



**Sankok & another v Mwangi (Environment and Land Appeal
E012 of 2021) [2023] KEELC 20331 (KLR) (2 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 20331 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT AND LAND APPEAL E012 OF 2021
MN GICHERU, J
OCTOBER 2, 2023**

BETWEEN

JOSEPH MATIPE SANKOK 1ST APPELLANT

CAREN URETO NAIRI 2ND APPELLANT

AND

TERESA WANJIRU MWANGI RESPONDENT

JUDGMENT

1. This judgment is on the appeal filed by the appellants vide a memorandum of appeal dated 13/4/2021. In the judgment in Kajiado Chief Magistrate's Court Civil Case No. 413 of 2018, the learned trial magistrate ordered that the appellants do specifically perform the sale agreement dated 29/8/2013. It is this order of specific performance that made the appellants file this appeal.
2. The appeal is based on five grounds all of which are captured in the memorandum of appeal dated 13/4/21. The grounds are as follows.

The learned Senior Principal Magistrate -

- i. erred in law in granting the order of Specific Performance without proof of evidence.
- ii. exercised her discretion injudiciously and indiscreetly and therefore fell into error of law.
- iii. erred in law and fact in dismissing the appellant's defence and counter claim without carefully considering, analyzing and or evaluating the appellant entire body of evidence on record thereby arriving at an erroneous decision.
- iv. erred in law and in fact when she shifted the legal and evidential burden of proof to the appellants.



- v. failed to appreciate and apply the doctrines of equity properly thus arriving at erroneous findings and conclusions in her judgement.
 - vi. erred in law by misinterpreting the sale agreement dated 29/8/2013 thereby arriving at an erroneous decision.
3. The facts of the case were as follows. On 29/8/2013 the two appellants and the respondent entered into a sale agreement for sale of LR Kajiado/Kaputiei North/21054 measuring 0.048 hectares. The appellants were the sellers and the respondent the buyer. The purchase price was Kshs.1,100,000/=. The period of completion was within 90 days. The sale was not completed within 90 days because the respondent was not able to trace all the four beacons on the land. Some of the land documents were missing too. More than four years later in October 2017 the sale was incomplete and the appellants would not accept the balance of Kshs.1 million as the land prices had increased. This dispute came to court and the learned magistrate found in favour of the respondent who was the plaintiff in the lower court.
4. Counsel for the parties filed written submissions on 27/6/2022 while the respondent's counsel filed his on 21/3/2023. Both counsel are agreed on the issues for determination which also tally with the grounds of appeal. They are as follows:
- a. Whether the trial court erred in granting the order of Specific Performance.
 - b. Whether the trial court erred in dismissing the appellants defence and counter claim.
 - c. Whether the trial court shifted the burden of proof to the appellants.
 - d. Whether the doctrines of equity were pleaded by the appellants and were applicable in the suit.
 - e. Whether the trial court misinterpreted the sale agreement dated 29/8/2013.
5. I have carefully considered the entire record of appeal and the submissions by learned counsel for the parties including the case law cited therein. I find that all the salient facts of the case are not disputed. They are as follows.
- Firstly, the respondent paid only Kshs.100,000/= in 2013 and by the time the suit in the lower court was filed on 14/12/2018, the balance of Kshs.1 million remained unpaid.
- Secondly, the respondent was not in occupation of the suit land.
- Thirdly, the consent of the Land Control Board to transfer the land from the appellants to the respondents was never obtained.
- Finally, no transfer instrument has been executed by the appellants in favour of the respondent.
6. It is trite law that an appeal to this court from the lower court is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. 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 allowance in this respect. In particular this court is not bound necessarily to follow the trial court's findings of fact if it appears either that he clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence of if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally”. See *Selle Vs. Associated Motor Boat Company* 1968 EA 123.



I make the following findings on the issues identified by the parties.

7. On the first issue, I find that the trial magistrate erred in granting the order of Specific Performance. It is trite law that the remedy of specific performance is not available to a party “unless such party can convince the court that the subject matter of the case is rare or unique and it is the object rather than its value that the plaintiff desires”.

See *Patel Vs. Dhana Singh* (1962) E.A. 32.

In addition to the above the plaintiff must approach the court free from any blame on her part. Thirdly, the plaintiff must not be guilty of laches or delay and the remedy will be refused on the ground that such a party slept on its rights. See *Mzee bin Ali vs. Alibhoy Nurboy* 1 KLR 58.

Finally, the court will reject the plaintiffs claim if it will occasion undue hardship to the defendant.

Applying the above principles to this case, we find that there was nothing rare or unique with the suit land to justify the order of Specific Performance.

Secondly, the respondent did not approach the court with clean hands because the balance of Kshs.1 million remained unpaid.

Thirdly, the respondent filed the suit more than five (5) years from the date of the sale agreement. Finally, the order of Specific Performance was oppressive to the defendants because the value of the land had increased in the intervening period of five (5) years and the trial magistrate did not make allowance for this.

From the above analysis, it is clear that there was no sound basis for the order of Specific Performance in all the circumstances of this case.

8. On the second issue, I find that the trial magistrate did not err because at the trial, the appellants did not adduce any evidence of damages suffered as a result of the breach. They did not ask for damages and they did not prove any. It is not clear if they put the respondent in possession of the suit land.
9. On the third issue, I am not certain that there was any shifting of burden from the respondent to the appellant. This does not come out clearly in the record of appeal or in the submissions.
10. On the fourth issue, I find that the equitable doctrine of Specific Performance was pleaded in paragraph 17 (a) of the plaint.

However as we have already found out above, it was not applicable in this case.

11. On the fifth and final issue, I do not find that the trial court misinterpreted the sale agreement dated 29/8/2013. It simply misapplied the doctrine of Specific Performance.
12. For the above stated reasons, I allow the appellant’s appeal in the following terms.
- a. The Judgement dated 12/5/2020 is set aside.
 - b. The appellants do refund to the respondent the deposit of Kshs.100,000/= with interest at the rate of 14% per annum from 29/8/2013 until the date of payment in full.
 - c. Each party to bear its own costs in this court and in the lower court.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 2ND DAY OF OCTOBER 2023.

M.N. GICHERU



JUDGE.

In the presence of

Mr. Nairi for the Appellants present.

Nyagaka holding brief for Respondent's counsel present.

Court Assistant – Mpoye.

