

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT
KAKAMEGA

ELC APPEAL NO. E035 OF 2024

RAJAB RAMADHAN SHIRAKU.....
APPELLANT

VERSUS

MACDONALD MAPUONI WALUCHIO.....1ST
RESPONDENT

IBRAHIM WAMBETSA WANGALWA.....2ND
RESPONDENT

(Being an appeal against the judgment of Hon. T.A Obutu, (CM) delivered on 11th July 2024 in Mumias ELC Case No. E054 of 2021)

JUDGMENT

Introduction

1. This appeal arises from the judgment of Hon. T. A. Obutu (CM) delivered on 11th July 2024 in Mumias ELC Case No. E054 of 2021. In the impugned judgment, the trial court held that the plaintiff had proved the existence of a valid sale agreement with the 1st

defendant, entered judgment in favor of the plaintiff and ordered specific performance by transfer of one acre of land from parcel No. EAST/WANGA /ELUCHE/1232 to the plaintiff, and in default ordered refund of the purchase price of Kshs. 300,000/= with interest at court rates.

Background

2. The suit before the trial court was commenced by the plaintiff, Macdonald Mapuoni Waluchio, vide a further amended plaint dated 12th October 2022 against the 1st defendant, Ibrahim Wambetsa Wangalwa, and the 2nd defendant, Rajab Ramadhan Shiraku, in relation to land parcel No. EAST/WANGA/ELUCHE/1232 (suit property).
3. The plaintiff pleaded that on 12th August 2014, he entered into a sale agreement with the 1st defendant for the purchase of one acre of land to be excised from the suit property at a consideration of Kshs. 300,000/=: which he alleged to have paid in full. He further averred that he was granted vacant possession of the purchased

portion of land and remained in peaceful occupation until the year 2020 when a dispute arose.

4. The plaintiff stated that the 2nd defendant, who was the administrator of the estate of the late Ramadhan Misikoyo Shikalu, began interfering with his occupation of the land, issued a demand for his eviction and allegedly destroyed developments he had made on the land including a toilet, fence and trees.
5. Consequently, the plaintiff sought judgment against the defendants for refund of Kshs. 340,000/- being the alleged value of the destroyed items, an order of specific performance for the transfer of one acre out of land parcel No. EAST/WANGA/ELUCHE/1232, together with costs, interest and any other relief the court deemed fit.
6. In response to the plaint, the 1st defendant filed a statement of defence dated 22nd November 2022 in which he stated that the transfer of his interest in the subject land to the plaintiff was done with the full participation and consent of the 2nd defendant as per the

sale agreement dated 12th August 2014, thereby absolving him of any liability.

7. The 1st defendant denied responsibility for the alleged actions of the 2nd defendant and contended that any claims by the plaintiff for compensation or specific performance to transfer one acre from land parcel EAST/WANGA /ELUCHE/1232 ought to be directed to the 2nd defendant, arguing that his inclusion in the suit was a misjoinder. The 1st defendant further averred that the plaint disclosed no cause of action against him and prayed that the plaintiff's suit against him be dismissed with costs.

8. The 2nd defendant also filed a statement of defence dated 18th July 2022 in which he alleged being the caretaker of land parcel EAST/WANGA/ELUCHE/1232. He stated that he had never entered into any agreement with the plaintiff or the 1st defendant, and that the plaintiff was a stranger to him. That the 1st defendant had only leased the land and that the agreement and assistant chief's letter filed were allegedly forged. He stated that a similar matter had been previously

determined in Succession Cause No. 491 of 2018 in his favor and prayed for the dismissal of the plaint and that status quo on the ground be maintained.

9. The suit proceeded to hearing through *viva voce* evidence. The plaintiff testified as the only witness in support of his case. The 1st and 2nd defendants similarly testified as the only defence witnesses.

Plaintiff's evidence

10. PW1, Macdonald Mapwoni Waluchio, adopted his witness statement as his evidence in chief. He also produced the documents contained in his list of documents filed on 3rd September 2021 and further list of documents dated 12th October 2022, including copies of sale agreements dated 3rd April 2014 and 12th August 2014, an official search, a copy of letter from the assistant chief and documents relating to succession proceedings.

11. His testimony was that he purchased one acre of land from the 1st defendant, who had earlier bought the portion from the 2nd defendant. That the 2nd defendant

was present and witnessed the agreement between himself and the 1st defendant and that he thereafter took possession of the land and utilized it for several years.

12. That he remained in possession of the land for about seven years until the 2nd defendant allegedly interfered with his occupation, chased him away and destroyed developments he had made on the land including trees, a fence and crops. He stated that the 2nd defendant later obtained letters of administration in respect of the estate of the registered proprietor and should therefore transfer the portion he had purchased.

13. On cross-examination, he maintained that he had constructed a pit latrine on the land, planted trees and cultivated crops before being evicted. He further stated that the 1st defendant did not interfere with his occupation and that the 2nd defendant was the one who chased him away and destroyed his developments. He also produced a letter from the area chief indicating that he was recognized as a purchaser and was to be allocated his portion upon completion of succession

proceedings. That marked the close of the plaintiff's case.

1st defendant's evidence

14. DW1 was Ibrahim Wambetsa Wangalwa. He adopted his witness statement dated 22nd November 2022 as his evidence in chief and produced the sale agreement dated 12th August 2014 and a demand letter addressed to the 2nd defendant as his exhibits. He stated that he had purchased a portion measuring one acre out of land parcel No. EAST/WANGA/ELUCHE/1232 from the 2nd defendant on 3rd April 2014 and subsequently sold the same to the plaintiff on 12th August 2014, whereupon the plaintiff took possession.

15. That the 2nd defendant, who was the administrator of the estate of his late father, had witnessed the sale agreement and that the plaintiff remained in peaceful occupation until the year 2020 when the 2nd defendant allegedly began interfering with the plaintiff's use of the land and preventing him from cultivating it.

16. On cross-examination, he reiterated that he had purchased the land from the 2nd defendant, and subsequently sold to the plaintiff. That the transaction was legitimate, and he never leased the land from Rajab. That disputes raised by the 2nd defendant arose after the plaintiff had occupied the land for more than six years. The 1st defendant's case was then closed.

2nd defendant's evidence

17. DW2 was Rajab Ramadhan Shiraku, He produced the documents filed in his list of documents dated 18th July 2022; being a copy of the ruling dated 25th June 2021 delivered in Succession Case No. 491 of 2018 and a copy of title deed for the suit land. He testified that the succession cause concerning his late father's estate had been concluded, in which the plaintiff was an objector.

18. He acknowledged that Ibrahim (the 1st defendant) sold the land to the plaintiff but denied ever witnessing the sale or entering into a lease agreement with him. He admitted that the land is now registered in his name

following the conclusion of succession, and that he had evicted the plaintiff, without a court order, because the succession had been finalized

19. During cross-examination, he confirmed the existence of the sale agreement between him and the 2nd defendant but denied signing or thumbprinting it, denied filing any police report for forgery, and maintained that the plaintiff's occupation of the land was as a lessee and not as a purchaser. The 2nd defendant's case was then closed.

20. Upon considering the pleadings, witness statements, evidence adduced at trial, and submissions filed by the parties, the trial court held that the plaintiff had established a valid claim to the one-acre portion of land form parcel No. E/WANGA/ELUCHE/1232. The court found that the sale agreement executed between the 1st defendant and the plaintiff was valid, and that the 2nd defendant, had completed the succession but had failed to transfer the land to the plaintiff as per the agreement.

21. The court further held that the plaintiff had lawfully occupied the land, that the eviction by the 2nd defendant was unauthorized, and therefore, ordered specific performance requiring the transfer of the land or, in default, refund of the purchase price of Kshs. 300,000/= with interest. The trial court dismissed claims on alleged costs of destroyed items for want of proof, and directed that the defendants bear the costs of the suit.

22. Having been dissatisfied with the trial court's decision, the appellant lodged the present appeal vide a Memorandum of appeal dated 22nd July 2024, citing the following six grounds of appeal:

a. THAT the trial Magistrate erred law in not finding that the appellant was not a party to the agreement dated 12th August 2014 by the 2nd respondent.

b. THAT the learned trial Magistrate erred in law in failing to consider the evidence of the appellant.

c. THAT the learned trial Magistrate erred in law in finding the appellant to refund

purchase price of a contract he was not a party to.

d. THAT the learned trial Magistrate erred in finding that the 2nd appellant do perform a specific performance by transfer of EAST WANGA / ELUCHE/1232 when the appellant is a stranger to the respondent.

e. THAT the learned Magistrate erred in finding that the 1st respondent and 2nd respondent be borne by the appellant when the appellant is a stranger to the contract.

f. THAT the learned Magistrate erred in law by failing in law to find that the agreement dated 12/8/2024 cannot be enforced as per the law of contract.

23. Consequently, the appellant prayed that the appeal be allowed and decision of the trial Magistrate be set aside with costs.

24. The appeal was canvassed by way of written submissions. On record are submissions by the appellant dated 17th July 2025, submissions by the 1st respondent dated 11th February 2025 and submissions

dated 18th October 2024, filed by the 2nd respondent; all of which this court has duly considered.

Appellant's submissions.

25. The appellant isolated and submitted on four key issues for determination. On whether there exists a valid contract between the parties herein, he submitted that the agreements dated 3rd April 2014 and 12th August 2014 were executed prior to the conclusion of succession proceedings in respect of the estate of the late Ramadhan Misikoyo Shikalu, and as such, were void *ab initio*. He argued that no party at the time had legal authority to enter into a contract over the deceased's estate, and therefore the purported agreements could not confer any enforceable rights.

26. The appellant further submitted that for a contract to be valid under the **Law of Contract Act, Cap. 23 of the Laws of Kenya**, certain essentials must exist. He referred to the decision of **Harris JA in Gauvey v Richard (2011) JMACA 16**, highlighting that a binding agreement requires the intention to create legal

relations, certainty of terms, and a lawful object. He contended that the agreements in question failed to satisfy these requirements as they were executed without legal authority over the estate property and prior to the completion of the succession process.

27. On whether the estate of the deceased was intermeddled, the appellant submitted that the respondents acted in contravention of the succession laws by attempting to sell or otherwise dispose of land still part of the deceased's estate. He argued that succession proceedings in Cause No. 491 of 2018 were concluded thereon, confirming that the plaintiff was not entitled to deal with the estate property without proper authority.

28. The appellant argued that the trial Magistrate erred by ignoring this fundamental legal issue and by failing to consider that any purported sale or transfer prior to the completion of succession was void and unenforceable.

29. On whether the appeal is merited, the appellant submitted that the trial Magistrate erred in both law and fact by ignoring the fundamental legal issue of

intermeddling. He cited **Section 109 of the Evidence Act**, stating that the burden of proof lies on the party who relies on a fact, and submitted that the respondents had failed to prove the existence of a valid and enforceable contract on the balance of probabilities.

30. On costs, the appellant submitted that costs always follow event. The appellant prayed that this court allow the appeal in its entirety, declare that the agreements dated 3rd April 2014 and 12th August 2014 are null and void for lack of legal authority, set aside the judgment of the trial court, and award the appellant his costs of the appeal.

1st respondent's submissions.

31. On whether the appellant was a party to the sale agreement dated 12th August 2014 executed between the 1st and 2nd respondents, counsel for the 1st respondent submitted that while the appellant did enter into a separate sale agreement with the 2nd respondent on 3rd April 2014, this did not negate his obligation to facilitate transfer to the 1st respondent.

32. Counsel argued that the appellant, as the administrator of his late father's estate, became vested with the legal powers to manage and transfer the estate assets upon grant of letters of administration. Reference was made to **Law of Succession Act, Cap 160, Sections 82 and 83 and Trustee Act, Cap 167**, to establish that the estate vests in the administrator, who can be sued or compelled to transfer property acquired through lawful agreements.
33. On the issue of the existence of a valid contract for the sale of land, counsel submitted that all contractual prerequisites were satisfied. The agreements dated 3rd April 2014 and 12th August 2014 were in writing, signed by the relevant parties, and attested by witnesses as required under **Section 3 of the Law of Contract Act, Cap 23 and Section 38(1) of the Land Act, 2012**.
34. Counsel further relied on the decision in ***Charles Mwirigi Miriti v Thananga Tea Growers Sacco Ltd & Another [2014] eKLR*** to demonstrate that where parties have objectively manifested consent to essential terms, a binding contract exists. Counsel contended that the appellant's signature as a witness to the agreement

between the respondents, coupled with his acknowledgment of the sale, establishes his awareness and acquiescence.

35. On whether the appeal is merited, counsel submitted that the appellant was in breach of the terms of the agreement. It was argued that the 1st respondent paid the full consideration for the land and took vacant possession immediately after the sale. Counsel contended that the trial court correctly held that the appellant's obligation to transfer the one-acre parcel arose from both the initial sale to the 2nd respondent and his subsequent acknowledgment of the 1st respondent's rights.

36. Reliance was placed on ***North End Trading Company v City Council of Nairobi and Gateway Insurance Co Ltd v Jamila Suleiman & Another [2018] e KLR*** to support the proposition that proof on a balance of probabilities suffices to establish contractual liability. Counsel therefore submitted that the appeal was devoid of merit and should be dismissed.

37. Regarding costs, counsel submitted that the appellant's appeal was devoid of merit and in accordance with **Section 27 of the Civil Procedure Act**, costs should follow the event. Counsel contended that since the 1st respondent had successfully established his entitlement to the property and fully complied with the contractual obligations, he was entitled to costs of the appeal.

2nd respondent's submissions.

38. Counsel for the 2nd respondent submitted that the primary issue for determination was whether the appeal should be allowed, setting aside the judgment of the trial court. It was contended that the appellant's grounds alleging non-party status to the sale agreement dated 12th August 2014 were entirely misplaced.

39. Counsel emphasized that the appellant, as administrator of his late father's estate, was fully aware of the sale of the one-acre parcel to the 2nd respondent on 3rd April 2014 and acknowledged the subsequent sale to the 1st respondent, signing as a witness to the latter transaction.

40. On the appellant's claim that the trial Magistrate erred in ordering him to refund the purchase price, counsel submitted that this obligation is directly linked to the appellant's failure to effect transfer under a valid contractual arrangement. That the sale agreement between the appellant and the 2nd respondent was legally binding, and the 2nd respondent duly paid the full consideration. Counsel argued that upon transferring the property to the 1st respondent, the appellant's contractual obligations simply shifted, and any failure to transfer constitutes a breach warranting specific performance or refund of the purchase price.

41. Reliance was placed on ***Fidelity & Commercial Bank Ltd v Kenya Grange Vehicle Industries Ltd [2017] eKLR***, where the Court held that contractual obligations must be objectively enforced according to the terms of the agreement. It was argued that the appellant's allegation of being a 'total stranger' to the agreement is contrary to the documentary evidence, which showed his signature as a witness under Clause 2 of the sale agreement.

42. On specific performance, counsel submitted that the trial court correctly exercised its discretion, given that the appellant has not disputed the validity of the initial sale agreement with the 2nd respondent, had received the full purchase price, and had failed to transfer the land after succession was concluded.

43. Counsel relied on ***Reliable Electrical Engineers Ltd v Mantrac Kenya Ltd [2006] e KLR*** to underscore that specific performance is appropriate where damages are inadequate, and a valid, enforceable contract exists. Counsel therefore prayed that the appeal be dismissed with costs to the respondents.

Analysis and determination

44. The court has carefully considered the Memorandum of appeal, the parties' rival submissions and the entire record. The role of this court as a first appellate court is to reanalyze, reassess and reconsider the evidence of the trial court and make its own independent conclusions bearing in mind that it had no opportunity to see or hear witnesses and make due allowance for that.

45. Section 78 of the Civil Procedure Act provides for the powers of an appellate court as follows;

“78. Powers of appellate court

(1) Subject to such conditions and limitations as may be prescribed, an appellate court shall have power—

(a) To determine a case finally;

(b) To remand a case;

(c) To frame issues and refer them for trial;

(d) To take additional evidence or to require the evidence to be taken;

(e) To order a new trial.

(2) Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.”

46. In the case of **Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] e KLR**, the court reiterated the duty of the first appellate court thus;

“This being a first appeal, we are reminded of our primary role as a first appellate court

namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way...”

47. However, it is trite that the court should not unnecessarily deviate from the finding of the lower court unless there are compelling reasons to do so. In ***Peters v Sunday Post Ltd*** [1958] EA 424, the Court held that;

“Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide”

48. I have considered the six grounds of appeal raised in the Memorandum of appeal. One key issue that arise from the appeal is whether the trial court was right in

granting an order of specific performance against the appellant.

49. Although the appellant in his submissions raised matters that neither arose from his Memorandum of appeal nor the parties' pleadings filed before the trial court, this court will address issues that arise from the Memorandum of appeal and those that arose from the parties' pleadings before the trial court. Submissions being merely persuasive arguments, should address issues raised in pleadings and ought not raise new or fresh matters that do not feature in the pleadings.

50. This is a fairly straight forward matter. On 3rd April 2014, the appellant sold one acre of land to be hived form parcel No. East/ Wanga/Eluche/1232, to the 2nd respondent. Consideration was paid in full. Then on 12th August 2014, the 2nd respondent sold the purchased land to the 1st respondent, and in that regard, consideration was paid in full. The appellant was a witness to the agreement between the 1st and 2nd respondents. In the said agreement, it was agreed that the appellant was to undertake succession proceedings

and include the name of the 1st respondent as being a purchaser.

51. The appellant is the registered proprietor of the suit property. The appellant does not dispute selling the suit property to the 2nd respondent and receiving the entire consideration. The fact that he agreed to ensure the 1st respondent obtains title upon conclusion of succession proceedings in respect of the deceased registered proprietor was not contested. The fact that the 1st respondent discharged all obligations under the agreement of August 2014 is not disputed.

52. Therefore, the questions that arise for this court's determination are whether under the agreement of 12th August 2014, the appellant herein had any obligations in favour of the 1st respondent and whether those obligations if any, could warrant grant of orders of specific performance.

53. Specific performance is an equitable remedy granted where there is a valid contract, where the plaintiff has performed his or her obligations under the contract and

where an award of damages would not be an effective remedy in the circumstances of the case.

54. In the case of **Gharib Suleman Gharib v Abdulrahman Mohamed Agil LLR No. 750 (CAK) Civil Appeal No. 112 of 1998** the court 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 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.”

55. Similarly, in the case of **Reliable Electrical Engineers Ltd. V Mantrac Kenya Limited (2006) e KLR** the court set out what ought to be considered when determining a claim for specific performance as follows;

“The Jurisdiction of 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 the formal requirements or mistake or illegality, which makes the contract invalid or enforceable. 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 an adequate remedy specific performance may still be refused on the ground of undue influenced or where it will cause severe hardship to the defendant.”

56. Section 38 of the Land Act provides the elements of a valid land sale transaction as follows;

“Validity of contracts in sale of land

(1) Other than as provided by this Act or by any other written law, no suit shall be brought upon a contract for the disposition of an interest in land—

(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 to by a witness who

was present when the contract was signed by such party.

(2) Subsection (1) shall not apply to—

(a) A contract made in the course of a public action;

(b) The creation or operation of a resulting, implied or a constructive trust; or

(c) Any agreement or contract made or entered into before the commencement of this Act, provided that—

(i) The verbal contracts shall be reduced to writing within two years from the date of enactment of this Act; and

ii) the Cabinet Secretary shall put a notice of the requirement to reduce the contracts in writing, in a newspaper of nationwide circulation.”

57. Therefore, a valid land sale agreement should be in written, duly executed by the parties to the agreement and attested by two witnesses.

58. Having considered the agreement of 12th April 2014, the same is in written and attested by several witnesses. Therefore, the agreement is valid and enforceable.

59. The appellant herein having sold the suit property to the 2nd respondent vide the agreement of 3rd April 2014,

held the land in trust for the 2nd respondents and or his assignees. The 2nd respondent having sold the land to the 1st respondent, vide an agreement where the appellant agreed to ensure the 1st respondent's rights as purchaser are enforced, the appellant was bound by the terms of the said agreement and was obligated to specifically perform the terms thereof both by virtue of being a trustee and holding the suit property in trust for the 2nd respondent or his assignees who in this case was the 1st respondent and by his own undertaking to do so in the said agreement.

60. That being the case, the trial court was right in granting orders of specific performance. The appellant cannot run away from the fact that he sold the suit property and received the entire consideration from the 2nd respondent and undertook to ensure that the 1st respondent obtains title upon conducting succession proceedings.

61. For the above reasons, I find no justification for this court's interfere with the conclusions made by the trial court. The result is that this appeal is devoid of merit

and the same is hereby dismissed with costs to the respondents.

62. It is so ordered

DATED, SIGNED AND DELIVERED AT KAKAMEGA IN OPEN COURT/VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM THIS 11TH DAY OF MARCH 2026

A. NYUKURI

JUDGE

In the presence of;

Appellant in person

1st respondent in person

No appearance for 2nd respondent

Court Assistant: Delphine