



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI
ELC APPEAL NO. E028 OF 2023

EMILY JANE WAWUDA MWADIME
.....**APPELLANT**

-VERSUS-

JUMA KARISA MASHA
RESPONDENTS

(Being an appeal arising from the judgment delivered by Hon. J.M. Kituku, S.P.M., on 6 December 2022)

JUDGMENT

1. The Appellant herein, aggrieved by the judgment of Hon. J. M. Kituku, SPM, delivered on 6 December 2022 in **Kilifi Civil Case No. 244 of 2019**, filed a Memorandum of Appeal dated 18

December 2023, challenging the said judgment on the following grounds:

- a) That the learned honorable magistrate erred both in law and in fact by dismissing and/or disregarding the Plaintiff's suit.**
- b) That the honourable magistrate failed in law and in fact by stewing facts in favour of the respondent and, as a result, found the same in favour of the respondent.**
- c) That the honourable magistrate erred both in law and fact by failing to appreciate that the respondent had sold the suit land and released possession of the suit premises to the appellant more than 10 years ago.**
- d) That the honorable magistrate erred in law and in fact by failing to find that the appellant had developed the suit premises and had proved her case on the balance of probabilities.**

e) That the honorable magistrate erred in law and in fact by relying on his own summaries instead of the evidence.

2. The Appellant therefore prays that the judgment and decree of the honorable magistrate be set aside and that the relief sought by the plaintiff in the said court be allowed as prayed; and that the costs of this appeal and the suit in the superior court (sic) be awarded.
3. The appeal was canvassed by way of written submissions.
4. The Appellant contended that the trial Magistrate erred both in law and in fact by dismissing her suit despite clear evidence that she had substantially performed her obligations under the 3rd October 2010 sale agreement, having paid Kshs. 100,000 toward the Kshs. 130,000 purchase price, and peacefully occupied the property for over ten years.
5. She argued that the trial court had wrongly disregarded documentary and oral evidence, misjudged the legality of her registration by the Mwanzo Mpya Committee, and failed to apply equitable principles, including the constructive trust enshrined in Section 3(3) of the Law of Contract Act and

elucidated in **Macharia Mwangi Maina & 87 Others v Davidson Mwangi Kagiri [2014] eKLR.**

- 6.** The Appellant added that the Magistrate misapplied the Law Society Conditions of Sale, which were not incorporated into the sale agreement, and ignored the Respondent's failure to issue a completion notice, thereby rendering the rescission invalid. She highlighted that, acting in good faith, the Appellant sought to pay the balance, while the Respondent evaded her and later unjustly sought to reclaim the land. She therefore urged the Court of Appeal to set aside the lower court's judgment, grant her ownership of Plot No. 1550, Kilifi Township, and award a permanent injunction and costs.
- 7.** On his part, the Respondent submitted that the appeal was entirely without merit and should be dismissed. He contended that the trial Magistrate had properly evaluated the evidence, correctly applied the law, and reached a sound decision supported by the record, finding the Respondent's testimony credible and consistent with the documentary evidence.
- 8.** The Respondent argued that the lower court correctly applied the Law Society Conditions of Sale because the sale agreement

lacked a specific completion date, and that the Appellant failed to issue the mandatory 21-day completion notice, thereby disentitling her from equitable relief.

9. Further, he submitted that the Appellant had not paid the purchase price in full and could not rely on equity while in breach, and that the trial court's factual findings and application of law were unimpeachable. Consequently, the Respondent urged the Court of Appeal to dismiss the appeal, uphold the lower court's judgment, and award costs to the Respondent.

10. As this is a first appeal, I am mindful that, as set out in the decision of **Selle & Another versus Associated Motor Boat Co. Ltd & Others (1968) EA 123**, this court's duty is to reconsider the evidence, evaluate it, and draw its own conclusions of fact and law. This court will depart from the trial court's findings only if they were not based on the evidence on record; where the trial court is shown to have acted on wrong principles of law, as held in **Jabane v Olenja (1968) KLR 661**; or where its discretion was exercised injudiciously, as held in **Mbogo & Another versus Shah (1968) EA 93**.

11. It is therefore necessary at this point to set out the nature of the claim before the trial court. The Appellant commenced the suit by filing a plaint dated 12 June 2019, in which he sought, inter alia, a permanent injunction restraining the Respondent from selling, trespassing, transferring, and/or in any other way dealing with all that unregistered land identified as Plot No. 1550, situated at Kilifi Township, within Kilifi County (the suit property); and that the Appellant be allowed to deposit the sum of Kshs. 30,000 owed to the Respondent in the court, and the Respondent be at liberty to collect.

12. The Appellant's case was that she purchased the suit property from the Respondent under a sale agreement dated 3rd October 2010 for Kshs. 130,000/-. She paid an initial deposit of KShs. 25,000/- and subsequent installments of Kshs. 30,000/- on 30th October 2010 and Kshs. 45,000/- on 27th November 2010. She averred that the Respondent used a signature different from the one on the sale agreement to acknowledge receipt of the payments. The Appellant further stated that she attempted to pay the remaining balance of

Kshs. 30,000/- but was unable to do so for an extended period, after which the Respondent refused to accept the balance.

13. The Respondent filed a statement of defense dated 3rd September 2019, admitting that the Appellant had paid Kshs. 100,000 but had refused to pay the remaining Kshs. 30,000/-. He stated that the Appellant declined to attend the chief's summons to resolve the matter and that on 18th June 2018, she reported him to the Kilifi CID for obtaining money by pretense. It was agreed that the Respondent would refund the money, but when he appeared on 21st March 2019 with the refund, the Appellant did not appear.

14. The Appellant testified as PW1 and called 4 witnesses. She adopted her written statement dated 12th June 2019 and relied on the documents listed in the documents exhibited as PEXH 1-7. In cross-examination, she told the court that the suit property was vacant and in both parties' names as a result of the suit.

15. PW2 - Phylyster Ningala Mtepe, PW3- Nicholas Jilani Ngala, PW4-Rose Mwaka Rungua and PW5 Francis Deche Mwangata equally adopted their witness statements all dated 12th June

2019. PW2, 3, and 4 witnessed the sale agreement. PW2, 3, and 4 maintained that the Appellant was willing to clear the balance, but the Respondent declined to accept payment.

16. The Respondent testified as DW1 and called one witness, Patrick Samini Yaa, as DW2. The Respondent adopted his witness statement filed on 28th October 2019 and produced the documents listed as DEXH 1-3. He stated that he had three witnesses when he signed the sale agreement, including DW2. He noted that the Appellant's husband (PW3) made the payment, but that PW3 stopped and became hostile toward him. He maintained that he could not accept payment after such a long period and confirmed that he still lived on the suit property.

17. DW2 confirmed drafting the sale agreement, but was not aware whether the balance had been cleared. He, however, noted that at one point, the Appellant declined to pay the balance, insisting that the suit property belonged to a third party, one Mtana Lewa. He summoned the two parties and referred them to the police.

18. Ultimately, the trial court dismissed the Appellant’s case, stating that the same was premature.

Analysis and Determination

19. Having considered the grounds of appeal, the submissions filed in this appeal, and the record of appeal, I find that the Appellant's primary relief is specific performance of the sale agreement dated 3 October 2010, or an order recognizing her as the owner of Plot No. 1550, Kilifi Township.

20. It is settled law in Kenya that specific performance is an equitable remedy and will be granted only where the party seeking it has substantially performed its obligations under the contract and is ready and willing to perform the remainder. The law further recognizes that equity will not assist a party who is in breach.

21. It is also a trite principle that he who alleges must prove. Section 107(i) of the Evidence Act provides that:

“Whoever desires any court to give Judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

22. In the present case, there is no doubt that an agreement for sale existed between the parties. It is also uncontested that the consideration was partly paid, leaving a balance of Kshs. 30,000/-.

23. The Appellant claimed that she could not reach the Respondent in December 2010 to pay the balance until sometime in April 2011, when he visited his Kilifi house. The Respondent declined to accept the payment. The Appellant further stated that she registered herself as the owner of the suit property and is recognized as such by the Mwanzo Mpya Committee, which is responsible for the plots in the area.

24. Based on the sale agreement drafted by the assistant chief (DW2), it is clear that a deposit was paid as alleged and that the balance of Kshs. 105,000 was to be paid by check. Although there was no provision for payment in installments, the Respondent admitted in cross-examination that he agreed to be paid in installments. The Defendant asserted that the Appellant refused to clear the balance despite being summoned by the area chief regarding the matter. He exhibited the summons from the area assistant chief dated 6

February 2013. He also showed a copy of a police requisition summons following a claim against him for obtaining by pretense.

25. The totality of the above evidence does not favor the Appellant's case. The evidence demonstrates the Appellant's reluctance to clear the balance, thereby contributing to her failure to perform. On a balance of probabilities, the summons issued by the area chief and the police department establishes that the Appellant was unwilling to clear the balance because she believed the Respondent did not own the suit property. Any contrary evidence did not shake the Respondent's evidence to that effect.

26. Regarding equitable principles, while constructive trusts or reliance on reasonable-faith payments may arise in certain circumstances, such principles cannot replace the statutory requirement to complete the sale agreement and obtain lawful possession. The principle that contracts freely and voluntarily entered into must be honored remains central to contract law. This principle, often captured by the phrase freedom of contract, recognizes that persons, through voluntary exchange,

should take responsibility for the promises they make and have their contracts enforced. Every party to a binding agreement that is ready to carry out its own obligation under it has the right to demand, so far as is possible, performance of the other party's undertaking in accordance with the contract. See **Macho & another v Athuman & 2 others [2025] KECA 2078 (KLR)**:

27. In **Thomas Openda v Peter Martin Ahn (1984) KECA 25 (KLR)**, the Court of Appeal set out the condition precedent for the enforcement of 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.”

28. Building on the above-cited findings, with which I also concur, it is trite that an order of specific performance is an equitable remedy awarded when an award of damages or adequate compensation would be unreasonable. It is granted only in circumstances where there is a valid and enforceable

agreement and where the aggrieved party seeks the equitable relief with clean hands.

29. The Appellant did not produce evidence that she tendered the full balance promptly, nor did she show that the Respondent acted in bad faith to obstruct payment.

30. It follows that the Appellant cannot claim specific performance of the agreement while in breach of it. Her claim is therefore unsustainable both in law and in equity. The Appellant failed to discharge the burden of proof required to support her case on a balance of probabilities, and the trial court was proper in dismissing her claim.

31. Accordingly, the appeal lacks merit and is dismissed. The Appellant shall pay the costs of this appeal.

Dated, signed, and delivered electronically in Malindi on December 17, 2025.

E. K. MAKORI

JUDGE

In the presence of:

Ms. Buluma for the Appellant

Mr. Mongare, the Respondent

Happy: Court Assistant