

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ELC NO 329 OF 2016

JOHN THEURI MATHENGE1ST PLAINTIFF
IRENE W. THEURI MATHENGE.....2ND PLAINTIFF

VERSUS

PHILOMENA WANGUI GITHEGI.....
DEFENDANT

JUDGMENT

1. By a Plaint dated 12th August, 2016, the Plaintiffs herein sued the Defendant seeking the following orders:
 - a) *A declaration that the plaintiffs are the rightful and legal owners of one (1) acre to be excised from all that parcel of land known as LR No.9242/5.*
 - b) *A declaration that the defendant is in breach of the agreement dated 22nd October 2014.*
 - c) *An order of specific performance compelling the defendant to convey an original title document for one (1) acre of land from LR No. 9242/5 and in the alternative the Deputy Registrar be allowed to execute transfer documents in favour of the plaintiffs.*
 - d) *A perpetual injunction (pending the hearing and determination of this suit a temporary injunction) restraining defendant either by herself, servants or agents from trespassing, interfering, alienating, disposing,*

advertising for sale, occupying, constructing and or dealing in any other way whatsoever with one (1) acre of land exercised (sic) from all that parcel of land known as LR No. 9242/5.

e) General damages for breach of contract.

f) Costs and interest of this suit.

PLAINTIFFS'CASE

2. PW1, John Theuri Mathenge, the 1st Plaintiff adopted his witness statement dated 23rd September, 2022, and further witness statement dated 2nd January, 2023, respectively and produced a list of documents as Pex No. 1 a) & b).
3. It was PW1's evidence that they purchased a one-acre property in Nakuru together with the 2nd Plaintiff who is his wife, in 2014, at a consideration of Kshs.9,000,000/= from the Defendant, and also agreed to sell her their business at USD 40,000/=.
4. It was his testimony that the Defendant had an extra piece of land which she would give them in exchange less \$20,000/= since the land was not enough. They therefore entered into two agreements, one for 1 acre and another for the business. PW1 further stated that they cleared the amount for the land and for the business after which they began the handing over of the business to the Defendant.
5. According to PW1, the Defendant could not assume ownership until a new license was issued and therefore, she worked in the Home awaiting the license but never told them that she had changed her mind regarding the business.

6. PW1 testified that the Defendant earned from the business and whatever proceeds they got, they released to her to pay the balance. He testified that she got the monies for April, May and June totaling USD 29,432.40 being the total expenses of the business including bills, but stopped paying the Defendant in July. He also stated that he pursued the Defendant to transfer the title for the 1 acre, but she asked them to pay the Surveyor, as she did not have money.
7. It was PW1's testimony that he engaged a lawyer who paid Ksh.80, 000/= and drew a service agreement between him and Simiyu the surveyor, who received the money and asked for a copy of the title. The Defendant did not give them the titles as she claimed that they had never paid her for the time she worked, prompting them to file the present suit.
8. Upon cross-examination by Mr. Ngure, PW1 confirmed that they purchased a total of 1.5 acres. He also confirmed that they did not have an agreement for the half-acre, and that the Defendant fully paid for the business she bought.
9. PW1 admitted that he had surrendered his license and stated that the Defendant could not have obtained a license since they had reinstated it. He further stated that when he took over the business, his lawyer wrote to the Chairman of the Estate Association about the approved bill. PW1 admitted that he had not produced the letter as part of his documents and confirmed that they still owed her over the sales that came from the home.
10. PW1 stated that he had the documents, which showed that he remitted money to the Defendant but admitted that he had not filed any. It was PW1's evidence that at the time of the sale, they had given notice to all residents of the facility that they were terminating the business to allow the change of management. Further, they had given the notice for change of ownership but did not hand

over the business officially to the Defendant, as she never got a license, and the Defendant abandoned the business without informing them.

11. According to PW1, the income that came from the business did not belong to the Defendant since she did not have a license, and that he had not completed the calculations with the Defendant. Further, by the time they filed this case, the Defendant had breached the sale but did not seek money from her.
12. Upon re-examination, he stated that the agreement with the Defendant was that he would help her acquire the business and in turn, she would compensate him with half an acre, but there was no specific sale agreement pertaining to the sale of the half an acre as it was an oral agreement.
13. PW1 was referred to the letter dated 12th December, 2014, the notice of change of ownership of the business for 60 days, but he stated that the Defendant could not apply for a license until the 60 days were over.

DEFENDANT'S CASE

14. DW1, Philomena Wangui Githegi adopted her witness statement dated 10th August, 2022, as her evidence in chief and also produced her list of documents dated 14th October, 2022, as Dex No. 1 to 9.
15. DW1 stated that she knew the Plaintiffs who had an Adult Family Home business in Washington State, USA and had told her that they wanted to buy her property which was at the time in the process of subdivision.
16. It was her testimony that they started negotiations and on 22nd October 2014, they entered into a sale agreement for Kshs 9,000,000/= and on 1st March 2015, the Plaintiffs approached her and revisited the sale of the Adult Family Home at a consideration of \$40,000 equivalent to Kshs. 4,000,000/=. DW1 further

stated that they agreed that \$20,000/ was to be deducted from the sale of the house and the balance was to be exchanged with half an acre plot in the same parcel of land.

17. Upon cross-examination by Mr. Chege, she confirmed that they entered into an agreement dated 22nd October, 2014, with the Plaintiff for Kshs.9million in respect of land measuring 1 acre. She further confirmed that she was paid Kshs.8,880,000/= leaving a balance of Kshs.2 million since the Plaintiffs retained 20,000 dollars.
18. DW1 stated that she paid the surveyor Kshs.120,000/= and that they entered into an agreement for sale of a business dated 1st March, 2015, located at her residence but that she was not paid the full amount.
19. DW1 was referred to Clause 2 of the agreement where she stated that the Plaintiff retained \$20,000/= dollars and she gave them a ½ acre plot with \$20,000 dollars making a total of \$ 40,000 dollars.
20. DW1 stated that the Plaintiff still owed her \$20,000 dollars since they threw her out of the business together with Kshs 2 million which they deducted from the business. It was DW1's evidence that she did not have any problem signing a transfer for the one acre that had six rental houses and that she never took possession of the business since she did not have a license.
21. Upon re-examination, she stated that she was willing to transfer the one acre to the Plaintiffs on condition that they pay her Kshs.2million.

PLAINTIFF'S SUBMISSIONS

22. Counsel for the Plaintiff filed submissions dated 13th January 2026, and submitted that the Plaintiffs were the rightful owners of one acre of land to be excised from L.R. No. 9242/5, which they purchased from the Defendant.
23. It was counsel's submission that the Defendant was in breach of the sale agreement dated 22nd October, 2014 despite having complied with all terms of the agreement. Further, that the Defendant has since refused to release the title deed to enable the excision of the purchased portion.
24. Counsel relied on **Section 107 and 108 of the Evidence Act** and the case of **William Kabogo Gitau V George Thuo & 1 Other [2010] 1 KLR 526** and submitted that the burden was upon the plaintiffs to prove their case and that the Plaintiffs had engaged a licensed surveyor and paid Kshs 80,000/= in fees to excise the land and are currently in occupation of the disputed one-acre portion. Further that they have been paying the land rates of which they produced the payment receipts.
25. Counsel submitted that the second agreement dated 1st March, 2015, was in relation to a business between the 2nd Plaintiff and the Defendant called Bellah AFH for US \$40,000, and the Defendant's attempt to link the land dispute to this business agreement was legally invalid. He argued that the business contract was an independent matter and its compliance (or lack thereof) did not form a basis for failure to honor the October 2014, land agreement.
26. Counsel relied on the case of **Daniel Otieno Migore V South Nyanza Sugar Co. Ltd [2018] eKLR**, submitted that the Defendant was bound by her pleadings and that she could not introduce new claims mid-trial, and urged the court to grant the orders as prayed in the Plaint.

DEFENDANT'S SUBMISSIONS

27. Counsel for the Defendant filed submissions dated 3rd February 2026, and identified the following issues for determination:
- a) *Whether the full consideration under the agreement was paid.*
 - b) *Whether either party breached the agreement and if so, who was in breach.*
 - c) *Whether the Plaintiff is entitled to specific performance.*
 - d) *Whether the Plaintiff is entitled to an injunction.*
 - e) *Whether damages or alternative relief is available.*
28. On the first issue, counsel submitted that the dealings between the parties were composite, meaning it combined the sale of the land in Nakuru with the acquisition of a business interest in an Adult Family Home in Washington State, USA, and relied on the cases of **National Bank of Kenya Ltd V Pipeplastic Samkolit (K) Ltd & Anor, Langat v Co-operative Bank of Kenya Ltd [2017] KECA 152 (KLR)** and **Eldo City Limited v Corn Products Kenya Ltd & another [2013] KEHC 5916 (KLR)**, where the court held that collateral agreements must be independently proved and cannot contradict written contracts.
29. It was counsel's submission that the Plaintiff took possession of the suit property with the permission, and authority of the Defendant as can be deduced from the Defendant's testimony that he knew the Plaintiff who resided and operated a bakery business in the London area within Nakuru, and cited the case of **Gabriel Mbui V Mukindia Maranya (1993) eKLR**.
30. On the second issue, Mr. Ngure, submitted that the full purchase price of USD 40,000 from the business was never paid by the Plaintiff. On the third issue, counsel submitted that the Plaintiffs breached the agreement regarding the business component of the deal and cited the case of **Kenya Ports Authority v**

Kuston (Kenya) Limited (often cited as [2011] eKLR and argued that a party in breach cannot rely on the breach of the other. Counsel further submitted that the Plaintiffs cannot enforce the land transfer until they fulfill their own reciprocal obligations.

31. On the fourth issue, it was counsel's submission that an order of specific performance was a discretionary equitable remedy that should be declined since equity will not assist a party who has not fulfilled his part of the bargain as in the instant case and relied on the case of **Reliable Electrical Engineers (K) Ltd v Mantrac Kenya Limited [2006] KEHC 2855 (KLR)**, and **Standard Chartered Bank Limited & another v Peter Oguko Abok & another [2005] KECA 190 (KLR)**, and submitted that the Plaintiff was not entitled to this order.
32. On the fifth issue, Mr. Ngure submitted that the Plaintiffs failed to establish a *prima facie* case or a clear legal right, which is a prerequisite for a permanent injunction, and relied on the case of **Kahindi Ngala Mwangome V Minister for Lands & Others**.
33. On the final issue, it was counsel's submission that general damages are not awarded in breach of contract cases and further that the Plaintiff has failed to either plead or prove any special damages. Counsel relied on the case of **Kenya Breweries Limited v Natex Distributors Limited [2004] KEHC 2737 (KLR)**, and urged the court to dismiss the Plaintiffs' case with costs.

ANALYSIS AND DETERMINATION

34. The issues for determination are whether the Plaintiffs entered into a sale agreement with the Defendant for the sale of the suit plot, whether the Plaintiffs

paid the full purchase price and whether they are entitled to the prayers sought in the Plaint.

35. It is not in dispute that the Plaintiffs and the Defendant entered into a sale agreement on 22nd October 2014, for the purchase of one acre of land to be excised from L.R. No. 9242/5 at a consideration of Kshs. 9,000,000/= which they stated that they paid in full. The Defendant acknowledged that she knew the Plaintiffs to whom she sold one acre of land and they further entered into an agreement for the sale of Adult Family Home business. The Defendant further confirmed that she was paid Kshs. 8,800,000/= but stated that the Plaintiff still owed her Kshs, 2Million.
36. The Defendant also stated that she is ready and willing to transfer the suit land upon payment of the balance of Kshs. 2 million, which she claims that the Plaintiffs never paid.
37. It should be noted that the Plaintiffs and the Defendant entered into two independent agreements for the sale of the suit plot and one for a business known as Adult Family Home. The sale agreement of the suit plot was not dependent on the business sale agreement. Nowhere in the agreement dated 22nd October 2014, was the business sale mentioned.
38. Section 107(1) of the Evidence Act, Cap 80 Laws of Kenya provides that:

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”
39. The Plaintiff produced the sale agreement dated 22nd October 2014, a service agreement for payment of survey fees to the Surveyor for subdivision of the suit

plot, the rates payment receipts. The agreement stipulated how the purchase price was paid and the Plaintiff gave evidence that he paid the Defendant as per the instalments, which the Defendant acknowledged that she received Kshs. 8,880,000/=. Further, the Plaintiffs took possession of the suit land upon purchase and have been in occupation since then.

40. The Defendant mixed her evidence by referring two agreements for the sale of the plot and the business, which were independent of each other. The Defendant further told the court that she is ready and willing to transfer one acre to the Plaintiffs on condition that the Plaintiffs pay the balance of the purchase price of Kshs. 2 million. She did not tabulate how this balance was arrived at as she had acknowledged that she had received Kshs. 8,880,000/= from the Plaintiffs. The Defendant gave evidence that she had paid Kshs, 120, 000/= to the Surveyor which seems to be the balance of the amount she is claiming. The Plaintiff also produced a service agreement, which confirmed that he paid Kshs, 80,000/= to the Surveyor after the Defendant indicated that she did not have money to pay.
41. Notably, the land that was to be subdivided belonged to the Defendant who was under a duty to subdivide and excise one acre for the Plaintiffs. If the Defendant was serious that the Plaintiffs owed her money, then she could have tendered such evidence and filed a counterclaim for orders accordingly. She did not do this and confirmed that she was ready and willing to transfer the land upon payment of the balance, which she has not proved.
42. The Plaintiffs prayed for an order that they are the rightful owners of one acre to be excised from L.R. No. 9242/5, and order for specific performance compelling the Defendant to convey the original documents for one acre of the

suit and in the alternative the Deputy Registrar to execute transfer documents in favour of the Plaintiffs.

43. In the case of **Reliable Electrical Engineers Ltd. vs Mantrac Kenya Limited (2006) eKLR**, the court stated that:

“Specific performance like any other equitable remedy is discretionary and the Court will only grant it on well principles”

“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, 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.”

44. Similarly, in the case of **Gurdev Singh Birdi and Marinder Singh Ghatora vs Abubakar Madhubuti CA No.165 of 1996** it was held that:

“...It cannot be gainsaid that the underlying principle in granting the equitable relief of specific performance has always been that under all the obtaining circumstances in the particular case, it is just and equitable so to do with a view to doing more perfect and complete justice. Indeed...a plaintiff must show that he has performed all the terms of the contract which he has undertaken to perform, whether expressly or by implication, and which he ought to have performed at the date of the writ in the action.”

45. The Plaintiffs fulfilled their part of the agreement, which is valid and enforceable. The agreement does not suffer from any, illegality or mistake. Consequently, I find it just and equitable to grant orders for specific performance as the Defendant is not likely to perform her part of the obligation to transfer the suit land to the Plaintiffs. This is an agreement that the parties entered into in 2014 and up to now the same has not been perfected.
46. The order of specific performance would not be prejudicial to the Defendant as the Plaintiffs took possession upon signing the sale agreement in 2014, and are still in occupation as was held in the case of **Amina Abdulkadir Hawa vs. Rabinder Nath Anand & Another [2012] eKLR**, where the court cited **Chitty on Contracts, 28th Edition (Sweet & Maxwell, 1999), Chapter 28 paragraphs 027 and 028**, where the authors stated as follows:

“Specific performance is a discretionary remedy. It may be refused although the contract is binding at law and cannot be impeached on some specific equitable ground (such as undue influence) although damages are not an adequate remedy and although the contract does not fall within group of contracts discussed above which will not be specifically enforced. But the discretion to refuse specific performance is not arbitrary discretion but one to be governed as far as possible by fixed rules and principles.....specific performance may be refused on the ground that the order will cause severe hardship to the Defendant where the cost of performance to the Defendant is wholly out of proportion to the benefit which performance will confer on the claimant and where the Defendant can put himself into a position to perform by taking legal proceedings against the third party.....severe

hardship may be a ground for refusing specific performance even though it results from circumstance which arise after the conclusion of the contract which effect the person of the Defendant rather than the subject matter of the contract and for which the claimant is in no way responsible.”

47. I find that the Plaintiffs have proved their case on a balance of probabilities and hence entitled to an order of specific performance. The Defendant is to provide the original documents, necessary for the transfer of one acre of the suit land to the Plaintiffs within 30 days failure to which the Deputy Registrar to sign the same on behalf of the Defendant. The order of general damages for breach of contract is hereby declined, as it was not proved.
48. The Defendant is to pay the costs of the suit.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 31ST
DAY OF MARCH 2026.**

**M. A. ODENY
JUDGE**