



**Ngaira v Cheng'oli (Civil Appeal 397 of 2017)
[2022] KECA 80 (KLR) (4 February 2022) (Judgment)**

Neutral citation: [2022] KECA 80 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 397 OF 2017
RN NAMBUYE, W KARANJA & HM OKWENGU, JJA
FEBRUARY 4, 2022**

BETWEEN

JAPHETH ANAMI NGAIRA APPELLANT

AND

CATHERINE KHAKASA CHENG'OLI RESPONDENT

*(An appeal against the judgment and decree of the Environment and Land Court,
E. O. Obaga, J.) dated 28th September, 2017 in Nairobi ELC No. 434 of 2012 (OS))*

JUDGMENT

1. This is a first appeal arising from the judgment of the High Court of Kenya in the Environment and Land Court of Kenya at Milimani ELC Cause No. 434 of 2012 delivered by E. O. Obaga, J. on 28th September, 2017.
2. The background to the appeal albeit in a summary form is that the appellant took out an Originating Summons (O.S) dated 24th July, 2012 against the respondent supported by a supporting and verifying affidavits seeking, inter alia, a declaration that the appellant was the beneficial owner of Flat Number E on Block MF-2 on LR Number 25980, (hereinafter, the suit property), specific performance of the contract for sale of land dated 26th August, 2010 signed between the appellant and the respondent, an order directing the respondent to vacate the suit property, an order directing the respondent to pay mesne profits to the appellant at the rate of Kshs.20, 000.00 per month until the date she vacates the suit property together with an attendant order that costs of the O.S be provided for.
3. The agreement triggering the O.S is that dated 9th November, 2009. In it the respondent entered into an agreement for sale of the suit property with National Housing Corporation (NHC) wherein NHC agreed to sell and the respondent agreed to buy the suit property (hereinafter referred to as the first agreement of sale) at a purchase price of Kshs. 1,600,000.00. Subsequently, on 26th August, 2010 the respondent entered into another agreement of sale with the appellant wherein the respondent agreed



to sell and the appellant to buy the suit property at a purchase price of Kshs.3,800,000.00 (hereinafter referred to as the second agreement of sale).

4. In the OS, the appellant avers further, inter alia, that it was a term of the second agreement of sale that Kshs.1,440,000.00 would be paid directly to NHC being the sum then owed by the respondent to NHC as the balance of the purchase price between NHC and the respondent pursuant to the first agreement of sale. The balance of Kshs.2,360,000.00 was to be paid to the respondent.
5. Upon execution of the second agreement of sale, the appellant paid to the respondent in fulfilment of his part of the bargain sums of money as follows: Kshs.500,000.00 on 10th January, 2011, Kshs.500,000.00 on 27th January, 2011, Kshs.500,000.00 on 11th February, 2011 Kshs.500,000.00 on 18th February, 2011 and Kshs.320,000.00 on 29th August, 2011 making a total sum of Kshs. 2,320,000.00. On 7th September, 2010 and 1st October, 2010 respectively, the appellant paid Kshs.20,000.00 to Messers M Uvyu & Co. Advocates being payment of legal fees the receipt of which was acknowledged. It was also a term of the second agreement of sale that NHC would transfer the suit property to the appellant directly without involving the respondent.
6. The appellant sought the court's intervention because despite receiving the entire purchase price, and receipt of several requests to do so, the respondent obstinately ignored, refused and or failed to vacate and give vacant possession of the suit property to the appellant prompting the appellant to initiate the O.S seeking the reliefs specified above.
7. The respondent was served with the O.S. She entered appearance dated 8th August, 2012 and filed a replying affidavit sworn on 23rd August, 2012 conceding the existence of the second agreement of sale dated 26th August, 2010 between her and the appellant but denied receiving the entire purchase price as agreed of Kshs.2,360,000.00 alleging that a balance of the purchase price of Kshs.40,000.00 payable to her by the appellant had not been paid as agreed between them. She further averred that despite her communicating to the appellant to pay NHC a further Kshs.400,000.00 being an increase in the purchase price of the property by NHC the appellant failed to do so forcing her to pay NHC the said amount on 18th June, 2012 long after the completion date.
8. The respondent contended further that: the appellant was in breach of the second agreement of sale as he failed to pay the installments as agreed; pursuant to the terms of the contract, time was of the essence and the appellant's failure to pay the purchase price as agreed rendered the second agreement of sale unenforceable; the second agreement of sale was rendered unenforceable as, prima facie, both parties were in breach thereof. She was therefore in the circumstances ready and willing to refund the monies paid to her by the appellant as part payment of the purchase price and to rescind the contract as the appellant failed to comply with the terms of the said agreement of sale between them.
9. The case was canvassed through rival pleadings, oral testimonies, written submissions and legal authorities relied upon by the respective parties in support of their opposing positions. The appellant was the sole witness in support of his case. In summary, the appellant's position albeit in a summary form was that he was in court because he purchased the suit property from the respondent vide the second agreement of sale dated 26th August, 2010, and notwithstanding receipt of the balance of the payment of the purchase price on 29th August, 2011 the respondent failed, refused and or neglected to give vacant possession. The appellant conceded that the completion date of the second agreement of sale was 31st January, 2011 while he made the last payment on 29th August, 2011. He conceded he did not clear the balance of the purchase price according to the stipulated terms of the second agreement of sale because he asked the respondent to clear with NHC first before he could release to her the final payment. He was aware the respondent averred explicitly that she was to clear all that she owed NHC by 31st January, 2011 but did not until 18th June, 2012. He maintained that



- the respondent acknowledged receipt of the payment of the last money he owed her. He denied any knowledge of any agreement vide which he was to pay to the respondent any additional money over and above the Kshs.3,800,000.00. He conceded that the respondent's evidence as well as documentary exhibits with regard to the alleged additional amount of money were contradictory as one set indicated Kshs.420,000.00 while the other indicated Kshs.400,000.00 both of which were unfounded as the minutes of the meeting allegedly held between him and the respondent pursuant to which the above mentioned figures were reached was unsigned. Neither was there anything in the emails exchanged between them to suggest that such an attendant agreement was ever executed as between them.
10. In cross-examination, the appellant conceded that the completion date was 31st January, 2011 while the last payment was made on 29th August, 2011. That as at 31st January, 2011 he had a balance of Kshs.320,000.00 to clear. He conceded that he did not agree in writing for extension of time of the completion date as per the original agreement and stated: "I agree that to this extent, I was in breach of the agreement..." He denied responsibility for breach of the second agreement of sale between him and the respondent, denied any knowledge of the respondent having been forced to get a loan from KCB to clear the balance with NHC allegedly occasioned by the appellant's failure to clear the balance of the purchase price on time.
 11. The respondent's position on the other hand was also a reiteration of the averments in the replying affidavit. Of crucial importance to the appeal is her admission of execution of the second agreement of sale between her and the appellant of 26th August, 2010, for the sale of the suit property at an agreed purchase sale price of Kshs. 3.8Million. The completion date fell on 31st January, 2011. She conceded variation of the second agreement of sale could only be by way of consensus. According to her, the extra amount of Kshs.400,000.00 was compensation for late completion of the second agreement of sale by the appellant. She also conceded that it was her obligation under the contract to clear the payment of rent and rates amounting to Kshs.435,803.00 which as at the time of the lapse of the completion date had not been cleared. Lastly, she was categorical that she was not willing to transfer the house to the appellant but was willing to refund what he had paid her towards the aborted second agreement of sale between them.
 12. When cross-examined, her position was that the house had not been transferred to the appellant. As such, he could not claim rental mesne profits. She also added that: "I have received Kshs.3,800,000.00 from the plaintiff. I received the last payment on 29th August, 2011... All the rents and rates were to be paid by the vendor at the completion of the agreement. The completion date was on 31st January, 2011. I had not paid the rates and rent as at 31st January, 2011. I cleared the rents and rates on 18th June, 2012..."
 13. The respondent also admitted that she was in breach of the agreement of sale between her and NHC and that it is the appellant who cleared the outstanding balance with NHC. Lastly, on the refund of the purchase price to the appellant she stated "I did not refund because there is a case in court. The plaintiff does not owe me any money..."
 14. At the conclusion of the trial, the Judge analyzed the record and identified two issues for determination namely, whether:
 - i) There was breach of the agreement of sale executed between the respective parties herein on 26th August, 2010.
 - ii) There was any agreement increasing the purchase price by Kshs.400,000.00.
 15. Upon considering the above issues in light of the analyzed record, the Judge took into consideration the holding in the case of *Wambugu vs. Njuguna [1983] KLR 172* in which the Court of Appeal declined



tosanction a sale agreement whereby the buyer had paid Kshs.2,300,000.00 out of Kshs.2,485,000.00 sale price, and proceeded to make findings thereon, inter alia, as follows: the agreement was clear that the appellant was to pay kshs.2,360,000.00 to the respondent. The documents tendered before the court indicated explicitly that the appellant paid kshs.2,320,000.00 to the respondent leaving a balance of kshs.40,000.00, the appellant had contended that he had paid the balance and produced two receipts for Kshs.20,000.00 each dated 7th September, 2010 and 1st October, 2010, issued by the appellant's advocates indicating explicitly that these were payments for legal fees which according to the Judge could not be taken as payment to the appellant's advocate on account of the agreement of sale executed between them and on that account the Judge ruled that: "it was clear that according to him the appellant did not clear the balance of the purchase price and could not therefore seek specific performance of the agreement executed between them especially when the appellant had admitted in cross-examination that he was in breach of the agreement executed between them by not paying the purchase price within the timelines stipulated in the said agreement."

16. The Judge appreciated the appellant's sentiments that he did not find it prudent to clear the balance of the purchase price before the respondent cleared her indebtedness to NHC which the Judge observed was indeed cleared by the respondent paying Kshs.440,000.00 to NHC on 18th June, 2012. Further, that despite evidence that the respondent had met her obligation to NHC albeit late to facilitate the transfer of the property, the appellant failed to pay the balance of his bargain. He could not therefore insist on specific performance of the agreement he himself had breached.
17. Turning to the respondent's assertion that the original agreement had been varied, the Judge after due consideration of the rival position on this issue as analyzed on the record, found no credible evidence in support of that assertion and accordingly rejected it especially when there was no deed of variation of the original agreement and dismissed the appellant's claim triggering this appeal.
18. Aggrieved by the judgment of the trial court, the appellant lodged the instant appeal citing eight (8) grounds of appeal subsequently condensed into five (5) issues in his revised written submissions dated 3rd June, 2021, namely, whether the appellant:
 - i) Fully paid the purchase price of Kshs.3,800,000.00 to the respondent?
 - ii) Was entitled to specific performance as against the respondent for the agreement dated 26th August, 2010?
 - iii) Is entitled to vacant possession of the property known as Flat No. E on Block MF-2 on LR No. 25980?
 - iv) Was entitled to mesne profits as pleaded in the originating summons?
 - v) Should be declared the beneficial owner of the property known as Flat E on Block MF-2 on LR No. 25980?
19. The appeal was canvassed via the Go-To-Meeting Platform through rival written submissions fully adopted in the presence of advocates for the respective parties herein without oral highlighting.
20. For plenary hearing of the appeal, the appellant was represented by learned counsel, Mr. Uvyu while the respondent was represented by learned counsel, Mrs. Morara.
21. Supporting the appeal, the appellant relies on both his written submissions, revised written submissions dated 3rd June, 2021 and their reiteration of the salient features of the said submissions dated 15th June, 2021. He submits that it is undisputed that he purchased the suit property from the respondent vide the second agreement dated 26th August, 2010 and fully finalized payment of the full purchase price of Kshs.3,800,000.00. Despite him completing payment of the purchase price



as stipulated in the agreement of sale between them, the respondent refused and or failed to transfer the suit property to him on alleged appellant's nonpayment to her of Kshs.400,000.00 vide another agreement not executed by the respective parties herein, a position affirmed by the Judge when he correctly found and held that no such agreement was ever executed between the parties herein. The Judge is therefore faulted for erroneously holding that the appellant had not fully paid the purchase price in that he had a balance of Kshs.40,000.00 contrary to the respondent's own evidence on the record in which she explicitly stated that she had been paid the full purchase price and that he did not owe her anything.

22. The appellant continued to submit that in light of the above undisputed position with regard to him having fully paid the purchase price, the court is invited to fault the trial Judge for erroneously finding that the appellant was not entitled to specific performance of the second agreement of sale duly executed between him and the respondent for the sale of the suit property dated 26th August, 2010 and especially when the respondent herself admitted on oath that she had received the full purchase price and that the appellant did not owe her anything. The court is further invited to fault the Judge for the failure to appreciate that even the respondent in her testimony on oath never mentioned that she was owed Kshs.40,000.00 by the appellant.
23. It is further the appellant's complaint that the Judge erred both in law and fact when he failed to appreciate and hold that the appellant was entitled to vacant possession since he had fully paid the purchase price for the suit property and had even tendered in evidence documentary proof for the alleged payment. The Court is therefore invited to fault the Judge for the failure to find and hold that the appellant was entitled to all the reliefs he had sought from the court inclusive of mesne profits of Kshs.20,000.00 monthly after the respondent admitted on oath that rental income for the unit was Kshs.20,000.00 and that the appellant had not received any benefit for the value of his money because she was still in possession of the suit property.
24. Lastly, the Judge is also faulted for the failure to find that the respondent was in breach of the agreement of sale executed between them for the failure to pay Kshs.435,803.00 for rates and rent owed to NHC and which she admitted not only that, that amount was owed to NHC but also that the same was not paid until after the lapse of the completion date of the agreement of sale.
25. Lastly, that the evidence tendered on the record demonstrates clearly the existence of a constructive trust in his favour.
26. Turning to the law, the appellant relies on the following authorities: *Macharia Mwangi Maina & 87 Others vs. Davidson Mwangi Kagiri [2014] eKLR*; for propositions which may be rephrased, that constructive trust and proprietary estoppel shall apply in cases where a party receives fully the consideration for purchase but fails to hand over the object of the purchase; *Hussey -vs- Palmer (1972) 3 ALL ER 744* in which Lord Denning held, inter alia, that a constructive trust may be imposed by law whenever justice and good conscience demands it; *Chase International Investment Corporation and Another vs. Laxman Keshbra and 3 others [1976 – 80] I KLR 891* in which Madan, J. (as he then was) held, inter alia, that in circumstances as those prevailing in this appeal, equity would be called in to aid the appellant's cause and or quest for justice; *Steadman vs. Steadman [1976] A.C. 536, 540* for the holding of Lord Reid that "if one party to an agreement stands by and lets the other party incur expenses or prejudice his position in the faith of the agreement being valid he will not then be allowed to turn around and assert that the agreement is unenforceable"; *Lyods Bank PIC vs. Rossel [1991] IAC 107, 132*, in which Lord Bridge held, inter alia, that "a constructive trust is based on common intention, which is an agreement, arrangement or understanding actually reached between the parties and relied on and acted on by the claimant" all in support of their prayers that the appeal be allowed in its entirety.



27. In rebuttal, the respondent relies on her written submissions and list of authorities both dated 15th June, 2021. Cumulatively on the grounds of appeal, it is the respondent's submission that the agreement indisputably executed by the respective parties herein was very categorical that the purchase price was Kshs.3,800,000.00 and the completion date given as 31st January, 2011. The agreement also contained clause 3(f) which stipulated clearly as follows: "If the purchaser is unable to complete the sale on or before the completion date, the deposit shall be refunded to the purchaser without interest and the agreement shall be rescinded."
28. That as at 31st January, 2011 the appellant had not completed paying the purchase price, as his last payment was done on the 29th August, 2011 less Kshs.40,000.00 of the purchase price. The appellant is also on record as having admitted that he was in breach of the agreement by not paying the purchase price within the set completion date timelines and therefore the remedy available to him was a refund of the purchase price. The Judge cannot therefore be faulted in the circumstances for declining to grant the appellant the remedy of specific performance nor any of the other prayers he had sought in the OS. Lastly, that it is trite that parties are bound by their pleadings. The appellant cannot blame the court for not granting him a refund of the purchase price as he had not prayed for that relief notwithstanding that the respondent in good faith in her submissions stated that she was willing and ready to refund the amount the appellant had paid her without interest in terms of clause 3(f) of the aborted agreement of sale.
29. To buttress the above submission, the respondent had also relied on High Court decisions namely, *L. N. Gitonga Mwaniki & Another vs. Annastacia Waitihira Kibiru [2013] eKLR*; and *Action Homes Limited & Another vs. David Nathan Chelogoi & 2 Others [2018] eKLR* both for the holding, inter alia, that "where parties have voluntarily entered into a contract, they are bound by the terms stipulated therein. Second, that a court of law has no mandate to rewrite a contract for parties as parties are in law bound by such a contract unless coercion, fraud or undue influence is pleaded and proved."
30. Also relied upon is the Court of Appeal decision in the case of *David Muturi Mwangi vs. Kiiru [1987] eKLR*, in which this Court discussed the threshold for invoking and applying of the doctrine of repudiation of a contract. Second, that "contracting parties are at liberty to make time to be of the essence in a contract voluntarily executed as between them. Where this was not provided for, the contract may be altered subsequently to make time to be of the essence; and lastly, a party who has been subjected to an unreasonable delay has liberty to give notice to the defaulting party making time to be of the essence."
31. Being a first appeal, our duty is as is stipulated for in Rule 29(1) of the *Court of Appeal Rules*, namely, to reappraise the evidence and to draw inferences of fact thereon.
32. In *Selle -vs- Associated Motor Boat Co. [1968] EA 123*, this mandate and which we fully adopt was delineated by the predecessor of this Court as follows:

"An appeal to this Court from a trial by the High Court is by way of 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 either 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 demeanor of a witness is inconsistent with the evidence in the case generally (*Abdul Hameed Saif -v - Ali Mohamed Sholan* (1955), 22 E. A. C. A. 270)."



33. We have considered the record in light of the above mandate and the rival submissions and principles of case law relied upon by the respective parties in support of their opposing positions herein already highlighted above. The issues that fall for our determination are the following namely, whether the learned Judge erred both in law and in fact in:
- i) Evaluating the evidence on the record thereby arriving at a wrong conclusion on the matter;
 - ii) Failing to grant the appellant orders for specific performance vacant possession and mesne profits.
 - iii) Failing to declare the appellant the beneficial owner of the property known as Flat No. E on Block MF02 LR No. 25980.
34. Starting with issue number 1, it is common ground firstly that the conclusion reached by the trial Judge in the determination of the issues he was confronted with at the trial was informed by the Judge's construction of the terms of the agreement executed between the respective parties herein in light of the record as assessed by the Judge. It is therefore imperative for us to revisit the contents of the said agreement appraise the same, consider it in light of the record as assessed above and then draw our own conclusions thereon. The salient features of the said agreement albeit in a summary form are that the agreement was dated 26th August, 2010, it was in respect of the sale of the suit property by the respondent as the vendor to the appellant as the purchaser at an agreed consideration of Kshs.3,800,000.00 out of the total purchase price indicated above, the appellant was to pay Kshs.1,440,000.00 directly to NHC on behalf of the respondent and the balance of Kshs.2,360,000.00 directly to the appellant. The completion date was given as 31st January, 2011 or on such other date as shall be agreed by the parties in writing.
35. Other salient features were that the purchaser was to obtain vacant possession upon payment of the full purchase price. The vendor was obligated to procure land rent and rates certificate to facilitate the transfer of the property by NHC from the respondent to the appellant. If the purchaser was unable to complete the sale on or before the completion date, the deposit paid by him to the respondent was to be refunded to the purchaser (without interest) and the agreement was to be rescinded. There was also provision that if non-completion of the agreement was occasioned by the default of the vendor, the purchaser was entitled to serve the vendor with a notice of twenty-one (21) days from the date of the notice to comply and in default to refund the full amount paid towards the purchase price with interest at the prevailing lending rates of Barclays Bank of Kenya within seven(7) days from the date of the expiry of the said notice as a consequence of which the agreement was to be treated as rescinded.
36. It is common ground, firstly, that neither party fulfilled their part of the bargain within the timelines stipulated in the said agreement, namely observance of the completion date of the said agreement, by 31st January, 2011. It is on record that the respondent admitted to have completed payment for the land rents and rates to NHC in June 2011 while the appellant completed payment of the full purchase price to the respondent on 29th August, 2011. The explanation the appellant gave for non-compliance was that it was a condition precedent that the respondent would hand over to him the certificate of compliance with regard to payment of the land rent and rates to NHC and consent of the sale and transfer of the suit property to him before he could remit the balance of the purchase price, While that of the respondent was that the appellant was to remit to her Kshs.40,000.00 as part of the initially agreed purchase price of Kshs.3,800,000.00 and a further additional amount of Kshs.400,000.00 as per a subsequent agreement allegedly executed by the parties as per the pleading and evidence of the respondent.



37. It is also common ground that neither party rescinded the agreement of sale following the above default. Neither did they execute another agreement in writing extending the timelines within which to comply. All we have on record is the conduct of the parties with that of the respondent being the earlier in time of clearing the land rent and rates in June, 2021 followed by that of the appellant of clearing the balance of the purchase price in August, 2011. Neither is on record as having protested against the others default.
38. The litigation resulting in this appeal as we have already pointed out above was triggered by the respondent's failure to either refund the purchase price fully paid to both NHC and herself or give vacant possession of the suit property to the appellant. Neither did she tender the said purchase price to court upon being served with the appellant's claim. All that she said in the averments was that the appellant was in breach. There is no mention of willingness to refund the same promptly. It was only upon the appellant raising that issue in his submissions that the respondent cannot be allowed to keep both the suit property and the money paid to her towards the sale that there is mention in her written submissions that she had offered in good faith to refund the purchase price in her written submissions before the trial court. There is no mention of any offer to refund the same upon being served with this appeal. It is the above set of circumstances that the Judge was confronted with at the trial and which this Court on appeal must reconsider and evaluate.
39. We adopt the rival position as assessed above as well as the trial Judge's observations on the record and conclusions drawn thereon also as already highlighted above on the basis of which the appellant has invited us to overturn and the respondent to affirm the trial court's findings.
40. Bearing the totality of the above assessment in mind, we find and hold that the trial Judge failed to properly appreciate and consider the following factors hence arriving at the wrong conclusion on the matter. Firstly, that the agreement was mutually entered into by the respective parties herein and both were bound by the terms contained therein. One of these was the obligation to observe the completion date of 31st January, 2011 which as we have already observed above was not complied with by either party. It was therefore erroneous for the Judge to pin the tag of non-compliance only on one contracting party, that is the appellant. Secondly, a proper construction of clause 6 of the said agreement is that either party was at liberty to rescind the contract upon breach by the other. Neither party herein opted to rescind the contract. They therefore kept it alive by their conduct.
41. We appreciate that revival as stipulated for in the said contract was by mutual agreement in writing. An action not resorted to by either party. All we have as already pointed out above is the conduct of the respondent meeting her part of the obligation of payment of land rents and rates out of time, bringing this to the attention of the appellant who acquiesced to it by his conduct of want of protest. Likewise, the respondent acquiescing to the appellant's conduct of meeting the balance of the purchase price outside the stipulated time by accepting the money from the appellant without any protest.
42. The position we take and which the trial Judge failed to properly appreciate and take into consideration is that taken by Lord Reid in *Steadman vs. Steadman* [supra] vide which his Lordship expressed himself therein, inter alia, that:
- “If one party to an agreement stands by and lets the other party incur expense or prejudice his position on the faith of the agreement being valid he will not then be allowed to turn round and assert that the agreement is unenforceable.”
43. We appreciate that it is now trite that the role of the court in an appeal of this nature is not to rewrite the agreement for the parties but to enforce it as it is absent coercion, fraud and or undue influence. See *National Bank of Kenya Ltd vs. Pipeplastic Samkolit (K) Ltd & Another* [2001] KLR 112 [2002] E.A



503. By taking the position we have taken above, we are not rewriting the agreement as between the respective parties herein but simply saying that it was erroneous for the Judge to fault the conduct of one party that of the appellant and absolve the respondent as a party equally at fault without assigning any good reasons for holding that view.
44. It is our position that indeed the agreement stated explicitly that time was of the essence but the conduct of the parties subsequent to the lapse of the timeline set in the agreement should not have been either overlooked or ignored by the trial Judge. Our take on the conduct of the parties lack of protests of either parties' action towards compliance with their part of the bargain as stipulated in the agreement was sufficient demonstration by implication that the parties desired to carry on with the sale agreement to its logical conclusion despite lapse of time within which to comply as stipulated on the binding contract of sale between them.
45. Turning to issue number 2 and 3 since they are interrelated, the threshold for sustaining a plea for specific performance has now been crystallized by case law numerous enunciated both by the predecessor of this Court and this Court. We take it from the decision in the case of *Thrift Homes Limited vs. Kenya Investments Limited [2015] eKLR* in which it was stated, inter alia, that "the remedy of specific performance like any other equitable remedy is discretionary. Second, the jurisdiction to grant the relief of specific performance is based on the existence of a valid enforceable contract. Third, specific performance will not be ordered if the contract suffers from some defect such as mistake or illegality or if there is an alternative effective remedy."
46. The parameters for exercise of discretion have also been delineated by case law. We take it from the case of *Githiaka vs. Nduriri [2004] 1 KLR 67* in which Ringera Ag, J.A (as he then was) was explicit that the prerequisites for the exercise of this mandate demand that it be exercised judiciously. That is to say devoid of whim and or caprice but with reason and for ends of justice to be met to both parties.
47. Applying the above to the prerequisites for granting the relief of specific performance, it is our position that there is no evidence on the record pointing towards any defect, mistake or illegality in the sale agreement executed by the rival parties herein. The contention of the respondent is that both parties were in breach of the sale agreement thereby making the agreement unenforceable. It is our position like all other equitable remedies, the maxim that is most appropriate to the circumstances herein is that which requires that "he/she who comes to equity must be prepared to do equity." Herein both parties breached the agreement for their noncompliance with the completion timelines set out in the agreement but this default on their part notwithstanding went further to fulfil their part of their obligation under the contract and gave plausible explanation for their conduct, which the Judge inadvertently failed to properly appreciate hence erroneously pinning responsibility for breach on the appellant and which allegedly rendered the agreement unenforceable, according to the Judge, notwithstanding explicit proof on the record that although either party had an opportunity to rescind the contract due to non-compliance by the other party within the timelines for compliance set out in clause 6 of the agreement neither rescinded the said contract. It was therefore kept alive.
48. The Judge also failed to properly appreciate the respondent's admission that she had received the full purchase price from the appellant on the one part and discounting and or rejecting the respondent's contention that the appellant still owed her Kshs.400,000.00 as additional purchase price reasoning and correctly so in our view that no basis had been laid for the same and on the basis of which the Judge erroneously declined to grant relief to the appellant, on the mistaken ground that he was the one who was in breach of the agreement of sale executed between them for his failure to remit to balance of the purchase price of Kshs.40,000.00.



49. In light of the totality of the above assessment, we find it unconscionable for the respondent to raise the issue of unenforceability of the contract on account of alleged non-compliance with the completion date to circumvent her obligation under the agreement of sale especially when she neither refunded the full purchase price directly to the appellant or tendered the same in court. We find no basis for faulting the appellant's contention that the Judge acted on a wrong notion that he had not completed payment of the full purchase price as stipulated for in the agreement of sale.
50. On the basis of the prerequisites for granting the equitable remedy of specific performance highlighted above, we find that the undisputed circumstances obtaining herein would usher in the invocation and operation of the equitable principles to demand that it would be unequitable for the respondent as the registered legal owner of the suit property to keep and or retain the suit property and the purchase price. We therefore find and hold that the respondent having received the purchase price as consideration for sale of the suit property and which as we have alluded to above was neither refunded to the purchaser nor tendered the same to court, the only effective remedy in the circumstances of this appeal is an order compelling the respondent to specifically execute the contract in favour of the appellant as the prima facie beneficial owner of the suit property.
51. From the record, we are satisfied that the trial court did err in failing to issue an order for specific performance directed at the respondent to specifically perform the contract in favour of the appellant on the alleged nonpayment of Kshs.40,000.00 to the respondent by the appellant and which we have ruled above and for the reasons given that no such amount was still owing and outstanding, the respondent having admitted on oath that the full purchase price as per the second agreement of sale was fully paid on the one hand and on the other hand the court having discounted the respondent's assertion that there was an agreement for payment of a further sum of Kshs.400,000.00 over and above the agreed purchase price as per the agreement of sale and against which the respondent filed no cross-appeal.
52. On the appellant's plea for vacant possession, our position is that the court having made a determination that the appellant performed his obligation under the sale agreement, the appellant is thus entitled to vacant possession of the suit property and execution thereof of the instruments of transfer of the suit property. We reiterated that going by the respondent's unequivocal admission that the full purchase price as per the agreement was paid; the appellant has a beneficial proprietary claim and interest over the suit property as in the circumstances highlighted above, the respondent was neither entitled to possession of the property nor had she any proprietary right or interest left over the suit property.
53. On the claim for mesne profits at the rate claimed, we find the rate was in tandem with the respondent's own admission that the rental value for similar units in the locality was Kshs.20,000.00 monthly. Having ruled that the appellant was entitled to vacant possession, there is no basis for us to decline an order for mesne profits to which the respondent was not entitled effective the date she received the entire purchase price and which she failed to refund and or tender to court upon forming the apparent intention to wriggle out of her obligation under the contract.
54. Lastly, as to whether a case has been made out for us to interfere with the trial Judge's exercise of his discretion in declining to grant the appellant the remedy sought of specific performance, the threshold applicable is that reiterated by this court in the case of *United India Insurance Company Limited vs. East African Underwriters Kenya Ltd [1985] KLR 898*. In this case, the court explicitly restated that interference with exercise of judicial discretion only arises where there is clear demonstration of misdirection in law, misapprehension of the facts, taking into consideration factors the Court ought not to have taken into consideration or failure to take into consideration factors that ought to have been



taken into consideration or looking at the decision generally. The only plausible conclusion reached is that the decision albeit a discretionary one is plainly wrong.

55. We have applied the above parameters to the reasoning of the Judge as basis for declining to grant the appellant the relief of specific performance and find that for reasons stated above, the trial Judge exercised his judicial discretion injudiciously as on the record as laid before him at the trial and now before us on appeal, it was equitable for the court to exercise its discretion to grant the same as in our view, the appellant deserved it. No unclean hand tag was ever attributed to him by either the respondent or the court. Neither was there any demonstration of his failure to do equity. The Judge therefore misdirected himself in law by failing to issue an order of specific performance. We find the appeal has merit. It is allowed on terms that:

- i) This appeal be and is hereby allowed.
- ii) The judgment delivered on 28th September, 2017 by E. O. Obaga, J. dismissing the appellant's case be and is hereby set aside.
- iii) The appellant be and is hereby declared the beneficial owner of the Flat number E on Block MF-2 on LR No. 25980.
- iv) The respondent be and is hereby directed to specifically perform the agreement dated 26th August, 2010 in favour of the appellant.
- v) The respondent be and is hereby directed to vacate the property known as Flat Number E on Block MF-2 on LR No. 25980 and give vacant possession to the appellant, failing which an order of eviction do issue.
- vi) The respondent do pay mesne profits to the appellant at the rate of Kshs.20,000.00 per month with effect from 29th August, 2011 until he either gives vacant possession or is evicted from the suit property.
- vii) The respondent do pay to the appellant costs of the appeal and the proceedings before the trial court.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF FEBRUARY, 2022.

R. N. NAMBUYE

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR

