



**Mawa Family Co Ltd v Industrial & Commercial Development Corporation & another (Civil Appeal 76 of 2017) [2024] KECA 802 (KLR) (5 July 2024) (Judgment)**

Neutral citation: [2024] KECA 802 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
CIVIL APPEAL 76 OF 2017  
W KARANJA, J MOHAMMED & LK KIMARU, JJA  
JULY 5, 2024**

**BETWEEN**

**MAWA FAMILY CO LTD ..... APPELLANT**

**AND**

**INDUSTRIAL & COMMERCIAL DEVELOPMENT CORPORATION .... 1<sup>ST</sup>  
RESPONDENT**

**GLADYS WAMBUI MWAURA (AS THE LEGAL REPRESENTATIVE  
OF THE ESTATE OF FREDRICK MWAURA KARANJA  
(DECEASED) ..... 2<sup>ND</sup> RESPONDENT**

*(An appeal from the decree & judgment of the High Court at Nyeri (J. Ngaah, J.) delivered on 24th April, 2015 in HCCA No. 130 of 2010)*

**JUDGMENT**

**Background**

1. By an advertisement carried in a local daily, the Daily Nation, Industrial & Commercial Development Corporation (the 1<sup>st</sup> respondent) advertised all that piece or parcel of land known as Loc.11/Maragi/1193/600 situated in Makuyu Market within Muranga County (the suit property) for sale by public auction through the firm of Hippo General Merchants (the auctioneers) in the exercise of its statutory power of sale. Following a successful bid at the auction on 20<sup>th</sup> December, 2007, Mawa Family Co Ltd (the appellant) was declared the highest bidder at Kshs.300,000, pursuant to which it paid a deposit of Kshs.75,000 being 25% of the bid price. A memorandum of sale was executed on the same day between the appellant and the auctioneers. It was a term of the said agreement that the balance of the purchase price would be paid within thirty (30) days of the date of the agreement. However, this was not done and after the payment of the deposit and execution of the agreement, the appellant went silent and wrote to the 1<sup>st</sup> respondent on 20<sup>th</sup> November 2008, admitting that it had not paid



- the balance of Kshs 225,000 towards the balance of the purchase price in respect of the suit property. Prior to that the 1<sup>st</sup> respondent had written to the appellant on 8<sup>th</sup> September, 2008 to the effect that having failed to pay the balance of the purchase price for the suit property on 20<sup>th</sup> December, 2007, it was deemed to have forfeited the deposit paid and the 1<sup>st</sup> respondent was at liberty to deal with the suit property as it deemed fit.
2. In response to the appellant's letter of 20<sup>th</sup> November, 2008 requesting for an extension of time within which to pay the balance of the purchase price, the 1<sup>st</sup> respondent declined the request. Instead, the 1<sup>st</sup> respondent informed the appellant that the suit property had been re-advertised for sale and advised him (the appellant) to re-bid for the suit property if it was interested in doing so. The second sale of the suit property by public auction was conducted on 14<sup>th</sup> November, 2008 by the auctioneers who declared the 2<sup>nd</sup> respondent as the successful bidder of the suit property. From the record, the 2<sup>nd</sup> respondent paid the full purchase price of Kshs. 400,000.
  3. Aggrieved by this turn of events, the appellant filed a suit against the 1<sup>st</sup> and 2<sup>nd</sup> respondents at the Principal Magistrate's Court at Muranga vide Civil Case No 491 of 2008 seeking the following orders:
    - a. A declaration that the defendant's acts of intending to auction the property known as Loc.Maragi/1193/60 Mukuyu Market is unjustified and illegal.
    - b. A permanent injunction do issue restraining the defendant either by itself agents servants employees or an authority or anybody howsoever claiming or acting through it from advertising, auctioning or in any manner transferring to a 3<sup>rd</sup> party the property known as Loc.Maragi/1193/60 Mukuyu Market.
    - c. Specific performance of the contract
    - d. Costs of the suit and interest.
    - e. Any other better relief this court may find just.
  4. The suit was heard by the trial court and judgment delivered on 2<sup>nd</sup> July, 2011 and found, inter alia, that the appellant was not in breach of the agreement and that the 2<sup>nd</sup> respondent's claim as purchaser of the suit property had not been proved. The trial court found that the appellant had proved his case and thereby entered judgment in his favour. Aggrieved by the decision, the 1<sup>st</sup> and 2<sup>nd</sup> respondents lodged separate appeals at the High Court at Nyeri which were consolidated. The grounds of appeal were,, inter-alia that the trial court erred in law and in fact: in finding that the 1<sup>st</sup> respondent had proved its case beyond reasonable doubt; in holding that the appellant was not in breach of the contract and based on the same erroneous misapprehension ordered for specific performance of the contract and thereby arrived at a wrong decision; in finding that the appellant had extended time for completion of the contract when in fact there was no such extension of time granted and consequently shifted the burden of proof to the appellant which burden did not exist; the learned magistrate acted under the wrong principles in deciding the issue of specific performance when it was not a fit case to make such an award, taking into consideration that there was an alternative remedy of damages particularly considering that the suit property had been sold to a third party; in awarding an order for specific performance against the appellant while ignoring the obligation of the 1<sup>st</sup> respondent to pay the purchase price; and in failing to consider payment of the full purchase price at the time of completion of sale as a condition precedent to granting the order of specific performance.
  5. Further, that the trial court erred in law and in fact: in holding that Title No. Loc. 11/ Maragi/1193/60 (Mukuyu market) was distinct from Title No. Loc. 11/Maragi/60 (Makuyu market) yet the name of the market was only necessary in the description of the location of the property



irrespective of whether it was spelt as "Makuyu" rather than "Mukuyu" and in any event none of the two names formed part of the descriptive parts of the title of the suit property; in declaring any action by the appellant to auction Title No. Loc.11/Maragi/1193/60 as illegal, thereby permanently depriving the appellant of its statutory right of sale which is guaranteed under Section 74 of the Registered Land Act (repealed); that the trial court's judgment was based on assumptions and opinions not supported by evidence on record; and in failing to take cognizance of the case law put to him in the

#### **appellant's submission.**

6. The High Court (Ngaah Jairus, J.) allowed the appeals and set aside the trial court's judgment and substituted the same by allowing the 2<sup>nd</sup> respondents counter-claim with costs in both the trial court and at the High Court. The learned Judge found in part as follows:

"It was evident in case at hand that the first respondent had not only breached the contract but it did not demonstrate that it was ready and willing to perform its part of the bargain until almost a year later after the completion date when, surprisingly, it asked for more time to complete the sale. A delay of almost a year after the due date before the 1<sup>st</sup> respondent popped up to ask for more time to complete the sale cannot, by any stretch of imagination, be interpreted to mean that it was ready and willing to complete the sale...In any event, when the 1<sup>st</sup> respondent failed to perform its part of the bargain under the contract and the appellant was thereby discharged from any obligations by which it was hitherto bound, its dealings with the property, howsoever, is a question that should have at least bothered the 1<sup>st</sup> respondent. In the absence of any valid agreement between it and the appellant over the suit property, the 1<sup>st</sup> respondent had no business in the manner the appellant disposed its property."

7. Aggrieved by the decision of the High Court, the appellant lodged the instant appeal. The appeal is premised on the grounds that the learned Judge misapprehended the law and facts: by considering extraneous matters which were not in issue; misapplying the law on principles governing the grant of specific performance and therefore arrived at a wrong conclusion; in dismissing the appellant's case in failing to address itself to the real issues in controversy and arrived at a decision that was not supported by evidence on record; by adopting a subjective interpretation of the law on contracts and therefore arrived at a wrong finding; in holding that there was a breach of contract by the appellant while there was evidence on record that the appellant was always ready, able and willing to complete the sale; in holding that there was no valid agreement between the appellant and 1<sup>st</sup> respondent herein over the suit property; and that the appellant had no business in the manner the respondent disposed its property to the then 2<sup>nd</sup> respondent as the facts and evidence adduced by the appellant were fatally misapprehended by the learned Judge; by placing the burden of proof of termination of contract upon the appellant instead of upon the 1<sup>st</sup> respondent; and in dismissing the appellant's suit and allowing the 2<sup>nd</sup> respondents counter claim thereby occasioning a miscarriage of justice.
8. The appellant sought the following orders: that the appeal be allowed; the judgment of the High Court be set aside and orders thereof be vacated and the orders sought by the appellant at the trial court be granted; and that the costs of the appeal, in the High Court and of the proceedings in the trial court be awarded to the appellant.

#### **Submissions by counsel**

9. The appeal was heard by way of written submissions with brief oral highlighting. Learned counsel, Ms. Phoebe Juma was on record for the appellant while learned counsel, Mr. Mahinda was on record



for the respondents. Ms. Juma submitted that the law on specific performance as was stated in Civil Appeal No. 165 of 1996; Gurdev Singh Birdi and Marinder Singh Ghatora and Abubakar Madhubuti by Gicheru JA (as he then was) is that the party seeking this remedy must demonstrate that they had performed or were ready and willing to perform all the terms of the agreement which ought to have been performed by them. Counsel submitted that in this case the appellant was and has always been willing and ready to complete payment of the balance of the purchase price that was/is due to the 1<sup>st</sup> respondent and that in order to demonstrate this the appellant approached the 1<sup>st</sup> respondent requesting for an extension of time and wrote a letter to the 1<sup>st</sup> respondent explaining why it was unable to complete the payment of the balance of the purchase price on time. Further, that a cheque of the full payment of the balance of the purchase price was sent to the 1<sup>st</sup> respondent who declined to accept the said balance.

10. Further, it was submitted that the learned Judge failed to address the fact that the 1<sup>st</sup> respondent acted maliciously towards the appellant and colluded with the 2<sup>nd</sup> respondent to deprive him of the suit property in respect of which he had already paid a deposit. Counsel further submitted that on 28<sup>th</sup> November 2008 the 1<sup>st</sup> respondent informed the appellant to bid afresh for the suit property which the 1<sup>st</sup> Respondent claimed to have already sold to the 2<sup>nd</sup> respondent on 14<sup>th</sup> November, 2008 which is over two weeks after it claimed to have sold the suit property.
11. Counsel further submitted that the learned Judge failed to address the fact that the land advertised for the 2<sup>nd</sup> auction by the 1<sup>st</sup> respondent was completely different from the one purchased by the appellant in the 1<sup>st</sup> auction. Counsel submitted that the property that the 1<sup>st</sup> respondent advertised and sold to the appellant was Loc.11/Maragi/1193/60 Mukuyu Market measuring 0.0371Ha, while the property re-advertised by the 1<sup>st</sup> respondent which it claims to have sold to the 1<sup>st</sup> respondent was stated as Loc.11/Maragi/1193/60 Makuyu Market measuring 0.81 Ha. Counsel asserted that the two properties are not the same.
12. Counsel further submitted that the 2<sup>nd</sup> respondent did not indicate his bid number and did not produce any payments by way of receipts or bank statements or any agreement or memorandum of sale between him and the auctioneers as proof that a second sale in respect of the suit property had taken place. Counsel further submitted that the learned Judge erred in adopting a subjective interpretation of the law on contracts and therefore arrived at a wrong finding. It was counsel's further submission that since purchasing the suit property the appellant had made extensive developments and it would therefore be unfair for it to lose the suit property. Counsel urged this Court to grants the orders sought.
13. In opposing the appeal, Mr. Mahinda submitted that the appellant did not pay the balance of the purchase price of Kshs 225,000 within the stipulated period and consequently the 1<sup>st</sup> respondent forfeited the deposit and sold the suit property to the 2<sup>nd</sup> respondent at an auction sale on 14<sup>th</sup> November, 2008 at a consideration of Kshs 400,000. Counsel submitted that the 2<sup>nd</sup> respondent paid the full purchase price and the 1<sup>st</sup> respondent released to him the original certificate of lease and the transfer by chargee in respect of the suit property to effect registration.
14. Counsel further submitted that the appellant was in gross breach of contract made on 20<sup>th</sup> December, 2007 as the appellant did not pay the consideration as stipulated in the memorandum of sale and that through its letter dated 20<sup>th</sup> December, 2008 the appellant sought an extension of time from the 1<sup>st</sup> respondent within which to complete the transaction. Counsel submitted that the extension of time was not granted and in the same letter the appellant acknowledged that they had been unable to raise the balance of Kshs.225,000 leading to the delay in payment of the balance of the purchase price. Counsel submitted that it is in evidence that the deposit paid by the appellant was forfeited and the suit property sold to the 2<sup>nd</sup> respondent.



15. Counsel further submitted that the appellant having breached a fundamental term of the agreement by non-payment of the consideration, the contract was rendered invalid and therefore unenforceable. Counsel asserted that as such the appellant was the author of its own misfortune and the holding of the High Court that the appellant was in breach of contract cannot be faulted. Counsel submitted that the terms of sale were very clear as spelt out in the contract and it does not call for extrinsic evidence to discern the intention of the parties as the agreement stipulated that time was of the essence which needed to be strictly observed as regards the parties' obligation. Counsel emphasised that the appellant having admitted that it was unable to pay the balance of the purchase price between the appellant and the 1<sup>st</sup> respondent stood rescinded as was rightly held in the impugned judgment.
16. With regard to the appellant's claim for specific performance, counsel submitted that the relief of specific performance is an equitable remedy and the same is discretionary and does not lie to a party who is in breach of the contract or who can be compensated in damages.  
  
Counsel submitted that the High Court found that the appellant was clearly in breach of a fundamental term of the contract in failing to pay the balance of the purchase price within the stipulated time. Counsel further submitted that the offer to pay was made almost a year after the sale had taken place by which time the contract had been rescinded and the suit property sold to another party, the 2<sup>nd</sup> respondent herein.
17. Counsel further submitted that the learned Judge did not err in holding that the remedy of specific performance was not available in this case as the appellant had an alternative remedy being compensation in damages. Further, that the appellant did not raise the claim for damages in the pleadings nor tender evidence touching on the same. Counsel urged this Court to dismiss the appeal for lack of merit.

### Determination

18. This is a second appeal. Our mandate is as has been enunciated in a long line of cases decided by the Court. See *Maina versus Mugiria* [1983] KLR 78, *Kenya Breweries Ltd versus Godfrey Odongo*, Civil Appeal No. 127 of 2007, and *Stanley N. Muriithi & Another versus Bernard Munene Ithiga* [2016] eKLR, for the holdings, inter alia, that on a second appeal, the Court confines itself to matters of law only, unless it is shown that the courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. See also the English case of *Martin versus Glywed Distributors Ltd (t/a MBS Fastenings)* 1983 ICR 511 where in, it was held, inter alia, that where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact and law, and, it should not interfere with the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law.
19. We discern the main issues for determination in the appeal to be:
  - a. Whether there was a breach of contract by the appellant;
  - b. Whether a relief for specific performance of contract could issue in this case.
20. The appellant's position is that time was never made of essence, and even if it was, it wrote to the 1<sup>st</sup> respondent on 20<sup>th</sup> November, 2008 seeking an extension of time within which to pay the balance of the purchase price of Kshs.225,000. It is notable that the request was however declined by the 1<sup>st</sup> respondent through its letter of 28<sup>th</sup> November, 2008 notifying the appellant that the suit property had been re-advertised for sale and that if it was interested it could re-bid.



21. What was the learned Judge's view on these contrasting positions?

As regards the letter from the 1<sup>st</sup> respondent dated 28<sup>th</sup> November, 2008, the learned Judge's view was that the 1<sup>st</sup> respondent did not allow an extension for completion of the agreement as from the date of the auction being 20<sup>th</sup> December, 2007.

22. In the Memorandum of Sale it was a condition of sale that:

“The balance of the purchase price shall be paid to the chargee within 30 days of the date of sale (as to which time shall be of essence of the contract), against execution of a legal Transfer of Property sold. However, the chargee reserves the right to extend completion date where necessary, subject to the purchaser meeting the extra costs and interest thereby occasioned. The sale contract can only be deemed absolute on payment of the balance of purchase price.”

23. It was also a further term of the contract that “If the purchaser fails to pay the balance of the purchase price within 30 days from the date of sale, the deposit paid by the purchaser shall be forfeited to the chargee absolutely and the chargee may without notice to the purchaser, re-sell the property at such time, in such manner and subject to such conditions as it shall think fit.”

24. From the record, the appellant breached a fundamental term of the contract by failing to pay the balance of the purchase price in accordance with the memorandum of sale. The 1<sup>st</sup> respondent was, therefore, justified under the contract in vitiating the sale with the appellant and proceeding to sell the suit property to another party.

25. This Court's finding in *Sun Sand Dunes Limited v Raiya Construction Limited* [2018] eKLR is instructive and states as follows:

“The object of construction of terms of a contract is to ascertain its meaning or in other words, the common intention of the parties thereto. Such construction must be objective, that is, the question is not what one or the other parties meant or understood by the words used. Rather, what a reasonable person in the position of the parties would have understood the words to mean.”

By parity of reasoning, the learned Judge's findings that the appellant breached a fundamental term of the contract cannot in the circumstances be faulted.

26. On the question whether the relief of specific performance or contract could issue in this case, it is notable that specific performance is an equitable remedy. In the impugned judgment, the learned Judge found as follows:

“In my humble view, I would say that having breached the fundamental conditions of the contract and thus, with its hands soiled, the 1<sup>st</sup> respondent was not entitled to any equitable remedy let alone the remedy of specific performance.”

27. In *Gurdev Singh Birdi and Marinder Singh Ghatora and Abubakar Madhubuti* Civil Appeal No. 165 of 1996 this Court (Gicheru, JA – as he then was) stated as follows:

“When the appellants sought the relief of specific performance of sale of the respondent's property...they must have been prepared to demonstrate that they had performed or were ready and willing to perform all the terms of the agreement...which ought to have been performed by them and indeed that they had not acted in contravention of the essential terms of the said agreement...It was not never in dispute that the appellant's were in breach



of an essential term of the agreement in that they failed to deliver up to the respondent the balance of the purchase price of the suit property... as stipulated in the agreement...When the appellants came to court seeking the relief of specific performance of the agreement, they had not performed their one essential part of the agreement. Namely: payment of the balance of the purchase price of the suit property. Indeed, right up to the conclusion of the proceedings in the superior court, they had not done so. In these circumstances, no court of equity properly directing its mind to the same would have considered it just and equitable to grant them the equitable relief of specific performance of the agreement with a view to doing more perfect and complete justice.”

28. Tunoi, JA (as he then was) on his part in the same case stated as follows:

“...The contract not having been completed within the period fixed for completion, it would be oppressive, unjust and financially injurious to require the respondent, who has not been guilty of laches nor inordinate delay, to part with his property, more than four years after the event when its current value had materially appreciated.”

29. By parity of reasoning, we find that in the instant case the memorandum of sale expressly provided that time was of the essence. For the appellant to seek the equitable relief of specific performance, he had a duty to demonstrate that he had performed all the terms of the contract. In the instant case, it is on record that the appellant had not performed all the terms of the contract. In the circumstances, we find that the appellant is not entitled to the equitable relief of specific performance.

30. The upshot is that we find that the 1<sup>st</sup> appellate court did not err in finding as it did. In the circumstances, we find no merit in the appeal and dismiss it with costs to the respondents. It is so ordered.

**DATED AND DELIVERED AT NYERI THIS 5<sup>TH</sup> DAY OF JULY, 2024**

**W. KARANJA**

.....

**JUDGE OF APPEAL**

**JAMILA MOHAMMED**

.....

**JUDGE OF APPEAL**

**L. KIMARU**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

