Selle & Another -vs- Associated Motion Boat Co. Ltd & Others* (1968) EA 123).
26. Having considered the grounds of appeal raised in the Memorandum of Appeal by the appellants, my view is that same raise two issue for determination, namely;
 - a. Whether the sale agreements dated 8th September 2018 and 15th October 2019 were valid contracts.
 - b. Whether upon finding that the respondent was paid a consideration of Kshs. 500, 000/= by the appellant for purchase of 1¼ acres of land from parcel No. Marama/Shinamwenyuli/1333, the trial court was wrong in concluding that the appellant was not entitled to the prayer for specific performance or the alternative prayer for refund of the consideration on the basis that the sale agreements were null and void.
27. In the instant case, it is not disputed that in 2018 and 2019, the parties herein entered into land sale agreements for purchase of 1¼ acres of land to be hived from parcel Marama/Shinamwenyuli /1333 at a consideration of Kshs. 500, 000/= which sum was received in full by the respondent herein. It is also not disputed that as at 2018 and 2019 when parties herein entered into land sale agreements, the parcel of land known as Marama/Shinamwenyuli/1333 was registered in the name of Melicen Ayoyi, deceased mother of the respondent. The parties contested the validity of these agreements and the trial court found that on the basis of provisions of section 45 of the *Law of succession Act* and sections 6 and 8 of the *Land Control Act*, the two agreements were null and void.
28. To obtain specific performance, a claimant must demonstrate that there is a valid contract, which has been breached by the respondent and that an award of damages shall not be an appropriate remedy.
29. Specific performance is an equitable remedy granted where there exists a valid contract and where damages would be inadequate in the circumstances of the case.



30. In the case of *Gharib Suleman Gharib v Abdulrahman Mohamed Agil* LLR No. 750 (CAK) Civil Appeal No. 112 of 1998 the court held that:

“The jurisdiction to order specific performance is based on the existence of a valid and enforceable contract and being an equitable relief, such relief is more often than not granted where the party seeking it cannot obtain sufficient remedy by an award of damages the focus being whether or not specific performance will do more perfect and complete justice than an award of damages.”

31. Consideration for specific performance were clearly laid out in *Reliable Electrical Engineers Ltd. V Mantrac Kenya Limited* (2006) eKLR where the court stated as follows;

“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 enforceable. 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 an adequate remedy specific performance may still be refused on the ground of undue influenced or where it will cause severe hardship to the defendant.”

32. For a sale of land transaction to be valid, section 38 of the *Land Act* provides as follows;

Validity of contracts in sale of land

1. Other than as provided by this Act or by any other written law, no suit shall be brought upon a contract for the disposition of an interest in land—
 - 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 to by a witness who was present when the contract was signed by such party.
2. Subsection (1) shall not apply to—
 - a. A contract made in the course of a public action;
 - b. The creation or operation of a resulting, implied or a constructive trust; or
 - c. Any agreement or contract made or entered into before the commencement of this Act, provided that—
 - i. The verbal contracts shall be reduced to writing within two years from the date of enactment of this Act; and



- ii. the Cabinet Secretary shall put a notice of the requirement to reduce the contracts in writing, in a newspaper of nationwide circulation.
- 33. Therefore, for a land sale agreement to be valid, parties to the agreement must sign it in the presence of their witnesses who should attest to the signatures. For a party to validly execute a land sale agreement they must be the lawful owners of the land and where the land is registered in the name of a deceased person, they must be holders of a confirmed grant in respect of such deceased person.
- 34. Section 82 (b) (ii) of the *Law of Succession Act* forbids sale of immovable property before confirmation of grant and provides as follows;

Powers of personal representatives

Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers—

 - a. To enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative;
 - b. To sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best:

Provided that—

 - i. Any purchase by them of any such assets shall be voidable at the instance of any other person interested in the asset so purchased; and
 - (ii) no immovable property shall be sold before confirmation of the grant;
 - c. to assent, at any time after confirmation of the grant, to the vesting of a specific legacy in the legatee thereof;
 - d. To appropriate, at any time after confirmation of the grant, any of the assets vested in them in the actual condition or state of investment thereof at the time of appropriation in or towards satisfaction of any legacy bequeathed by the deceased or any other interest or share in his estate, whether or not the subject of a continuing trust, as to them may seem just and reasonable to them according to the respective rights of the persons interested in the estate of the deceased, and for that purpose to ascertain and fix (with the assistance of a duly qualified valuer, where necessary) the value of the respective assets and liabilities of such estate, and to make any transfer which may be requisite for giving effect to such appropriation:
- 35. Therefore, in selling the suit property without having a confirmed grant in respect of the estate of the late Melicen Ayoyi, the respondent was selling the suit property without the requisite capacity, hence the trial court was right in arriving at the finding that the respondent lacked capacity to sell the suit property, as she was neither the owner thereof nor a holder of a confirmed grant for the estate of the late owner. Since the respondent had no confirmed grant for the estate of Melicen Ayoyi, at the time of sale, the land sale transactions entered into with the appellant were void and the contracts invalid.
- 36. To obtain specific performance, there must be a valid contract, and it must be demonstrated by the claimant that an award of damages shall not be an adequate remedy. In the instant case, as there was no valid agreement, the prayer for specific performance was untenable. Besides, the pleadings and evidence did not demonstrate that an award of damages would be inadequate.



37. In this case however, the appellant had also sought refund of the purchase price of Kshs. 500, 000/= as an alternative prayer to specific performance. The respondent confirmed receiving the said amount in her defence and evidence. Can a person allege lack of capacity to sell land but have capacity to keep money received in a transaction where they had no capacity to transact? I do not think so. If that were allowed, it would lead to unjust enrichment which would be contrary to the spirit of Article 159 (2) (d) of *the constitution* that enjoins this court to administer substantive justice. The 2010 constitution does not just expect the court to be guided by the rule of law, it also expects courts to apply the law in a manner that would result in just outcomes.
38. In the instant case, the respondent cannot lawfully withhold monies received in an invalid transaction. Therefore, in dismissing the appellant's case and denying her a refund, the trial court was wrong as her decision resulted in unjustly enriching the respondent, who basically sold nothing. Equity and justice will not countenance a situation where one-party benefits from their own mischief by using the law to shield them from returning what they unlawfully obtained. As the respondent had no capacity to transact in respect to the suit property, she could not lawfully retain that which she obtained without capacity. Therefore, the appellant was lawfully, equitably and fairly entitled to a refund of the consideration paid. As the prayer for refund is a prayer for damages-special damages, the appellant cannot again be awarded damages for breach of contract as that will lead to double compensation for a single transaction which would be unjust enrichment. In the premises, having awarded special damages of Kshs. 500, 000/= the prayer for damages for breach of contract is declined.
39. In the premises I find and hold that the appeal is merited and the same is allowed. Ultimately, the trial court's judgment is hereby set aside and substituted with an order allowing the appellants claim for refund of Kshs. 500, 000/=. Interest on this sum is awarded at court rates and shall run from the date of this judgment till payment in full. The appellant shall have the costs of the suit in the lower court as well as the costs of this appeal.
40. It is so ordered.

DATED, SIGNED AND DELIVERED AT KAKAMEGA IN OPEN COURT/VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM THIS 11TH DAY OF JUNE, 2025

A. NYUKURI

JUDGE

In the presence of;

Mr. Okanda for the appellant

Ms Josca Andola Wamukowa the respondent in person

Court Assistant: M. Nguyai

