



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MERU

ELC APPEAL CASE NO. E019 OF 2022

LEON **NDUBAI.....**

.....APPELLANT

VERSUS

CHARLES **NTIRITU** **M'IKUNYUA.....1ST**

RESPONDENT

MOSES **MURIUKI** **M'IKUNYUA.....2ND**

RESPONDENT

STEPHEN **MUTHEE** **M'IKUNYUA.....3RD**

RESPONDENT

HARRIET **GACHIENJA** **M'IKUNYUA.....4TH**

RESPONDENT

LUKE **MURIUNGI** **MAKATHIMO.....5TH**

RESPONDENT

(An Appeal against the Judgment of the Chief Magistrate Court at Meru (Hon D.W Nyambu, CM) dated 5/4/2021 in Meru CMC E & L Case No. E061 of 2021)

JUDGMENT

Introduction

1. This appeal challenges the judgment rendered on 05/04/2021 by the Chief Magistrate Court at Meru (**Hon. D. W. Nyambu CM**) in **Meru CMC E & L Case No. E061 of 2021**. One of the key issues that fell for determination in the said suit was whether the Appellant had satisfied the criteria for granting an order of specific performance of a contract for sale of land, in relation to land parcel number **Kiirua/Naari/1178**. That is one of the issues that fall for determination in the appeal. Before I analyse and dispose all the issues that fall for determination in the appeal, I will set out a background to the appeal, outlining the parties' respective cases in the trial court. I will also outline the grounds of appeal and the parties' respective submissions in the appeal.

Background

2. The suit in the trial court was initiated by the appellant against the five respondents vide a plaint dated 27/04/2021. The appellant sought against the five respondents; (i) an order decreeing specific performance of the agreement for sale of land, dated 29/10/2015, relating to land parcel number **Kiirua/Naari/1178**, measuring 1.62 hectares in favour of the appellant; (ii) liquidated and general damages for breach of the said agreement by the respondents; (iii) an order nullifying/cancelling the then existing title relating to the

suit land and restoring the land into the names of the 1st and 4th respondents; (iv) an order authorizing/directing the Executive Officer of the court to execute all relevant and necessary conveyance documents; and (v) costs of the suit.

3. The case of the appellant was that, in 1982 his late father, **Benjamin Revel Ndubai**, entered into a sale agreement with the late father of the 1st to 4th respondents, the late **John M'Ikunyua M'Mairanyi**, for sale of two abutting parcels of land, namely, land parcel number **Kiirua/Naari/1177** and land parcel number **Kiirua/Naari/1178** (hereinafter referred to as "**parcel number 1177**" and "**parcel number 1178**" respectively). By the time the 1st to 4th respondents' father died, he had only managed to transfer parcel number **1177**, although the appellant's father had already taken possession of both parcels and had developed a hotel on them.
4. The appellant added that, in 2015, the 1st - 4th respondents claimed that his late father had not paid purchase price relating to parcel number **1178**. Consequently, they entered into an agreement dated 29/10/2015, pursuant to which they agreed that he would purchase parcel number **1178** from the four respondents at a consideration of Kshs. 1,000,000/- and the four

respondents undertook to transfer the land to him upon finalization of **Meru ELC Case No. 26 of 2011 (OS)** which was pending before this court.

5. The appellant contended that the 4 respondents received and acknowledged receipt of the consideration. He added that Meru ELC Case No. 26 of 2011(OS) was subsequently finalized in favour of the 4 respondents and the 4 respondents were registered as proprietors of the land. He averred that subsequent to that, the 4 respondents unlawfully and mischievously transferred parcel number **1178** to the 5th respondent in April 2021 without his knowledge. In conclusion, he stated that despite demand, the respondents failed to meet their contractual obligations, hence the claim in the Lower Court.
6. The 5 respondents filed a joint defence dated 09/08/2021 in which they contested the appellant's claim. They averred that the alleged agreement of 1982 was statute-barred and could not be enforced. They stated that the only land which was registered in the name of their late father was parcel number **1177**, adding that parcel number **1178** had all along been under the use of the 1st - 4th respondents. They averred that there was no sale agreement between them and the plaintiff and put the plaintiff to strict proof. They added that if there was any agreement relating to parcel number 1178, the same was

null *ab initio* and could not be enforced by the appellant against the respondents. They added that the 4th respondent (**Harriet Gachienja M'ikunyua**) was not a party to **Meru ELC Case No. 26 of 2011 (OS)**.

7. The 1st - 4th respondents averred that they were not aware of the agreement between them and the appellant. The five respondents stated that the transfer of parcel number 1178 to the 5th respondent was done lawfully and procedurally, adding that they had no obligation to inform the appellant about the transfer. The 5th respondent emphasized that he was an innocent purchaser for value who acquired the suit land for value after proper due diligence. The five respondents denied the allegation that the appellant was in possession of the suit land and emphasized that the 1st - 4th respondents had been in possession up to the time they sold and transferred the suit land to the 5th respondent who thereafter took possession.
8. The five respondents averred that the appellant had *no locus standi* to institute the suit in the Lower Court, adding that the suit was defective on that account. They urged the trial court to dismiss the suit.
9. Upon conducting trial and upon receiving submissions, the trial court rendered the impugned judgment in which

it found that the appellant had failed to prove his case against the respondents on a balance of probabilities. The trial court dismissed the appellant's case and awarded costs of the suit to the respondents.

Appeal

10. Aggrieved by the judgment and decree of the trial court, the appellant brought this appeal, advancing the following 12 grounds:

- 1) Learned Magistrate erred in law in failing to appreciate the import and full meaning of Section 3(3) of the Law of Contract Act and Section 38-42 of the Land Act.**
- 2) The Learned Magistrate erred and fundamentally contradicted herself in proceeding to find against the appellant despite acknowledging existence of an agreement for sale over L.R No. Kiirua/Naari/1178(hereinafter the suit property) dated the 29th day of October 2015 between the appellant and the 1st respondent being an addendum to the sale agreement between the appellant and the 1st respondent's father dated the 23rd day of August 1984.**
- 3) The Learned Magistrate erred in law and in fact in holding that the agreement for sale dated the 29th day of October 2015 between the appellant and the 1st respondent over the suit property was not a binding instrument between the appellant and the 1st respondent**

in view of the fact that it was disputed by the 1st respondent.

- 4) The Learned Magistrate erred and contradicted herself in finding that the agreement for sale between the appellant and the 1st respondent was not binding between the appellant and the 1st respondent but then proceeded to find that the appellant was in default of the impugned agreement and therefore not deserving the orders sought.***
- 5) The Learned Magistrate erred in law and in fact by finding against the appellant despite acknowledging existence of an agreement for sale between the appellant's father and the 1st-4th respondent's father over the suit property.***
- 6) The Learned Magistrate erred in law and in fact in failing to take into consideration in her judgment the fact that the appellant has been in full possession of the suit property for the past 26 years.***
- 7) The Learned Magistrate erred in law and fact in finding that the appellant was in breach of a contract dated the 29th day of October 2015 between the appellant and the 1st respondent as an addendum to the sale agreement between the appellant and the 1st respondent's father dated the 23rd day of August 1984.***

- 8) The Learned Magistrate erred in fact by finding that the appellant had chosen to file the suit against the respondents for specific performance instead of seeking payment in default of the agreement for sale despite the appellant having sought an order for liquidated general damages (sic) for breach of agreement for sale dated the 29th day of October 2015.**
- 9) The Learned Magistrate erred in law and fact in failing to find that the conduct of the respondents amounted to fraudulent conduct and therefore invite the revocation of the title deed issued to the 5th respondent.**
- 10) The Learned Magistrate erred in law and in fact in failing to consider and analyse the evidence in totality.**
- 11) The Learned Magistrate erred in law in failing to consider the written submissions and authorities filed by the appellant.**
- 12) The Learned Magistrate erred in fact and in law in failing to award costs to the appellant.**
- 11.** The appellant urged this court to set aside the judgment of the trial court and substitute it with an order allowing the claim of the appellant. He further urged this court to condemn the respondents to pay costs of the appeal.

Appellant's Submissions

- 12.** The appellant filed written submissions dated 19/03/2025 through **M/s Ndalila & Co. Advocates**. Counsel for the appellant submitted on grounds 1,2,3,4,5 and 7 together. Counsel pointed out that **Section 3(3) of the Law of Contract Act** is replicated in **Section 38(1)** of the **Land Act**. Counsel added that on 29/10/2015, the appellant entered into a sale of land agreement with the 1st respondent relating to land parcel number **Kiirua/Naari/1178** at a consideration of Kshs. 1,000,000/-. Counsel contended that the said agreement was an addendum to an agreement dated 23/8/1984 between **Benjamin Ndubai (deceased)** and **John M'Ikunyua (deceased)**, who are the late fathers of the appellant and the 1st to the 4th respondents, respectively.
- 13.** Counsel contended that the said agreement was subject to the outcome of the suit for adverse possession vide Meru ELC No.26 of 2011 in which the 1st,2nd and 3rd respondents were seeking to have title to the suit property vested in their names. Counsel argued that it was a term of the agreement that the 1st respondent would transfer the suit property to the appellant upon conclusion of the said suit. Counsel added that the court found in favour of the 1st,2nd and 3rd respondents and vested the property in their names.

14. Counsel submitted that the addendum agreement became enforceable against the 1st respondent. Counsel further submitted that instead the 1st respondent conveying the land to the appellant, the four respondents sold it to the 5th respondent in blatant breach of the sale agreement dated 29/10/2015. Counsel argued that the condition upon which the agreement was predicated occurred vide the judgment of this Court in Originating Summons No. 26/2011, and therefore this Court should enforce the agreement without attempting to rewrite it. Counsel relied on the case of **National Bank of Kenya Limited Vs Pipe Plasic Samkolit (K) Ltd and another (2002)EA.**

15. Counsel faulted the trial court for determining the case against the appellant yet the court had existence of the sale agreement dated 29/10/2015. Counsel contended that the court contradicted itself by finding that the agreement for sale was not binding merely because the 1st respondent disputed it. Counsel added that all agreements are valid unless they are vitiated by undue influence, duress, misrepresentation, mistake or illegality.

16. Counsel argued that there was no evidence of any of the above vitiating factors, adding that during cross-examination of the 1st respondent, he confirmed that he had agreed to transfer the suit property to the appellant

upon conclusion of the Environment and Land Court Case. Counsel faulted the trial court for finding the appellant to have breached the agreement dated 29/10/2015. Counsel contended that the 1st respondent having admitted selling and transferring the suit property to the 5th respondent, the appellant had no obligation to pay the balance of the purchase price because the 1st respondent was in breach of the sale agreement. Counsel relied on the case of ***Ezemark Refrigeration & Contractors Limited Vs Nation Media Group Limited (High Court Civil Suit No.468 of 2009 (Nairobi)*** which cited the case of ***Nakana Trading Co. Limited Vs Coffee Marketing Board (1990-1994)E.A 448.***

- 17.** On whether the trial court erred in dismissing the appellant's prayer for liquidated and general damages, counsel submitted that paragraph 6 of the addendum agreement provided that the defaulting party would pay double the contract price. Counsel further submitted that the 1st respondent received a down payment of Kshs. 400,000/- upon execution of the agreement, adding that, the 1st respondent having admitted selling the suit property to the 5th respondent, he was in breach of the agreement and the trial court ought to have awarded the appellant liquidated damages. Counsel relied on the case of ***Ezemark Refrigeration & Contractors Limited Vs***

Nation Media Group Limited (High Court Civil Suit No.468 of 2009 (Nairobi).

- 18.** On whether the Learned Magistrate erred in not finding the conduct of the respondents to be fraudulent, counsel submitted that the addendum agreement provided that the suit land would be transferred to the appellant upon conclusion of the suit for adverse possession. Counsel contended that once the title was vested in the respondents, their conduct of selling the suit land to the 5th respondent with the knowledge of the addendum agreement was fraudulent. Counsel urged the court to allow the appeal as prayed with costs.

Respondents' Submissions

- 19.** The respondents filed undated written submissions through the firm of **Mutegi Mugambi & Co Advocates**. Counsel for the respondents argued that the trial court correctly interpreted **Section 3 (3)** of the **Law of Contract**. Counsel submitted that the respondents did not dispute the agreement of 1984 but they disputed the addendum agreement dated 29/10/2015. Counsel contended that the appellant ought to have “amended” or “cancelled” the earlier agreement between the parties’ late fathers and entered into a new sale of land agreement between them.

- 20.** Counsel submitted that the respondents had not acquired a title deed for the suit land at the time the alleged addendum agreement was entered into, adding that there was a subsisting case of adverse possession whose outcome was unknown. Counsel added that the law governing sale agreements in Kenya was the **Law of Contract Act** and **Sections 38-42** of the **Land Act**. Counsel argued that parole evidence could not be used to contradict what parties had reduced into a written contract. Counsel relied on the case of **Muthuri Vs NIC Bank Ltd(2003)KLR 145, Caroline Cherono Kirui Vs Linear Cherono Towett(2018)eKLR and Fidelity Commercial Bank Ltd Vs Kenya Grange Vehicles Industries Ltd (2017)eKLR.**
- 21.** On whether the trial court erred in law and in fact in holding that the agreement for sale dated 26/10/2015 between the appellant and the 1st respondent was not binding, counsel submitted that there was no valid sale agreement entered into between the appellant and the 1st respondent. Counsel further submitted that one could not sell what he did not have, hence the alleged addendum agreement was null ab initio. Counsel relied on the case of **Daniel Kiprugut Maiywa Vs Rebecca Chepkurgat Maim(2019)eKLR.**

- 22.** On whether the trial court erred in law and fact by finding against the appellant despite acknowledging the existence of the agreement for sale between the appellant's late father and the 1st - 4th respondent's late father over the suit property, counsel argued that the respondents may have acknowledged the existence of an agreement but no evidence was tendered in court to support the appellant's claim. Counsel cited **Section 107(1) of the Evidence Act, Cap 80** and relied on the case of **William Kabogo Gitau Vs George Thuo & 2 Others (2010) 1 KLE 526** and **Re H and others (minors) (1996)AC 563,586**.
- 23.** Counsel submitted that the appellant alleged that he made a down payment but there was no single acknowledgement that was produced to the court to confirm the same. Counsel further submitted that what were tendered in court were copies of cheques but there was no evidence of encashment or payment of the cheques.
- 24.** On whether the trial court erred in law and fact in failing to take into consideration the fact that the appellant had the suit for the preceding 26 years, counsel argued that Meru ELC Case No.26 of 2011 (OS), the 1st to 4th respondents were found to have been in adverse possession of the suit land and were adjudged to be the

owners. Counsel submitted further that the court conducted a scene visit and established the appellant was not in possession.

- 25.** On whether the trial court erred in finding that the appellant was in breach of the contract dated 29/10/2015, counsel argued that the appellant was a stranger to the agreement entered into between the two deceased persons. Counsel submitted that the appellant had no legal capacity to enforce the agreement on behalf of his father, adding that the agreement was statute-barred.
- 26.** On whether the trial court erred in not awarding the appellant damages, counsel argued that there existed no valid agreement between the appellant and the respondents and as such, the appellant could not claim any damages from them. Counsel urged the Court to dismiss the appeal.

Analysis and Determination

- 27.** I have read and considered the original record of the trial court; the record filed in this appeal; and the parties' respective submissions in the appeal. I have also considered the relevant legal frameworks and jurisprudence. The two key issues that fall for determination in the appeal are (i) Whether the appellant satisfied the criteria for grant of an order of specific

performance of a contract for sale of land; and (ii) Whether the appellant made out a case for the claim of liquidated and general damages against the respondents. I will analyse and dispose the two issues sequentially in the above order. Before I do that, I will briefly outline the principle that guides this court when exercising appellate jurisdiction.

- 28.** This is a first appeal. The task of a first Appellate Court was summarized by the Court of Appeal in the case of **Susan Munyi Vs 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.”

- 29.** The principle was similarly outlined in **Abok James Odera t/a A. J Odera & Associates Vs 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.”

30. Did the appellant satisfy the criteria for grant of an order of specific performance relating to a contract for sale of land? At the material time, contracts for sale of land were governed by the provisions in **Section 3(3)** of the **Law of Contract Act** which provides as follows:

(3) No suit shall be brought upon a contract for the disposition of an interest in land unless: -

(a) the contract upon which the suit is founded: -

(i) is in writing;

(ii) is signed by all the parties thereto; and

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.

31. The above framework was re-enacted with minor modifications in **Section 38** of the **Land Act** which provides as follows:

38. 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.

32. The prevailing jurisprudence on the criterial for grant of an order of specific performance was aptly captured by **Maraga J** (as he was then) in **Reliable Electrical Engineers (K) Ltd Vs Mantras Ltd (2006) eKLR** as follows:

“Specific performance like any other equitable remedy is discretionary and the court will only grant it on well laid principles. The jurisdiction of specific performance is based on the existence of a valid enforceable contract. It will not be

ordered if the contract suffers from some defect, such as failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid and enforceable. Even when a contract is valid and enforceable, specific performance will however not be ordered where there is an adequate alternative remedy.” ▲

33. In their book ***THE LAW OF REAL PROPERTY***, 7th Edition, the ***Rt. Hon. Roberty Megarry*** and ***Sir William Wade*** have outlined the following guiding principle in the exercise of jurisdiction to grant an order of specific performance:

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

34. The two authors add thus:

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

may be refused include the following:(i)in proper cases where there is mistake or great hardship, even though these do not invalidate the contract at law.(ii.)where there has been delay causing injustice to the other party(iii.)whether the vendor would be required “to embark upon difficult or uncertain litigation in order to secure any requisite consent or obtain vacant possession.(iv.)where the property is being used for illegal purposes, which would make the purchaser liable to prosecution, even though on this ground he has no right to terminate the contract; or(v.)where the vendor’s title is doubtful but he has failed to disclose the known cause of that doubt and the purchaser has agreed to accept any defects that there may be. In these cases the contract will remain binding at law, so that the party in default will be liable in damages, but equity will not assist with a decree of specific performance. On the other hand, specific performance may be decreed before the legal time for performance has arrived if there has been an anticipatory breach, e.g. by repudiation.”

- 35.** Did the appellant satisfy the above criterial? In the suit giving rise to this appeal, the appellant relied on a document which was described on its face as an addendum to the agreement for sale of land dated 23rd August 1984 between **John M’Ikunyua (Deceased)** and **Benjamin Revel Ndubai (Deceased)**. The vendor in

the said addendum was **Charles Ntiritu M'Ikunyua** of **ID No. 2376431**. Charles was described as the administrator of the estate of the late **John M'Ikunyua**. The purchaser was described as **Leon Muriithi Ndubai** of **ID No. 2424630**. He was described as the administrator of the estate of the late Benjamin Revel Ndubai.

36. The order of specific performance was sought against all the five respondents. The 2nd, 3rd, 4th and 5th respondents were not vendors in the addendum agreement. Put differently, the addendum agreement could not be enforced against them because they were not privy to it. The prevailing law on contract is that a contract is enforceable only against a contracting party.

37. Secondly, the appellant relied on the addendum agreement dated 29/10/2015 but did not bother to place before the court the primary agreement/contract. If indeed there existed a primary agreement between the late John M'IKunyua and the late Benjamin Revel Ndubai, their respective estates, through their respective duly appointed personal representatives would be the proper parties to a suit seeking orders of specific performance. In the suit giving rise to this appeal the *locus standi* of the appellant was expressly contested. Further, the respondents contended that they were not parties to the

agreement. Against the above defence, the appellant elected not to tender pleadings to the effect that he was suing on behalf of the estate. He similarly elected not to tender evidence proving that he held a valid grant of letters of administration. Thirdly, did not tender to proof that the five respondents were the duly appointed personal representatives of the **late John M'ikunyua** who was the substantive vendor. Clearly, the appellant did not appreciate the distinct identity of him as a person and him as a legal entity seeking to enforce his late father's contract. If he intended to enter into a fresh agreement, that regrettably, is not what he did vide the addendum agreement that formed the fulcrum of his case. That is not all.

- 38.** Through his pleadings, the appellant relied on the judgment of this Court (**Cherono J**) rendered on 14/06/2018 in **Meru ELC Case No. 26 of 2011 (OS)**. Through the said judgment, the 1st, 2nd, and 3rd respondents, together with one **Peter Gachiena M'ikunyua**, were adjudged to have acquired title to the suit land through adverse possession. The court decreed them to be registered as proprietors of the suit land. The appellant appears on the face of the judgment as a party in the case.

- 39.** It does emerge from the addendum agreement that the appellant entered into the addendum agreement while aware of the subsisting claim of the four plaintiffs in Meru ELC Case No. 26 of 2011 (OS). Having recognized that the four (4) plaintiffs had acquired title to the suit land in their own right, it beats logic that he entered into the addendum agreement in furtherance of the interest of the two deceased parties over the suit land. This monumental contradiction dealt a fatal blow to the appellant's plea for an order of specific performance.
- 40.** The totality of the foregoing is that the appellant did not satisfy the criteria for granting an order of specific performance in relation to a contract for sale of land. That is the finding of the court on the first issue.
- 41.** Did the appellant make out a case for the claim of liquidated and general damages? I do not think so. First, the appellant initiated a claim in his personal name as opposed to suing on behalf of the estate of the deceased. The primary agreement in respect of which he sought liquidated and general damages was not tendered. The addendum agreement which he tendered was allegedly entered into in furtherance of a contract relating to a party who was not the plaintiff in the case that was before the trial court. Four out of the five defendants in the suit were not parties to the addendum agreement which the

appellant relied on. A claim for contractual damages cannot be mounted by or against a stranger to the contract. It can only be mounted by or against a party to a contract.

42. For the above reasons, the finding of the court is that the appellant did not make out a case for the claim of liquidated and general damages.

43. On costs, the general principle in Section 27 of the Civil Procedure Act is that costs follow the event. Consequently, the Appellant shall bear costs of the appeal.

44. In the end, this appeal is rejected and dismissed for lack of merit. The appellant shall bear costs of the appeal.

DATED, SIGNED AND DELIVERED AT **MERU** THIS **16TH** DAY **SEPTEMBER, 2025.**

**B. M. EBOSO [MR]
ELC JUDGE**