Gathuna v Gatimu & another (Civil Appeal 402 of 2018)
[2024] KECA 22 (KLR) (25 January 2024) (Judgment)

Neutral citation: [2024] KECA 22 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 402 OF 2018

S OLE KANTAI, M NGUGI & PM GACHOKA, JJA

JANUARY 25, 2024

BETWEEN

SIMON KIRUI GATHUNA ..... APPELLANT

AND

DAVID KAVUTI GATIMU ..... 1ST RESPONDENT

WACIAMA TIMBER HARDWARE LTD ..... 2ND RESPONDENT

(Being an appeal against the judgement and decree of the Environment and Land Court at Nairobi (E.O. Obaga J.) dated 26th July, 2018 in ELC 442 of 2009)

JUDGMENT

1. The facts that emerge from the evidence presented before the trial court leading to the judgment now before us on appeal are not much in contention. Both in their pleadings and testimony, the appellant and the 1st respondent, who testified before the trial court, are in agreement on most of the material particulars of the dispute between them. We set out below what we glean from the pleadings and evidence of the two witnesses.

2. At the time that the events leading to the appeal before us began, Simon Kirui Gathuna, the appellant, was the registered proprietor of land parcel number Dagoretti/Riruta/3932. The 1st respondent, David Kavuti Gatimu, a director of the 2nd respondent, leased a portion of the suit property measuring 100x100 feet, on which the 2nd respondent operated a hardware and timber yard. The tenancy relationship was governed by an agreement entered into on 20th March 1998. Five years later, the appellant agreed to sell to the respondents the portion leased to them. Accordingly, the appellant entered into a sale agreement dated 28th October 2003 with the 2nd respondent, Waciama Ltd, for sale of a portion measuring 100x100 feet for a sum of Kshs 1,400,000.

3. Prior to the sale agreement, the respondents had paid a sum of Kshs. 370,000 to the appellant, a sum which was acknowledged in the sale agreement. Thereafter, and pursuant to the sale agreement, the 1st respondent and his wife started paying the purchase price in instalments, paying a further sum of Kshs. 200,000 to make a total of Kshs. 570,000. According to the agreement between the parties, the balance of the purchase price was to be paid on or before 30th June, 2004.

4. It was contended by the respondents and undisputed by the appellant that in addition to the payments of Kshs. 370,000 and Kshs. 200,000 acknowledged at the execution of the sale agreement, they had made further payment to bring the total payment to Kshs. 1,000,000. The respondents asserted that two months before the completion date of the transaction, the 1st respondent had asked the appellant to accompany him to their common lawyer, Alex Karanja & Co. Advocates, to make a final payment, but the appellant had declined to do so. The 1st respondent left the balance of the purchase price, being Kshs.400,000, with the advocate and asked the appellant to collect it, but he never did.

5. While the agreement between the parties was for the sale of a portion out of Dagoretti/Riruta/3932, it transpired that two years prior to the execution of the sale agreement, the appellant had subdivided the land and the said title number Dagoretti/Riruta/3932 had been closed. Two new titles, LR No. Dagoretti/ Riruta/4957 measuring 0.33 hectares and Dagoretti/ Riruta/4956 measuring 0.10 hectares had been issued. Accordingly, the portion claimed by the respondents, it emerged, was on LR No. Dagoretti/ Riruta/4957.

6. Perhaps as a result of this development, the 1st respondent had made a complaint to the police in December 2004, accusing the appellant of obtaining money by false pretences. The appellant was arrested and charged with the said offence, but he was acquitted in the judgment of the trial court dated 7th July 2006. He then showed the 1st respondent a portion of land that he was ready to give him, but the 1st respondent declined. The appellant then rescinded the sale agreement and asked the 1st respondent to accept a refund of the amount paid towards the purchase price. The 1st respondent declined to accept it.

7. The record of the trial court indicates that the appellant then sued the respondents in ELC No. 465 of 2005 seeking eviction orders against them. Thereafter, during the pendency of ELC No. 465 of 2005, the appellant filed ELC No. E442 of 2009 seeking, unsuccessfully, a mandatory injunction requiring the respondents to vacate his property, LR No. Dagoretti/Riruta/4957, general damages and the costs of the suit.

8. In ELC No. 465 of 2005, the respondents had filed a defence and counterclaim against the appellant, denying the appellant's claim and seeking orders:

    a. That the plaintiff he compelled to take all the necessary steps and execute all the necessary documents to exercise excise transfer the agreed portion of 100x100sq feet of land being the portion currently occupied by the defendant from the plaintiff's land LR. Dagoretti/ Riruta/4957 and to transfer the same to the defendant.

    b. That this Honourable Court do issue temporary injunction restraining the plaintiff by himself, his servants and/or agent from trespassing on the defendant's plot or from evicting the defendant from alienating, transferring, charging, subdividing, surveying or in any manner interfering with peaceful possession of the defendant's portion of land measuring 100x100sq feet or the defendant's operations till disposal of this suit or until otherwise directed by this Honourable Court.

c. That the Honourable Court be pleased to extend the time within which the parties herein may obtain Land Control Board Consent to this sale transaction.

d. That failure of the plaintiff to take all necessary steps to complete this transaction including subdivision and transfer within the extended time, the Deputy Registrar of this Honourable Court be mandated to do each and everything necessary action and sign all documents necessary to complete this transaction and transfer the portion subject matter of this suit to the defendant.

e. Costs of this suit be provided for.

9. In his evidence, the appellant confirmed that the respondents had leased a plot measuring 100x100 feet from him; that they had thereafter entered into a sale agreement for a plot of the said dimensions; that the respondents had paid him in bits but had not completed payment. In cross-examination, he confirmed that he had sold the plot with the improvements on it; that he had sworn an affidavit in which he had stated that it was true that the balance of Kshs. 400,000 was with his lawyers; and he confirmed that the letter from his advocate dated 8th April 2004 indicated that he had been paid Kshs. 1,000,000 for the purchase of the plot. He testified that he had not taken the respondents to the Land Control Board for consent as he had rescinded the sale agreement.

10. In his testimony, the 1st respondent confirmed the essential facts as they emerged from the evidence of the appellant relating to the lease of the 100x100 feet plot; the agreement for sale of the said plot out of Dagoretti/Riruta/3932; his subsequent discovery that the title to the property had been closed after it had been subdivided; and that the appellant had indicated in the (criminal) trial court that he still had land to sell to the respondents. It was the 1st respondent's testimony that he had constructed permanent houses on the portion he had purchased from the appellant, and that he was living there. He had spent about Kshs.5,000,000 to develop the property. He had asked the appellant to take him to the Land Control Board for consent but the appellant had failed to do so.

11. Upon hearing the parties, the trial court found in favour of the respondents on their counterclaim and issued the following substantive orders:

a. The plaintiff is hereby compelled to take all necessary steps and execute all necessary documents to excise and transfer the agreed portion of 100x 100 sq feet of land being currently occupied by the defendant from the plaintiffs land known LR No.Dagoretti/ Riruta/4957 and transfer the same to the defendant.

b. The period for applying for consent of the Land Control Board is hereby extended by a period of six months.

c. If the plaintiff does not take all the necessary steps to complete the transaction including subdivision and transfer within the extended time, the Deputy Registrar of this Court is hereby mandated to sign all necessary documents to ensure that a plot measuring 100x100ft is excised from LR No.Dagoretti/ Riruta/4957 and transferred to the defendant.

12. The appellant was also ordered to pay the respondents' costs of the suit.

13. {The appellant was dissatisfied with the judgment and he filed the present appeal in which he raised eight grounds of appeal in the memorandum of appeal dated 6th November 2018. At the hearing of the appeal before this Court, his learned counsel, Mr. Kinyanjui, indicated that the grounds had been collapsed into the following, namely that the trial court erred:

a. in holding that he had received Kshs 1,000,000 from the respondents and that the balance of Ksh 400,000 was deposited with the 1st respondent's lawyers prior to the completion date, which he has failed to collect to date;

b. in finding that the portion purchased by the 2nd respondent fell on LR, Dagoretti/Riruta/4957 which was the subject of the suit;

c. in finding that the portion claimed by the respondents is identifiable and can be excised from LR Dagoretti/Riruta/4957;

d. in holding that the appellant has long recognized the sale agreement between himself and the respondents and that he never rescinded the sale agreement;

e. in holding that the land transaction was not void for want of consent of the Land Control Board;

f. in holding that time was not of essence in the matter and that the appellant had failed to prove his case while the respondents had proven their counterclaim on a balance of probability.

14. In submissions dated 25th April, 2019 in support of the appeal which were highlighted by his learned counsel, Mr. Kinyanjui, the appellant submitted that the trial court was wrong in its finding that he had received Kshs 1,000,000 from the respondent; that Kshs. 400,000 had been deposited with the 1st respondent's advocate prior to the completion date; and that he had been asked to collect it. The appellant submitted that the respondents were never willing to pay the balance of the purchase price, and no evidence was ever produced showing that they attempted to pay it. It is his submission that the allegation that the respondents had deposited the balance of Kshs. 400,000 in the offices of Alex Karanja & Co. Advocates for collection by the appellant was unsubstantiated, and he never received the letter dated 8th July, 2004 to that effect.

15. The appellant submits further that specific performance cannot be enforced since the respondents failed to pay the balance of the purchase price, nor did they produce any evidence to show that any amount was paid other than the Kshs. 570,000 he received at the time of execution of the agreement. It is his submission that there was a complete breach of the conditions set in the sale agreement, citing in particular clause 1(iii) which required that the purchase price be paid on or before 30th June, 2004.

16. With respect to the trial court's finding that the property the subject of the sale agreement was identifiable, the appellant submitted that at the time of the sale agreement, there was no property or title referred to as LR No. Dagoretti/Riruta/3932, a fact that was admitted by the 2nd respondent and his advocate before the criminal court. He submitted that the learned 'judge'(sic) before the criminal court held that the portion claimed by the respondents was unidentifiable. Thus, in the impugned judgment, the learned judge erred in finding that a specific portion measuring 100x100ft, which the 2nd respondent purchased, fell on LR No. Dagoretti/Riruta/4957.

17. It is the appellant's contention further that the sale agreement was not valid as it was not properly executed and attested to in accordance with the law. Further, that it became void after the expiry of 6 months from the date of signing as it did not have the requisite Land Control Board consent. According to the appellant, 15 years had passed since the sale agreement was executed and the respondents had made no application for extension of time to obtain the said consent from the Land Control Board. They had also not sought extension of the completion period in accordance with the terms of the sale agreement, and it was therefore void. He therefore asked this Court to set aside the impugned judgment and issue a mandatory injunction requiring the respondents to vacate his property LR No. Dagoretti/Riruta/4957, and to award him general damages.

18. At the hearing of the appeal, learned counsel for the appellant, Mr. Kinyanjui, highlighted two issues raised in the appeal, the first being whether there was a valid sale agreement between the parties. He reiterated the appellant's contention that the sale agreement was executed between the appellant and the 2nd respondent, a body corporate which could only have a binding agreement if it was signed and sealed with the corporate body's seal, which was missing in this case. He cited in support the case of *Queens Pharmaceutical Ltd –vs- RUP Pharm Ltd* [2002] eKLR and submitted that where the seal or the stamp of the company is missing on an agreement, that agreement is not valid. In his view, the trial court was wrong in finding that notwithstanding that there was no seal, the fact that the appellant had received and accepted money from the 1st respondent validated the agreement.

19. Mr. Kinyanjui emphasized, secondly, that at the time of entering into the sale agreement, the property referred to in the agreement, Dagoretti/Riruta 3932, did not exist. It was his submission that the agreement was in respect of a land reference number describing a property that had ceased to exist two years prior to signing of the agreement. He submitted, therefore, that the trial court erred in issuing the order for specific performance, emanating from a sale agreement in respect of a property which was no longer in existence. He observed that the 1st respondent had, in his evidence, confirmed that the property or the portion which he was occupying had already been sold to a third party; that if the property had already been sold to a third party, there was nothing for the trial court to issue orders of specific performance in respect of. Further, specific performance being an equitable remedy, it could only be granted to a party who comes before the court of equity with clean hands, and as the respondents had not paid the full purchase price as agreed by the parties, they were not entitled to the order.

20. When the Court pointed out that, from the evidence, the last day for payment of the purchase price was 30th June 2004, and that the whole balance of the purchase price was deposited with the lawyer representing both parties prior to that date, Mr. Kinyanjui asserted that in the criminal case against the appellant, the lawyer had confirmed that payment was not made; and further, that in his affidavit which also formed part of the record, the appellant confirmed that the money was never paid. His submission was that in the absence of full payment being made and the particular property not being available for transfer, the order for specific performance could not issue.

21. In response to further questions from the Court, Mr. Kinyanjui conceded that the property at issue, a specific portion of 100 x100 feet, was leased to the respondents in 1998. He submitted, however, that at the time the agreement for sale was entered into between the parties, the appellant had already sub-divided the property. There was therefore nothing to enter into an agreement for, or for the trial court to give an order for specific performance in respect of as, by the time the appellant entered into the agreement with the 2nd respondent, he knew he had sub-divided the land. Mr. Kinyanjui submitted that that was the reason why the issue of misrepresentation came into play: that from the word go, there was a misrepresentation of facts by the appellant while entering into the sale agreement.

22. Mr. Kinyanjui nonetheless confirmed that the appellant did receive the Kshs.1,000,000 from the 1st respondent and his wife; that he still had the said Kshs. 1,000,000; that as averred in the appellant's affidavit, the balance of the purchase price, being Kshs. 400,000, was being held by the parties' joint advocates, the firm of Alex Karanja & Co Advocates.

23. Mr. Kinyanjui further conceded that under section 3 of the *Law of Contract Act*, on a disposition of an interest in land, the sale agreement must be in writing and signed by the parties. He maintained, however, that in this case, the agreement was signed by a director of the 2nd respondent and the appellant, and since the purchaser was a company, the agreement ought to have been sealed with the seal of the company.

24. In submissions in response dated 24th July 2019 highlighted by their counsel, Ms. Chege, the respondents submitted that the appellant had received Kshs 1,000,000 from the respondents, and was fully aware that the balance had been deposited with their joint advocates; that the appellant had confirmed this both in his own affidavit and his advocates' letter which formed part of the record; that the appellant admitted in evidence that he was selling the respondents the same parcel of land that they had leased from him; that the appellant had all along held the agreement for sale between him and the respondents valid, and he was therefore estopped from raising the issue of its execution for the first time in submissions; that the trial court was correct in finding that Land Control Board consent could not be applied for due to outstanding issues between the appellant and the respondents, and that the appellant could not rely on his own wrongdoing in failing to furnish the completion documents necessary for the application for Land Control Board consent.

25. In highlighting the respondents' submissions, Ms. Chege emphasized that the parcel of land the respondents purchased from the appellant was the same parcel that they had leased from him in 1998, and they were still, at the time of hearing the appeal, in occupation of that parcel having paid the full purchase price as agreed upon with the appellant; that they had developed the land parcel and were still in possession of it; that the parcel of land that the respondents had purchased is in existence as part of the property now known as Dagoretti/Riruta/4957; that while the agreement for sale referred to Dagoretti/Riruta 3932, it turned out that by the time the agreement was made, the appellant had already subdivided the property and new parcel numbers had already been issued. It was her submission that the property that the respondents purchased still exists as part of Dagoretti Riruta/4957.

26. With regard to the execution of the sale agreement, Ms. Chege submitted that the appellant first raised the issue in his submissions at the trial court, and it was not part of the issues for determination before the court. Not having been raised before the trial court and not being one of the issues for determination at that point, it cannot be used to vitiate the agreement of the parties.

27. In response to questions from the court with regard to the order of specific performance, Ms. Chege conceded that indeed the issuance of the remedy was rare. She submitted, however, that the circumstances of this case warranted the grant of the order. This, she submitted, was on the basis that the parcel number identified in the agreement was the parcel number that the appellant confirmed to have been the actual parcel number for the property occupied by the respondents. Her submission was that even if the agreement referred to Dagoretti-Riruta 3932, it was not the responsibility of the respondents to have provided the proper title number, given that they were not the party in possession of the title document for the property. It was her view that the remedy of specific performance was warranted since, even though the agreement referred to Dagoretti/Riruta/3932, it is not in dispute that the parcel occupied and purchased by the respondents continues to be in existence.

28. Ms. Chege maintained that the evidence on record proves that indeed the respondents paid the full purchase price; that the last portion of Kshs. 400,000 was deposited with the parties' joint advocates and the appellant was expected to go and complete the transaction by submitting the completion documents, one of which was the application for Land Control Board consent. Ms. Chege submitted that the appellant did not turn up at the advocate's office, and that is why the parties were not able to attend before the Land Control Board for the purpose of obtaining consent. She confirmed, however, that an application for Land Control Board consent was not prepared as the appellant did not present himself at the advocates office to receive the balance of the purchase price, Kshs. 400,000, and to execute the application for consent and the transfer forms which would then have enabled the transfer of the property to the respondents. She submitted, however, that time for application for Land Control Board consent can be extended by the court, which was done in this case, and it is not a factor that would negate the agreement of the parties.

29. In brief submissions in response, Mr. Kinyanjui contended that this was one matter that did not meet the minimum threshold for grant of orders of specific performance; that there must be special attachment to the land to warrant grant of the orders; that one must prove that this particular property is unique in nature; and that it is the only property that (the respondents) can get for the value paid for it. In this case, these conditions were not met to warrant the orders of specific performance being granted, and the only remedy that would be available to the respondents, according to Mr. Kinyanjui, was perhaps damages and a refund of the purchase price.

30. We have considered the proceedings and the judgment of the trial court, appellant's grounds of appeal, and the respective submissions of the parties with regard thereto. Four issues, we believe, arise for determination in this matter:

    i. whether there was a valid sale agreement between the appellant and the 2nd respondent;

    ii. whether the respondents paid the full purchase price in respect of the land the subject of the sale agreement;

    iii. whether the land the subject of the sale agreement was available and whether the remedy of specific performance was available to the respondents;

    iv. whether the transaction between the parties was void for lack of land control board consent.

31. We have set out above the evidence before the trial court which, in accordance with our mandate as enunciated in the well- known case of *Selle & another vs. Associated Motor Boat Co. Ltd & others* [1968] EA 123, we shall re-evaluate as we analyse the issues set out above. Since the issues and the evidence leading to their proof or otherwise are so intricately connected, we shall consider them together.

32. As we observed at the beginning of this judgment, the essential facts of the case are not much in dispute. The respondents leased premises measuring 100x100 ft in dimension out of Dagoretti/Riruta/3932 from the appellant. Five years later, the appellant agreed to sell and they agreed to buy, pursuant to a sale agreement dated 28th October 2003, a property of the same dimensions, with the 2nd respondent as the purchaser. The evidence indicates that the subject of the agreement was the same portion that the appellant had leased to the respondents. By the time they entered into the sale agreement, the respondents had paid a total of Kshs. 570,000, a fact that was acknowledged in the sale agreement.

33. The respondents' testimony was that they had paid a total of Kshs. 1,000,000 to the appellant, and had deposited a further Kshs. 400,000 with their common advocate, Alex Karanja & Co. Advocates, before the contractual completion date, 30th June 2004. The appellant denied receipt of the said Kshs 1,000,000, and further denied that the respondents had deposited the balance of Kshs 400,000 for him to collect.

34. The appellant's own evidence, however, gives the lie to his assertions. Acting on the instructions of the appellant, purportedly in rescission of the sale agreement between the appellant and the respondents, the firm of C. W. Njuguna & Co Advocates, in the letter dated 8th April 2004 addressed to the 1st respondent, stated as follows:

> "...you both proceeded to the offices of M/S Karanja & Co. Advocates in the year 2003, wherein you jointly instructed him to act for both of you.
>
> To this end you both executed the sale agreement and you proceeded to intermittently remit to our client through your joint Advocate various instalments for the purchase of the

portion of land you were to purchase. Todate our client has received a total sum of Kshs. 1,000,000. The balance of Kshs. 400,000 todate continues to be held by your advocate."

35. At paragraph 9 and 10 of his affidavit sworn on 21st April 2005 and filed in the High Court in Civil Suit No. 465 of 2005-*Simon Kirui Gathuna v Waciama Timber Hardware Ltd*.-, the appellant deposes as follows:

> " 9. That on the 28th October 2003, the defendant through its director David Kivuti Gatimu and I entered into a written agreement for the purchase of the agreed acreage and our advocate as of then was Ms. Karanja & co. Advocates.
>
> 10. That after execution of the sale agreement, the respondent intermittently remitted various amounts of monies, out of which I have todate received a total of Kshs. 1,000,000and the balance of Kshs. 400,000 continues to be held by our joint advocate (Ms. Alex Karanja & Co Advocates.)

36. While the appellant admits on oath that he entered into a 'written agreement' and received Kshs. 1000,000 out of a total purchase price of Kshs. 1,400,000; and that the balance had been deposited with the advocate acting jointly for him and the respondents, he still tried to wriggle out of his obligations, raising two arguments with respect to the validity of the sale agreement: first, that it was not valid as it was not sealed with the common seal of the 2nd respondent, and, secondly, that it was void for lack of Land Control Board consent.

37. Ms. Chege observed at the hearing before us that the argument with respect to the execution of the sale agreement was only raised in the submissions before the trial court, and that it had not been raised in the appellant's pleadings. In addressing itself to this issue, the trial court stated:

> 14. The plaintiff is raising the issue of the agreement not being sealed with the company seal for the first time in submissions. The issue of the agreement not being sealed with the company seal never arose in the pleadings and this issue cannot be raised in submissions. Parties are bound by their pleadings and if a matter is not raised in the pleadings or evidence, it cannot be raised in submissions."

38. The trial court relied on the case of *Global Vehicles Limited Vs Lenana Road Motors* (2015) eKLR in which this Court stated:

> " Again we must emphasize that the respondent was obliged, if its defence was that the agreements were not duly executed or were otherwise vitiated, to plead the same and give particulars of the facts vitiating the agreement. That was never done. The issue of the validity of the agreements was not raised expressly or even obliquely by any parties in their pleadings. Order 2 Rule 4 of the *Civil Procedure Rules* obliged the respondent to specifically plead facts, which it alleged made the appellant's claim unmaintainable. This, the respondent did not do, and having failed to satisfy the requirements as to pleadings it could not purport to lead evidence to prove facts that were contrary to its pleadings. It was clearly misdirection on the part of the judge to rely on issues that were not pleaded and constitute them the basis upon which the suit turned.".

39. The trial court concluded, a conclusion that we have no difficulty in affirming, that:

> " The plaintiff has all along recognised the agreement the basis of which he received payments. He is now estopped from attacking it on grounds that it was not sealed with the company

seal. I find that the agreement signed by the first plaintiff on behalf of the second defendant was valid."

40. The second argument relating to the validity of the sale agreement revolves around the lack of Land Control Board consent, with the appellant contending that the agreement was void for lack of Land Control Board consent. This argument, we observe, is a favourite of vendors intent on weaseling out of their contractual obligations. The trial court addressed the argument in two ways. It observed, first, that there was no evidence adduced by the appellant that the land in issue falls within an agricultural area, and a transaction in respect thereof requires consent from the Land Control Board. While noting, however, that the respondents had, in their counterclaim, sought extension of time for obtaining the consent, the trial court found that the agreement for sale was not void for want of consent, and proceeded to extend time for obtaining consent in its final orders in exercise of powers granted to the court under section 8 of the *Land Control Act*.

41. We find that, in the circumstances of this case, there is no basis for faulting the finding and orders of the trial court in this regard. As this Court observed in *Aliaza v Saul* (Civil Appeal 134 of 2017) [2022] KECA 583 (KLR) (24 June 2022) (Judgment):

> "The failure on the part of the respondent to obtain the necessary consent from the Land Control Board within the required period of six
>
> (6) months to enable the appellant transfer the suit land into his name does not render the transaction void. Equity and fairness, the guiding principles in Article 10 of the *Constitution*, require that the *Land Control Act* is read and interpreted in a manner that does not aid a wrongdoer, but renders justice to a party in the position of the appellant."

42. The facts of this case echo, in many respects, the facts in Aliaza v Saul above. The appellant in this case leases a defined portion of land to the respondents; thereafter agrees to sell it to them; receives the purchase price, then begins to invent all manner of reasons, including his own failure to execute the forms necessary for the application for Land Control Board consent, to avoid his obligations. The trial court, in our view, correctly found that the issue of Land Control Board consent was not a basis for avoiding the appellant's obligations, and granted the orders for extension of time. This issue must also be determined in the negative, and in favour of the respondents.

43. The final issue is whether the trial court erred in granting orders of specific performance to the respondents. Coupled with this is the question whether the trial court issued an order of specific performance in respect of land that was not in existence.

44. The appellant's counsel, Mr. Kinyanjui, made a fascinating and telling submission before us, which we have captured earlier in this judgment, the essence of which was that the appellant had, 'from the word go', deliberately misrepresented to the respondents the position with respect to the land the subject of the agreement. The misrepresentation, admitted with so much chutzpah for the appellant, was that while entering into a sale agreement in respect of a portion of L. R. Dagoretti/Riruta/3932, the appellant knew that he had subdivided the said land, the title in respect thereof had been closed, and two new titles had been issued.

45. The respondents, however, were still in possession of the parcel of 100x100ft that they had leased from the appellant, which they intended to purchase, had entered into an agreement in respect of the said parcel with the appellant, and had paid the full purchase price in respect thereof. In determining this

issue in favour of the respondents, we can do no more than quote what the trial court said in respect of the appellant's contention that the land the respondents had purchased was no longer in existence:

> " ...the plot which the 2nd defendant purchased through the first defendant was described as a portion measuring 100x100ft out of LR Dagoretti/Riruta/3932. There is evidence that the first defendant had leased the plot which he later decided to purchase in his company's name. He had leased the particular portion as from 1998. As at the time of lease, the land part of which he had leased was on LR Dagoretti/Riruta/3932. This parcel was later subdivided and the portion where the first defendant had leased became LR Dagoretti/Riruta/4957. The second defendant was purchasing the portion with the improvements erected and being thereon. The subdivision was carried out in 2001. The agreement was made in 2003. It was therefore clear that title No. LR Dagoretti/Riruta/3932. was non-existent as it had ceased on (sic) exist on subdivision but the specific portion which the second defendant purchased was still there and that is the portion which fell on No. LR Dagoretti/Riruta/4957 which is the subject of this suit. The plaintiff cannot therefore claim that the second defendant purchased a non-existent land. If the second defendant bought a non-existent land, why are the defendants being asked to vacate from LR No.Dagoretti/Riruta/4957.
>
> 13. It is clear that LR No. Dagoretti/Riruta/4957 is bigger than what the defendants are occupying. The defendants are not claiming the whole of it. They are claiming a plot measuring 100x100ft which they purchased. This portion is identifiable and can be excised from LR No.Dagoretti/Riruta/4957."(Emphasis added)

46. Having found that the respondents had entered into a valid agreement for sale of a specific, identifiable portion of land measuring 100x100 feet out of Dagoretti/Riruta/4957, and that they had paid the full purchase price in respect thereof, the trial court reached the conclusion, again correctly in our view, that they were entitled to the order of specific performance that they sought in their counterclaim.

47. Mr. Kinyanjui submitted before us that the remedy of specific performance is available only in rare cases, and that being an equitable remedy, it was not available to the respondents as they had not paid the full purchase price for the subject plot. As the evidence analysed in this judgment shows, however, the respondents had paid or made available the full purchase price, a fact that was fully acknowledged in writing by the appellant and his advocates. In the circumstances, we are satisfied that the trial court properly reached the conclusion that the circumstances of the case before it were such as to entitle the respondents to an order of specific performance.

48. We are, in the result, unable to find a basis for interfering with the very well-reasoned judgment of the trial court. We find that the present appeal is without merit, and it is hereby dismissed with costs to the respondents.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF JANUARY,2024.

S. OLE KANTAI

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JUDGE OF APPEAL

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MUMBI NGUGI

JUDGE OF APPEAL

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M. GACHOKA, CIArb, FCIArb

JUDGE OF APPEAL

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I certify that this is

a true copy of the original.

Signed

DEPUTY REGISTRAR