Ochila & another v Olocho (Environment and Land Appeal E011 of 2023)
[2024] KEELC 13643 (KLR) (3 December 2024) (Judgment)

Neutral citation: [2024] KEELC 13643 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ENVIRONMENT AND LAND APPEAL E011 OF 2023

SO OKONG'O, J

DECEMBER 3, 2024

BETWEEN

PAUL MIDANY OCHILA ..... 1ST APPELLANT

BILLY OTIENO ..... 2ND APPELLANT

AND

ANDREW OPIYO OLOCHO ..... RESPONDENT

(Being an appeal from the judgment and decree of Hon. Dr. Douglas Ogoti (CM) delivered on 19th July 2023 in Kisumu CMCELC No. 15 of 2020)

JUDGMENT

Brief facts

1. This appeal is against the judgment delivered by Hon. Dr. Douglas Ogoti on 19th July 2023 in Kisumu CMCELC No. 15 of 2020 (hereinafter referred to only as "the lower court"). The Respondent filed a suit against the Appellants in the lower court through a plaint dated 27th February 2020 which was later amended on 12th August 2021. In his amended plaint, the Respondent averred that at all material times, the 1st Appellant was the registered proprietor of all that parcel of land known as Title No. Kisumu/Kanyawegi/3136 (hereinafter referred to only as "the suit property"). The Respondent averred that by an agreement of sale dated 28th June 2011, the 1st Appellant agreed to sell and he agreed to purchase from the 1st Appellant a portion of the suit property measuring 60 strides by 55 strides at a consideration of Kshs. 160,000/-. The Respondent averred that while purchasing the said portion of the suit property, he conducted a search which showed that the suit property was registered in the name of the 1st Appellant's deceased grandmother in respect of whose estate the 1st Appellant was the only beneficiary. The Respondent averred that after the payment of the full purchase price, he began the process of transferring the suit property into the name of the 1st Appellant who would then transfer the same to his name.

2. The Respondent averred that the transfer of the suit property to the 1st Appellant was done successfully and the Respondent got the original title deed for the property in the 1st Appellant's name. The Respondent averred that the land surveyor who was to undertake the survey of the suit property and have the portion thereof that was sold to the Respondent excised and registered in the name of the Respondent died before the process was undertaken. The Respondent averred that the 1st Appellant requested the Respondent to give him the original title deed to enable him sell his portion of the suit property to a third party. The Respondent averred that despite several requests, the 1st Appellant refused to give him back the said title deed to enable him transfer his portion of the suit property to his name.

3. The Respondent averred that he was surprised to receive a cheque for Kshs. 160,000/- from the 1st Appellant's advocate under cover of a letter in which the 1st Appellant claimed that the Respondent had frustrated the sale agreement between them. The Respondent averred that he later conducted a search on the suit property on 4th February 2020 which confirmed that the suit property was still registered in the name of the 1st Appellant. The Respondent averred that he registered a caution against the title of the suit property. The Respondent averred that the suit property was thereafter transferred and registered in the name of the 2nd Appellant and a title deed was issued to him. The Respondent averred that the transaction between the 1st Appellant and the 2nd Appellant was illegal, unlawful and fraudulent.

4. The Respondent averred that he had planted trees for commercial purposes on the portion of the suit property which he purchased from the 1st Appellant. The Respondent sought judgment against the Appellants for;

    a. A declaration that the Respondent was the legal owner of identified portion of the suit property measuring 60 strides x 55 strides.

    b. A declaration that the transfer of the suit property to the 2nd Appellant was irregular, fraudulent, illegal, null and void.

    c. An order for the rectification at the register for the suit property by the cancellation of the title deed issued to the 2nd Appellant and reversion of the suit property to the name of the 1st Appellant.

    d. An order compelling the 1st Appellant to transfer to the Respondent the identified portion of the suit property measuring 60 strides x 55 strides in default of which the Executive Officer of the court shall be at liberty to sign the transfer forms on behalf of the 1st Appellant in favour of the Respondent.

    e. A permanent injunction restraining the Appellants, their servants, agents and /or whomsoever jointly and severally from trespassing, encroaching, forcefully entering, fencing, stepping on, evicting the Respondent and /or dealing howsoever with the identified portion of the suit property measuring 60 strides x 55 strides.

    f. osts and incidental to this suit plus interest.

5. The Appellants entered appearance and filed a joint amended statement of defence on 31st August 2021. The Appellants denied every allegation in the amended plaint. The Appellants admitted that the 1st Appellant agreed to sell to the Respondent a portion of the suit property measuring approximately 60 strides by 55 strides at Kshs. 160,000/-. The Appellants averred that the Respondent paid Kshs. 140,000/- to the 1st Appellant and Kshs. 20,000/- to the Respondent's surveyor who was to

undertake the subdivision of the suit property and have the said portion of the suit property measuring approximately 60 strides by 55 strides excised and registered in the name of the Respondent. The Appellants averred that for a period of 9 years, the Respondent's surveyor did not undertake the subdivision exercise. The Appellants averred that the 1st Appellant treated the agreement as having been rescinded and refunded to the Respondent the purchase price of Kshs. 160,000/-.

6. The Appellants averred that the Respondent never took possession of the suit property and never initiated any activity on the same. The Appellants averred that it was the 1st Appellant who was at all material times in actual possession and was using the property. The Appellants averred that the Respondent was notified by the Land Registrar of the intention to remove the caution that he had registered against the title of the suit property and he failed to take the necessary action. The Appellants averred that the Respondent's suit did not disclose any cause of action as the Respondent had been refunded the purchase price and the suit property transferred by the 1st Appellant to the 2nd Appellant and as such beyond the reach of the 1st Appellant. The Appellants urged the court to dismiss the suit with costs for being vexatious, frivolous and an abuse of the court process.

7. The lower court heard the suit and delivered a judgment on 19th July 2023 in favour of the Respondent as prayed in the amended plaint. The lower court found that it was the 1st Appellant who had the duty to facilitate the transfer of the portion of the suit property sold to the Respondent to the Respondent. The lower court further found that the agreement of sale between the parties was frustrated by the 1st Appellant who also connived and colluded with the 2nd Appellant to take away land that belonged to the 1st Appellant. The Appellants were aggrieved with the decision of the lower court and preferred the present appeal. In their memorandum of appeal dated 17th August 2023, the Appellants challenged the lower court's judgment on the following grounds;

    1. That the Learned Magistrate erred in law and fact by finding that the 1st Appellant and the Respondent executed a valid agreement of sale of a portion of the suit property on the 28th February(sic) 2011 in the face of the acknowledged evidence that the 1st Appellant was not the registered proprietor of the suit property at the time.

    2. That the Learned Magistrate further erred in law and fact in finding in the alternative, that the said agreement of sale dated 28th February(sic) 2011 acquired validity upon the subsequent transfer of proprietorship of the suit property to the 1st Appellant.

    3. That the Learned Magistrate erred in law and fact in assuming that the said agreement of sale remained valid beyond the mandatory six months statutory period of validity set by the *Land Control Act* without evidence of valid consents for sub-division and transfer from such a board being tendered by any party.

    4. That the Learned Magistrate erred in law and fact in assuming that the Respondent had taken possession of the subject portion of the suit property without the benefit of any evidence from the Respondent of such possession and in the face of unchallenged evidence from the Appellants denying it.

    5. That the Learned Magistrate erred in law in failing to find that the said agreement of sale was rendered void and unenforceable for want of the requisite consents of the relevant land control board.

    6. That the Learned Magistrate further erred in fact by finding that the 1st Appellant bore the sole responsibility for securing the requisite consents of the Land Control Board and transferring

the said portion of the suit property to the Respondent despite the overwhelming evidence to the contrary.

7. That the Learned Magistrate erred in law in failing to find that upon the Respondent's failure to undertake the subdivision of the suit property which failure persisted from the date of the agreement to the date of the suit, the Respondent could not avail himself of the reliefs he sought in the amended plaint.

8. That the Learned Magistrate erred in law and fact in finding that the 2nd Appellant's title to the suit land was impeachable.

8. The Appellants prayed that the Appeal be allowed with costs. The appeal was argued by way of written submissions.

Appellants' submissions

9. The Appellants framed the following issues on which they submitted on;

i. The validity of the sale agreement dated the 28th February (sic) 2011 and whether the 1st Appellant was solely to blame for frustrating the agreement.

ii. Whether the Respondent was a buyer in possession in whose favor the doctrine of constructive trust applied to validate the sale agreement dated the 28th February(sic) 2011.

iii. Whether the 2nd Appellant's title was impeachable in the circumstances.

10. The Appellants submitted that it was common ground that no consent of the Land Control Board was obtained for the transaction between the 1st Appellant and the Respondent. The Appellants submitted that the 1st Appellant was not to blame for the failure of the parties to obtain consent of the Land Control Board for the transaction. The Appellants submitted that the trial court ignored the evidence of variation of the agreement of sale by the parties which variation relieved the 1st Appellant of his duties under clause 2 of the agreement of sale until and unless the Respondent and his Surveyor had completed the subdivision of the suit property which they did not. The Appellants submitted that the trial court erred in its finding that the 1st Appellant was to blame for the failure by the parties to obtain the Land Board Consent for the transaction. The Appellants submitted that as a result of the said erroneous finding, the court arrived at the erroneously conclusion that it was the 1st Appellant who frustrated the agreement of sale. The Appellants submitted further that as a result of the said erroneous finding, the trial court erred in not finding that the Respondent's case was distinguishable from the cases in which the Court of Appeal had held that the consent of the Land Control Board was not mandatory on account of the doctrine of constructive trust. The Appellants urged the court to find that the agreement of sale was illegal for want of the Land Control Board's consent and as such was unenforceable. The Appellants submitted further that there was no evidence in support of the Respondent's claim that he was in possession of the suit property. The Appellants submitted that possession was the basis of the Court of Appeal's findings of constructive trust in cases where it held that want of Land Control Board consent could not defeat the rights of a land buyer.

11. The Appellants cited Section 26 of the *Land Registration Act*, 2012 and the case of Katende v. Haridar & Company Limited [2008] 2 E.A 173 and submitted that the 2nd Appellant was a bona fide purchaser of the suit property for value whose title could not be impeached.

The Respondent's submissions

12. In his submissions the Respondent raised three issues for determination on the appeal as follows;

a. Whether the agreement of sale dated 28th June 2011 was valid and whether the agreement was rendered void and unenforceable for want of consents of the relevant land control board.

b. Whether the learned magistrate erred in his finding that the Respondent had taken possession of the portion of the suit property sold to him under the agreement of sale dated 28th February(sic) 2011.

c. Whether the 2nd Appellant's title was impeachable.

13. The Respondent submitted that the validity of the agreement of sale dated 28th June 2011 (the agreement of sale) was never in contention by either of the parties. The Respondent submitted that he duly performed his part of the contract by paying the full purchase price of Kshs. 160,000/- on the execution of the agreement of sale a fact which the 1st Appellant did not dispute. In support of this submission, the Respondent relied on Peter Mbiri Michuki v. Samuel Mugo Michuki [2014] eKLR. The Respondent submitted that there existed a valid sale agreement between the Respondent and the 1st Appellant. In support of this submission, the Respondent relied on Section 3 (3) of the *Law of Contract Act*.

14. The Respondent submitted that under clause 2 of the agreement of sale, the 1st Appellant had a duty to ensure a smooth transfer of the purchased portion of the suit property to the Respondent. The Respondent submitted that the 1st Appellant was required to sign all necessary documents, obtain the consent of the authorities where necessary and ensure that the transaction succeeds. The Respondent submitted that the 1st Appellant delayed the process of transfer thereby forcing the Respondent to engage a surveyor to assist in the transfer process who unfortunately died before the process was completed. The Respondent submitted that there was an implied and/or constructive trust established in favour of the Respondent for the portion of the suit property measuring 60 strides by 55 strides such that the 1st Appellant ought not to be allowed to claim the land to the detriment of the Respondent who was the bona fide purchaser thereof for a valuable consideration. In support of this submission, the Respondent cited Willy Kimutai Kitilit v. Michael Kibet [2018] eKLR. The Respondent submitted that he fulfilled his obligation under the agreement of sale by paying the purchase price in full.

15. The Respondent submitted that clause 4 of the agreement of sale provided that the purchaser took possession of the suit property subject to such taxes and fees payable to the government of Kenya and would discharge all other liabilities the land may be subject to. The Respondent submitted that he took actual possession upon execution of the agreement and planted trees thereon for commercial purposes.

16. The Respondent submitted that the sale of the whole of the suit property to the 2nd Appellant including the portion measuring 60 strides by 55 strides earlier on purchased by the Respondent was illegal, null and void as there was an existing contract between the 1st Appellant and the Respondent in respect thereof. In support of this submissions, the Respondent cited Section 26 (1) of the *Land Registration Act*, 2012.

17. The Respondent submitted that the 2nd Appellant was aware of the fact that there was an agreement between the 1st Appellant and the Respondent in respect of the said portion of the suit property but proceeded to enter into an agreement to purchase the whole of the suit property. The Respondent urged the court to uphold the trial court's decision and dismiss the appeal for lack of merit with costs to the Respondent.

Analysis and determination

18. I have considered the pleadings, the proceedings of the lower court, the judgment of the court, the grounds of appeal by the Appellants and the submissions by the parties. In their submissions before this court, the Appellants submitted at length on the issue of the validity of the said agreement of sale under the *Land Control Act*, Chapter 302 Laws of Kenya. The Appellants in their submissions also challenged the validity of the said agreement of sale on the ground that the suit property was not registered in the name of the 1st Appellant when the agreement was made. The Appellants did not plead that the said agreement was invalid for want of Land Control Board Consent, or capacity on the part of the 1st Appellant to enter into it.

19. Order 2 Rule 4 of the Civil Procedure Rules provides as follows:

> 4.
>
> (1) A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant Statute of limitation or any fact showing illegality —
>
> (a) which he alleges makes any claim or defence of the opposite party not maintainable;
>
> (b) which, if not specifically pleaded, might take the opposite party by surprise; or
>
> (c) which raises issues of fact not arising out of the preceding pleading.
>
> (2) Without prejudice to subrule (1), a defendant to an action for the recovery of land shall plead specifically every ground of defence on which he relies, and a plea that he is in possession of the land by himself or his tenant shall not be sufficient."
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> (emphasis added)

20. In Independent Electoral and Boundaries Commission & Another v. Stephen Mutinda Mule & 3 others [2014]eKLR, the Court of Appeal cited with approval the Malawi Supreme Court of Appeal case of Malawi Railways Ltd. v. Nyasulu [1998]MWSC 3 where the judges quoted an article by Sir Jack Jacob entitled "The present importance of pleadings" published in 1960 Current Legal problems, at P.174 where the author stated as follows:

> "As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings ... for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....

> In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice."

21. Since the issues of want of Land Control Board consent and the capacity of the 1st Appellant to enter into the agreement of sale were not pleaded, the lower court did not express an opinion on the same and rightly so. The issues having not been pleaded and the lower court having not determined the same one way or the other, they cannot in my view be made grounds of appeal before this court. In my view, the only issue that arises for determination in this appeal is whether the trial court erred in ordering specific performance of the agreement dated 28th June 2011 between the Respondent and the 1st Appellant. In Kenya Ports Authority v. Kuston (Kenya) Limited [2009] 2EA 212 the Court of Appeal stated that:

> On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."

22. In the Supreme Court of Uganda case of Manzoor v. Baram [2003] 2 E.A 580 that was cited in the case of Thrift Homes Limited v. Kays Investment Limited [2015]eKLR, the court stated as follows on specific performance:

> Specific performance is an equitable remedy grounded in the equitable maxim that "equity regards as done, that which ought to be done". As an equitable remedy, it is decreed at the discretion of the court. The basic rule is that specific performance will not be decreed where a common law remedy such as damages, would be adequate to put the plaintiff in the position he would have been but for the breach. In that regard, the courts have long considered damages an inadequate remedy for breach of a contract for the sale of land, and they more readily decree specific performance to enforce such contract as a matter of course. In the instant case, I find no circumstances that would make it inequitable to order the respondent to complete the contract. On the contrary, it seems to me that to deny the appellant that relief would be to give unfair advantage to a respondent, who sought to avoid his contractual obligations through false claims, as found by the trial court, and through inapplicable technicalities. After taking into consideration the equities of this case, I am satisfied that the discretion ought to be exercised in favour of the appellant. I would hold that the appellant is entitled to specific performance."

23. In Amina Abdulkadir Hawa v. Rabinder Nath Anand & Another [2012] eKLR, the court cited Chitty on Contracts, 28th Edition (Sweet & Maxwell, 1999), Chapter 28 paragraphs 027 and 028 where the authors stated as follows:

> Specific performance is a discretionary remedy. It may be refused although the contract is binding at law and cannot be impeached on some specific equitable ground (such as undue influence) although damages are not an adequate remedy and although the contract does not fall within group of contracts discussed above which will not be specifically enforced. But the discretion to refuse specific performance is not arbitrary discretion but one to be governed as far as possible by fixed rules and principles...specific performance may be refused on the ground that the order will cause severe hardship to the Defendant where the cost of performance to the Defendant is wholly out of proportion to the benefit which

> performance will confer on the claimant and where the Defendant can put himself into a position to perform by taking legal proceedings against the third party...severe hardship may be a ground for refusing specific performance even though it results from circumstance which arise after the conclusion of the contract which effect the person of the Defendant rather than the subject matter of the contract and for which the claimant is in no way responsible."

25. In Gurdev Singh Birdi and Marinder Singh Ghatora v. Abubakar Madhubuti *CA No.165 of 1996* the court stated that:

> ...It cannot be gainsaid that the underlying principle in granting the equitable relief of specific performance has always been that under all the obtaining circumstances in the particular case, it is just and equitable so to do with a view to doing more perfect and complete justice. Indeed...a plaintiff must show that he has performed all the terms of the contract which he has undertaken to perform, whether expressly or by implication, and which he ought to have performed at the date of the writ in the action."

26. The Appellants' contention in the lower court was that the agreement of sale dated 28th June 2011 was frustrated by the Respondent and as such could not be performed. According to Black's Law Dictionary, 10th Edition "Frustration" is defined as:

> The prevention or hindering of the attainment of a goal, such as contractual performance".

27. In the same Dictionary, "Commercial frustration" is defined as:

> An excuse for a party's nonperformance because of some unforeseeable and uncontrollable circumstances".

28. In Lucy Njeri Njoroge v. Kaiyahe Njoroge [2015] eKLR the Court of Appeal stated as follows:

29. This leads us into the issue of whether the contract was indeed frustrated. The case of Davis Contractors Ltd vs Farehum U.D.C [1956] AC 696 sought to provide guidance on when a contract can be held to have been frustrated. In that case Lord Radcliff stated thus:-

> "...frustration occurs when the law recognizes that, without the default of either party, a contractual obligation has become incapable of being performed because the circumstances in which the performance is called for would render it as a thing radically different from which was undertaken by the contract. "Non haec in faederi veni" It was not what I promised to do...There must be such a change in the significance of the obligation that the thing undertaken would, if performed be a different thing from that contracted for".

30. In Charles Muirigi Miriti v. Thananga Growers Sacco Limited and others [2014]eKLR, the court stated as follows:

> "As subsequently developed, the doctrine of frustration operates to excuse from further performance where: (1) it appears from the nature of the contract and the surrounding circumstances that the parties have contracted on the basis that some fundamental thing or state of things will continue to exist, or that some particular person will continue to be available, or that some future event which forms the basis of the contract will take place; and (2) before breach, an event in relation to the matter stipulated in head (1) above renders performance impossible or only possible in a very different way from that contemplated. This assessment has been said to require a 'multi-factorial' approach. Five propositions have

been set out as the essence of the doctrine. First, the doctrine of frustration has evolved to mitigate the rigour of the common law's insistence on literal performance of absolute promises so as to give effect to the demands of justice. Secondly, the effect of frustration is to discharge the parties from further liability under the contract, the doctrine must not therefore be lightly invoked but must be kept within very narrow limits and ought not to be extended. Thirdly, the effect of frustration is to bring the contract to an end forthwith, without more and automatically. Fourthly, the essence of frustration is that it should not be due to the act or election of the party seeking to rely upon it, but due to some outside event or extraneous change of situation. Fifthly, that event must take place without blame or fault on the side of the party seeking to rely upon it; nor does the mere fact that a contract has become more onerous allow such a plea"

31. It was not disputed in the lower court that there existed a valid contract dated 28th June 2011 between the 1st Appellant and the Respondent for the sale of a portion of the suit property at a consideration of Kshs. 160,000/-. As correctly submitted by the Appellants, the terms of the contract were clear and were not disputed. From the definition of frustration in the authorities I have cited above, I am not satisfied that the contract of sale between the 1st Appellant and the Respondent was frustrated. It was not demonstrated that without the fault of either party, the agreement of sale dated 28th June 2011 was not capable of being performed. The Appellants did not establish that due to unforeseen and uncontrollable circumstances, the said agreement could not be performed. Frustration was therefore not a ground on which to refuse an order for specific performance. The other ground that was put forward by the Appellants against the order for specific performance was that the Respondent had for 9 years failed to fulfil his part of the agreement of sale in that he failed to cause the suit property to be subdivided so that the portion thereof that was purchased by the Respondent could be excised and transferred to him. It is common ground that the agreement of sale could not be completed without the subdivision of the suit property. The agreement did not provide expressly the party who had the responsibility of subdividing the suit property. According to the Respondent, clause 2 of the agreement of sale put the responsibility of transferring the suit property upon the 1st Appellant. The Appellants on the other hand argued that the Respondent took the responsibility of subdividing the suit property. Clause 2 of the agreement of sale was on the following terms;

> "That the Vendor shall do all things as may be required of him to ensure there is smooth transfer of the said parcel of land to the Purchaser and in particular shall sign all documents and papers and obtain the consent of the authorities where necessary to ensure that all the foregoing succeeds."

32. From the evidence on record, I agree with the Appellants that the Respondent took the responsibility of subdividing the suit property and excising the portion thereof that was sold to him. This is clear from the fact that out of the purchase price of Kshs. 160,000/-, the Respondent paid to the 1st Appellant a sum of Kshs. 140,000/-. The balance of Kshs. 20,000/- was paid directly to the Respondent's own nominated surveyor who was to undertake the process of subdividing the suit property. The Respondent told the lower court that the survey and subdivision were not undertaken because of the death of the said surveyor. He stated that at the time of the death of the said surveyor, he had prepared the necessary documents and had even applied for consent of the Land Control Board for the subdivision. He further told the court that the 1st Appellant had already signed "his part" of the documents. The Respondent told the court that after the death of the said surveyor in 2012, he did not proceed with the process of subdivision because, he "had no money to go to another surveyor." The Respondent remained with the original title deed for the suit property that was handed to him for

the purposes of the said subdivision exercise from 2012 until 2020 when the 1st Appellant asked for it when he wanted to sell the suit property to the 2nd Appellant.

33. I am alive to the fact that the agreement of sale did not provide that time was of the essence as concerns the obligations of any of the parties under the agreement. The agreement was also not made subject to the Law Society Conditions of Sale. The fact that there was no date of completion in the agreement of sale did not mean that the agreement was open-ended and could continue in perpetuity. Section 58 of the *Interpretation and General Provisions Act*, Chapter 2 Laws of Kenya provides as follows:

> Where no time is prescribed or allowed within which anything shall be done, such thing shall be done without unreasonable delay, and as often as due occasion arises."

34. Since no time was prescribed within which the parties were to perform their obligations under the agreement of sale, the law presumes that the said obligations were to be performed without unreasonable delay. I am of the view that a delay on the part of the Respondent of over 8 years to take steps to subdivide the suit property and excise a portion thereof that was sold to him by the 1st Appellant was unreasonable and amounted to a breach on his part of his obligations under the agreement. Since the Respondent was in breach of the agreement, he was not entitled to an order for specific performance. I wish to add that even if I were wrong on this finding that the Respondent breached the contract with the 1st Appellant, specific performance is a discretionary remedy. The Respondent having paid the full purchase price inclusive of survey fees took no action for 8 years to pursue the subdivision and transfer of the portion of the suit property that he purchased to his name. The Respondent could not expect the 1st Appellant to wait indefinitely for him to get money to engage another surveyor. On account of his indolence, the Respondent was not entitled to an equitable remedy of specific performance.

Conclusion

35. In conclusion, it is the finding of the court that the trial court erred in granting the Respondent an order for specific performance of the agreement of sale dated 28th June 2011. I therefore find merit in the Appellants' appeal. The judgment of the lower court delivered on 19th July 2023 and the decree extracted therefrom on 18th October 2023 are set aside and substituted with an order dismissing the Respondent's suit in the lower court. To bring finality to this matter, I make a further order that the 1st Appellant shall within 60 days from the date hereof refund to the Respondent the sum of Kshs. 160,000/- that was paid by the Respondent to him as the purchase price of the disputed portion of the suit property in default of which the Respondent shall be at liberty to take out warrants of attachment and sale for the recovery thereof. Each party shall bear its costs of the appeal and the lower court suit.

DELIVERED AND DATED AT KISUMU ON THIS 3RD DAY OF DECEMBER 2024

S. OKONG'O

JUDGE

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

N/A for the Appellants

Mr. Odeny for the Respondent

Ms. J.Omondi-Court Assistant