IN THE COURT OF APPEAL
AT MALINDI

(CORAM: MURGOR, LAIBUTA & NGENYE,

JJ.A.) CIVIL APPEAL NO. E013 OF 2022

BETWEEN

MAGRETVILLE ASAMI MACHO.....................1ST APPELLANT
GRIGORIOS SMARAGDIS...........................2ND APPELLANT

AND

MUSA MWERA ATHUMAN .... 1ST RESPONDENT
TRUPHENA NYABOKE ONWONG'A 2ND RESPONDENT
YOBESH ONWONG'A OYARO .... 3RD RESPONDENT

(Being an appeal from the Judgment and Decree of the Environment and Land Court of Kenya at Malindi (Odeny, J.) delivered on 2nd February 2022

in

ELC No. 93 of 2015
(Formerly Mombasa ELC No. 77 of 2014))
****

JUDGMENT OF THE COURT

1. The commencement of the dispute between Magretville Asami Macho and Grigorios Smaragdis ***(the appellants)*** and Musa Mwera Athuman, Truphena Nyaboke Onwong'a and Yobesh Onwong'a Oyaro ***(the 1st, 2nd and 3rd respondents respectively)*** revolved around the ownership of land parcel number Kilifi/Mtwapa/1496 ***(the suit property).***

2. The dispute resulted in the filing of ***Mombasa Environment and Land Court Case No. 77 of 2014*** which, upon transfer to the Malindi Environment and Land Court, was allocated

Case No. 93 of 2015. In a judgment of the learned Judge ***(Odeny, J.)*** dated 2nd February 2022, she rejected the appellants' plea that they were entitled to an order of specific performance in relation to the terms of the sale agreement dated 10th July 2009. The learned Judge found that the appellants were instead entitled to a refund of the purchase price of Kshs.572,000 with interest from 10th July 2009. They were also awarded Kshs.4,000,000 as special damages.

3. The gist of the appellants' case as pleaded in their plaint dated 4th April 2014 and amended on 1st December 2017 was that the 1st respondent was the registered owner of the suit property; that, by a sale agreement dated and executed on 10th July 2009, the appellants and the 1st respondent entered into an agreement for sale of the suit property for a consideration of Kshs.900,000; and that the appellants paid a sum of Kshs.572,000, being part of the agreed purchase price.

4. It was pleaded that, in total disregard to the sale agreement, the appellants contended that the 1st respondent breached its terms by:

   a) failing to obtain completion documents within 90 days from the date of the agreement;

   b) failing to transfer the suit property to the appellants despite obtaining consent to transfer from the Land Control Board; and

   c) failing to deliver completion documents to the appellants.

5. The appellants pleaded that, during the pendency of the suit, the 1st respondent, in disobedience of the inhibition orders dated 10th April 2014 issued by ***Mukunya, J.***, transferred the suit property to the 2nd and 3rd respondents. They particularised the alleged fraud by the respondents as follows:

   a) *the 1st respondent transferring the suit property to the 2nd and 3rd respondents while the suit was ongoing;*

   b) *the 1st respondent transferring the suit property to the 2nd and 3rd respondents despite an order of inhibition issued by the Court inhibiting transfer of the suit property;*

   c) *The 1st respondent transferring the suit property to the 2nd and 3rd respondents whereas he was fully aware that the Court had issued a temporary injunction restraining him from transferring the suit property; and*

   d) *the 2nd and 3rd respondents causing the suit property to be transferred whereas they were aware that there was an order stopping the transfer of the suit property.*

6. The appellants maintained that they were willing to pay the balance of the purchase price of Kshs.328,000 as per the terms of the sale agreement, but that the 1st respondent had frustrated the process by failing to transfer the suit property to them.

7. In view of the foregoing, the appellants prayed for:

   i. An order revoking the title deed issued to the 2nd and 3rd respondents in respect of the suit property, and an order directing the Kilifi District Land Registrar to cancel the entries on numbers 4 and 5 on the register of the

title number to the suit property;

ii. ***An order of specific performance to compel the 1st respondent to comply with the agreement of sale dated 10th July 2009, and execute all relevant documents to effect transfer of the suit property in favour of the 1st appellant, failure to which the Deputy Registrar be ordered to execute the transfer and all relevant documents to effect transfer in favour of the 1st respondent;***

iii. ***An order of permanent injunction restraining the respondents from wasting, damaging, alienating, selling, removing, disposing of, taking possession or dealing in any manner with the suit property, except by transferring it to the appellants;***

iv. ***In the alternative to the above orders, the 1st respondent be ordered to refund:***

   a) the deposit of the purchase price of Kshs.572,000/ to the appellants together with interest at court rates from 10th July 2019, being the date of the Agreement, until payment in full; and
   b) loss of investment and profits being equivalent to the current value of the suit property, being the sum of Kshs.6,000,000 as per the valuation report;

v. ***Costs of the suit; and***

vi. ***Such further or other order or reliefs the court deemed appropriate.***

8. The 1st respondent filed a Statement of Defence dated 23rd April 2014. He admitted being in breach of the terms of the agreement, but denied procuring the consent to transfer the suit property. He contended that he received opposition from his children against selling the suit property, and that he conveyed this information to the

appellants, who never responded; and that, relying on Clause 13 of the sale

agreement, which essentially states that in the event of default the purchaser is entitled to be paid a sum equivalent to 10% of the purchase price, the 1st respondent informed the appellants of this, both orally and by written notice, but that he never received a response.

9. The 1st respondent denied receiving a notice of completion and intimation of the alleged readiness to pay the balance of the purchase price from the appellants. He contended that the prayer for specific performance was unjust, and that, if granted, would cause severe hardship since damages had already been provided for in the sale agreement. The 1st respondent therefore prayed that the suit be dismissed with costs.

10. The 2nd and 3rd respondents did not enter appearance, and neither did they file their respective defences despite having been served with summons to enter appearance.

11. The hearing proceeded by way of viva voce evidence. The 1st appellant testified in support of the appellants' case by adopting her witness statement dated 23rd March 2018. She further adopted a list of documents of even date which she produced as ***'PEXH 1-26.'***

12. In her written statement, the 1st appellant reiterated that they (the appellants) entered into a sale agreement with the 1st respondent on 10th July 2009 for the purchase of the suit property for a consideration of Kshs.900,000; that they made payment in instalments and that, as at the time of filing the suit, they had made a total payment of

Kshs.572,000; and

that, on 12th January 2010, the 1st respondent obtained a consent to transfer the suit property from Bahari Land Control Board.

13. The 1st appellant further stated that several follows-ups made with the 1st respondent so as to ensure that the transfer was registered in their favour was futile; that they issued the 1st respondent with a completion notice dated 7th January 2014, which he did not comply with; that, on 12th March, 2014, the 1st respondent informed them that the registration would not be effected since his family had not sanctioned the sale; that the appellants approached the Environment and Land Court for inhibition orders; that, as a consequence, an inhibition was registered against the title to the suit property on 17th April 2014; that, in a twist of events, the suit property was transferred to the 2nd and 3rd respondents on 29th April 2014; and that, therefore, the title to the suit property as transferred to the 2nd and 3rd respondents ought to be cancelled and re-issued in her name.

14. The learned Judge held that the sale agreement dated 10th July 2009 incorporated the Law Society Conditions of Sale (1989 Edition) ***(the LSK Conditions of Sale);*** that Clause 4(7) of the LSK Conditions of Sale provided for the remedies available to either party in the event of default; and that further provision was made for a purchaser who was willing to complete the sale, but was aggrieved by the vendor's default. The trial court observed that, even after the appellants issued the 1st respondent with a completion

notice, the 1st respondent reciprocated with issuing the

appellants with a termination notice, an indication that he was not willing to meet his part of the bargain in the agreement which was valid.

15. It was further held that, the appellants having admitted that they had not paid the full purchase price, they were not entitled to specific performance, which is an equitable remedy; that the appellants were bound to demonstrate that they performed all the terms of the contract; that the only remedy available was a refund of the purchase price already paid, and to general damages of Kshs.4,000,000 having produced a valuation report of.

16. It is the foregoing findings of the learned Judge that precipitated the instant appeal. In a Memorandum of Appeal dated 28th March 2022, the appellants raised the following three (3*)* grounds of appeal, namely:

> ***"i. That the learned Judge erred in fact and in law by holding that the appellants did not meet the threshold for grant of an order of specific performance whereas the appellants' evidence was not corroborated;***
>
> ***ii. That the learned Judge erred in fact and in law by failing to consider the appellants' submissions and authorities on specific performance and hence, arriving at an erroneous decision; and***
>
> ***iii. That the learned Judge's judgement as a whole is not supported by evidence that was tendered in court by the appellants and further the Judge failed to take note that the respondents did not adduce any evidence to oppose the appellants' prayer for an order of specific performance."***

17. The appellants prayed that: the appeal be allowed; and the decision of the trial court be set aside and substituted for the orders as prayed before the trial court.

18. We heard this appeal on 5th May 2025. Learned counsel ***Ms. Abobo*** appeared for the appellants, learned counsel ***Mr. Abubakar*** for the 1st respondent and learned counsel ***Mr. Kago*** for the 3rd respondent. There was no appearance for the 2nd respondent.

19. Ms. Abobo orally highlighted the appellants' submissions dated 23rd February 2023. According to the appellants, only one issue falls for our determination, namely whether the appellants were entitled to an order of specific performance. On this, it was submitted that the duty to lead evidence that an order for specific performance should not issue lay with the person opposed thereto; and that, the respondents not having testified, there was no evidence led to the effect that an order for specific performance should not have issued. Further, that no evidence was equally led to the effect that the 1st respondent was not in a position to convey the land to the appellants. In support of this submission, the appellants referred to the decision of the Environment and Land Court ***(Eboso, J.)*** sitting in Nairobi in ***Julie Mukami Kanyoko & 2 Others vs. Samuel Mukua Kamere & Another*** ***(2021) KEELC 2864 (KLR).***

20. The appellants further relied on the case of ***Andrew Kiremi King'ori vs. Joseph Waweru Njoroge*** ***(2018) KEELC***

460 (KLR); and ***Godfrey Ngatia Njoroge vs. James Ndungu***

***<u>Mungai</u>* (2019) KEELC 2633 (KLR)** where the Environment and Land Court separately held that, for an order of specific performance to be issued, a party should demonstrate that they performed the terms of the contract. It was submitted that there was no dispute that the sale agreement dated 10th July 2009 was valid, a fact acknowledged by the trial court; that, as per the terms of the sale agreement, the appellants paid Kshs.300,000 as an initial deposit; that it was a term of the sale agreement that the balance thereof of Kshs.600,000 was to be paid within 7 days upon successful transfer of the suit property; that, as at the time of filing suit, the appellants had paid a total of Kshs.572,000; and that they are still ready and willing to pay the balance of Kshs.328,000.

21. To the appellants, the 2nd and 3rd respondents are not entitled to the suit property since it was transferred to them during the pendency of the suit and when there was an inhibition order was registered against the suit property; that, since the suit property remains unoccupied, an order of specific performance would not prejudice the respondents as no one would be subjected to eviction thereof; and that, therefore, it was only fair and just that the 1st respondent performed his obligation under the sale agreement.

22. Mr. Abubakar for the 1st respondent did not file written submissions, but sought to submit orally. Counsel admitted that the deposit of Kshs.300,000 was paid in terms of the sale agreement; that the completion date

was 10th October 2009; that the balance of Kshs.600,000 was to be paid on the completion date; that the vendor had certain obligations to

perform before the completion date, that is to procure the consent form from the Land Control Board, clearance certificate, original title deed, PIN certificate, and national identity card; and to execute the transfer forms, which was not done.

23. Mr. Abubakar contended that the Agreement did not specifically address the issue of what happens when a vendor does not comply, but that, instead, it incorporated the LSK Conditions of Sale; that it was incumbent upon the appellants to issue a completion notice after the completion date, but that this was done 5 years later on 7th January 2014; and that the Agreement terminated by 10th October 2009 by dint of effluxion of time; and that, therefore, the completion notice of 7th January 2014 was of no legal consequence.

24. It was further submitted that the 1st respondent was, and still is, willing to refund the purchase price, but the appellants were not entitled to an order of specific performance for failure to issue the termination notice in accordance with the LSK Conditions of Sale.

25. On the award of damages, counsel submitted that there was no legal basis upon which the trial court made an award of Kshs.4,000,000, and that the same ought to be set aside; that the prayer for revocation of title was not a prayer sought before the superior court, and that that prayer ought not to be introduced on appeal. We were accordingly urged to dismiss the appeal.

26. Mr. Kago appearing on behalf of the 3rd respondent highlighted their written submissions dated 3rd May 2025. Counsel submitted that the 1st respondent issued a letter dated 12th March 2014 notifying the appellants of his inability to comply with the terms of the sale agreement and of his intention to invoke Clause 13, which provided for a penalty that in the event of a default, the vendor was liable to pay damages of 10% of the purchase price, which the 1st respondent was willing to pay.

27. It was submitted that an award of specific performance is an equitable remedy, and that it would not be issued where an award of damages is adequate as was held by the Supreme Court of Uganda in ***Manzoor vs. Baram (2003) 2 E.A. 580,*** which was cited with approval by this Court in ***Licinus Investment Limited vs. Dalpiaz (2023) KECA 465 (KLR)***; and that, additionally, an order of specific performance would also not issue where it is apparent that it will cause severe hardship to the defendants. In this regard, reference was made to the ***Halsbury's Law of England Volume 44 (1), 4th Edition (Re - issue)* at *paragraph 840***, which was cited by the superior court in the decision of ***Reliable Electrical Engineers (K) Limited vs. Mantrac Kenya Limited (2006) KEHC 2855 (KLR).***

28. It was contended that the remedy of specific performance is also not available to a party who has not completed his part of the agreement; that, by the appellants seeking alternative prayer for damages, interest and refund, was

an admission that damages are an adequate remedy in the circumstances;

that the trial court cannot therefore be faulted for granting the alternative prayer; that, for this reason, the appellants cannot have their cake and eat it, by seeking an alternative prayer and, when the same is granted, turn around and denounce it (the alternative prayer) and ask for grant of the main prayer. For this proposition, reliance was placed on this Court's decision in ***Alex Wainaina t/a John Commercial Agencies vs. Janson Mwangi Wanjihia (2015) KECA 750 KLR)*** where it was held that *"...it is trite law that where relief is prayed for in the alternative, a court of law has to choose, on the facts, whether to grant the main relief or the alternative and give reasons either way. Both ought not to be granted in a blanket form."*

29. It was also submitted that it would be difficult to enforce specific performance at this stage since the suit property changed hands to the 2nd and 3rd respondents, who settled on the land for over 10 years; and that to evict them from the property would cause them untold suffering and hardship.

30. Mr. Kago concurred with Mr. Abubakar that the prayer for revocation of the title was not sought before the trial court and that, this being an appellate court, the same cannot be considered at this juncture. We were urged to uphold the decision of the trial court and consequently dismiss the appeal.

31. We have considered the record of appeal, the respective parties' submissions, the authorities cited and the law. We

are conscious that our duty as a first appellate court is to re- appraise and re-analyse the evidence on record and draw

inferences of fact thereon as stipulated under ***rule 31(1)*** of this ***Court's Rules, 2022***. Even as we exercise this duty, we are aware that we should give allowance to the fact that we did not hear or see the witnesses testify. Our mandate was further highlighted by this Court in the case of ***Mwangi vs. Wambugu*** ***(1984) KECA 13 (KLR)*** as follows:

> ***"A Court of Appeal will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence or the judge is shown demonstrably to have acted on the wrong principles in reaching the finding, and an appellate court is not bound to accept a trial judge's finding of fact if it appears either that he has clearly failed on some material point to take into account of particular circumstances or probabilities material to an estimate of the evidence, or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."***

32. In ***Kenya Ports Authority vs. Kuston (Kenya) Ltd (2009) 2 EA 212,*** the role of a first appellate court was explained as follows:

> ***"This being a first appeal to this Court, the duty of the court, is to reconsider the evidence, evaluate and draw its own conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect…"***
>
> See also ***Selle vs. Associated Motor Boats Co. Limited & Others*** ***(1968) EA 123*** and ***Peters vs. Sunday Post Limited*** ***[1958] EA***

424.

33. Having those principles in mind, we have identified two issues that fall for our determination, namely whether the

appellants were entitled to an order of specific performance; and whether the award of general damages for breach of contract was merited.

34. The contested issue in this appeal arises from breach of the sale agreement dated 10th July 2009 and executed between the appellants and the 1st respondent. The principle that contracts freely and voluntarily entered into must be honoured remains central to the law of contract. This principle, often captured under the phrase freedom of contract, recognises that persons, through voluntary exchange, should take responsibility for the promises they make, and have their contracts enforced. Every party to a binding agreement who is ready to carry out his own obligation under it has a right to demand from the other party, so far as is possible, a performance of his undertaking in terms of the contract.

35. It is common ground that the appellants and the 1st respondent entered into a sale agreement dated 10th July 2009 for the sale of the suit property for a consideration of Kshs.900,000. It is also uncontroverted that, out of the agreed purchase price, the appellants paid a total of Kshs.572,000. The appellants maintained that they were ready and willing to pay the balance of the purchase price. They contended that, by failing to execute the transfer forms in respect of the suit property timeously, the 1st respondent repudiated the sale agreement to their detriment.

36. On his admission, the 1st respondent stated that he was unwilling to complete the part of his bargain on the grounds that his family opposed sale of the suit property and, to this end, he sent a termination notice to the appellants dated 12th March 2014. He further contended that the notice of completion of the sale dated 7th January 2014 was time- barred having been sent 5 years after the period in which the completion notice ought to have been issued.

37. It is instructive that Clause 12 of the sale agreement (hereafter the Agreement) incorporated the LSK Conditions of Sale as long as *they are not inconsistent with the terms of the sale agreement*. Turning to the specific provisions of the Agreement, it was a requirement under ***Clause 4*** that the purchasers, in this case the appellants, would pay a deposit of Kshs.300,000. ***Clause 5*** provided that the balance of Kshs.600,000 would become payable within 90 days from the date of compliance. The compliance contemplated was stipulated in ***Clause 6,*** which provided that the vendor, in this instance the 1st respondent, was to obtain the necessary consents from the Land Control Board. In this respect, it is the vendor who would issue a notice of completion in the event the purchaser failed to comply with payment of the balance of the purchase price within 90 days from obtaining the consent.

38. A perusal of the Agreement does not disclose a specific provision on the period within which a purchaser was to

issue a completion notice upon compliant. In our view, the fall back would be the LSK Conditions of Sale, which were

incorporated into the Agreement. The proviso to ***Clause 4(7)***

of the LSK Conditions of Sale provides thus:

> ***(7) This sub–condition applies unless a special condition provides that time is of the essence in respect of the completion date: -***
>
> ***a) In this condition "completion notice" means a notice served in accordance with this sub– condition;***
>
> ***b) ………………***
>
> ***c) Upon service of a completion notice it shall become a term of the contract that the transaction shall be completed within twenty - one (21) days of service and in respect of such period, time shall be of the essence of the contract.***

39. The above provision is clear that, upon service of a completion notice, it shall then be a term of the contract that the transaction would be completed within 21 days. The appellants issued a completion notice dated 7th January 2014. The 1st respondent was therefore under a duty to complete the transaction on or before 28th January 2014.

40. However, the 1st respondent responded by issuing a termination notice dated 12th March 2014. In the letter, he offered to refund the deposit of Kshs.300,000 towards the purchase price and the sum of Kshs.200,000 paid as land rates, making the total proposed refund to be Kshs.500,000. Objectively viewed, the conduct of the 1st respondent as at 12th March 2014 constituted conduct

from which it can be reasonably inferred that he regarded himself as no longer bound by the terms of the Agreement and that, therefore, he had no intention of meeting his part of the bargain.

41. The Agreement provided that the consequence of default on the part of the 1st respondent was payment of damages to the appellants, being an equivalent sum of 10% of the purchase price. In his termination notice of 12th March 2014, the 1st respondent, well knowing that he was in default, offered to refund a total sum of Kshs.500,000 to the appellants and asked for their account bank details. The appellants neither responded to the termination notice nor provided their bank account details. Instead, they filed suit claiming, among others, an order of specific performance, which the appellants fault the trial Judge for not awarding.

42. An award of specific performance is in principle an equitable relief which lies within the court's discretion to grant. It is issued where common law remedies, such as pecuniary damages will be inadequate. An order of specific performance mainly enforces the terms of an executed contract and, as in the present case, contracts relating to land or interest therein. We respectfully concur with the findings of this Court in ***Michael Murithi Muthii vs. Cecilia Wanjiru Cooper & 3 others*** ***(2021) KECA 964 (KLR)*** where it was held that:

> ***"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. (See United India Insurance Co. Ltd vs East African Underwriters (Kenya) Ltd [1985] E.A 898).”

43. This Court in the case of ***<u>Caltex Oil (Kenya) Limited vs. Rono Limited</u> (2016) KECA 457 (KLR)*** cited with approval the decision of ***<u>Gharib Suleman Gharib vs. Abdulrahman Mohamed Agil</u>*** **LLR No. 750 (CAK) *Civil Appeal No. 112 of 1998 (UR),*** and held that:

> ***“The jurisdiction to order specific performance is based on the existence of a valid and enforceable contract and being an equitable relief, such relief is more often than not granted where the party seeking (sic) it cannot obtain sufficient remedy by an award of damages the focus being whether or not specific performance will do more perfect and complete justice than an award of damages.”***

44. In ***<u>Thomas Openda vs. Peter Martin Ahn</u> (1984) KECA 25 (KLR)*** this Court set out the condition precedent for enforcement of a specific performance relief as follows:

> ***“Now it is correct that the purchaser must pay or tender at the time and place of completing the sale the purchase price to the seller or such person as he directs. This is a condition precedent for specific performance of the agreement and it is the***

form in which an order for specific performance of such an agreement is made.”

45. Flowing from the above cited findings of this Court, with which we also concur, it is trite that an order of specific performance is an equitable remedy, which is awarded where an award of damages or adequate compensation would not be reasonable. Further, it is only granted in circumstances where there is a valid and enforceable agreement, and where the aggrieved party is seeking the equitable relief with clean hands.

46. It is evident from the appellants' own conduct that time was not considered to be of essence in fulfilling their obligation. They did not demonstrate that they made any effort to complete payment of the balance of the purchase price timeously. It was an unequivocal term of the Agreement that the balance thereof was to be paid within 90 days after compliance with the obtaining of consent from the Land Control Board as stipulated under ***Clause 6*** of the Agreement. The appellants have conceded that they were in receipt of the consent from Bahari Land Control Board as at 12th January 2010. On this basis they were under a duty to pay the balance of the purchase price within 90 days thereof. Nothing was presented before the trial court to explain what hindered the appellants from complying. The failure to pay the balance of the purchase price within time rendered the agreement of no force and effect, and as a consequence, the agreement lapsed *ipso facto.* It then follows that, as at the time they pursued their complaint in court by filing the suit, the contract had long lapsed and could not be revived for enforcement.

47. In ***Sisto Wambugu vs. Kamau Njuguna* (1983) KECA 69 (KLR),** this Court rendered itself as follows in regard to a purchaser who does not complete the payment on time:

> ***"Contracts for the sale of land commonly give the vendor the right to rescind the sale if the purchaser does not pay on the appointed day. The law is that; this right can only be exercised where time is of essence or if it is not after a party who is in default has given reasonable notice to the defaulting party making time of essence".***

48. The question then that we must answer is whether an order of specific performance was an appropriate remedy in the circumstances. As observed above, an order of specific performance is at the court's discretion, and there are circumstances under which the court may refuse to grant it. When a court is exercising its discretion, it should do so not capriciously or upon application of the wrong principle, but with the aim of preventing occasioning an injustice to either party.

49. The Agreement was entered into on 10th July 2009 and the dispute was filed before the Environment and Land Court on 7th April 2014, 5 years after the execution of the Agreement, and almost 16 years as at the time of determination of this appeal. We cannot ignore the economic fact of inflation from the time the sale agreement was executed or the market trends of immovable property in the Kenyan real estate which often tend to appreciate as opposed to depreciate. A property which was being offered for Kshs.900,000 in 2009 cannot

be

of the same value 16 years later. To ask the appellants to pay a paltry balance of Kshs.328,000 would certainly cause an injustice to the 1st respondent, more so noting that he was not at fault *ab initio*.

50. In ***Zimbabwe Express Services (Private) Limited vs. Nuanetsi Ranch (Private) Limited*** **SC21/09,** the Zimbabwe Supreme Court declined to order specific performance of a contract whose contract price had been determined in 2003, and had been eroded into nothing by inflation at the time specific performance was sought. In declining to order specific performance, the Court was of the view that, were it to grant specific performance, the appellant in that matter would take delivery of 280 heifers for a very small amount of money. In other words, the court reasoned that the appellant would take possession of a herd of cattle worth a considerable sum of money for which it would have paid virtually nothing.

51. In this case, the appellants were not entitled to an order of specific performance considering that they breached the essential terms of the Agreement, namely the want of payment of the purchase price timeously. Even if we were to find that specific performance was the proper order to issue, it is evident that the suit property was sold and it would be practically impossible for the 1st respondent to comply with that order. By virtue of the suit property changing hands to third parties, it dissipated and no longer existed in the name of the 1st respondent and, therefore, there would be nothing capable of being

transferred to the appellants by the 1st respondent.

52. The 1st respondent having terminated the Agreement, and it is not disputed that he was ready and willing to refund the advanced money, the only effective remedy obtaining to the appellants would be to order the 1st respondent to refund the amount already paid on account of the purchase price. In ***George Njenga Kagai vs. Samuel Kabi Njoroge & another*** ***(2019) KECA 222 (KLR)*** where this Court referred to its own decision of ***Syedna & Others vs. Jamil's Engineering Co. Limited*** ***(1973) 244,*** held that where the contractual terms have not been fulfilled, the seller should return the money paid. This Court delivered itself thus:

> ***"The general principles would appear to be that where a buyer had paid but is unable to complete a contract, the seller upon rescinding it may sue for damages but must return any money that may have been paid. The general principle however must yield to the intention of the parties…..if the payment was part payment on default and reasons the seller must return the money."***

53. The undisputed circumstances obtaining herein would usher in the invocation and operation of the equitable principle to demand that it would be unequitable for the 1st respondent having been the erstwhile owner of the suit property, and perhaps selling it to the 2nd and 3rd respondents for a profit, to keep and/or retain the advanced purchase price. We therefore find and hold that the 1st respondent having received the purchase price as consideration for sale of the suit property and which, as

we have already alluded to, that it would be impractical to transfer the suit property, the only

effective remedy in the circumstances of this appeal is an order of refund of the purchase price already paid in the sum of Kshs.572,000 with interest at court rates from 10th July 2009. We therefore find that no good reasons have been advanced to warrant interference with this finding of ***Odeny, J.***

54. As to the claim of general damages, the plea by the appellants was that they were entitled to Kshs.6,000,000, being the alleged loss of investment and profits as an equivalent of the current value of the suit property. The appellants relied on a valuation report. On our part, we have not had sight of the valuation report as it is not one of the documents which forms part of the record of appeal before us.

55. The trite principle, which is well settled in law, is that general damages are not recoverable in disputes of alleged breach of contract. In ***Kenya Tourist Development Corporation vs. Sundowner Lodge Limited*** ***(2018) KECA 312 (KLR),*** this Court had this to say regarding general damages for breach of contract:

> ***"…as a general rule general damages are not recoverable in cases of alleged breach of contract and that has been the settled position of law in our jurisdiction, and with good reason. In DHARAMSHI vs. KARSAN [1974] EA 41, the former Court of Appeal held that general damages are not allowable in addition to quantified damages with Mustafa J.A***

expressing the view that such an award would amount to duplication….

> ***The same situation applies to the case at bar in that the respondent having quantified what it considered to have been the loss it suffered, and gone on to particularize the same, there would be absolutely no basis upon which the learned Judge would go ahead to award the totally different, unrelated, unclaimed and unquantified sum of Kshs.30 million merely because he believed that the respondent "had suffered serious damages" (sic).***

56. In any case, the justification of asking the trial court to award Kshs.6,000,000 was for alleged loss of investment and profits. In our considered view, this was speculative and more of a plea of special damages, for which the appellants ought to have led evidence to prove the alleged losses incurred. In the absence of such proof, the appellants were not entitled to be awarded the sum of Kshs.4,000,000. In the circumstances, this award is hereby set aside.

57. However, cognizant that no real damage was suffered, but that there is a semblance of an infraction committed against the appellants, we are of the view that they are deserving of nominal damages. The Black's Law Dictionary 9th edition defines 'nominal damages' as ***"token sum of money awarded to a plaintiff whose legal right has been infringed, but who has not suffered any***

substantial loss or harm." It is therefore a small sum of money that is

awarded to a plaintiff in recognition that their legal right has been violated. The damages are awarded as a token in affirmation that a wrong occurred.

58. In ***Kimakia Co-operative Society vs. Green Hotel (1988) KECA 114 (KLR)***, this Court held, inter alia, that:

> ***"Where damages are at large and cannot be quantified, the court may have to assess damages upon some conventional yardstick. But if a specific loss is to be compensated and the party was given a chance to prove the loss and he did not, he cannot have more than nominal damages."***

59. In this case, whereas the appellants will get a refund of the
deposit of the purchase price, they ultimately have suffered some psychological anguish as they anticipated owning the suit land. On the other hand, they have succeeded to the extent that they will be refunded that part of the purchase price already paid but, in essence, and this notwithstanding and for the reasons afore-stated in this Judgment, they are not legally entitled to compensation in general damages.

60. In view of the fact that nominal damages are a token award, we are of the view that an award of Kshs.100,000 is sufficient in the circumstances. *(From Judge Murgor, Why Kshs.100k, any precedence for this?*

61. Ultimately, we conclude that the appeal has no considerable merit, save for the order of setting aside the award of Kshs.4,000,000 as general damages and

substituting

therefor an order for an award of nominal damages in the sum of Kshs.100,000.

62. Consequently, the appeal is hereby dismissed. Considering the background and nature of the dispute between the parties, we order that each party bears their own costs.

Dated and delivered at Mombasa this 5th day of December, 2025.

A. K. MURGOR

....

JUDGE OF APPEAL

DR. K. I. LAIBUTA CArb, FCIArb.

....

JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

....

JUDGE OF APPEAL

I certify that this is the true copy of the original

Signed

DEPUTY

REGISTRAR

THE COURT OF APPEAL
JUDICIARY
REPUBLIC OF KENYA