



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYERI

ELC APPEAL NO. E023 OF 2023

EDWARD NJOROGE MWANGI.....APPELLANT

-VERSUS-

FRANCIS MURIUKI MURAGURI.....1ST RESPONDENT

EPHANTUS WACHIRA NGOCHI.....2ND RESPONDENT

CONSOLIDATED BANK OF KENYA LTD.....3RD RESPONDENT

COUNTY GOVERNMENT OF NYERI.....4TH RESPONDENT

DISTRICT LAND REGISTRAR.....5TH RESPONDENT

(Being an appeal against the judgment of the Honourable Principal Magistrate Hon. E. Kanyiri delivered on 16.11.2023 in Principal Magistrate’s Court at Karatina Case ELC No. 15 of 2019)

EDWARD NJOROGE MWANGI..... PLAINTIFF

-VERSUS-

FRANCIS MURIUKI MURAGURI.....1ST DEFENDANT

EPHANTUS WACHIRA NGOCHI.....2ND DEFENDANT

CONSOLIDATED BANK OF KENYA LTD.....3RD DEFENDANT

COUNTY GOVERNMENT OF NYERI.....4TH DEFENDANT

DISTRICT LAND REGISTRAR.....5TH DEFENDANT

JUDGEMENT

1. The Appellant filed this Appeal, being dissatisfied with the judgment of the Hon. Principal Magistrate Hon. E. Kanyiri delivered on 16th of November 2023 in Karatina Principal Magistrate’s Court at Karatina Case ELC No. 15 of 2019.

2. The Memorandum of Appeal dated 7th December 2023 details the grounds of appeal as follows:

- 1) **THAT the Learned Magistrate erred in law and in fact in finding that the contract between the Appellant and the 1st Defendant was defective to the extent that it failed to comply with a formal or legal requirement where the 1st Defendant was obligated to inform the 3rd Defendant of any dealing with Land Parcel No. IRIANI/KAIRIA/747/27.**
- 2) **THAT the Learned Magistrate erred in law and in fact in finding that the Appellant was not entitled to the rent collected.**
- 3) **THAT the Learned Magistrate erred in law in finding that the remedy of specific performance could not issue.**
- 4) **THAT the Learned Magistrate erred in law and in fact in finding that the Appellant had not proved that the 1st and 2nd Defendants had committed fraud, and that the Appellant had not shown what procedure was not followed in acquisition of land by the 2nd Defendant to warrant court to cancel the title of Land Parcel No. IRIANI/KAIRIA/747/27.**
- 5) **THAT the Learned Magistrate erred in law and in fact that having held that the court cannot grant orders of specific performance in terms of the subject land and that the Appellant was not entitled to the order of permanent injunction.**

3. The Appellant prays for the following orders:

- a) **THAT this appeal be allowed**

- b) **THAT the judgment delivered on the 16th of November 2023 be reviewed and/or be set aside, and/or the appeal be allowed.**
- c) **THAT the costs of this appeal and of the court below be borne by the respondents.**

The case before the trial Court

- 4. The suit before the trial court was instituted by the Appellant/Plaintiff through the Amended Plaint dated 31st October 2012 and amended on 2nd June 2021. The suit was first instituted against the 1st and 2nd Respondent/Defendants with the 3rd to 5th Respondents/Defendants being added by way of amendment.
- 5. The Plaintiff claimed that by an Agreement of sale dated 30th March 2010, the 1st Defendant agreed to sell to him Land Parcel No. IRIANI/KAIRIA/747/27 at a price of Ksh.1,400,000/=, which amount was to be applied to repay the loan that the 1st Defendant owed to Consolidated Bank Ltd, the 3rd Defendant and thus have the land discharged to facilitate transfer to him.
- 6. The Plaintiff took possession of the suit property together with all the subsisting tenancies and received monthly rent from April 2010 to September 2012, when the 2nd Defendant wrote to the tenants and advised them to stop paying rent to the plaintiff and instead to be paid to 2nd Defendant's agent, one Ms. Gladys Nyaguthii Karanja.
- 7. The Plaintiff sought the following orders;

- a) **A permanent injunction restraining the 2nd Defendant from selling, collecting rent, entering and/or disposing of L.R. NO. IRIAINI/KAIRIA/747/27.**
 - b) **Cancellation of title issued on 2nd October 2012 to the 2nd Defendant, Ephantus Wachira Ngochi and rectification of the register to read the original owner Francis Muriuki Muraguri.**
 - c) **In the alternative but without prejudice to the above, an order requiring that the 1st Defendant specifically performs his part of the contract by transferring L.R. NO. IRIAINI/KAIRIA/747/27 to the Plaintiff alternatively that he dies refund the entire purchase price of Kshs 1,400,000/= plus an additional Kshs. 7,000,000/= being the difference of the current market value of the property totaling Kshs. 8,400,000/=**
 - d) **Costs of the suit**
 - e) **Any other fit relief.**
 - f) **The 2nd and 3rd Defendants be compelled to release all the rent they have been collecting from the rental houses on the Plaintiffs land parcel L.R. NO. IRIAINI/KAIRIA/747/27.**
8. The 1st Defendant filed a defence and denied selling or transferring land parcel IRIA-INI/KAIRIA/747/27 to the 2nd Defendant or colluding with him to have the land transferred to the 2nd Defendant. He claimed to be the legitimate owner of the land and that the only agreement he had with the 2nd defendant was dated 21 June 2012 for the sale of LR. KARATINA TOWN BLOCK 1/576. He further denied the alternative prayer sought as being unavailable to the Plaintiff under the sale agreement dated 30th March 2010. Further, the 1st Defendant averred that if there was any agreement between him and the

Plaintiff, the Plaintiff assumed all risks likely to ensue with respect to the agreement since the land was charged to Consolidated Bank Ltd the 3rd Defendant.

9. The 1st Defendant concurred with the Plaintiff that prayers (a) and (b) of the Plaintiff ought to be allowed.
10. The 2nd Defendant filed a statement of defence, denying the allegations contained in the plaintiff as having no factual or legal basis.
11. The 3rd Defendant filed a statement of defence denying the allegations contained in the amended plaintiff. They denied the sale of LR IRIA-INI/KAIRIA/747/27 between one Plaintiff and the 1st Defendant, stating that even if it existed, it was void for want of consent and accused the 1st Defendant of fraudulently tampering with the security. The 3rd Defendant also denied receiving the deposit of the sale price.
12. The 3rd Defendant further claimed that the suit land was the subject of a sale by private treaty between the 1st and 2nd Defendants with its consent. The 3rd Defendant further claimed there existed other suits being Nyeri HCELC no. 246 of 2013 which was transferred and became Karatina SPMCC No 55 of 2018 which suit was dismissed for want of prosecution.
13. The 4th Defendant filed a defence denying the Plaintiffs' claim and stating that it was not privy to the transaction of sale of the suit land.

14. The hearing began on the 13th of April 2022, when **PW 1**, the Plaintiff **Edward Njoroge Mwangi** testified and adopted his witness statement dated 31st October 2012 and bundle of documents of even date, as well as a further statement and list of documents both dated 26th November 2021 as his evidence in chief.
15. He reiterated the contents in the Plaint, stating that he bought the suit property from the 1st Defendant, but the 1st Defendant fraudulently transferred it to the 2nd Defendant. The Plaintiff stated that the transfer to the 2nd Defendant was done with full knowledge 1st Defendant, and states that they colluded to defraud him. He asked for the suit property to be returned back to him and costs of the suit.
16. Upon cross-examination, the Plaintiff confirmed that he knew the property was charged and there was no consent from the 3rd Defendant.
17. **DW 1 Francis Muriuki Muraguri**, the 1st Defendant, testified that he sold the suit property to the Plaintiff, but did not effect the transfer because it was still charged to the Bank due to an outstanding debt. He stated that the confusion of the titles that he sold arose from the Bank and that he was ready to refund the money to the Plaintiff. He further stated that the transfer to the 2nd Defendant was illegal and a forgery, and blamed the 3rd Defendant for this.
18. Upon cross-examination, he stated that the Bank gave an oral consent for the sale of the suit land to the Plaintiff to offset the outstanding loan. That the Bank gave title to the wrong person.

19. **DW 2, Inspector James Mutuma**, identified himself as a qualified forensic examiner with 6 years' experience working with the Directorate of Criminal Investigation. He testified that the 1st Defendant's signature in the agreement of sale dated 21st June 2022 to the 2nd Defendant and the subsequent transfer form had evidence of manipulation. On cross-examination he confirmed that there was forgery, but he did not know who carried it out and the intention.
20. **DW 3 Catherine Muthiani**, a recovery officer at the 3rd Defendant Bank adopted her witness statement dated 09/09/2022 as well as their list documents as the 3rd Defendant's evidence. She had stated therein that there is no direct cause of action against the 3rd Defendant and that the suit arises from a sale agreement between the Plaintiff and the 1st Defendant, which the Bank was not a part of.
21. The witness noted that the suit property was charged to the Bank and the Vendor undertook to clear the outstanding loan by November 2010 under clause 2, thereby obtaining a discharge of charge. However, she stated that there is no evidence that the proceeds of the sale were ever deposited with the 3rd Defendant Bank.
22. The ownership of the subject land changed when the suit land was sold by private treaty to the 2nd Defendant, who subsequently charged the same in favour of the 3rd Defendant. She stated that the 2nd Defendant is in default of repaying the loan advanced to him but the 2nd Defendant cannot realize the securities owing to this suit.

23. DW 3 further stated that for the charged suit property to have been sold by the Plaintiff to the 1st Defendant, the 3rd Defendant's consent as the charge should have been mandatory before a private sale agreement was undertaken, which was not done by the said parties in this case.
24. On being cross-examined, she stated that the discharge of charge that was given by the 3rd Defendant was only partial, so that the proceeds of the sale could be used to offset the loan. That the Bank was only privy to the transaction between the Plaintiff and the 2nd Defendant but not the one involving the 3rd Defendant.
25. **DW 4** was **Ephantus Wachira Ngochi**, the 2nd Respondent herein who adopted his witness statement dated 24th November 2021 and bundle of documents of even date as his evidence in chief. He stated therein that he is the proprietor of the suit property herein, Land Parcel No. IRIANI/KAIRIA/747/27, which he acquired after the 3rd Defendant Bank advertised the suit property for sale by auction to offset a loan balance owed to them by the 1st Defendant. That all the necessary procedures required for transfer was followed and he thereafter took possession of the same.
26. Upon cross-examination, DW 4 stated that he had intended to buy Block/576 but was informed by the City Council that the plot had a case in Court. He returned to the Bank and told them that he would not buy that land, and that transaction did not go through. He stated that the bank erred in respect of LR 576 as he wanted the suit property herein. He also denied committing any forgery.

27. **DW 5, Beatrice Chelagat Koech**, the Chief Officer, Department of Land, Housing and Physical Planning and Urban development at the County government of Nyeri, the 4th Respondent, adopted her witness statement dated 8th April 2021 as her evidence in chief as the 4th Defendant's witness. She denied knowledge of any fraud allegedly committed in respect of the issuance of Consent to transfer the suit property's title from the 1st Defendant to the 2nd Defendant and prayed that the 4th Defendant be struck out as a party to the suit as they have been improperly joined as a party, having not been listed in the particulars of fraud as a party to thereof.
28. On cross-examination, she stated that the document in their list of documents did not emanate from their office, and she could not trace the minutes thereof, thus could not speak about ownership.
29. Parties filed their respective submissions and judgment was delivered by the trial court on the 16th of November 2023.
30. The Court found that there was a valid contract between the Plaintiff and the 1st Defendant under the law, and that full consideration was paid to the 1st Defendant. The Court also did not believe the allegation by the 1st Defendant that he was not involved in the transaction to transfer the suit property to the 2nd Defendant and that the Plaintiff has not proven fraud nor shown what procedure was followed in the acquisition of land by the 2nd Defendant as to warrant the Court to cancel the title. The final decision of the trial court was;
- a) The 1st Defendant shall pay the Plaintiff Kshs. 1.4 Million being the purchase price paid for the subject No. IRIANI/KAIRIA/747/27.

- b) That the 1st Defendant shall pay to the plaintiff liquidated damages as agreed in the contract dated 30th March 2010 amounting to the 30% of the purchase price
- c) That the 1st Defendant shall pay to the Plaintiff interest on the purchase price of Kshs 1.4 Million from the 30th of March 2010 to date
- d) That the 1st Defendant shall pay the Plaintiff and the 2nd 3rd and 4th Defendants costs of this suit.

Appellant's written submissions

- 31. The Appellant, through Counsel, submits that the trial court erred in declining to grant the order of specific performance despite having found that the agreement for sale between the parties was valid. Counsel argues that once the trial court made a finding affirming the validity of the agreement, it ought to have proceeded to enforce the contract by granting the equitable remedy of specific performance.
- 32. On the issue of fraud and cancellation of title, Counsel for the Appellant relies on section 26 of the Land Registration Act and the decision in **Joseph Kiprotich Bor v Tabutany Chepkoech Chebusit (2021) eKLR**. It is contended that there was collusion between the 2nd and 3rd Defendants which resulted in the suit property being registered in the name of the 2nd Defendant. The Appellant therefore faults the trial court for failing to cancel the title despite the alleged irregularities in the registration process.
- 33. With regard to the prayer for permanent injunction, the Appellant submits that he satisfied the legal threshold for the grant of injunctive relief as established in the well-known case of **Giella vs. Cassman Brown (1973) E.A 358**.
- 34. . Counsel maintains that the evidence before the trial court demonstrated the Appellant's entitlement to protection of his interest in the suit property.

35. The Appellant further submits that he was entitled to mesne profits, particularly in the form of rent allegedly collected from the suit property from October 2012 until the date of judgment.

The 1st Respondent's submissions

36. Counsel for the 1st Respondent, on the other hand, supports the findings of the trial court and submits that the transaction between the parties was not legally enforceable. It is argued that the sale was undertaken without the involvement or consent of the 3rd Respondent in whose favour a charge had been registered over the suit property. Consequently, the transaction was defective and incapable of enforcement.

37. On the claim for rent, the 1st Respondent submits that the trial court had already awarded the Appellant general damages together with interest. Counsel argues that any further award of rent would amount to double compensation for the same loss allegedly suffered as a result of the failed transaction.

38. Regarding specific performance, the 1st Respondent submits that such an order would in any event have been difficult, if not impossible, to enforce because the contract had already been frustrated by the subsequent registration of the 2nd Respondent as the proprietor of the suit property.

39. On the allegation of **fraud**, Counsel contends that the Appellant failed to discharge the burden of proof required in allegations of fraud. It is submitted that no evidence was tendered to demonstrate the involvement of the 1st Respondent in the transfer of land parcel No. **IRIA-INI/KAIRIA/747/27** to the 2nd Respondent.

40. With respect to the refusal to grant a **permanent injunction**, the 1st Respondent argues that such an order cannot issue to restrain the registered

owner from using his property indefinitely where the Appellant has no legally recognizable interest in the land. The 1st Respondent therefore urges the Court to dismiss the appeal with costs.

3rd and 4th Respondent's submissions

41. Counsel for the **3rd and 4th Respondents** raises a **preliminary objection** to the competence of the appeal. They submit that the appeal is defective for failure to include a certified copy of the formal decree. In support of this position, reliance is placed on the decisions in **Lucas Otieno Masaye V Lucia Olewe Kidi [2022] KEELC, Salama Beach Hotel Limited and 3 others vs Kenvariri & Associates Advocates [2017 eKLR and Bwana Mohamed Bwana vs Silvano Buko & 2 Others [2015] eKLR**
42. Further, the 3rd Respondent Bank submits that it was a stranger to the private arrangement between the Appellant and the 1st Respondent. It contends that the Appellant failed to conduct proper due diligence prior to entering into the alleged sale agreement. The Respondents further state that there is no record of any transfer of the suit property from the 1st Respondent to the Appellant.
43. Counsel relies on sections 25(1) and 59 of the Land Registration Act as well as sections 87 and 88(1) (g) of the Land Act, together with the decisions in **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others and Opa Ltd v Speedway Investments Ltd & Another.** It is submitted that the 1st Respondent did not demonstrate that the Bank had consented to the sale of the charged property by private treaty. Additionally, there was no discharge of charge produced or filed in Court.
44. According to the 3rd and 4th Respondents, since the Appellant never acquired a registered interest in the suit property, he cannot seek to defeat the rights of the chargee bank, whose charge remains duly registered against the title.

Analysis and Determination

45. This being a first appeal, the duty of this Court is well settled. A first appellate court is required to re-evaluate, re-assess and analyse the evidence on record and draw its own conclusions while bearing in mind that it did not have the opportunity of seeing and hearing the witnesses testify. This principle was stated in **Selle v Associated Motor Boat Co. Ltd (1968) EA 123** where the former Court of Appeal for Eastern Africa stated:

“An appeal to this court from a trial by the High Court is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence generally (Abdul Hameed Saif vs. Ali Mohamed Sholan [1955] 22 EACA 270).”

46. Having considered the Memorandum of Appeal, the record of appeal and the submissions by the parties, the Court is of the view that the following issues arise for determination:

- a) *Whether the appeal is incompetent for failure to include a certified copy of the decree.*

- b) Whether the Appellant proved fraud or illegality in the acquisition of title by the 2nd Respondent.**
- c) Whether the contract between the Appellant and the 1st Respondent was defective for failure to acquire the 3rd Respondent's consent.**
- d) Whether the Appellant was entitled to the equitable remedy of specific performance.**
- e) Whether the Appellant was entitled to a permanent injunction and mesne profits or rent from the suit property.**
- f) Whether the trial court's remedy was appropriate**
 - a) Whether the appeal is incompetent for failure to include a certified copy of the decree.**

47. The 3rd and 4th Respondents submitted that the appeal is incompetent for failure to include a certified copy of the decree in the Record of Appeal. Order 42 rule 13(4) of the Civil Procedure Rules provides for the documents that must be included in the Record of Appeal and states that:

Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say—

(a) the memorandum of appeal;

(b) the pleadings;

(c) the notes of the trial magistrate made at the hearing;

- (d) the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;*
- (e) all affidavits, maps and other documents whatsoever put in evidence before the magistrate;*
- (f) the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal:*

Provided that—(i) a translation into English shall be provided of any document not in that language;

- (ii) the judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a), (b) and (f).”*

48. Thus, a decree or order appealed from is ordinarily required to be included in the record of appeal. However, courts have increasingly adopted a pragmatic approach where the judgment appealed from is available and the substance of the decision can be discerned. The absence of a decree does not automatically render an appeal incompetent if the omission can be cured or the court can still determine the issues in controversy. The Court in the case of **Nyota Tissue Products v Charles Wanga Wanga & 4 Others** [2020] KEHC 6207 (KLR) observed as follows:

“The rule applicable to the appeals to the High Court makes provision under Order 42 rule 13 (f) of the Civil Procedure Rules for the filing of a copy of the “judgment, order or decree appealed from” and does not make it mandatory to attach the judgment and the decree. The Record of Appeal herein attached the Judgment of the trial court according to the requirements of Order 42 rule 13 (4) (f) of the Civil Procedure Rules, and in my respectful view, I would agree with the Court in Silver Bullet Bus case

on the point, that it would be too draconian to strike out the appeal in these circumstances.”

49. In the Supreme Court case cited by the 2nd Respondent that they insist this Court is bound to uphold, the case of **Bwana Mohamed Bwana vs Silvano Buko & 2 Others [2015] eKLR**, the Appellant failed to file the entire record of appeal, thus there was nothing for the Court to refer to. This case is distinguishable from the present case since the record of appeal includes the signed and dated judgment.

50. In the circumstances of this case, the judgment of the trial court is sufficiently described in the record and the orders made by the trial court are clear. The Court therefore finds that the omission is not fatal and declines to strike out the appeal on that ground.

b) Whether fraud was proved against the 1st and 2nd Respondent

51. The Appellant contends that the title held by the 2nd Respondent ought to have been cancelled on account of fraud and collusion between the Respondents.

52. The law relating to the indefeasibility of title is provided under **Land Registration Act (Kenya)**, particularly section 26(1), which provides that a certificate of title shall be taken as prima facie evidence that the person named as proprietor is the absolute and indefeasible owner, subject only to challenge

on grounds of fraud or misrepresentation to which the person is proved to be a party. It states as follows;

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or*
- (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”*

53. This position was affirmed and upheld by the Apex Court when the Supreme Court in **Dina Management Ltd v County Government of Mombasa & 5 others (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR)** held as follows:

“Article 40 of the [Constitution](#) entitles every person to the right to property, subject to the limitations set out therein. Article 40(6) limits the rights as not extending them to any property that has been found to have been unlawfully acquired.”

54. It is also settled that allegations of fraud must not only be specifically pleaded but must also be strictly proved, though the standard of proof is slightly higher than on a balance of probabilities. This principle was affirmed in **Kinyanjui Kamau v George Kamau Njoroge (2015) eKLR.**

55. In the present case, the question of whether the transfer of the suit land L.R. No. Iriani/Kairia/747/27 from the 1st Respondent to the 2nd Respondent was fraudulent was the subject of **Nyeri ELC Appeal NO. E025 of 2023 Francis Muriuki Muraguri Versus Ephantus Wachira Ngochi and 3 others** where this court found as follows;

“Considering the totality of the evidence, including the altered agreement, the forensic findings on signature disparity, the inconsistencies in the Defendant’s cases, and the irregularities in the consent process, and the disparities in the value placed on the suit property, the evidence tilts in favour of the Appellant’s contention that the transfer of L.R. No. Iriani/Kairia/747/27 from the Appellant to the 1st Respondent with the consent of the 2nd Respondent was fraudulent and unprocedural. The trial court failed to properly evaluate these material factors and thereby arrived at an erroneous conclusion.”

56. The Court affirms the position taken above that the transfer of L.R. No. Iriani/Kairia/747/27 from the 1st Respondent (who was the Appellant in the above appeal) to the 2nd Respondent (the 1st Respondent in the above appeal) with the consent of the 3rd Respondent (the 2nd Respondent in the above appeal) was fraudulent and unprocedural.

57. This Court further finds that the trial court failed to properly evaluate these material factors and thereby arrived at an erroneous conclusion.”

c) Whether the contract between the Appellant and the 1st Defendant was defective for failure to acquire the 3rd Defendant’s consent.

58. This court is of the view that the legality or otherwise of the transaction Between the 1st and 2nd Respondents did not assist the Appellant herein for the reason that the same does not give credence or cloth the transaction between himself and the 1st Respondent legal status.
59. The evidence on record indicates that the suit property was charged to the 3rd Respondent bank and that the Appellant was aware of the existence of that charge at the time of entering into the sale agreement. The Appellant also admitted during cross-examination that there was no consent from the chargee bank authorizing the sale of the charged property.
60. The requirement for consent of the Chargee is provided for under sections 87 and 88(1) (g) of the Land Act CAP 280, which provide as follows respectively hereunder:

Section 87. Chargee's consent to transfer

If a charge contains a condition, express or implied that chargee prohibits the chargor from, transferring, assigning, leasing, or in the case of a lease, subleasing the land, without the consent of the chargee, no transfer, assignment, lease or sublease shall be registered until the written consent of the chargee has been produced to the Registrar.

Section 88. Implied covenant by the chargor

(1) There shall be implied in every charge covenants by the chargor with the chargee binding the chargor—

(g). not to transfer or assign the land or lease or part of it without the previous consent in writing of the chargee which consent shall not be unreasonably withheld;

61. A similar provision is made under Section 59 of the Land Registration Act CAP 300, which provides that:

Section 59. Lender's consent to transfer

If a charge contains a condition, express or implied by the borrower that the borrower will not, without the consent of the lender, transfer, assign or lease the land or in the case of a lease, sublease, no transfer, assignment, lease or sublease shall be registered until the written consent of the lender has been produced to the Registrar.

62. From the above statutory provisions, it is evident that consent of the 3rd Respondent Bank was mandatory before proceeding with the sale of the suit property to the Appellant herein. The sale thus could not be validated under the law.

d) Whether the Appellant was entitled to the equitable remedy of specific performance.

63. Specific performance is an equitable remedy granted at the discretion of the court where damages would not be an adequate remedy and where the contract is capable of being performed.

64. In the present case, although the trial court found that there existed a valid agreement between the Appellant and the 1st Respondent; it is evident that the suit property was at all material times charged to the 3rd Respondent bank.
65. The evidence before the trial court demonstrated that the charge had not been discharged and that the consent of the chargee bank had not been obtained prior to the purported sale. As quoted elsewhere under Sections 87 and 88 of the **Land Act**, the interest of a chargee takes priority over subsequent dealings in the charged property unless the chargee consents to such dealings.
66. Without the consent of the chargee and in the absence of a discharge of charge, the 1st Respondent could not pass a valid title to the Appellant.
67. Moreover, the suit property was subsequently registered in the name of the 2nd Respondent. In those circumstances, the contract between the Appellant and the 1st Respondent had become incapable of specific enforcement.
68. The trial court therefore cannot be faulted for declining to grant an order of specific performance.

e) Whether the Appellant was entitled to a permanent injunction and mesne profits or rent from the suit property.

69. Mesne profits are damages payable by a person in wrongful possession of land to the rightful owner, covering the period from the start of illegal occupation until vacant possession is delivered. The Court of Appeal vide the case of [Attorney General v Halal Meat Products Ltd \[2016\]eKLR](#), where the Court observed as hereunder;

“It follows therefore that where a person is wrongfully deprived of his property he/she is entitled to damages known as mesne profits for loss suffered as a result of the wrongful period of occupation of his/her property by another.”

70. The Appellant also sought a permanent injunction and payment of rent allegedly collected from the suit property. The principles governing the grant of injunctions were set out in **Giella v Cassman Brown & Co Ltd (1973) EA 358**.

71. In the case of [Nguruman Limited v Jan Bonde Nielsen & 2 others \[2014\] eKLR](#) the Court of Appeal found that:

“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion.”

77. In this case, the Appellant was not found to be the rightful owner of the suit land as it has been observed above that the 1st Respondent did not obtain the Chargee Bank’s consent to sell the property to the Appellant herein. The Appellant could thus not be awarded mesne profits or rent.

78. Further, an injunction cannot issue to restrain a registered proprietor from dealing with his property unless the applicant demonstrates a legally recognizable interest in the land.

79. Since the Appellant never acquired a registrable interest in the suit property and the title is presently held by the 2nd Respondent, the Appellant could not lawfully claim rent or seek to restrain the 2nd Respondent from using the property.

80. The trial court therefore correctly declined to grant those reliefs.

f) Whether the trial court's remedy was appropriate

82. Having declined to grant the equitable remedies sought, the trial court ordered the 1st Respondent to refund the purchase price together with liquidated damages and interest.

83. The evidence on record shows that the 1st Respondent admitted receiving the purchase price from the Appellant and also admitted that the transfer of land was never effected.

84. In the circumstances, the order requiring the 1st Respondent to refund the purchase price together with damages as agreed under the contract was an appropriate remedy for breach of contract.

85. This Court therefore finds no basis to interfere with the trial court's exercise of discretion in that regard.

86. Accordingly, the Court makes the following orders:

1. **The appeal is hereby dismissed for lack of merit.**
2. **The judgment of the trial court delivered on 16th November 2023 in Karatina Principal Magistrate's Court ELC Case No. 15 of 2019 is hereby upheld in its entirety.**
3. **The Appellant shall bear the costs of this appeal to the 1st, 3rd and 4th Respondents.**

Delivered, dated and signed via Microsoft Teams this 12th day of March, 2026.

HON. L. G. KIMANI

JUDGE ENVIRONMENT AND LAND COURT

The Ruling is read in the presence of-

No attendance for the Appellant

Kamwenji for the 1st Respondent

No attendance for the 2nd Respondent

Kariuki for the 3rd and 4th Respondents

No attendance for the 5th Respondent