**IN THE COURT OF APPEAL**

**AT MOMBASA**

**(CORAM: NAMBUYE, GATEMBU & M'INOTI, JJ.A.)**

**CIVIL APPEAL NO. 159 OF 2018**

**(CONSOLIDATED WITH CIVIL APPEAL NO. 57 OF 2019)**

**BETWEEN**

**MICHAEL MURITHI MUTHII.....APPELLANT**

**AND**

**CECILIA WANJIRU COOPER alias**

**CECILIA WANJIRU ERNEST.....1ST RESPONDENT**

**MICHAEL NDUNGU MBUGUA.....2ND RESPONDENT**

**LILY K. MUSINGA.....3RD RESPONDENT**

**FRANCIS KIARIE KARIKUI.....4TH RESPONDENT**

***(Appeal from the judgment and decree of the Environment and Land Court***

***at Mombasa (Omollo, J.) dated 2nd August 2018***

**in**

**ELCC No. 460 of 2011)**

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**JUDGMENT OF THE COURT**

This appeal challenges the judgment and decree of the ***Environment and Land Court (ELC)*** at ***Mombasa (Omollo, J.)*** dated 2nd August 2018 by which the learned judge issued an order for specific performance and directed the ***1st respondent, Cecilia Wanjiru Cooper,*** also known as ***Cecilia Wanjiru Ernest (Ms. Cooper)***, to transfer ***Plot No. MN/1/17640 (the suit property)*** to the ***2nd, 3rd and 4th respondents (the respondents)***. In default, the court directed the deputy registrar of the court to execute and register the transfer in lieu of Ms Cooper. ***The appellant, Michael Murithi Muthii (Mr. Muthii)***, who claims to have purchased the suit property from Ms Cooper contends that the trial court erred by making an order for specific performance in the circumstances of this appeal. On her part Ms. Cooper filed ***Civil Appeal No. 57 of 2019*** against the same judgment and supports Mr. Muthii in this appeal. Both appeals were consolidated with the consent of the parties, with ***Civil Appeal No. 159 of 2018*** as the lead file.

The brief background to the appeal is thus. On 7th July 2010, Ms Cooper entered into a written agreement with the respondents by which she agreed to sell and the respondents agreed to purchase the property described as ***"a portion of land measuring 1/8 of an acre of Subdivision No 1435 (original No. 464/49) section I Mainland North".*** The agreed purchase price was ***Kshs 7,000,000***, of which the respondents were to pay a 10% deposit of ***Kshs 1,050,000.*** The balance of the purchase price ***(Kshs 5,950,000)*** was to be paid *"after the subdivision has been done and the transfer signed."* The sale was made subject to the Law Society of Kenya conditions of sale (1989) in so far as they were not inconsistent with the agreement and time was made of the essence.

The completion date was 90 days from the date of the agreement, but could be extended by mutual consent. In the event the transaction was

not completed due to Ms. Cooper's fault or inability to avail the requisite documents and consents, the respondents were entitled to rescind the agreement and full refund of the purchase price.

On 17th August 2011 the respondents filed a suit in the ELC for an order of specific performance of the agreement of 7th July 2010. They contended that after finalising the subdivision, the plot, the subject of the agreement for sale, was identified as the suit property measuring 0.0504 of a hectare, but Ms. Cooper failed or refused to avail the completion documents. They added that although they had already paid to Ms. Cooper a total of ***Kshs. 3,244,320***, she purported to sell the suit property to a third party and to rescind the agreement by a letter dated 5th August 2011. The respondents averred that they were ready, able and willing to pay the balance of the purchase price subject to Ms. Cooper availing the completion documents.

By her defence filed on 14th September 2011, Ms. Cooper pleaded that the respondents paid only ***Kshs. 350,000*** instead of the agreed deposit of ***Kshs. 1,050,000*** and thereafter made sporadic payments. She contended that the respondents' payments were in breach of the agreement and that she completed the subdivisions and sent to them the deed plans, but they failed to pay the balance of the purchase price. It was also her contention that she was obliged to deliver to the respondents the completion documents only upon receipt of the full purchase price, which they failed to pay, forcing her to rescind the agreement and refunded their money. Lastly, Ms. Cooper averred that the sale agreement did not identify the particular plot that was to be sold to the respondents and that at all times she was ready, able and willing to complete the transaction, but the same was frustrated by the respondents. She contended that due to their conduct, the respondents were not entitled to the equitable remedy of specific performance.

On his part, Mr. Muthii, who was joined to the suit as a defendant by an order dated 24th August 2011, filed a defence and counterclaim on 25th August 2011. He denied all the averments by the respondents and contended that he purchased the suit property from Ms. Cooper on 5th July 2011 for ***Kshs. 11,000,000*** which he paid in full and obtained all the completion documents. However, his efforts to register the suit property in his name were thwarted by a caveat that the respondents had placed on the suit property. On the basis that he was a *bona fide* purchaser for value without notice, he prayed for a declaration that he was the rightful owner of the suit property, an order removing the caveat on the suit property, and general damages.

The respondents called two witnesses and Ms. Cooper and Mr. Muthii testified on their own behalf. After considering the matter, the learned judge framed three main issues for determination, namely whether the agreement of 7th July 2010 was breached, and if so by which party; whether the respondents were entitled to an order of specific performance; and the fate of Mr. Muthii's counterclaim. The learned judge found that neither the respondents, nor Ms. Cooper had discharged their obligations under the agreement for sale within 90 days; that by accepting payments outside the 90 days Ms. Cooper agreed by conduct to extend time; and that in the circumstances Mr. Muthii's counterclaim had no merit. Accordingly the learned judge allowed the respondents' claim and issued an order for specific performance, thus provoking this appeal.

The Consolidated appeals are based on the contentions that the learned judged erred by failing to hold that the agreement of 7th July 2010 was void and unenforceable; by issuing the remedy of specific performance; by holding that the suit property was the subject of the agreement of 7th July 2010; by re-writing the parties' contract; by relying on oral evidence to vary a written agreement; by failing to find that the agreement of 7th July 2020 was discharged; and by failing to find that the suit property was validly sold to Mr. Muthii on 5th July 2011.

In support of the appeal, ***Mr. Karina,*** learned counsel for Mr. Muthii, submitted that the agreement between Ms. Cooper and the respondents was tainted by illegality and was void because the 4th respondent, one of the purchasers, was also the lawyer for Ms. Cooper and the respondents. It was contended that the 4th respondent was in a fiduciary relationship with Ms. Cooper and that he allowed his interest as purchaser to conflict with that of Ms. Cooper as seller, thus rendering the transaction null and void. The decision in ***Thrift Homes Ltd v. Kays Investment Ltd [2015] eKLR*** was cited in support of the proposition that a void contract cannot be enforced by an order of specific performance.

Next, counsel submitted that the learned judge erred by awarding the remedy of specific performance to the respondents who were in breach of the very agreement that they were seeking to enforce. It was contended that the parties having agreed on a completion date of 90 days and having made time of the essence, the learned judge erred in granting an order of specific performance even after finding that the respondents did not pay the balance of the purchase price within 90 days. Counsel added that the respondents further breached of the agreement when they paid a deposit of Kshs. 350,170 in lieu of Kshs. 1,050,000 and that on the authority of ***Gurdev Singh Birdi & Another v. Abubakhar Madhubuti [1997] eKLR*** an order of specific performance cannot issue in favour of a party who is in breach. It was also contended that to succeed, the respondents were obliged to show that by the time they sought an order for specific performance, they had performed all their terms of the contract, which they had not. Counsel added that the learned judge ought not to have awarded an order for specific performance because the respondents had other adequate alternative remedies, including refund of their deposit.

On whether the suit property was the subject of the agreement dated 7th July 2010, counsel submitted that it was not because the suit property did not exist at the time of that agreement and that the plot that was sold could not be identified. Counsel also contended that the learned judge erred by rewriting the contract and imposing terms that the parties had not agreed upon. He urged that the learned judge was not entitled to rely on the conduct of the parties because they had made time of the essence and agreed that extension could only be in writing and by mutual consent, which was not done. He added that the parties having reduced the agreement into writing, the court could not rely on oral evidence to vary the written contract.

Counsel concluded by submitting that the learned judge erred by failing to hold that the agreement of 7th July 2010 was discharged by the conduct of the parties. He contended that in the absence of written extension, the agreement expired after 90 days and thereafter there was nothing to invalidate the subsequent agreement for the sale of the suit property between Ms. Cooper and Mr. Muthii, who was a *bona fide* purchaser for value without notice and satisfied all the terms.

***Mr. Asige***, learned counsel for Ms. Cooper supported the appeal. He submitted that the learned judge erred by granting an order of specific performance after finding that both Ms. Cooper and the respondents were in breach of the agreement of 7th July 2010. In his view, what the learned judge did amounted to re-writing the agreement for the parties, which she was not entitled to do. He added that as an equitable

remedy, specific performance is not available to a party in breach of an agreement and that the agreement having been breached was not enforceable by specific performance. In support of the proposition he cited ***Bernard Nganga Ndirangu v. Samuel Wainaina Tiras [2019] eKLR.***

Counsel further urged that the agreement of 7th July 2010 could not be specially enforced because it was tainted by illegalities and mistakes such as failure to disclose the owner of the suit property, purported sale of a property that was not yet in existence, and the unethical conduct of the 4th respondent as advocate for Ms. Cooper and the respondents, who included himself as a purchaser. It was contended that the learned judge erred by issuing an order of specific performance for the transfer of land which was not the subject of the agreement and which was not owned by Ms. Cooper, and further by failing to consider adequacy of damages as an alternative remedy.

Lastly counsel submitted that the learned judge erred by failing to appreciate that the suit property was lawfully sold and conveyed to Mr. Muthii and was not capable of further transfer to the respondents by an order of specific performance.

The appeal was opposed by the respondents, represented by ***Mr. Mogaka***, learned counsel. On the contention that Ms. Cooper was not the owner of the suit property, counsel submitted that the mother title was registered in the name of Ms. Cooper and another as joint tenants and that upon the death of the other joint tenant on 9th March 1999, his interest passed to Ms. Cooper. In support of the proposition, counsel relied on ***Boniface Awour & Another v. Victor Otieno Nyadimo & 2 Others [2017] eKLR***. As regards the respondents' ability to complete the transaction, counsel contended that the balance of the purchase price of ***Kshs 3,755,780*** due to Ms. Cooper was held in a fixed deposit interest earning account in the joint names of the advocates for Ms. Cooper and the respondents, as directed by the court.

On whether the remedy of specific performance was available to the respondents, it was contended, on the authority of ***Magunga General Stores v. Pepco Distributors Ltd [1987] eKLR***, that the remedy was discretionary and that this Court will not interfere with exercise of discretion by the trial court unless it is shown the court acted on wrong principle. As regards the validity of the agreement of 7th July 2010, the respondents submitted that Ms. Cooper had indicated willingness to complete the transaction up to when she delivered the deed plans, and therefore could not turn round and impeach the agreement, which in the respondents' view was approbating and reprobating.

Learned counsel further contended that the subject of the sale agreement was 1/8 of an acre to be excised from sub-division No. 1435 (Original No. 464/49) Section I Mainland North, which by dint of clause 8 of the agreement, had already been inspected by the respondents. He added that Ms. Cooper did not complete the subdivision plan until after the 90 days completion period and that she continued to accept and received payments after the date of completion. In his view, the parties had, by their own conduct agreed to continue with the transition after the completion date had passed.

Lastly, the respondents submitted that Ms Cooper had o capacity to sell the suit property to Mr. Muthii before rescinding the agreement of 7th July 2010 and further that the trial court properly dismissed Mr. Muthii's counterclaim because there was no privity of contract between him and the respondents.

We have duly considered the record of appeal, the grounds of appeal, the written and oral submissions, as well as the authorities that the parties relied on. We have carefully reappraised and re-evaluated the evidence on record as is our duty as a first appellate court (See ***Selle & Another v. Associated Motor Boat Company Ltd & Others [1968] EA 123***). In our estimation, this appeal turns on whether the agreement for sale dated 7th July 2010 was void and unenforceable; whether there was certainty about the subject matter of that agreement; whether in the circumstances of this appeal an order of specific performance should have issued; and lastly the fate of Mr. Muthii's counter-claim.

Before we delve into the above issues, its apt to put to rest the argument that Ms. Cooper was not the owner of the suit property and therefore had no capacity to enter into the agreement of 7th July 2010. It is Common ground that before his death on 9th March 1999 ***Mr. Leonard Quentin Tyrell Cooper*** and Ms. Cooper were registered as joint tenants of Subdivision No. 1435 (original No. 464/49) Section 1 Mainland North from which the suit property was to be excised. Upon the death of Leonard, the interest passed to Ms. Cooper as the surviving tenant. (See ***Boniface Awour & Another v. Victor Otieno Nyadimo & 2 Others (supra).*** We are satisfied that there is no merit in the contention that Ms. Cooper was not the owner of the property from which the suit property was to be excised.

The basis of the contention that the agreement of 7th July 2010 was illegal, void and unenforceable is that the 4th respondent was the advocate for Ms. Cooper and the purchasers, who included himself. It is contended that he suffered from serious conflict of interest and that in his fiduciary relationship with Ms. Cooper, he compromised her rights and interest. We have carefully considered the defences filed by Ms. Cooper and Mr. Muthii and in none of them were these matters pleaded. Ms. Cooper and Mr. Muthii were obliged by ***Order 2 rule 4*** of the ***Civil Procedure Rules*** to specifically plead any fact showing any alleged illegality that would make the claim against them unmentainable. In addition, ***rule 10*** of the same Order obliged them to plead any alleged fraud, breach of trust, wilful default or undue influence relied upon. These matters could only have been properly raised through pleadings as required by the rules and not surreptitiously through submissions. In ***Baber Alibhai Mwaji v. Sultan Hashim Lalji & Another, CA No 296 of 2001,*** this Court stated thus:

> ***"****A court of law cannot pluck issues literally from the air and purport to make determinations on them. It is the pleadings which determine the issues for determination."*

*(See also* ***Gandy v. Caspar Air Charters Ltd*** *[1956] 23 EACA, 139).*

Accordingly, we are satisfied that the learned judge cannot be faulted for declining to be drawn into matters which the rules required to be specifically pleaded, but were not.

The second issue is whether the learned judge erred by issuing an order of specific performance in respect of a property which was not the subject matter of the agreement of 7th July 2021. Ms. Cooper's and Mr. Muthii's assertion here is that the suit property did not exist as of the date of the agreement and whatever parcel of land was sold could not be identified.

The agreement of 7th July 2010 described the subject matter of that agreement as follows, in ***clause 1***:

> ***"The property being sold is an 1/8 of an acre of Subdivision No. 1435 (original No. 464/49 Section I Mainland North (hereafter called "the Property")."***

By ***clause 8*** (a) Ms Cooper "confirmed" and "acknowledged" that the respondents had inspected the property and were purchasing it with full knowledge of its actual physical and condition and were taking it as it stood. In ***clause 8(b)*** the respondents confirmed that they had entered into the agreement "solely as a result of their own inspection". Lastly, in ***clause 13*** Ms. Cooper and the respondents agreed and confirmed that they had executed the agreement with the intention to bind themselves to the contents therein.

A look at the agreement and the evidence on record shows that there was really no uncertainty about the subject matter of the agreement and that both parties knew that the subject matter was an 1/8 of an acre to be excised from the described property owned by Ms. Cooper. From the agreement itself the respondents had inspected and accepted the property which was to be excised. The practice of entering into an agreement in respect of a property to be excised from a larger property is common practice and a matter of public notoriety in this jurisdiction. The practise is intended to promote and expedite business transactions, and to declare such transactions void on grounds of alleged uncertainty would unduly hamper commerce and business transactions. While each case must depend on its own merits, in the circumstances of this appeal, we are satisfied that there was no uncertainty as to the subject matter of the agreement of 7th July 2010.

In ***Charles Karate Kiarie & 2 Others v. Administrators of John Wallace Mathare (deceased) & Others [2013] eKLR*** this Court sustained an order for specific performance issued by the High Court to enforce an agreement ***"for sale of 2.5 acres to be excised from the vendor's property LR No. 2243/3."*** In rejecting the contention that the agreement was void for uncertainty, the Court expressed itself thus:

> ***"In our view the terms of the contract were sufficiently stated. The necessary terms are set out in the agreement for sale. The parties to the agreement are clearly identified. The property sold under the agreement for sale is sufficiently described and clearly identified. The price is also indicated. We are not persuaded, as submitted by counsel for the appellants, that the remedy of specific performance was not available to Mathare and Rimui on account of uncertainty as to the property that was being sold."***

We respectfully agree with that reasoning.

As regards whether an order of specific performance was properly issued in the circumstances of this appeal, it is worth repeating that such an order is an equitable remedy issued at the discretion of the court. It will be issued where the judge is satisfied that it is equitable to grant it. As is the norm, an equitable remedy will not be granted to a party who does not deserve it, for example by reason of unclean hands or failure to himself to do equity. Where a judge has exercised his discretion, this Court will not interfere unless it is demonstrated that he misdirected himself in law, or he considered matters he should not have considered or he failed to considered matters he should have considered or that the decision is plainly wrong. (See ***United India Insurance Co. Ltd v. East African Underwriters (Kenya) Ltd [1985] E.A 898).***

The parties had made time of the essence in the transaction. The completion date was agreed to be 90 days from 7th July 2010, i.e. 6th October 2010. The effect of making time of the essence was that each party was bound to strictly observe and comply with the agreed timelines, unless the parties agreed otherwise. The *balance of the purchase price was payable by the respondents "after the subdivision has been done and the transfer signed"*. That subdivision was supposed to be accomplished within the 90 days.

It is common ground that Ms. Copper was not able to complete the subdivision within the 90 days. That was a condition precedent for the payment of the balance of the purchase price. She contends that the respondents were themselves in breach because they did not pay 10% of the deposit as required by the agreement, but paid it piecemeal. Yet Ms. Cooper accepted those payments that she contends were paid contrary to the agreement. The evidence on record shows that the bulk of the ***Kshs 3,244,220*** paid by the respondents to Ms. Cooper was paid and accepted long after the completion date of 6th October 2010 had passed. As ***Githinji J***. (as he then was) observed in ***Githinji v. Njuguna and Another (1992) KLR 459***, by accepting instalments after expiry of the set deadline, time ceases to be of the essence to the contract. To make time of the essence again, Ms. Cooper was obliged to serve a notice on the respondents to complete the transaction. She never did that but instead purported to rescind the agreement on 5th August 2011, having already purported to enter into another agreement for the sale of the suit property to Mr. Muthii on 5th July 2011.

The respondents satisfied the trial judge that they were ready, able and willing to pay the balance of the purchase price and indeed deposited it in a joint interest earning account as directed by the court. Taking into account all the evidence, and in particular the conduct of the parties after the completion date had passed, and the secured balance of the purchase price, we cannot see how the learned judge can be accused of having exercised her discretion erroneously in making an order for specific performance. We equally find no basis in the assertion that the learned judge re-wrote the agreement for the parties. The effect of that conclusion is that clearly, Mr. Muthii's the counterclaim had no merit and was properly dismissed.

Ultimately, we come to the conclusion that there is no merit in this consolidated appeal, and that the learned judge properly issued the order for specific performance, which is what the justice of the case demanded. Accordingly, the appeal is dismissed with costs to the respondents. It is so ordered.

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

**R. N. NAMBUYE**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCIArb**

**.....**

**JUDGE OF APPEAL**

**K. M'INOTI**

**.....**

**JUDGE OF APPEAL**

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

*Signed*

***DEPUTY REGISTRAR***