IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), J. MOHAMMED & KANTAI, JJ.A.)

CIVIL APPEAL NO. 199 OF 2019

BETWEEN

JOSEPH GICHUHI KAMAU..... 1ST APPELLANT

MBOCHE NENE..... 2ND APPELLANT

AND

SALOME WACHEKE KANYINGI.....RESPONDENT

(Being an appeal from the Judgment at the Environment and Land Court of Kenya

at Nairobi (Okongo, J.) dated 22nd November, 2018

in

ELC Misc. Application No. 152 & 153 of 2013)

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JUDGMENT OF THE COURT

There were two suits filed at the Magistrates Court at Limuru, both against the respondent, **Salome Wacheke Kanyingi**. In the suit by the 1st appellant, **Joseph Gichuhi Kamau**, it was stated that he had entered into a sale agreement with the respondent for the purchase of 2 acres of land to be excised from a parcel of land known as **L.R. No. Nguirubi/Ndiuni/433 ("the suit land")** for a consideration of **Ksh.350,000** and that, of that sum, Ksh.270,000 had been paid. It was prayed that the court order specific performance of the contract; that a sum of **Ksh.340,450** be awarded as special damages in addition to the order of specific performance; that a

permanent injunction be issued to restrain the respondent from alienating, trespassing, cultivating, tilling, selling, offering for sale, disposing, charging, mortgaging, creating lien or in any other way dealing with the suit land and the court was also asked to grant such further relief as it deemed just and award costs to the 1st appellant.

The suit by the 2nd appellant, **Mboche Nene**, related to the same suit land where he similarly claimed to have entered into agreement with the respondent to purchase one acre from the suit land at a consideration of Ksh.150,000. He claimed to have paid the whole of that sum; that he had incurred expenses in the sum of Ksh.20,000 in the course of the transaction and because the respondent had failed to transfer the said portion of the suit land to him he prayed for specific performance; special damages Ksh.170,000 in lieu of and in addition to specific performance and an injunction framed in similar fashion as the suit by the 1st appellant. He similarly asked for further relief, costs of the suit and interest.

The respondent filed defence and counter-claim but these were stuck out in the course of the proceedings.

The suits were transferred to and heard by the **Environment and Land Court ("ELC")** where in a Judgment delivered on 22nd November, 2018 **Okongo, J.** found that the appellants were not entitled to orders of specific performance. The Judge ordered that the respondent pay to the 1st appellant

Ksh.270,000 plus interest; pay to the 2nd appellant Ksh.20,000 plus interest and each party was to meet their costs.

Those are the orders that have provoked this appeal premised on the Memorandum of Appeal drawn for the appellants, by their lawyers, **M/S Enonda and Associates, Advocates**, where 6 grounds of appeal are taken. The learned Judge is faulted for finding the agreements for sale to have been void and unenforceable; for making the awards of money where the appellants had claimed higher sums of money; for not ordering injunctions in favour of the appellants against the respondent; for not considering submissions and case law cited; that the Judge relied on pleadings that had been struck out and, finally, for not awarding costs to the appellants.

This is a first appeal from a decision of the High Court in first instance and rule 29 of the rules of this Court requires that we re-apprise the evidence and draw inferences of fact. We must remember, while doing so, that we do not have the advantage of seeing or hearing the witnesses, an advantage that the trial Judge had. On the mandate of the first appellate court it was held in the case of **Peters v Sunday Post Limited [1958] EA 424**:

> ***"It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witness."***

The case before the trial Judge was through the evidence of the two appellants who also produced witness statements and various documents into the evidence. The 1st appellant, a small scale farmer, testified that he

was offered land to buy by the respondent in the year 2010. He stated that an agreement for purchase of two acres of the suit land was reduced into writing; that the two acres had previously been sold to one **Thomas Mbugua Ruo**, in an agreement that had since been repudiated; that the agreement between him (the 1st appellant) and the respondent stipulated *inter alia* that part of the purchase price (Ksh.270,000) was to be paid to Thomas Mbugua Ruo; that he paid that sum but had then incurred expenses in the sum of Ksh.100,000. He admitted that he did not pay the balance of purchase price to the respondent but that he had taken possession of the land. He had since been evicted from the suit land. According to him consent of the land control board was obtained before the agreement for sale was entered. Of the expenses he claimed, he admitted that these were not agreed with the respondent and no receipts were produced before the trial Judge in support of such expenses.

The 2nd appellant testified that he paid Ksh.150,000 to the respondent for purchase of one acre of the suit land and he produced evidence showing a payment of Ksh.20,000 by bankers' cheque. He had since occupied the suit land but was receiving threats from the respondent to vacate the same. In cross examination he admitted that the respondent's name was not in the agreement for sale he produced into the evidence and that the agreement was not witnessed. No consent of the land control board was applied for or obtained.

The respondent's defences having been struck out no evidence was called in her favour and the trial Judge considered the evidence placed before him and documents produced and made the orders we have already spoken to.

The appeal came up for hearing before us on 26th November, 2020 through "Go-to-Meeting" platform due to the COVID-19 pandemic. The 1st appellant appeared in person while the 2nd appellant represented by M/S Enonda & Associates Advocates, was absent. The said lawyers had been served with a hearing notice on 13th November, 2020 as was displayed to us on screen by the Hon. Registrar of this Court as had the respondent. The 1st appellant and the respondent had filed written submissions and in an address to us the 1st appellant stated that consent of the land control board had been obtained in his favour before he entered into agreement with the respondent. According to him the trial Judge was wrong to consider defences that had been stuck out, and finally, it was his case that it would be unfair for the order for refund of the money to him to stand.

We have considered the whole record, the submissions made and the law and having done so, this is how we determine this appeal.

The main prayer by both appellants was for orders of specific performance, the 1st appellant praying to be awarded two acres from the suit land while the 2nd appellant claimed one acre. A determination of this issue will, in our view, dispose of all issues raised in the Memorandum of Appeal as all other issues ride on that central issue.

The 1st appellant claimed that, of the purchase price of Ksh.350,000 he had paid Ksh.270,000 to a third party (as agreed with the respondent) but had then incurred various expenses claimed in the plaint as special damages Ksh.340,450.

The 2nd appellant claimed to have paid the whole purchase price of Ksh.150,000. He produced evidence of payment of Ksh.20,000 but claimed to have incurred expenses which he claimed as special damages Ksh.170,000.

The trial Judge analyzed evidence before him and found that the 1st appellant had not paid the balance of the purchase price of Ksh.80,000 while the 2nd appellant only proved payment of a sum of Ksh.20,000 on the evidence produced before the Judge. The 1st appellant admitted that he had not paid the said balance but instead prayed for special damages in a sum of Ksh.340,450 (the purchase price was Ksh.350,000). The 2nd appellant only produced evidence of payment of Ksh.20,000 but in an interesting twist, he prayed for special damages of Ksh.170,000, a sum much higher than the purchase price of Ksh.150,000.

The trial Judge cited **Chitty on Contract**, 30th edition Volume 1 at paragraph 27-003 where the following useful discussion appears:

> ***"The jurisdiction to order specific performance is based on the existence of a valid, enforceable contract …It will not be ordered if the contract suffers from some defect, such as failure to comply with formal requirements or mistake or illegality, which makes the contract invalid or unenforceable."***

Specific performance is, indeed, a discretionary remedy which may be refused although the contract is binding in law and cannot be impeached – See the persuasive case of **Reliable Electrical Engineers Limited v Mantrac Kenya Limited [2006] eKLR** by Maraga, J. (as he then was).

It is also good law that he who comes to equity must do so with clean hands. This Court in **John Njue Nyaga v Nicholas Njiru Nyaga & Anor [2013] eKLR** observed that:

> ***"It is our considered view that one who comes to equity must come with clean hands and equity frowns upon secrecy and underhand dealings. The applicant has not done so and is underserving of the orders he seeks."***

In addition, both appellants claimed special damages and the law requires that special damages not only be pleaded but be specifically proved – **Moses Onchiri v Kenya Ports Authority and 4 others (2017) eKLR** where it was held:

> ***"The fifth principle is that special damages must be specifically pleaded and proved at the trial."***

The appellants, who did not pay the whole of the purchase price for the portions they claimed to have bought were underserving of orders of specific performance. The Judge was right to award the appellants a refund of money they proved to have paid to the respondent.

We have perused the Judgment appealed. The Judge did not consider the defences that had been struck out. He relied on the evidence produced by the appellants.

The Judge ordered each party to meet their costs and we find that he was entitled to reach that conclusion but nothing turns on this in view of the determination we have made in this appeal.

The appeal has no merit and we dismiss it. The respondent did not attend the hearing of the appeal. Let each party meet their costs.

Dated and delivered at Nairobi this 19th day of February, 2021.

W. OUKO, (P)

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR