



**Masika v Mwasame (Environment and Land Appeal E048 of 2024)
[2025] KEELC 5706 (KLR) (31 July 2025) (Judgment)**

Neutral citation: [2025] KEELC 5706 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT AND LAND APPEAL E048 OF 2024**

EC CHERONO, J

JULY 31, 2025

BETWEEN

CYPRIN WEKESA MASIKA APPELLANT

AND

EVANS SIMIYU MWASAME RESPONDENT

JUDGMENT

Introduction

1. Vide a Memorandum of Appeal dated 09/10/2024, the Appellant who was the Defendant before the trial court [hereinafter referred to as the former suit] preferred this appeal challenging the judgment delivered by Hon. J.P Nandi [SPM] on 08/10/2024 in Kimilili SPM-ELC E028 of 2023 wherein the trial court allowed the plaintiff/Respondent's case with costs.
2. The Respondent herein vide a plaint dated 04/09/2023 sued the Defendant/Appellant herein for purporting to own land parcel no. Bungoma/Soysambu/1942 situated in Mitua area in Narati sub-location. That he [the Appellant] offered to sell him [Respondent] ½ acre of the said land at a consideration of Kshs. 745,000/= and thereafter, they entered into a Sale agreement dated 04/05/2022. That at the time of execution of the said agreement, the Respondent paid to the Appellant through her Sidian Bank account no. xxx a sum of Kshs. 400,000/= and a further sum of Kshs. 40,000/= in cash. He averred that the Appellant thereafter became evasive and without reason declined to accept the balance of Kshs.265,000/=. That even with the intervention of elders and local authorities, the Appellant remained adamant and declined indulging him. That he reported the dispute at Brigadier Police station under OB No. 25/08/2023.
3. He averred that the Appellants actions are in breach of their agreement and are in disregard of his legitimate right to the parcel purchased. He sought for the following prayers against the Appellant;



- a. A declaration that the Defendant's purported rescission of agreement for sale dated 04/05/2022 was fatally un-procedural, irregular, unjustified, baseless and a breach of contract, illegal, unlawful, invalid and null and void ab initio.
 - b. A declaration that the Defendants refusal to receive/ accept payment of Kshs. 265,000/= at the last deposit of the purchase price and/or vacate the suit property comprised in Title No. Bungoma/Soysambu/1942 is in breach of the agreement for sale dated 04/05/2022 and in fragrant disregard of the Plaintiff's legitimate and indefeasible title of the suit property.
 - c. An order restraining the Defendant and his agents from leasing, charging, selling, transferring to third parties, or otherwise dealing with the suit property.
 - d. An order for specific performance of the contract entered into by the parties on 04/05/2022 and the Plaintiff be allowed to pay the balance of the purchase price while the Defendant be compelled to sign the relevant documents to complete the transfer of ½ acre of the suit property comprised in title no. Bungoma/Soysambu/1942 to the Plaintiff.
 - e. In alternative the Plaintiff claims against the Defendant herein an order of refund of the initial deposit of the purchase at the current market price together with interest at court rates from the date of purchase to date.
 - f. Further and in the alternative the court to order the suit property comprised in title no. Bungoma/Soysambu/1942 to be sub-divided into 6 portions of ½ acre each and thereafter the ½ acre be transferred to the Plaintiff.
 - g. Costs of the suit and interest thereon.
 - h. Any other just relief that the court may deem fit.
4. In defence, the Defendant/Appellant filed a statement of defence dated 13/09/2023 where he denied the Respondents claim in toto and in particular denied being evasive and/or is refusing to accept the outstanding balance. He averred that the transaction between the two parties was unequivocally subject to the consent of the Land Control Board and therefore since a period of 6 months post the agreement lapsed without the acquisition of the consent, the agreement became null and void by dint of Section 6 of the *Land Control Act*. He averred that the agreement therefore cannot confer any rights and/or obligations and the claim for specific performance was untenable. He averred that he was willing to refund the amount advanced as a debt received since he was within his rights to rescind the agreement. He averred that no particulars of breach had been pleaded in the plaint and urged the court to dismiss the Respondents claim with costs.
 5. When the former suit before the trial court came for directions, the parties agreed to proceed by way of viva voce evidence with the Respondent calling three witnesses while the Appellant testified as the sole witness.
 6. PW1 Evans Simiyu Mwasame adopted his witness statement dated 04/09/2023 as his evidence-in-chief. He also produced into evidence a sale agreement dated 04/05/2022 as P-Exhibit 1 and copy of OB as P-Exhibit 2. In cross-examination, he stated that he approached the Appellant to accept the balance before the completion period lapsed. In re-examination, he testified that the Appellant told him to wait for him to harvest sugarcane planted on the suit land.
 7. PW2 Matthew Mwasame adopted his witness statement dated 04/09/2023 as his evidence-in-chief. He confirmed that he knew the agreement was subject to the LCB Consent.



8. PW3 Martin Mwasame Simiyu adopted his witness statement dated 04/09/2023 as his evidence-in-chief. He confirmed that the balance was to be paid by 31/12/2023 which was the completion period and that the LCB consent was not obtained.
9. DW1 Cyprian Wekesa Masika adopted his witness statement dated 09/06/2024 as his evidence-in-chief. He also produced in his evidence a letter as D-Exhibit 1, letter dated 27/08/2023 as D-Exhibit 2 and a letter dated 30/08/2023 as D-Exhibit 3. He testified that he was not ready to receive the balance.
10. Upon considering the materials placed before him, the trial Magistrate entered judgment in favour of the plaintiff/Respondent, wherein it declared that the Appellant was in breach of contract and found that the Appellant's refusal to accept the outstanding balance amounted to a breach of the Respondent's legitimate and indefeasible title and restrained the Appellant from any further dealings with the suit land. He issued an order of specific performance directing the Respondent to pay the outstanding balance of Kshs. 265,000/= to the Appellant through M-Pesa, bank account, or advocate and further issued an order compelling the Appellant to execute all relevant sub-division and transfer documents to effect the transfer of ½ acre of the suit land to the Respondent. The court also awarded costs in favour of the plaintiff/Respondent.

The Appeal.

11. Aggrieved by the trial court's judgment, the Appellant preferred the current appeal on the following grounds;
 - a. That the learned trial Magistrate erred in law and in fact when he ordered for specific performance of the land sale agreement dated the 4th day of May 2022 between the Appellant and the respondent yet it was unenforceable for lack of the consent of the land control board.
 - b. That the learned trial Magistrate erred in law and in fact when he misconceived the doctrines of constructive trust and proprietary estoppel and misapplied the doctrines to the case, notwithstanding the fact that the Respondent had neither completed payment of the purchase price nor taken possession of the suit land.
 - c. That the learned trial Magistrate erred in law and in fact when he failed to properly appreciate and evaluate the evidence on record and thereby arrived at an erroneous decision.
 - d. That the learned trial magistrate erred in law and in fact when he delivered a judgment that infringed on the appellant's rights as the absolute registered proprietor of the suit land.
12. The appellant sought to have the judgment of the trial court set aside and the appeal allowed.

Submissions on appeal.

13. When this appeal came up for directions, the parties agreed that the appeal be canvassed by way of written submissions.
14. The Appellant filed submissions dated 26/05/2021 and submitted that although the transaction was subject to consent of the land control board, the said consent was never obtained within the statutory period or at all and the agreement became null and void at the expiry of 6 months for lack of the consent of the land control Board. He therefore argued that it was not proper for the trial court to issue an order of specific performance. It was further submitted that the court improperly invoked the doctrine of proprietary estoppel and constructive trust yet the Respondent had not paid the entire consideration and was not in possession of the suit land. He referred to the case of *Macharia Mwangi Maina and 87 others v Davidson Mwangi Kagiri* 2014 eKLR.



15. The Appellant argued that the balance was payable on 31/12/2023 but the Respondent started asking the Appellant to receive it in August 2023 and even filed the suit in the lower court in September 2023. He argued that the suit was filed seeking for specific performance of an agreement when the date of completion of payment was 3 months away therefore, the claim before the court was pre-mature and ought to have been dismissed. Lastly it was submitted that the Appellant maintained the rights in Section 25 of the Land Registration Act and Article 40 of the Constitution and the trial court was therefore erroneous in its findings.
16. The Respondent filed submissions dated 25/06/2025 and submitted that the sale agreement between the Appellant and the Respondent was in accordance with the Law of Contract Act and the Land Act. He submitted that the parties duly executed the same hence, the Appellant cannot attack it for lack of land control board consent and yet he is the one who declined to receive the remaining balance of Kshs 265,000/=. It was further submitted that according to the evidence and testimonies tendered by the Appellant during the trial as well as his submissions, there was no notice of recession of the sale agreement by the Appellant. The Respondent submitted that the Appellant should not be discharged from his obligation but rather should be compelled by this honourable court to perform his part of the bargain as ordered by the trial court. Reliance was placed in the case of Willy Kimutai Kitilit v Michael Kibet [2018] eKLR.

Analysis and Determination.

17. This being a first appeal, this court has a duty to consider and re-evaluate the evidence on record and to draw its own conclusions, although it has to bear in mind that it did not have the advantage of seeing and hearing the witnesses who testified before the trial court. See, the case of Verani t/a Kisumu Beach Resort v Phoenix of East Africa Assurance Co. Ltd [2004] 2 KLR 269 and Selle v Associated Motor Boat Co. Ltd. [1968] E.A 123 on the duty of the first appellate court.
18. It is also well established in law that an appellate court will not ordinarily interfere with the findings of fact by the trial court unless they were not based on evidence at all, or they were based on misapprehension of the evidence or where it is demonstrated that the court acted on wrong principles in reaching its conclusion. See, Peter v Sunday Post Ltd. [1958] E.A 424 and Makube v Nyamuro [1983] KLR 403.
19. From my review of the pleadings, the evidence and submissions of parties before the trial court, it is not in dispute that the parties herein entered into a sale agreement for ½ acre of land to be hived out of land parcel no. Bungoma/Soysambu1942 and that an initial deposit of Kshs. 480,000/= was made at the time of execution of the said agreement leaving a balance of Kshs 265,000/= It is also not in contention that the transaction was not completed albeit parties differ on the reasons. On the part of the Respondent, he claims that the Appellant declined to receive the outstanding balance therefore, unlawfully rescinding the agreement while the Appellant contends that the contract was not enforceable because 6 months lapsed before a LCB Consent was obtained thus, the agreement became void.
20. Although the Appellant raised four [4] grounds of appeal in his memorandum of appeal, it is my considered view that the sole issue that arises for determination is whether the Respondent was entitled to the relief sought in view of the provisions of the Land Control Act.
21. The Respondents prayers pivoted on specific performance which is an equitable remedy. The remedy of specific performance is tailored at protecting and realizing the legitimate expectation of an innocent and evidently loyal purchaser. In this connection, the conscience of equity will not settle and leave a purchaser who has faithfully invested in a contract of purchase to suffer injustice at the hands of



a merciless vendor, conditioned on the following principles/parameters. In Chitty on Contract, 30th edition, volume 1 at paragraph 27-003 the authors have stated as follows: “The jurisdiction to order specific performance is based on the existence of a valid, enforceable contract...it will not be ordered if the contract suffers from some defect, such as failure to comply with formal requirements or mistake or illegality, which makes the contract invalid or unenforceable.” Also see the case of Reliable Electrical Engineers Ltd v Mantrac Kenya Limited [2006] eKLR, Maraga, J. [as he then was].

22. Section 6 of the [Land Control Act](#) is clear that transactions affecting agricultural land – including sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing or division - is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction. If money has exchanged hands, then section 7 thereof applies and it provides that “If any money or other valuable consideration has been paid in the course of a controlled transaction that becomes void under this Act, that money or consideration shall be recoverable as a debt by the person who paid it from the person to whom it was paid, but without prejudice to section 22.”
23. Jurisprudence on this issue revolving around the above provisions reveals two schools of thought. One which holds that the doctrines of equity cannot unseat and supplant express and unequivocal prohibitory provisions of statute, contrary to the hierarchy of laws contemplated under section 3 of the [Judicature Act](#) which places the said doctrines below statute law as was seen in the Court of Appeal case of David Ole Tukai v Francis Arap Muge & 2 Others [2014] eKLR. The other school of thought held that in circumstances where the offending party was placing reliance in the provisions above, then the courts should invoke the doctrines of constructive trust and unjust enrichment in favour of the cooperative and compliant party. Such was the case in the Court of Appeal decisions in Willy Kimutai Kitilit v Michael Kibet [2018] eKLR which the trial court placed reliance on where the court held;

“[25] ...Thus, since the current Constitution has by virtue of Article 10[2] [b] elevated equity as a principle of justice to a Constitutional principle and requires the Courts in exercising judicial authority to protect and promote that principle, amongst others, it follows that the equitable doctrines of constructive trust and proprietary estoppel are applicable to and supersede the [Land Control Act](#) where a transaction relating to an interest in land is void and enforceable for lack of consent of the Land Control Board.”
24. Having said that, I now wish to proceed and make a consideration of the evidence on record. The conduct of the parties is that the Appellant received a deposit of Kshs. 480,000/= as part payment for the purchase of the suit land. However, he has since declined to accept the outstanding balance, thereby frustrating the completion of the transaction to the detriment of the Respondent. It is noteworthy that the Appellant has had the benefit of both the use of the land and the substantial deposit, yet now seeks to walk away from the agreement without consequence. Such conduct amounts to unjust enrichment and a blatant disregard of contractual obligations and cannot be tolerated.
25. For the above reasons, this court leans to the conclusion that, the lack of the consent of the Land Control Board does not preclude the Court from giving effect to equitable principles.
26. The trial court in its determination allowed the Respondents case and made an order for specific performance. However, this courts mind is drawn to the principles which govern equitable remedies more so that a Court of law will ordinarily not grant this remedy if there is another adequate remedy available to the aggrieved party, either in statute or common law. It is the very last port of call. It follows therefore that wherever an alternative and adequate remedy like damages or an injunction is available, this remedy should be avoided.



27. Further, this Court takes note that the consideration was not paid in full and the Respondent had not obtained vacant possession of the suit land. These two factors, coupled with the Appellant's refusal to accept the balance of the purchase price render the remedy of specific performance neither tenable nor equitable in the circumstances. In *Flood v Pritchard* [1906] 1 Ch 354, the court held that specific performance will not issue where material terms of the contract remain unfulfilled or where possession has not passed. Similarly, in the Kenyan context, courts have consistently held that specific performance is a discretionary remedy and will not be granted where it would result in injustice or undue hardship.
28. In *Reliable Electrical Engineers Ltd v Mantrac Kenya Limited*[supra] the court stated as follows;
- “Even when a contract is valid and enforceable, specific performance will however not be ordered where there is an adequate alternative remedy. In this respect damages are considered to be an adequate alternative remedy where the claimant can readily get the equivalent of what he contracted for from another source. Even when damages are adequate remedy specific performance may still be refused on the ground of undue influenced or where it will cause severe hardship to the Defendant.”
29. Accordingly, the more appropriate and just remedy in the circumstances is an order compelling the Appellant to refund the sum of Kshs. 480,000/= received as part payment, together with interest at court rates from the date of payment until full refund, to compensate the Respondent for the financial prejudice suffered due to the Appellant's breach.
30. Subsequently, I set aside the trial court's judgment entered on 08/10/2024 and substitute it with an order for a refund of the the sum of Kshs. 480,000/= received as part payment, together with interest at court rates from the date of payment until full refund.
31. The Respondent shall have costs of this appeal.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 31ST DAY OF JULY, 2025.

HON.E.C CHERONO

ELC JUDGE

In the presence of;

1. Mr. Oira H/B for Mr. Were for the Appellant.
2. Respondent-present
3. Bett C/A.

