



**Gituro v Kiama (Environment and Land Appeal E031 of 2024)
[2025] KEELC 6728 (KLR) (6 October 2025) (Judgment)**

Neutral citation: [2025] KEELC 6728 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL E031 OF 2024**

JA MOGENI, J

OCTOBER 6, 2025

BETWEEN

JULIUS KIBERA GITURO APPELLANT

AND

ELIZABETH NJERI KIAMA RESPONDENT

JUDGMENT

1. The genesis of the dispute leading to this Appeal is an Agreement for Sale entered into between the Appellant and the Respondent dated 19/06/2020, “the agreement”. The agreement was for the sale of LR. No. Ruiru East/juja East Block 2/40931, “the suit property” by the Appellant who was the registered proprietor thereof to the Respondent for an agreed purchase price of Kshs.4,800,000/-. The Sale Agreement incorporated the terms of the Law Society conditions of sale as well and in so far as they were not inconsistent with terms of the agreement and the purchase price was agreed to be paid as follows:
 - a. Kshs.3,400,000/- as deposit on execution of the agreement.
 - b. Balance of Kshs. 1,600,000/- to be paid on 30/04/2021.
2. The Respondent made the payment as stated above and took actual possession of the suit property and developed the same thereby increasing the value of the suit property.
3. The Magistrate dismissed the Appellant’s suit in the lower Court and also the Respondent’s defence and counterclaim. The Magistrate however invoked Section 3A of the *Civil Procedure Act* claiming inherent power/discretion to make such orders that are necessary for ensuring the end of justice is met and proceeded to make the following orders:-
 1. An order of specific performance of Sale Agreement that the Defendant to pay the balance of Kesh 1,600,000= within (14) days from the date of this Judgment.



2. The purchaser's Advocates, the stakeholders of the title deed Robert Githui of Githui & Partners is ordered to release the title deed for L.R No. Ruiru East/Juja East Block 2/40931 to the Plaintiff herein Julius Kibera Gituro.
 3. Thereafter Plaintiff is ordered to transfer at Defendant's costs and expense the suit property to the Defendant forthwith and in default of the Defendant signing, executing or endorsing the necessary documents or the transfer, the Executive Officer of this Court to sign, execute and or endorse such papers/documents to effect the transfer.
 4. Each party shall bear its own costs.
4. The suit in the lower Court to wit Ruiru SPMC ELC Case No. E15 of 2023 was in respect of the parcel of land known as L.R No. Ruiru East/Juja East Block 2/40931 (hereinafter referred to as the "suit property"). In the suit, the Appellant sought the following reliefs against the Respondent: -
1. A declaration that the Agreement for Sale of Land Reference Number RUIRU EAST BLOCK 2/40931 entered on 19th June 2020 between the Plaintiff (Vendor) and Defendant (Purchaser) has been duly rescinded due to default by the Defendant.
 2. There be a declaration that the Plaintiff being the registered proprietor and absolute owner of the Land Reference Number RUIRU EAST BLOCK 2/40931 is entitled to full and exclusive possession of the land.
 3. An order directing the Defendant to surrender vacant possession of Land Reference Number Ruiru East Block 2/40931 within twenty-one (21) days failure to which forceful eviction do issue at the Defendant's cost.
 4. The Purchaser's Advocates, the stakeholder of the title deed Robert Githui of Githui & Partners be ordered to release the title deed for Land Reference Number Ruiru East/Juja East Block 2/40931 to the Plaintiff herein Julius Kibera Gituro
 5. A permanent injunction do issue restraining the Defendant, her Agents, Servants, relatives or anyone claiming under her from entering re-entering, trespassing into any part or whole of land Reference Number Ruiru East Block 2/40931.
 6. That 10% of the purchase price be forfeited to the Plaintiff as charges, costs and/or damages for breach of contract.
 7. Cost of the suit.
5. On her part the Respondent filed an Amended Defence and counterclaim and sought the following orders:-
1. An order for specific performance of the Agreement for Sale and Purchase of Land dated 19th June 2020 for Land Title No. Ruiru East/juja East Block 2/40931 measuring 0.041Ha.
 2. An interim order does issue to deposit the balance of Purchase Price with this Honorable Court.
 3. In the alternative to (1) and (2) above, an Order for payment of improvements of Kes 2,600,000.
 4. General damages.
 5. Any further relief that the Honorable Court would deem fit.



6. In the impugned Judgment, the trial Court, after hearing the parties and their witnesses, granted an order of specific performance in favour of the Respondent herein.
7. This Appeal is not a mere procedural wrangling but a profound inquiry into whether the imposition of such an order rightly reconciles the structures of law with the dictates of fairness.
8. The Appellant contends that the imposition of the remedy of specific performance was disproportionate and unsuited to the particular circumstances of the case. It is my duty to determine whether the Magistrate, in exercising her discretion, did so within the bounds of established legal principles and equitable fairness.
9. The impugned Judgment is the subject of this Appeal where the Appellant being dissatisfied with the decision of Principal Magistrate J.A. Agonda delivered in SPM Court at Ruiru Civil Suit No. E15 of 2023 ON 14/03/2024 has filed the Memorandum of Appeal on the following grounds:-
 1. That the Learned Magistrate erred in law and fact in failing to appreciate that the obligation of the Appellant under the Sale Agreement of transferring and registering the suit land in the name of the Respondent only arises after the full payment of the purchase price and not payment of the deposit.
 2. That the Learned Magistrate erred in law and fact in holding that the Appellant failed to fulfil his obligation under the agreement by failing to obtain land Control Board Consent yet this obligation arises on or after full payment or confirmation of full payment of purchase price to the Appellant by the Respondent.
 3. That the Learned Magistrate erred in law and fact in holding that the Respondent is in occupation of the suit land without any evidence in support of the Respondent's contention.
 4. That the Learned Magistrates erred in law and fact in proceeding to issue orders validating the provisions of the Sale Agreement after finding and holding that the Respondent had breached the contract of sale.
 5. That the Learned Magistrate erred in law and fact in failing to award to the Appellant damages for breach of contract after making a finding that the Respondent breached the contract of sale entered into between her and the Appellant.
 6. That the Learned Magistrate erred in law and fact in holding that the Respondent failed to perform her obligation under the Sale Agreement due to depletion of funds yet finds that the Respondent had developed the property in tune of Kesh 2,600,000 in the absence of any evidence in support.
 7. That the Learned Magistrate erred in law and fact in failing to appreciate that completion documents are handed over after the purchase price has been received in full and/or on issuance of a professional undertaking by the Purchaser's Advocates or financiers Advocates to releaser full payment on receipt of the completion documents or successful transfer.
 8. That the Learned Magistrate erred in law and fact in ordering the parties to comply and perform obligations under a Sale Agreement that she had declared void and incapable of specific performance.



9. That the Learned Magistrate erred in law and fact in acting beyond her jurisdiction by making orders 1-4 in the Judgment after dismissing both the suit and the counter-claim in their entirety.
 10. That the Learned Magistrate erred in law and fact in holding that the Respondent did not fulfill her obligations under the contract because the husband and father were terminally ill without any evidence of illness and/or proof of medical expenses produced in Court.
 11. That the Learned Magistrate erred in law and fact in holding that it was incumbent upon the Appellant to facilitate and furnish the Respondent with all completion documents yet the Respondent had clearly demonstrated that she had no funds to continue with the transaction to completion. The Appellant could not furnish all completion documents before the payment of full purchase price is made.
 12. That the Learned Magistrate erred in law and fact by proceeding to effectively re-write a contract for the parties by misapplication and misinterpretation of Section 3A of the *Civil Procedure Act* even after placing reliance on the case of National Bank of Kenya Ltd vs Pipelastic Samkolit (K) Ltd & Another Civil Appeal No. 95 of 1999 (2002) KLR 112 (2002) EA 503.
 13. That the Learned Magistrate erred in law and fact by blaming the Appellant for withholding the Respondent's substantial amount of the purchase price and ignored the various correspondence with the parties Advocates, Gathui & Partners to the effect that the Appellant was ready to refund the deposit in exchange of the title and removal of temporary structure erected on the suit property.
 14. That the Learned Magistrate erred in law and fact in finding that the Respondent had beneficial interest in the suit land superior to the Appellant's proprietary interest even without making full payment of the purchase price.
 15. That the Learned Magistrate erred in law and fact by failing to scrutinize analyse and/or evaluate the material facts placed before her, evidence tendered and submissions on record thereby arriving at a conclusion that was contradictory, inconsistent and contrary to law and evidence.
10. The Appellant upon receipt of the certified copies of Judgment and proceedings did not file a Supplementary Memorandum of Appeal setting out such other grounds except the 15 grounds listed above as is evident from the proceedings.
 11. The Appellant prays that this Appeal be allowed and the Judgment of the lower Court be set aside and be substituted with prayers as per the Plaint.
 12. The Appeal was canvassed by way of written submissions with both parties duly filing their submissions for consideration. The task before me is twofold: to assess the validity of the exercise of judicial discretion and to scrutinise whether the remedy prescribed truly harmonises the scales of justice.

Issues for Determination

13. I have perused the original record of the trial Court together with the Record of Appeal. I have considered the parties' respective submissions, the legal frameworks applicable to the issues falling for determination, and the relevant jurisprudence on those issues. The Appellant advanced fifteen



- (15) Grounds of Appeal in the Memorandum of Appeal dated 4/04/2024. In its subsequent written submissions dated January 24, 2022, it condensed the fifteen (15) Grounds of Appeal into four (4) issues of determination and submitted on the four (4) issues. That being the position in this appeal, I will focus on the four (4) Grounds of Appeal that the Appellant submitted on.
14. Based on the four (4) Grounds of Appeal that were argued before this Court, the following are the two issues that fall for determination in this appeal:
- i. Whether the trial Court erred in finding that there was a valid and enforceable contract of disposition of an interest in land;
 - ii. Whether the trial Court erred in finding that the award of damages, in the circumstances of the case, was not sufficient and in issuing an order of specific performance.
15. This is a first appeal. The principle upon which a first appellate Court exercises jurisdiction is well settled. The task of the first appellate Court was summarized by the Court of Appeal in the case of *Susan Munyi v 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.”
16. The above principle was similarly outlined in *Abok James Odera t/a AJ Odera & Associates v 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.”
17. The first issue that falls for determination is whether the trial Court erred in finding that there was a valid and enforceable contract of disposition of an interest in land. There is no dispute that the contract which the Respondent sought to enforce related to disposition of an interest in land. The Respondent paid a deposit of Kesh 3,400,000 leaving a balance of Kesh 1,400,000 which was to be paid on 30/04/2021. The Respondent contended that the Appellant declined to accept the balance of the purchase price. The Appellant disputed that allegation. There was, however, no documentary evidence placed before the trial Court to suggest that the sum of Kshs 1,400,000 was tendered to the Appellant by the Respondent and that he refused to receive it.
18. It further emerged in evidence that on the 03/05/2021 the Advocate Messrs Achillah T.O Advocates, sent a Rescission of Agreement for Sale of the suit property to the Counsel for the Purchaser Githui & Partners Advocates in respect to the Sale Agreement dated the 19/06/2020 the termination letter was rescinding the said Sale Agreement. I note on 28/05/2021 the purchaser sought for extension of time but the Appellant responded that the request for extension had come a bit late in the day after the lapse of 21 days’ notice and rescission of the agreement by the Vendor.
19. On rescission of the Sale Agreement, I wish to reproduce an excerpt from the impugned Sale Agreement on completion:-

“Clause 11.1



If the Purchaser is in default or fail to comply with any of the conditions hereof, the Vendor shall give to the Purchaser Twenty one (21) days' notice (time being of the essence) in writing confirming the Vendors readiness to complete the sale in all respects and specifying the default and requiring the Purchasers to complete and/or remedy the default before the expiration of such notice AND if the Purchasers shall fail to comply with such notice the Vendor shall be entitled without prejudice to its rights herein, to:

11. 1.1 rescind this Agreement and
11. 1.2 thereafter be at liberty to resell the Property.”

20. Was there a compliant land sale contract capable of enforcement through an action? The current framework in Section 3(3) of the [Law of Contract Act](#) came into force in June 2003. Consequently, any land sale contract entered into between May 2010 and March 2018 was subject to the mandatory requirements of 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.”

21. The legal implications of the framework in Section 3(3) of the [Law of Contract Act](#) is that no suit can be brought to enforce a contract for the disposition of an interest in land unless the contract is in writing; the contract has been signed or executed by all the parties to it; and the signature of each contracting party has been attested by a witness who is present when the contract is signed by the contracting party. I do not agree with the conclusion made by the trial Magistrate. The issue before the trial Magistrate was whether there was a valid and an enforceable contract relating to the disposition of an interest in land. She did find that there was a valid contract only that the two parties each had violated the valid contract in the ways stated in the Judgment.

22. The vendor after receiving a deposit of the purchase price he gave vacant possession to the purchaser who in turn had embarked on putting improvements on the suit property which was not denied by the Vendor meaning he consented to the development of the suit property by the purchaser and the construction had progressed.

23. The Court of Appeal in the case of *Twalib Hatayan & Another vs Saggar Ahmed Al- Heidy & Others* [2015] eKLR held as follows:

“A constructive trust is an equitable remedy imposed by the Court against one who has acquired property by wrong doing. (see Black’s Law Dictionary) (Supra). It arises where the intention of the parties cannot be ascertained. If the circumstances of the case are such as would demand that equity treats the legal owner as a trustee, the law will impose a



trust. A constructive trust will thus automatically arise where a person who is already a trustee takes advantage of his position for his own benefit (see. Halsbury's Laws of England supra at para1453). As earlier stated, with constructive trusts, proof of parties' intention is immaterial; for the trust will nonetheless be imposed by the law for the benefit of the settlor. Imposition of a constructive trust is thus meant to guard against unjust enrichment. In the present case, a constructive trust cannot be imposed or inferred since the suit premises were yet to be transferred to the Third Party. Therefore, there is no unjust enrichment to be forestalled."

24. On his part the vendor was to release all the completion documents as itemized at Clause 9 of the Agreement. From the documents produced by the vendor including the letter from the Chief, one can see that the vendor as he stated in his testimony was engaged in processes to resolve the issue of the outstanding balance of the purchase price. Infact the purchaser was summoned to the Chief vide the letter dated 29/12/2021 this notwithstanding the fact that the vendor had issued a notice to rescind the contract in May 2021.
25. The Appellant having received part payment of the purchase price and having put the Respondent into possession of the suit land, had created a constructive trust in favour of the Respondent who had now acquired equitable rights which were binding.
26. I think I have said enough on the first issue. My finding on the first issue is that the trial Court did not err in finding that there was a valid and enforceable contract of disposition of an interest in land. See the case of Fidelity Commercial Bank v Kenya Grange Vehicle Industries Limited [2017] eKLR.
27. It was contended that the learned Magistrate erred by issuing an order of specific performance for the transfer of land to the Respondent where there was no consent to transfer the land applied for and obtained as provided by the Land Control Act.
28. In my view the terms of the contract were sufficiently stated as set out in the agreement for sale. The parties to the agreement are clearly identified. The property sold under the agreement for sale was sufficiently described and clearly identified. I am therefore persuaded, that the remedy of specific performance was available to the Respondent who had demonstrated that he had fulfilled all his obligations under the terms of the contract and further demonstrated proof that he was ready and willing to fulfill the last part of the same by paying up the balance of the purchase price of Kshs.1,400,000 in Court.
29. In the case of Michael Murithi Muthii v Cecilia Wanjiru Cooper alias Cecilia Wanjiru Ernest, Michael Ndungu Mbugua, Lily K. Musinga & Francis Kiarie Karikui [2021] KECA 964 (KLR) the Court of Appeal had held as follows;

"As regards whether an order of specific performance was properly issued in the circumstances of this appeal, it is worth repeating that such an order is an equitable remedy issued at the discretion of the Court. It will be issued where the judge is satisfied that it is equitable to grant it. As is the norm, an equitable remedy will not be granted to a party who does not deserve it, for example by reason of unclean hands or failure to himself to do equity. Where a judge has exercised his discretion, this Court will not interfere unless it is demonstrated that he misdirected himself in law, or he considered matters he should not have considered or he failed to considered matters he should have considered or that the decision is plainly wrong."
30. In this regard I find that the learned trial Magistrate exercised his discretion in issuing the order of specific performance as herein above stated and I cannot fault her.



31. On the issue of lack of consent from the Land Control Board in the execution of the agreement though this was not an issue in the trial Court but I will weigh in by stating that this Court is guided by the holding in *Aliaza v Saul* (Civil Appeal 134 of 2017) [2022] KECA 583 (KLR) (24th June 2022) (Judgment) where Mumbi Ngugi JA of the Court of Appeal sitting at Eldoret had observed as follows:

“...The failure on the part of the Respondent to obtain the necessary consent from the Land Control Board within the required period of six (6) months to enable the Appellant transfer the suit land into his name does not render the transaction void. Equity and fairness, the guiding principles in Article 10 of *the Constitution*, require that the *Land Control Act* is read and interpreted in a manner that does not aid a wrongdoer, but renders justice to a party in the position of the Appellant.” Kiage JA at paragraphs 46, 47 and 48 while agreeing with the conclusion and the reasoning of Mumbi Ngugi JA opined as follows; -“It is time, I think, that this Court spoke in unmistakable terms that it would not, in this day and age, rubber-stamp fraud and dishonesty by holding as null and void agreements freely entered into by sellers of agricultural land, and which have been fully acted upon by the parties thereto, when those sellers, often impelled by no higher motives than greed and impunity, seek umbrage under the *Land Control Act*, an old statute of dubious utility in current times And that is how a once well-intentioned provision of law as set out by my sister Judge, now gets twisted, taken advantage of, and abused to divest a seller of his duty under contract. That is using the statute as a cloak and an alibi for fraud and dishonesty. It flies in the face of all that is right and just and honourable. And Courts which are just and honourable, should put the matter right by requiring him to meet his just obligations and denying him the benefits of default and deceit. Thus, whether on the basis of constructive trust or to avoid unjust enrichment as an equitable estoppel, the Respondent’s attempt to hide under the *Land Control Act* in the circumstances of this case must be named for what they are and rebuffed. And the Appellant should succeed.”

32. I wish to refer to other decisions made in respect to specific performance.

33. In the case of *Gurdev Singh Birdi & Marinder Singh Ghatora vs. Abubakar Madhubuti*, the Court of Appeal in Civil Appeal No. 165 of 1996, held that the underlying principle in granting the equitable relief of specific performance is that:-

“The 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.” emphasis added.

34. While in the case of *Thrift Homes Ltd v Kenya Investment Ltd* 2015 eKLR, the Court stated that:-

“Specific performance like any other equitable remedy is discretionary and will be granted on well settled principles. The jurisdiction of specific performance is based on the existence of a valid enforceable contract and will not be ordered if the contract suffers from some defects or mistake or illegality. Even where a contract is valid and enforceable, specific performance will not be ordered where there is an adequate alternative remedy. The Court then posed the question as to whether the Plaintiff who was seeking specific performance in that case had shown that he was ready and able to complete the transaction.”



35. In *Steadman v Steadman* [1976] AC 536, 540, it was observed that:-

“If one party to an agreement stands by and lets the other party incur expense or prejudice his position on the faith of the agreement being valid he will not then be allowed to turn around and assert that the agreement is unenforceable.”

36. Additionally see also the case of *Reliable Electrical Engineers Ltd vs Mantrac Kenya Limited* (2006) eKLR.

37. At the moment let me leave it at that.

38. Taking into account all the evidence, and in particular the conduct of the Respondent, I find that the learned trial Magistrate cannot be faulted for having exercised her discretion in making an order for specific performance. Ultimately, I find that there is no merit in this appeal which I proceed to dismiss with costs. The finding of the trial Learned Magistrate is herein upheld. It is so ordered.

DATED, SIGNED AND DELIVERED AT THIKA THROUGH MICROSOFT TEAMS ON THIS 6TH DAY OF OCTOBER, 2025.

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MOGENI J

JUDGE

In the presence of :-

Mr. Achillah for the Appellant

Mr. Kori holding brief for Mr. Ogutu for the Respondent

Melita – Court Assistant

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