Gachanja v Njuguna (Environment and Land Appeal E016 of 2024)
[2025] KEELC 5704 (KLR) (Environment and Land) (31 July 2025) (Judgment)

Neutral citation: [2025] KEELC 5704 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIVASHA

ENVIRONMENT AND LAND

ENVIRONMENT AND LAND APPEAL E016 OF 2024

MC OUNDO, J

JULY 31, 2025

BETWEEN

JESSE KAMAU GACHANJA ..... APPELLANT

AND

GEOFFREY GITAU NJUGUNA ..... RESPONDENT

(Being an Appeal from a Judgement of the Chief Magistrates ELC No. 10 of 2019 at Naivasha delivered by Hon. Y. I. Khatambi (PM) virtually on 20th September, 2024)

JUDGMENT

1. Before me for determination on Appeal is a matter which was heard and determined by Hon. Y.I Khatambi, Principal Magistrate wherein upon considering the evidence of both parties, vide her Judgment delivered on 20th September, 2024, the learned Magistrate found that the Plaintiff had not proved his case as against the Defendants, but was entitled to a refund of the purchase price of Kshs. 2,500,000/= plus interest at the rate of 20% per annum as from 14th May 2018 and costs of the suit.
2. The Appellant being dissatisfied with the said findings and Judgement, has now filed the present Appeal based on the following grounds in his Amended Memorandum of Appeal:
    i. That the Learned Trial Magistrate erred in law and facts in awarding the Respondent interest at the rate of 20% of the purchase price.
    ii. That the Learned Trial Magistrate erred in law and facts in failing to appreciate the fact that the 20% sum agreed upon between the Appellant and the Respondent in the Agreement dated 14th May 2018 was supposed to have been awarded if the same was pleaded and prayed for.

iii. That the Learned Trial Magistrate erred in law and fact in failing to consider the fact that an interest of 20% of the purchase price was not a general damage claim and required to be specifically pleaded.

iv. That the Learned Trial Magistrate erred in law and fact in failing to consider the fact that the 20% penalty was only to apply upon demand by the Respondent and after 15 days upon delivery of a demand Notice.

v. That the Learned Trial Magistrate erred in law and fact in failing to consider the fact that the Respondent did not demonstrate or proof that he had made and delivered any demand Notice to the Appellant as agreed in clause 8 of the Agreement dated 14th May, 2018. The Appellant was prejudiced in the circumstances.

vi. That the Learned Trial Magistrate erred in law and facts in failing to consider the fact that in the absence of evidence that the Respondent had made and delivered a demand notice to the Appellant before filling of the case demanding refund of the purchase price and payment of 20% interest, the interest at 20% could not be awarded.

vii. That the Learned Trial Magistrate erred in law and facts in failing to consider the fact that under clause 8 of the Agreement dated 14th May, 2018, the 20% interest was not to accrue to either party once default arises until the demand notice was issued hence what the Respondent could seek was interest on the sum awarded by court.

viii. That the Learned Trial Magistrate erred in law and facts in awarding the Respondent 20% interest.

ix. That the Learned Trial Magistrate erred in law and facts in not finding that the Respondent in the entire claim did not claim the refund of the Purchase price or the 20% agreed upon in clause 8 of the Agreement dated 14th May 2018.

x. That the Learned Trial Magistrate erred in law in not finding that the Respondent was not entitled to the 20% interest which was envisaged under clause 8 of the Sale Agreement dated 14th May 2018.

xi. That the learned Trial Magistrate erred in law and facts in not finding that the Respondent had not claimed for any special damages in the Plaint hence he was not entitled to be granted any special or general damages in the case.

xii. That the Learned Trial Magistrate erred in law and facts in not finding that the damages envisioned in the 20% interest of the Purchase price was in the nature of special damages which must not only be claimed but also specifically pleaded and proved.

xiii. That the Learned Trial Magistrate erred in law and facts in not finding that general damages could be awarded in a case where the claim was specific performance.

xiv. That the Learned Trial Magistrate erred in Law and fact in not finding that general damages could not be awarded for a case of breath of contract.

3. The Appellant thus prayed for the following orders:

i. That the Honourable Court do find that the Appellant is entitled to refund the Purchase price paid by Respondent but not the 20% interest as agreed under clause 8 of the Agreement dated 14th May 2018.

ii. That the Honourable Court do find that what the Respond is only entitled to refund of the Purchase price but the 20% interest which should only have been payable had the Respondent served the required Demand Notice but could not be paid without such Notice having been served.

iii. That the Respondent is not entitled to general damages, special damages or the 20% interest of the Purchase price as the same were not prayed for or pleaded as required in law.

iv. That the costs of the Appeal and Lower Court be provided.

v. Any other appropriate relief that the Honourable Court may deem fit to grant.

4. In response and opposition to the Appellant's Memorandum of Appeal, the Respondent filed his Grounds Affirming the decision dated 7th April 2025 and seeking to have it affirmed on the following grounds

i. That a trial court has discretion to award and fix the rate of interests noting that the Respondent was deprived of the use of funds from the date of the Sale Agreement.

ii. That Section 26 of the *Civil Procedure Act* grants the trial court discretion to award an interest rate which it deems reasonable.

iii. That Section 26 of the *Civil Procedure Act* grants the trial Magistrate to award interest from an earlier date as it deems fit.

5. The Appeal was disposed of by way of Witten submissions wherein the Appelant vide his submissions dated 2nd May 2025 reiterated the trial Magistrate's findings and the prayers that had been sought by the Respondent in his Plaint dated 11th February, 2025 to submit that the Respondent never sought for the refund of the Purchase Price or the payment of the Kshs. 500,000/= that the agreement had envisaged under clause 8.

6. That indeed, the learned trial Magistrate having found that the Sale Agreement between the Appellant and the Respondent was invalid and unenforceable, the same should not have formed the basis of awarding the Respondent judgement for the refund of the purchase price of Kshs. 2,500,000/= plus interest at the rate of 20% per annum as from 14th May 2018 when the parties had entered into the Agreement for Sale. He maintained that the said refund and interest had not been a prayer or an alternative prayer in the Plaint and neither had it been pleaded in the body of the Plaint. Reliance was placed on the Court of Appeal's decision in the case of Caltex Oil (Kenya) Limited v Rono Limited [2016] KECA 457 (KLR) to submit that the trial Magistrate had erred in law and facts to award judgement for damages and costs that had not been prayed for or pleaded in the suit which exercise was neither justified nor in tandem with the law.

7. That whereas the Appellant had no objection in refunding the purchase price, the same not having been sought for, the Respondent may be required to file another cause of action seeking for the same. He maintained that whilst the payment of the 20% interest was only to arise after the Respondent had issued a Demand Notice to the Appellant, at the time of filling the suit, the Respondent had not drawn or sent such a demand Notice that instead the Demand Notice dated 6th July 2018 required the Appellant to effect the Transfer of the Land to the Respondent within three (3) days.

8. That having found that specific performance could not be granted, the learned trial Magistrate should have dismissed the Plaintiff's claim with costs to the Defendant but since she had found it wise to award the Respondent by a refund of the purchase price, the Appellants contention was only on the award of

the interest on the purchase price at the rate of 20% per annum from 14th May 2018 when the parties had entered into the Agreement for Sale, in the absence of a Demand Notice.

9. That the Respondent not having lay claim to special damages, the 20% interest was a sum that would have been considered in the nature of special damages which then required to be pleaded and proved. That in a case where the main claim was specific damages, general damages could not be awarded neither could the same be awarded in the case for breach of Contract.

10. That since the trial court had found the Agreement between the Appellant and the Respondent invalid and unenforceable, such agreement could not form the basis of awarding any costs or damages to the Respondent more so where none had been pleaded. Such costs should have been exercised in favour of the Appellant.

11. He thus urged the court to allow the Appeal and set aside the award of 20% interest as awarded and to grant him costs of both the Appeal and the lower court.

12. In response, the Respondent vide his submissions dated 3rd June 2025 summarized the factual background of the matter and then framed one (1) issue for determination to wit; whether he was entitled to the interest of 20% per annum as from 14th May 2018.

13. He submitted that the trial Magistrate's basis for granting payment of interest at the rate of 20% per annum on total purchase price as from 14th May 2018 when the parties had entered into the agreement of sale had not been founded on any clause of the Sale Agreement, hence the assumption that the Respondent ought to have complied with the conditions set out in clause 8 of the said sale agreement was far from the truth. That he was entitled to interest of the purchase price since he had paid the Appellant on 14th May 2018 and had been deprived from using the said funds. He placed reliance in the decided case of Kimani v Attorney General [1969] EA 502.

14. He then placed reliance on the provisions of Section 26 of the *Civil Procedure Act* and the decided case of PremLata v Peter Musa Mbiyu [1965] EA 592 to submit that the court had arrived at the interest rate of 20%, on the principal sum to compensate him for the deprivation of the money through the wrongful act of Appellant. He thus urged the court to uphold the decision of the Subordinate Court and dismiss the appeal herein with costs.

Analyses of the evidence.

15. According to the proceedings conducted in the trial court, Geoffrey Gitao Njuguna, (the Plaintiff/ Respondent) instituted the instant suit against the 1st Defendant/Appellant herein and Family Bank Limited as the 2nd Defendant vide Naivasha CMCELC No. 10 of 2019 in the Plaint dated 11th February, 2019 wherein he had sought for the following orders;

    i. Specific performance order directed at the 1st Defendant to perform the agreement for sale dated 4th May 2018 between the Plaintiff and the 1st Defendant in respect of the suit property namely Title Number Naivasha/Town Block 1/516 (Kihoto) by signing and delivering to the Plaintiff the relevant documents comprising the Application for Land Control Board Consent to transfer, original title deed, discharge of charge, instrument of transfer, identification documents and such other necessary documents and take all necessary actions for the transfer of the suit property to the Plaintiff.

    ii. That in default of the 1st Defendant complying with (i) above, the Registrar of the Court do undertake the actions required on part of the 1st Defendant.

iii. The 2nd Defendant be ordered to deliver up to the Court the original title deed in respect of the suit property and duly executed original discharge of charge.

iv. The 1st Defendant to give vacant possession of the suit property to the Plaintiff immediately and in default the Plaintiff be at liberty to evict the 1st Defendant.

v. General damages for breach of contract.

vi. Costs of the suit plus interest thereon from the date of judgement until settlement thereof in full.

16. Subsequent to the filing of the suit, the 1st Defendant filed his Statement of Defence dated 13th March, 2019 denying the allegations contained in the Plaint while putting the Plaintiff to strict proof wherein he stated that it had been a family friendly arrangement in which the Plaintiff and the 1st Defendant had agreed that the Plaintiff would bail the 1st Defendant out by paying for him some required loan dues that were required by the Bank and thereafter the Plaintiff and the 1st Defendant would agree on the mode of payment or refund. That the purported agreement had not been a sale agreement as there had been no land that the 1st Defendant could sell or which the Plaintiff could purchase as regards Land Parcel No. Naivasha/Town Block 1/516 (Kihoto) a fact which the Plaintiff knew.

17. That it was the Plaintiff who had adamantly refused to meet with the 1st Defendant and make arrangements on refund of his money but had insisted on getting land from a purported agreement of sale that never was. He contended that the 2nd Defendant had not been a party or privy to the purported sale agreement or arrangements that had been in place between the 1st Defendant and the Plaintiff. That further, the Plaintiff was relying on a purported sale agreement whose clauses were quite different from the one that the 1st Defendant had executed.

18. He thus prayed that the Plaintiff's suit be dismissed with costs.

19. The 2nd Defendant on the other hand vide its Statement of Defence dated 23rd October 2019, denied the allegations contained in the Plaint putting the Plaintiff to strict proof while stating that there was no cause of action arising against it by the Plaintiff and that the suit was speculative at best. It thus prayed that the Plaintiff's suit be dismissed with costs on the ground of being vexatious and abuse of the court process.

20. The case proceeded for hearing wherein the Plaintiff while testifying as PW1 adopted his witness statement as his evidence in chief and produced the documents filed in his list of documents in evidence as follows;

i. Copy of Title Deed in respect of Title No. Naivasha/Town Block 1/516 (Kihoto) as Pf exh 1.

ii. Official search certificate dated 14th May 2018 in respect of Title No. Naivasha/Town Block 1/516 (Kihoto) as Pf exh 2.

iii. Agreement for Sale dated 14th May 2018 as Pf exh 3.

iv. Letter of Offer dated 23rd May 2018 as Pf exh 4.

v. Copy of the title deed in respect of Title No. Kabete/Lower Kabete/1658 as Pf exh 5.

vi. Copy of the Land Control Board Consent to charge in respect of Title No. Naivasha/Town Block 1/516 (Kihoto) as Pf exh 6.

vii. Copy of Acknowledgement of Funds dated 30th June 2018 as Pf exh 7.

viii. Letter to the 1st Defendant dated 6th July 2018 as Pf exh 8.

ix. Letter to the 2nd Defendant dated 6th July 2018 as Pf exh 9.

21. He had then proceeded to testify that the 1st Defendant who had sold him plot Number Naivasha/ Naivasha Town/516 (Kihoto) (the land) had declined to transfer the same to him. That he had paid a sum of Kshs. 2,500,000/= as consideration in cash wherein the 1st Defendant had acknowledged receipt of the said amount. That he wanted the 1st Defendant to vacate the said land and that he had given him 6 months' notice to so vacate having reported the same on 19th January 2018 but he had declined to do so. That instead, he had offered to reimburse him the purchase price but had declined to transfer the land. That the bank was after him hence he wanted to take possession of the land. He sought the prayers as per the Plaint.

22. In cross examination by the Counsel for the 1st Defendant, he clarified that the 1st Defendant was his cousin hence he knew him before the transaction herein. That the said 1st Defendant had approached him with an offer to sell the land on the premise that the 2nd Defendant was about to auction the same due to a loan. That he knew that the land had been charged and that the title was in the custody of the 2nd Defendant. That however, they did not involve the 2nd Defendant in the sale since the 1st Defendant had told him to buy the land so that the same could not be sold by the auctioneers.

23. That subsequently, he had deposited the sum paid as consideration through his account and that he had not been bailing out the 1st Defendant so that he would refund him. When he was referred to paragraph 8 of the Agreement, he read the same and confirmed that it had been indicated that incase the land had not been transferred, he was to be refunded and that he had an option of seeking other legal remedies. He however maintained that he never sought the refund of his money but he had wanted the land to be transferred to him.

24. That indeed the 1st Defendant had deposited a sum of Kshs. 500,000/= in his account. That the 1st Defendant declined to sign the consent documents hence they never appeared before the Land Control Board (LCB).

25. He confirmed that the 1st Defendant's wife had not been a witness to the agreement. When he was referred to paragraph 5 of the Agreement, he confirmed that the 1st Defendant had confirmed that he was authorized to sale. That whereas the 1st Defendant's wife was supposed to give consent before the LCB, the same had not been done. He explained that he had placed a restriction on the land because he had purchased the same. That whereas he knew that the land had been charged, he did not place restriction to prevent the 1st Defendant from taking a top up loan.

26. He admitted that he was ready to take back his money at the current market value. He reiterated that the 1st Defendant had acknowledged receipt of Kshs. 2,500,000/=. That while the CID had confirmed that the signature had belonged to the 1st Defendant, the document examiner was not a witness in court.

27. When he was cross-examined by the Counsel for the 2nd Defendants, he confirmed that the 1st Defendant had approached him to buy the land that had been charged to the 2nd Defendant because the land was almost being sold off. He confirmed that he had conducted due diligence before the purchase. He also confirmed that the 2nd Defendant was not a party to the sale agreement and that the said agreement did not indicate that the sum paid had been for payment of the land. That whereas the 2nd Defendant had given him money for the purchase of the land, the property had not been specified.

28. That he had paid a sum of Kshs. 2,500,000/= to the 1st Defendant and not to the 2nd Defendant since the agreement had been between himself and the 1st Defendant. He confirmed that he did not obtain a written consent for the purchase of the land but the sale agreement was not illegal.

29. In re-examination, he stated that the 1st Defendant had confirmed that he had obtained authority from his family as per the special condition of the agreement. That he was aware that the land had been charged to Family Bank and that the same was about to be auctioned. That he had deposited money to the 1st Defendant's account to pay off the loan for the land which was then to be transferred to him as per clause 4 and 5 of the sale agreement.

30. That Clause 8 of the agreement had allowed him to seek remedies applicable in law hence he had gone to take possession of the land. That he was seeking the possession of land or refund of the sum paid at current market value. That there was a signature in the agreement and the acknowledgement form.

The Plaintiff had thus closed his case

31. DW1, Jesse Kamau Gachanja, the 1st Defendant herein adopted his witness statement as his evidence in chief and produced his filed documents in evidence as follows:

    i. Copy of the Title Deed to land parcel No. Naivasha/Town Block 1/516 (Kihoto) as Df exh 1.

    ii. Copy of the Notice of Public Auction as Df exh 2.

    iii. Copy of the Complaint Dispute heard by the area Chief as Df exh 3.

    iv. Copy of the actual copy of the purported Sale Agreement as Df exh 4.

    v. Copy of Bank Statement as Df exh 5.

32. He testified that the Plaintiff was his cousin and that they had entered into an agreement for sale of Kihoto land so as to stop the bank from selling the property through public auction. That the Plaintiff had given him money which he had repaid. That they had agreed that after stopping the sale by the bank, he would get money from the bank and pay him back with a commission.

33. That pursuant to the provisions of clause 8 of the said agreement, he was to pay a 20% commission. That however, it did not get to that stage because when he went to the bank for valuation, he realized that the Plaintiff had put a caution on the land. That the Plaintiff also declined to take back the refund of the Kshs. 500,000/= and refused to take further payments. He sought to be allowed to refund the Plaintiff an amount of Kshs. 150,000/= that had not been paid to the bank and for the caution to be removed.

34. In cross-examination by the Counsel for the Plaintiff, he confirmed that he had signed the sale agreement. That he was to refund the money to the Plaintiff although this was captured in writing. That the Plaintiff's Sale Agreement had different clause on the date of completion at paragraph *1*. That the sum by the bank had been paid up to the month of May 2024.

35. That his agreement was correct and that Kshs. 2,350,000/= had been paid but the balance was not cleared. He confirmed that the title deed to the land was in custody of the bank and that he did not know the amount of money that the Plaintiff had taken from the bank. He confirmed that the Agreement had indicated that the loan was for the purchase of land wherein he was to secure consent from his family members to sell the land.

36. That the Plaintiff had defaulted since he had failed to complete the payment as per the provisions of Clause 8 of the Agreement. He confirmed that the possession date had been indicated at clause 6 of

the Agreement and maintained that he had refunded the money into the Plaintiff's account although he had not presented proof of the said refund.

37. When he was cross-examined by the Counsel for the 2nd Defendant, he confirmed that the land had first been charged to the 2nd Defendant on 9th August 2012 and secondly on 9th May 2012, for a loan facility. That there had also been a further charge on 18th August 2014 for Kshs. 300,000/=. That at the time he entered into the agreement with the Plaintiff, the land had not been discharged which fact the Plaintiff was aware of. He confirmed that the Bank was not a party to the agreement and neither had any consent been issued by the bank before the said agreement. He admitted that he had no power or right to enter into transaction with a third party without permission from the bank.

38. In re-examination, he maintained that the Plaintiff was aware that the land had been charged when they entered into an agreement to which he did not have a title. That the Plaintiff knew that he lacked the authority. That the Plaintiff wanted to refund him a sum of Kshs. 500,000/=

The 1st Defendant had thus closed his case.

39. The 2nd Defendant's case proceeded for hearing with the testimony of Bernard Kipkirui , the 2nd Defendant's Relationship Manager who adopted his witness statement and further witness statements dated 15th May 2022 and 26th September 2023 as his evidence in chief. He then produced the documents in his list and further list of documents as follows

i. Copy of Sale Agreement dated 14th May 2018 as Df exh 6.

ii. Copy of letter of offer dated 23rd May 2018 as Df exh 7.

iii. First Legal Charge registered on 9th August 2012 as Df exh 8.

iv. Title Deed for Jesse Kamau Gachanja as Df exh 9.

40. In cross-examination by the Counsel for the Plaintiff, he confirmed that he worked with the 2nd Defendant although he had no identification. He confirmed that the money owed to the 2nd Defendant by the 1st Defendant had been dully settled and that there had been no sale agreement presented to them. That the account statement had reflected a final transfer from one individual to the 1st Defendant's account.

41. When he was cross-examined by the Counsel for the 1st Defendant, he confirmed that the 2nd Defendant had advanced a loan to the 1st Defendant and that the security had been the land herein. That the said security was yet to be discharged for which it was in the Bank's custody without the Bank's consent. That the 1st Defendant did not have authority to sell the land. That he could not tell the account from where the money used to settle the debt had come from but he could see that the money paid by the Plaintiff was payment for land.

42. When he was examined by the court he confirmed that the loan had been settled in full.

The 2nd Defendant had thus closed their case.

Determination.

43. I have considered the record of appeal, the evidence as adduced in the trial court, the holding by the trial Magistrate, the written submissions by learned Counsel, the authorities cited and the applicable law. Conscious of my duty as the first Appellate Court in this matter, I have to reconsider the decision appealed against, assess it and make my own conclusions as was stated by the Court of Appeal in

Paramount Bank Limited vs. First National Bank Limited & 2 Others (Civil Appeal 468 of 2018) [2023] KECA 1424 (KLR) where the court held as follows;

> " A first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. A first Appellate Court is the final court of fact ordinarily and therefore a litigant is entitled to a full, fair, and independent consideration of the evidence at the appellate stage. Anything less is unjust. The first appeal has to be decided on facts as well as on law. While considering the scope of section 78 of the *Civil Procedure Act*, a first Appellate Court can appreciate the entire evidence and come to a different conclusion."

44. The summary of the evidence adduced by the Plaintiff /Respondent in the trial court as well as his adopted witness statement, was to the effect that that on or about the month of May 2018, the 1st Defendant who was known to him had contacted him and asked him to buy his property No. Naivasha/Town Block 1/516 (Kihoto), measuring approximately 0.0877 Ha (suit property), at a throw away price as the property was on the verge of being sold by the 2nd Defendant by way of public auction, on 21st May 2018 for non-payment of a loan facility. That he had agreed.

45. They entered into an agreement of 14th May 2018 wherein after the Respondent took a loan facility with the 2nd Defendant of Kshs. 2,800,000/= using his property Title Number Kabete/Lower Kabete/1658 as security and thereafter made a payment of Kshs. 2,500,000/= to the Appellant's account as per their agreement. The Appellant acknowledged receipt by signing an acknowledgment dated 30th June 2018 but refused to effect that transfer of the property as agreed. The Respondent then registered a caution over the suit property at the Naivasha District Land Registry claiming purchaser's interest and made a criminal complaint against the Appellant at Naivasha CID offices whereupon the 1st Defendant had been arrested and charged in Naivasha criminal court for the offence of obtaining by false pretense. In his Plaint the Respondent sought for the prayers herein above cited.

46. The Appellant's case and witness statement on the other hand had been that the Plaintiff was his step brother. He confirmed that he had taken a loan facility with the 2nd Defendant and had fallen into arrears in payment where the bank had advertised his land for sale. That subsequently he had entered into a "deal" with the Respondent who had agreed to bail him out for which he would look for funds and refund him. He conceded to having executed an agreement dated 14th May 2018 but refuted the same as being a Sale agreement for No. Naivasha/Town Block 1/516 (Kihoto). That the agreement that the Respondent relied upon contained parts and clauses which were quite different from the agreement that he had executed.

47. I have also considered the evidence and adopted witness statements of one Bernard Kipkurui Munangai, the 2nd Defendant's Relationship manager, dated 15th May 2021 and 25th September 2023 respectively who confirmed that indeed the 2nd Defendant had advanced the loan facility to the Appellant where the security had been secured by a Charge dated 9th August 2012 over L.R No. Naivasha/Town Block 1/516 (Kihoto) which Charge Instrument was registered on 9th August 2012 to the effect that:

> " The Chargor shall not without a prior written consent of the 2nd Defendant create or attempt to create or permit to subsist any charge or mortgage upon or permit any lien or any encumbrance whatsoever to affect any part of the property"

48. That the Respondent had also obtained credit facilities from the 2nd Defendant through a Letter of Offer dated 21st November 2019 wherein the loan had been secured by a charge of Kshs. 2,800,000/=

over L.R No. Kabete/Lower Kabete/1658 registered in his name. That the Respondent had disclosed that the purpose of the loan was to purchase a parcel of land in Naivasha but he did not specify the exact property.

49. That they were strangers to the alleged Sale Agreement dated 14th May 2018 between the Respondent and the Appellant which did not disclose that the Respondent was purchasing the suit property title number Naivasha/Town Block 1/516 (Kihoto).

50. That the 2nd Defendant had acted in his usual cause of business and in good faith by granting the loan facility. That they never engaged in the sale of the charged parcel of land nor did they grant a written consent to the illegal transaction between the parties thereto, and therefore were a stranger to the deal that had gone sour between the two. That the alleged sale agreement between the parties was illegal, since the 2nd Defendant who had legal/equitable rights over the said parcel of land did not consent to the said transaction.

51. Having given a brief history of the matter herein, I find the issues arising therein for determination as follows:

    i. Whether there was a sale agreement between the Appellant and the Respondent over land parcel No. title No. Naivasha/Town Block 1/516 (Kihoto) if yes;

    ii. Whether the Sale Agreement dated 14th May 2018 was valid if yes;

    iii. Whether the Respondent was entitled to the 20% interest in breach of a contract.

52. On the first tissue for determination, it is not disputed that the 2nd Defendant (Family Bank Limited) had given a loan to the Appellant herein wherein land parcel No. Naivasha/Town Block 1/516 (Kihoto) had been secured as a security and a Charge over it registered appropriately. That the Appellant defaulted and whilst the 2nd Defendant sought to exercise its power of sale of the charged property, the Appellant sought help from the Respondent herein wherein vide a sale agreement of 14th May 2018, the Respondent settled the money owed to the 2nd Defendant by the Appellant.

53. I have looked at the agreement of 14th May 2018 therein produced as Pf exh 3, Df exh 4 and 6 which I seek to reproduce for ease of reference as herein under;

> ‘’republic Of Kenya
>
> Sale Agreement
>
> This Agreement is made this 14th day of May the year Two Thousand and Eighteen (12/05/2018) Between Jesse Kamau Gachanja Id/no. 67217961 Of P.o. Box 583-20117, Naivasha within the Republic of Kenya hereinafter referred to as the Vendor which expression shall where the context so admit include his personal representatives, heirs and assigns of the One Part And Goffrey Gitao Niuguna Id/ No. xxx Care Of P.o. Box xxx-00100, Nairobi, in the aforesaid Republic hereinafter referred to as the Purchaser ’ which expression shall where the context so admit includes his personal representatives, heirs and assigns of the Second Part:.
>
> Whereas:
>
> The Vendor is the absolute registered owner of the parcel of land known as Naivasha/town Block 1/516 (kihoto) measuring approx. 0.0877Ha,

Further, the Vendor has caused development on the said land parcel consisting of permanent family house, water, electricity, water tank, natural fence and gate all inclusive In the purchase amount.

And Whereas

The Vendor is desirous of selling the subject parcel and the Purchaser is desirous of buying the same for an agreed consideration sum of Kenya Shillings Two Million Five Hundred Thousand (Ksh. 2,500,000/-) only.

Now It Is Hereby Agreed And Declared As Follows:

1. The said agreed consideration sum of Kenya Shillings Two Million Five Hundred Thousand only (Ksh. 2,500,000/-) shall be paid by the Purchaser unto the Vendor as follows:

    a) The whole Purchase amount hereof of Kenya Shillings Two Million Five Hundred Thousand (Ksh. 2,500,000/=) shall be financed by the Purchaser's Financiers M/s Family Bank and shall be deposited directly to the Vendors account at Family Bank A/c No. xxx A/c Name: Jesskam Agencies payable within Three (3) months from the date of execution hereof. ¢ C

2. The subject parcel has been sold with developments.

3. The purchase amount hereof of Ksh 2,500,000/= only is Not Inclusive Title Deed registration charges and the Purchaser shall therefore meet the necessary transfer charges at the relevant Land's office to facilitate registration of the subject title deed in his favour.

    .....

8. That in the event that the transfer of the parcel is not completed on default on the part of the vendor, then the vendor shall on demand refund to the purchasers the purchase amount received by him plus interest thereon at a rate of 20% calculated from the date of the execution of this agreement within fifteen (15) days from the date of the delivery of the demand notice to him by the purchaser without prejudice to the other legal avenues available to the purchaser to foresee the enforcement of this agreement including specific performance and other remedies applicable in law. Likewise, the Vendor shall also receive from the Purchaser such amount equivalent to 20% penalty of the sale amount incase of default on the part of the Purchaser including other remedies applicable in law.

9. The Vendor warrants that at the time of the transfer of the parcel to the Purchaser he has good title to the property.

10. This Agreement contains the whole agreement and understanding between the parties relating to the transaction provided for herein and supersedes all previous agreements (if any) whether written or oral between the parties in respect of such matter....."

54. A sale agreement for land is a crucial legal document that outlines the terms and conditions of a property transaction between a seller (vendor) and a buyer (purchaser) and protects the interests of

both parties so as to ensure a smooth transfer of ownership. Some of the essential elements in such a sale agreement would include clauses of the parties involved, their full Names and Identification, detailed legal description of the land, including the Title/L.R. Number, approximate acreage, location etc, purchase price and payment terms, conditions precedent and or special conditions, execution signatures of both the seller(s) and buyer(s) which must be attested by witnesses and lastly the date the agreement is executed.

55. The agreement herein I find was a sale agreement for Naivasha/Town Block 1/516 (Kihoto) measuring approx. 0.0877 Ha, and had met the requirements of a contract as per the provisions of Section 3(3) of the Contract Act which provides as follows;

> ''3(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.''

56. On whether the said sale agreement was legal and capable of conferring any interest to the Respondent herein, it is trite that although a party (the chargor or mortgagor) can enter into a sale agreement with a third party to sell a property that is charged (mortgaged) to a bank (the chargee), however, there are crucial legal requirements and practical considerations that must be adhered to make the sale valid and for the purchaser to acquire a clean title. The overarching principle is that the charge (mortgage) is an interest in the land itself, and it remains attached to the property even if the ownership changes.

57. Section 87 of the *Land Act* and Section 59 of the *Land Registration Act* provide as follows;

> ''If a charge contains a condition, express or implied that chargee prohibits the chargor from, transferring, assigning, leasing, or in the case of a lease, subleasing the land, without the consent of the chargee, no transfer, assignment, lease or sublease shall be registered until the written consent of the chargee has been produced to the Registrar.''

58. The implication of these provision of the law is that charge instruments (mortgage agreements) explicitly contain a clause requiring the chargor to obtain the chargee's consent before selling or otherwise dealing with the charged property. Even if not explicit, such a covenant can be implied and while the sale agreement can be entered into, the actual transfer of the title to the purchaser cannot be registered at the Land Registry without the bank's consent. Without registration, the purchaser does not acquire a legal interest in the property. The law thus makes the registration of the transfer conditional on the bank's consent.

59. The Consequences of not obtaining Consent thereto would be that the purchaser will not have a legal title to the property, even if they have paid the full purchase price as their interest would remain equitable. Secondly attempting to sell and transfer charged property without the bank's knowledge or consent, amounts to fraud, with criminal implications under Section 318 of the *Penal Code*.

60. In the present case, at clause 6.8 of the Charge Instrument which was registered to Naivasha/Town Block 1/516 (Kihoto) on 9th August 2012 was to the effect that:

> " ....not sell or agree to sell or transfer or part with the possession subject to these presents or otherwise the Charged Property or any part thereof without the prior written consent of the bank which consent shall not be unreasonably held"

61. The evidence herein adduced was to the effect that at the time the Appellant and Respondent entered into the Sale Agreement of 14th May 2018, the suit land had not been discharged, the Bank was not a party to the agreement and neither had any consent been obtained and/or issued by the bank. I therefore find that the Sale Agreement of 14th May 2018 was invalid and unenforceable for which the Appellant herein had no good title to pass as the Bank's registered charge had superior rights until it was discharged.

62. Having found that the Sale Agreement was invalid and unenforceable owing to the Bank's overriding interest over the suit land, within the meaning of Section 28(g) of the *Land Registration Act*, the Respondent could only seek for specific performance of the sale agreement for charged property subject to the discharge of the charge. The Respondents prayer for Specific performance herein was therefore naught.

63. I say so because Specific performance is where a court compels a party to a contract to perform their actual contractual obligations as agreed. It forces the breaching party to do what they promised to do, rather than just paying money for their failure to do so but the court has the discretion to grant or refuse it, even if a valid contract and a breach are proven. This discretion is exercised based on established equitable principles and circumstances. A party seeking specific performance must themselves have acted fairly and honestly in relation to the contract for ''He who comes to equity must come with clean hands'' In the present case we cannot say that the parties to the contract of 14th May 2018 had clean hands them having known prior that the property had been charged to the bank, and they had not sought consent from the bank, their hands were soiled and neither of them deserved any equitable remedy as the the contract was void and unenforceable from the outset.

64. Having found that the Sale Agreement of 14th May 2018 was invalid and unenforceable what then would be the remedies available to the purchaser/Respondent where money changed hands? The goal is generally to restore the parties to their pre-contractual position by refunding the money paid as common law principles dictate that where a contract is unenforceable, any money paid under it should be refunded to prevent unjust enrichment of the recipient. The contract is treated as if it never existed, and the parties are restored to their original positions.

65. The Appellant's quarrel with the decision of the trial Magistrate was that she awarded the Respondent interest at the rate of 20% of the purchase price despite the terms of the agreement being that the same could only be awarded pursuant to issuance of Notice.

66. The Latin maxim ''Ex Turpi Causa Non Oritur Actio'' reflects the idea that the law will not assist a party who is complicit in their own wrongdoing or who comes to court with "unclean hands."

67. The Privy Council in Mistry Amar Singh v. Serwano Wofunira Kulubya, [1963] EA 408 on appeal from a judgment and order of the East African Court of Appeal at page 414 of the report, in his speech

Lord Morris of Borthy- Guest quoted with approval the following passage from the judgment in Scott v.Brown, Doering, McNab & Co (3), [1892] 2 QB 724 Lindley LJ at p.728 : stated as follows:

> " This old and well-known legal maxim is founded in good sense, and expresses a clear and well recognised legal principle, which is not confined to indictable offences. No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the attention of the court, and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality the court ought not to assist him. Any rights which he may have irrespective of his illegal contract will, of course, be recognised and enforced. If a plaintiff cannot maintain his cause of action without shewing, as part of such cause of action, that he has been guilty of illegality, then the courts will not assist him in his cause of action."

68. In this matter, it was not disputed that the both the Appellant and the Respondent, knowing very well that the Suit parcel of land had been charged to the bank, and was about to be auctioned, entered into a "deal" to sell and purchase the same at a throw away price without involving the bank. The Respondent having been a party to the void and unenforceable contract, was no entitled to the 20% interest.

69. It is trite that when a contract is void and unenforceable, it is generally treated as if it never existed from the beginning (void ab initio) for which the implications are significant for remedies including the ability of a court to order interest on a purchase price. A void contract is one that has no legal effect whatsoever and cannot be enforced by either party whereas an unenforceable contract is one that, while it may have existed, cannot be enforced in court. It would therefore not be in the place of a court to order interest on the purchase price when a contract is void and unenforceable in the same way it would for a valid contract that has been breached because there is no legal agreement to enforce. The interest is typically awarded as a component of damages for a breach of a valid contract, or as a term agreed upon within a valid contract. If there's no valid contract, there's no breach in the traditional sense.

70. I thus find in conclusion that the contract having been void and unenforceable through the conduct of both parties, that restitution to restore the parties to their original positions would be the only equitable relief in the circumstance. To this effect I allow the Appeal and set aside the Judgment of the trial court which is herein substituted with an order for the refund of the purchase price only, to the Respondent.

The Appellant shall also have the Cost of the Appeal.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT NAIVASHA THIS 31ST DAY OF JULY 2025.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE