



Lindsays Enterprises Limited v Maganga & another (Environment and Land Appeal E046 of 2022) [2024] KEELC 4861 (KLR) (19 June 2024) (Judgment)

Neutral citation: [2024] KEELC 4861 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL E046 OF 2022
SO OKONG'O, J
JUNE 19, 2024**

BETWEEN

LINDSAYS ENTERPRISES LIMITED APPELLANT

AND

ALIMA SAVAYI MAGANGA 1ST RESPONDENT

AMINA SAID MARIAM SAID (SUED AS LEGAL REPRESENTATIVES OF THE ESTATE OF OMAR MOHAMED MWINYIKONDO) 2ND RESPONDENT

(Being an appeal from the judgment and decree made by Hon. Ezekiel A. Obina PM on 22nd November 2022 in Kisumu CMC ELC No. E03 of 2021)

JUDGMENT

1. The Appellant brought a suit against the Respondents before this court in 2020 namely, Kisumu ELC No. E012 of 2020. The suit was transferred to the lower court in 2021 and given case reference number Kisumu CMC ELC No. E03 of 2021(hereinafter referred to only as “the lower court or the lower court suit”). In the lower court, the Appellant sought judgment against the Respondents for; a permanent injunction restraining the Respondents from selling, subdividing, transferring, alienating, charging or dealing in any manner whatsoever with all that property known as Title No. Kisumu/ Mkendwa/317(hereinafter referred to only as “the suit property”), an order of specific performance of the agreement of sale dated 12th October 2018 between the Appellant, and the 1st Respondent and Omar Mohamed Mwinyikondo, deceased(hereinafter referred to only as “the deceased”) in respect of the suit property, a mandatory injunction compelling the Respondents to sign all the documents necessary to vest the suit property in the name of the Appellant in default of which the same be signed on their behalf by the executive officer of the court, a mandatory injunction compelling the Land Registrar to register the transfer of the suit property in favour of the Appellant, and the costs of the suit.



2. In its plaint, the Appellant averred that on 12th October 2018, it entered into an agreement of sale of the suit property with the 1st Respondent and the deceased whereby the 1st Respondent and the deceased agreed to sell to it and it agreed to purchase the suit property at a consideration of Kshs. 2,800,000/- of which a deposit of Kshs. 280,000/- was paid on or before the execution of the agreement and the balance of Kshs. 2,520,000/- was to be paid on the completion date. The Appellant averred that the completion period was 90 days from the date of the agreement which was to lapse on 3rd January 2019.
3. The Appellant averred that the deceased died on 11th November 2018 about a month after the execution of the agreement of sale. The Appellant averred that the 2nd Respondents were appointed as the deceased's legal representatives. The Appellant averred that the Respondents had refused to complete the agreement of sale dated 12th October 2018 despite having been served with a completion notice. The Appellant averred that it was ready and willing to complete the said agreement.
4. The 1st Respondent neither entered appearance nor filed a statement of defence in the lower court. The 2nd Respondents filed a statement of defence dated 16th November 2020. The 2nd Respondents denied that the 1st Respondent and the deceased were joint proprietors of the suit property. The 2nd Respondents averred that the title deed for the suit property was obtained by the 1st Respondent fraudulently and the same was cancelled and an order made for the partitioning of the property which was on course.
5. The 2nd Respondents averred that after the cancellation of the title that was issued in the joint names of the deceased and the 1st Respondent, the same ceased to exist and as such could not be transferred to the Appellant. The 2nd Respondent averred that in any event, the Land Control Board consent to transfer the suit property to the Appellant had not been obtained. The 2nd Respondents denied that they were in breach of the agreement of sale dated 12th October 2018. The 2nd Respondents averred that the said agreement was frustrated by the subsequent events and the fact that the title that was sold to the Appellant was acquired fraudulently.
6. At the trial of the suit in the lower court, only the Appellant called evidence. The Appellant's sole witness, John Awino Ogacha Ogaya told the court that the 1st Respondent and the deceased sold to the Appellant the suit property at Kshs. 2,800,000/- of which the Appellant had paid a sum of Kshs. 280,000/-. The witness stated that the transaction was frustrated by the death of the deceased a month after the execution of the agreement. He told the court that the Appellant wanted the Respondents to complete the agreement. The witness urged the court to enter judgment for the Appellant as prayed in the plaint. The 2nd Respondents did not appear at the trial and as such did not give evidence in the lower court in their defence.
7. The lower court delivered judgment in the matter on 22nd November 2022 dismissing the Appellant's suit in the lower court with each party bearing its costs of the suit. The lower court stated that although the Respondents did not adduce evidence at the trial, the Appellant still had the burden of proving its case against the Respondents. The lower court found that there was a valid agreement of sale between the Appellant and the 1st Respondent and the deceased but the same could not be enforced because of an order that was issued by the Kadhi's Court at Kisumu on 3rd July 2019 cancelling the title deed that had been issued for the suit property in the joint names of the 1st Respondent and the deceased on the ground that the same was issued to the 1st Respondent fraudulently and ordering that the suit property be partitioned into two(2) portions with the 1st Respondent having a portion thereof measuring 0.01875 of a hectare and the estate of the deceased having a portion thereof measuring 0.13125 of a hectare to be shared amongst his heirs.



8. The lower court held that the title for the property that was sold to the Appellant having been cancelled pursuant to the said order by the Kadhi's Court, there was nothing that the 1st Respondent and the legal representatives of the estate of the deceased could transfer to the Appellant. The lower court found the Appellants' claim against the Respondents not proved and dismissed the same.
9. The Appellant was dissatisfied with the judgment of the lower court and brought the present appeal on 2nd December 2022. The Appellant challenged the decision of the lower court on nine grounds set out in its memorandum of appeal dated 2nd December 2022. In summary, the Appellant contended that the lower court erred in its holding that the Appellant had failed to prove its case against the Respondents to the required standard and that the lower court delivered an undated judgment.
10. The appeal was heard by way of written submissions. The Appellant filed submissions dated 3rd November 2023 while the Respondents did not file submissions. The Appellant submitted that the deceased having sold the suit property during his lifetime, the suit property was not free property of the deceased that devolved upon his estate. The Appellant submitted that the deceased's interest in the suit property was extinguished when he signed the agreement of sale. The Appellant submitted that even if the suit property formed part of the deceased's estate, what the Kadhi's Court did was to define the shares of the deceased and the 1st Respondent in the property. The Appellant submitted that the deceased having sold his share in the suit property during his life time, the 2nd Respondents who were his legal representatives had an obligation to transfer the deceased's share in the property to the Appellant. In support of these submissions, the Appellant cited two cases that I have considered. The Appellant submitted that in the circumstances, the lower court erred in its finding that the Appellant had not proved its case against the Respondents. The Appellant submitted that the alleged fraud in the acquisition of the title for the suit property by the 1st Respondent was not proved. The Appellant submitted that the title could not be termed fraudulent merely because it had not specified the shares of the joint owners thereof. The Appellant submitted that the Respondents having failed to adduce evidence, the evidence tendered by the Appellant was not controverted.
11. The Appellant submitted further that the lower court misapplied the doctrine of frustration to the case before it. The Appellant cited several authorities and submitted that the doctrine was inapplicable. The Appellant submitted further that the lower court judgment was not dated contrary to the provisions of Order 21 Rule 3 (1) of the Civil Procedure Rules. The Appellant submitted that a judgment that is not dated is a nullity. The Appellant cited two authorities in support of this submission which I have considered.
12. The Appellant submitted further that the lower court did not appreciate that the estate of the deceased was a party to the lower court suit and that a remedy lay both at law and at equity against the said estate as well as the 1st Respondent without the necessity of a new suit. The Appellant submitted further that the lower court misdirected itself in failing to appreciate that the effect of its decision left the Appellant who was an innocent purchaser of the suit property for value without a remedy. The Appellant submitted that the decision was unjust and led to unjust enrichment of the Respondents. The Appellant submitted that the lower court had power to order for a refund of the purchase price paid if it found a claim specific performance not proved. The Appellant submitted that its appeal had merit and should be allowed.
13. I have considered the pleadings, the proceedings and the judgment of the lower court. I have also considered the memorandum of appeal and the written submissions by the Appellant. As correctly submitted by the Appellant, this being a first appeal, this court has a duty to consider and re-evaluate the evidence on record and to draw its conclusions on the issues that were raised for determination



before the lower court. However, the court has to bear in mind that it did not have the advantage of seeing and hearing the witnesses who testified before the lower court.

14. In *Kenya Ports Authority v. Kuston (Kenya) Limited* [2009] 2EA 212 the Court of Appeal held among others that:

“On a first appeal from the High Court, the Court of Appeal should 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 that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”

See also, *Verani t/a Kisumu Beach Resort v. Phoenix of East Africa Assurance Co. Ltd* [2004] 2 KLR 269, *Selle v. Associated Motor Boat Co. Ltd.* [1968] E.A 123 and *Abok James Odera t/a Odera & Associates v. John Patrick Machira t/a Machira & Co. Advocates* [2013]eKLR on the duty of the first appellate court.

15. The court will also not interfere with the findings of fact by the trial court unless they were not based on evidence at all or they were based on a misapprehension of the evidence, or where it is demonstrated that the court acted on wrong principles in reaching its conclusion. See, *Peter v. Sunday Post Ltd.* [1958] E.A 424 and *Makube v. Nyamuro*[1983] KLR 403.
16. From the Appellant’s grounds of appeal, the issues arising for determination in this appeal in summary are; whether the lower court erred in its finding and holding that the Appellant did not prove its case against the Respondents to the required standard, whether the lower court erred in delivering undated judgment and whether the none dating of the judgment rendered it a nullity and finally whether the appeal should be allowed.
17. The main relief that was sought by the Plaintiff in the lower court was an order for specific performance of the agreement of sale dated 12th October 2018. In the Supreme Court of Uganda case of *Manzoor v Baram* [2003] 2 E.A 580 that was cited in the case of *Thrift Homes Limited v Kays Investment Limited* [2015]eKLR, the court stated as follows on specific performance:

“Specific performance is an equitable remedy grounded in the equitable maxim that “equity regards as done, that which ought to be done”. As an equitable remedy, it is decreed at the discretion of the court. The basic rule is that specific performance will not be decreed where a common law remedy such as damages, would be adequate to put the plaintiff in the position he would have been but for the breach. In that regard, the courts have long considered damages an inadequate remedy for breach of a contract for the sale of land, and they more readily decree specific performance to enforce such contract as a matter of course. In the instant case, I find no circumstances that would make it inequitable to order the respondent to complete the contract. On the contrary, it seems to me that to deny the appellant that relief would be to give unfair advantage to a respondent, who sought to avoid his contractual obligations through false claims, as found by the trial court, and through inapplicable technicalities. After taking into consideration the equities of this case, I am satisfied that the discretion ought to be exercised in favour of the appellant. I would hold that the appellant is entitled to specific performance.”



18. In *Amina Abdulkadir Hawa v Rabinder Nath Anand & Another* [2012] eKLR, the court cited Chitty on Contracts, 28th Edition (Sweet & Maxwell, 1999), Chapter 28 paragraphs 027 and 028 where the authors stated as follows:

“Specific performance is a discretionary remedy. It may be refused although the contract is binding at law and cannot be impeached on some specific equitable ground (such as undue influence) although damages are not an adequate remedy and although the contract does not fall within group of contracts discussed above which will not be specifically enforced. But the discretion to refuse specific performance is not arbitrary discretion but one to be governed as far as possible by fixed rules and principles...specific performance may be refused on the ground that the order will cause severe hardship to the Defendant where the cost of performance to the Defendant is wholly out of proportion to the benefit which performance will confer on the claimant and where the Defendant can put himself into a position to perform by taking legal proceedings against the third party...severe hardship may be a ground for refusing specific performance even though it results from circumstance which arise after the conclusion of the contract which effect the person of the Defendant rather than the subject matter of the contract and for which the claimant is in no way responsible.”

19. In *Gurdev Singh Birdi and Marinder Singh Gatora v Abubakar Madhubuti* CA No.165 of 1996 it was stated that:

“...It cannot be gainsaid that the underlying principle in granting the equitable relief of specific performance has always been that under all the obtaining circumstances in the particular case, it is just and equitable so to do with a view to doing more perfect and complete justice. Indeed...a plaintiff must show that he has performed all the terms of the contract which he has undertaken to perform, whether expressly or by implication, and which he ought to have performed at the date of the writ in the action.”

20. The lower court found that there was a valid agreement of sale between the Appellant, and the 1st Respondent and the deceased. There was no dispute that the Appellant had fulfilled its part of the agreement. Although the Appellant had performed its part of the agreement with the deceased and the 1st Respondent, the lower court still denied it an order for specific performance. As mentioned earlier in the judgment, the lower court gave various reasons for refusing to grant the order. In the authorities that I have cited above, it is settled that specific performance is an equitable remedy and as such discretionary. What I need to determine is whether the lower court exercised its discretion properly in refusing to grant an order for specific performance. As mentioned earlier in the judgment, the lower court suit was filed in this court in 2020 before it was transferred to the lower court in 2021. At the time the suit was filed, there was already an order issued by the Senior Resident Kadhi at Kisumu on 3rd July 2019 in which the Hon. Kadhi had ordered among others that the title deed for the suit property which was issued in the joint names of the 1st Respondent and the deceased was fraudulently issued to the 1st Respondent and the Hon. Kadhi revoked it and declared it to be of no effect. The Hon. Kadhi ordered further that the suit property be partitioned and the Land Registrar, Kisumu County “to effect the distribution and issue the titles in the respective shares of”; the 1st Respondent 0.01875 of a hectare and the deceased, 0.13125 of a hectare. This order was unless set aside or varied binding upon the Land Registrar, 1st Respondent and the administrators of the estate of the deceased.
21. I have not seen on record a completion notice issued by the Appellant to the Respondents in accordance with Clause 7.1 of the agreement of sale dated 12th October 2018. Even if such notice had been issued,



the 1st Respondent and the administrators of the estate of the deceased could not have acted on the same while the said orders by Hon.Kadhi were subsisting. In their submissions, the advocates for the Appellant took issue with the said orders. The lower court had no jurisdiction to vary or set aside the said orders. For the orderly functioning of the system of administration of justice, the lower court could also not ignore the orders and issue other orders that would conflict with the same. The lower court could not order the 1st Respondent and the administrators of the estate of the deceased to transfer the suit property to the Appellant while there was a subsisting order from the Kadhi's Court that had cancelled the title for the suit property that was in the joint names of the 1st Respondent and deceased on the strength of which the agreement of 12th October 2018 was made. How could the lower court order the Land Registrar to register the suit property in the name of the Appellant while the Hon. Kadhi had ordered the same Land Registrar to cancel the title for the suit property and to partition and issue separate titles in the names of the 1st Respondent and the estate of the deceased?

22. In the circumstances of this case, I am satisfied that the lower court exercised its discretion properly in refusing to grant the Appellant an order of specific performance. The agreement of 12th October 2018 was not capable of being performed in view of the orders that were made by the Kadhi's Court. The letter at page 31 of the Record of Appeal shows that the Appellant's advocates were aware of the Kadhi's Court case and that before the Kadhi issued the orders of 3rd July 2019, he had issued interim orders on 27th November 2018 restraining the 1st Respondent from dealing with the suit property. How did the Appellant expect the Respondents to complete the agreement during the subsistence of the said order? I have also noted from the e-mail at page 65 of the Record of Appeal that the Appellant was asked by the advocates who appeared to have been acting for the 1st Respondent and the deceased in the transaction to join the Kadhi's Court proceedings as interested parties to protect its interest. The Appellant appears not to have acted on this invitation. Having failed to participate in the proceedings before the Kadhi and the Kadhi having issued orders that were adverse to its interest, the Appellant could not expect the lower court to ignore those orders or make orders contrary to the same. I have said enough to show that the lower court was right in denying the Appellant an order for specific performance.
23. The Appellant had argued that in refusing to grant it an order for specific performance, the lower court left it without a remedy. The lower court could only grant the prayers that were sought. The Appellant did not seek damages for breach of contract or a refund of the 10% deposit it had paid to the 1st Respondent and the deceased. The lower court could not grant such reliefs that were not sought. The lower court did not err in its gratuitous advice to the Appellant to follow up on its 10% deposit with the 1st Respondent and the administrators of the deceased's estate. It was not an issue before the court and as such it could not pronounce itself on the same.
24. On the issue of the dating of the judgment of the lower court, it is apparent that although the judgment was delivered in the presence of the advocates for the Appellant and the Respondents on 22nd November 2022, the learned magistrate forgot to date the judgment. This in my view was an error that could be corrected under the slip rule provided for in section 99 of the *Civil Procedure Act*. With due deference to the decisions cited by the Appellant, I do not share the view that a judgment read in the presence of the advocates for the parties in open court on a working day and signed by a magistrate is nullity simply because the magistrate forgot to date the same. In my view, such a judgment is irregular but not a nullity. I am of the view that the Appellant should have moved the lower court under the slip rule to correct the said error in the judgment rather than making it a ground of appeal. In the circumstances of this case, I will ignore the error as a technicality under Article 159(2)(d) of *the Constitution* of Kenya 2010. If I were to agree with the Appellant's argument on this issue, the orders I would make are those setting aside the lower court judgment on the ground of being a nullity and



ordering a re-hearing of the suit. Such action would not be proportionate to the error committed by the lower court which has not affected the substance of the lower court judgment. I do not think that a re-hearing of a suit on the sole ground that a judgment delivered after a hearing was not dated as a result of an oversight on the part of a judicial officer would be a prudent use of judicial time. It will not serve the overriding objectives of the Civil Procedure Rules and Article 159(2)(d) of [the Constitution of Kenya 2010](#).

25. For the foregoing reasons, I find no merit in the appeal before me. The appeal is dismissed with no order as to costs.

DELIVERED AND DATED AT KISUMU ON THIS 19TH DAY OF JUNE 2024.

S. OKONG'O

JUDGE

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

N/A for the Appellant

N/A for the 1st Respondent

N/A for the 2nd Respondent

Ms. J. Omondi-Court Assistant

