



Wesonga & another v Tsimonjela & 2 others (Environment and Land Appeal E025 & E023 of 2022 (Consolidated)) [2024] KEELC 4734 (KLR) (19 June 2024) (Judgment)

Neutral citation: [2024] KEELC 4734 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND APPEAL E025 & E023 OF 2022 (CONSOLIDATED)
DO OHUNGO, J
JUNE 19, 2024**

BETWEEN

PHILIS WESONGA APPELLANT

AND

RICHARD AVOMBA TSIMONJELA 1ST RESPONDENT

ERIC AKATU 2ND RESPONDENT

AS CONSOLIDATED WITH

ENVIRONMENT AND LAND APPEAL E023 OF 2022

BETWEEN

ERIC AKATU APPELLANT

AND

PHILIS KHAOYA WESONGA RESPONDENT

(Being appeals from the judgment and decree of the Chief Magistrate's Court at Kakamega (Hon. J N Maragia, Senior Resident Magistrate) delivered on 8th June 2022 in Kakamega MCELC No. E147 of 2021)

JUDGMENT

1. Litigation leading to these appeals started in the Subordinate Court on 14th September 2021, when Philis Khaoya Wesonga (hereinafter 'Philis') filed plaint dated 9th September 2021, against Richard Avomba Tsimonjela (hereinafter 'Richard') and Eric Akatu (hereinafter 'Eric'), as first and second defendants, respectively. She averred that Richard was the registered proprietor of land parcel number



- South Kabras/Chesero/3289 (the suit property) and that she executed a sale agreement on 26th April 2017 through which Eric sold to her a 0.4 hectare portion of the suit property at a consideration of Kshs 740,000 which she paid in full. She further averred that Eric had earlier on purchased the portion from Richard and that Eric was in possession as at the time of the agreement.
2. Philis further averred that Richard refused or ignored to transfer the portion to her and that she later discovered that Richard had sold the portion to other buyers. She therefore prayed for judgment against Richard and Eric jointly and severally for an order of specific performance compelling Richard to execute the requisite transfer documents to transfer 0.4 hectares of the suit property to her and in default the Deputy Registrar (sic) of the Subordinate Court be authorized to sign all such necessary transfer documents on Richard's behalf. She further prayed for compensation for breach of the sale agreement, for costs of the suit and interest.
 3. Richard neither entered appearance nor participated in the proceedings.
 4. Eric filed a statement of defence wherein he averred that his interest in the portion got extinguished upon the sale to Philis and that it was upon Richard to transfer title to Philis.
 5. Upon hearing the matter, the Subordinate Court (Hon. J N Maragia, Senior Resident Magistrate) delivered judgment on 8th June 2022 and held that Philis did not prove her case against Richard. She entered judgment against Eric for Kshs 740,000 being the amount he received as purchase price. She also awarded Philis half the costs plus interest.
 6. Dissatisfied with the outcome, Eric filed ELCA No E023 of 2022 on 1st July 2022, through Memorandum of Appeal dated the same date. He prayed that the judgment be set aside. The grounds of appeal are listed on the face of the said Memorandum of Appeal.
 7. Similarly aggrieved with the judgment, Philis filed ELCA No E025 of 2022 on 7th July 2022, through Memorandum of Appeal dated 6th July 2022. She prayed that the judgment be set aside and be replaced with an order allowing her case as prayed in her plaint. The grounds of appeal are similarly listed on the face of her Memorandum of Appeal.
 8. The two appeals were consolidated by consent and ELCA No E025 of 2022 selected by consent as the lead file.
 9. The grounds of appeal in both appeals can all be collapsed into four: that the decision went against the weight of the evidence, that the learned magistrate erred in finding that it was an illegality for Richard to sign the sale agreement as a witness, that the learned magistrate erred in failing to order specific performance and that that the learned magistrate erred in awarding Kshs 740,000 against Eric when the said amount was neither prayed for against him nor pleaded and proven.
 10. The appeal was canvassed through written submissions. Philis argued that the sale agreement specified both the buyer and seller, defined the agreed consideration and how payment was to be made, the description of the property sold, and was executed by both parties therefore rendering it a valid and enforceable contract for which specific performance ought to have been granted. That the sale agreement which was produced in evidence showed that she was the buyer while Richard was the seller and that a common advocate attested execution by all parties. She further contended that having paid the purchase price, she fully discharged her obligations under agreement and that there was nothing left for her to do.
 11. Relying on the cases of *Toshike Construction Company Limited v Harambee Co-operative Savings and Credit Society Limited* [2021] eKLR and *Reliable Electrical Engineers (K) Ltd v Mantrac Kenya Limited* [2006] eKLR, Philis submitted that the court's duty is always to give effect to contracts as



opposed to remaking them and that the only viable and adequate remedy in the circumstances was specific performance. She therefore urged this court to allow her appeal and to grant her judgment as she sought in her plaint.

12. On his part, Eric argued that although he had purchased the property earlier, title had not passed to him and that he therefore received the sum of Kshs 740,000 as a refund of what he had paid. That Richard who committed at clause 10 of the agreement to attend the Land Control Board and to execute all transfer documents reneged on his said obligation and failed to defend the suit. Eric further argued that there was no prayer against him for refund of the purchase price.
13. Relying on the cases of *Galaxy Paints Company Limited v Falcon Guards Limited* [1999] eKLR and *Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others* [2014] eKLR, Eric argued that parties are bound by their pleadings and that in awarding the sum of Kshs 740,000 against him, the learned magistrate ran afoul of that cardinal principle of law. He also argued that parties willingly entered into the sale agreement and are bound by its terms. That it was not for the Subordinate Court to rewrite the contract for the parties and that Philis knowingly purchased the portion of the suit property for which she was seeking title as opposed to a refund of the purchase price. That the Subordinate Court could not impose on her a relief which she had not sought.
14. Just like happened in the proceedings before the Subordinate Court, although evidence of service upon him was availed, Richard did not participate in the hearing of the consolidated appeals.
15. The consolidated appeals are both first appeals. Consequently, this court's mandate is to re-evaluate, re-assess and re-analyse the record and then determine whether the conclusions reached by the learned trial magistrate are to stand or not and to give reasons either way. I also bear in mind that I have neither seen nor heard the witnesses and I will therefore give due allowance in that respect. I further remind myself that it is the responsibility of this court to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in their pleadings and evidence. See *Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR and *Selle & another v Associated Motor Boat Co. Ltd & others* [1968] EA 123.
16. I have considered the grounds of appeal, the pleadings, the evidence, and the submissions. The issues that arise for determination are whether the learned magistrate erred in awarding Kshs 740,000 against Eric and whether specific performance ought to have been granted.
17. Eric's main grouse regarding the award of Kshs 740,000 against him is that no judgment for that sum was sought against him.
18. It is crucial, at this stage, to restate the basic principle that parties are bound by their pleadings. The court too is in a sense bound by the parties' pleadings since pleadings circumscribe the issues for determination and reliefs sought. See *Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others* [2014] eKLR.
19. The central role of pleadings was restated by the authors of *Bullen and Leake and Jacob's Precedents of Pleadings*, 12th Edition, London, Sweet & Maxwell (The Common Law Library No 5) as follows:

The system of pleadings operates to define and delimit with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases and upon which the court will be called upon to adjudicate between them. It thus serves the two-fold purposes of informing each party what is the case of the opposite party which he will have to meet before and at the trial, and at the same time informing



the court what are the issues between the parties which will govern the interlocutory proceedings before the trial and which the court will have to determine at the trial.

20. A perusal of Philis' plaint shows that her case was grounded on the sale agreement dated 26th April 2017. A perusal of the agreement shows that it was titled "Land Sale Agreement," and Richard was the seller while Philis was the purchaser. The property sold was 0.4 hectares of land parcel number South Kabras/Chesero/3289 while the purchase price was stated as Kshs 740,000. The mode of payment was that the said sum was paid to Eric. Richard acknowledged the payment by signing the agreement. Eric also signed the agreement as a witness and not a party.
21. With the foregoing background in mind, Philis prayed in the plaint for judgment against Richard and Eric jointly and severally for an order of specific performance compelling Richard to execute transfer documents to transfer 0.4 hectares of the suit property to her and in default the Subordinate Court to sign all such necessary transfer documents on Richard's behalf. She additionally prayed for compensation for breach of the sale agreement, for costs of the suit and interest.
22. It will be noted from the foregoing that no judgment was sought against Eric for the Kshs 740,000. The prayer for specific performance was exclusively targeted at Richard while the prayer for compensation for breach of the sale agreement could not be targeted at Eric who was a witness to the agreement and not a party. The agreement did not impose any obligation upon him, and he could not be ordered to refund the Kshs 740,000 even under the prayer for compensation for breach. I agree with Eric that the learned magistrate erred in awarding the Kshs 740,000 against him. I also note that arising from her submissions in these consolidated appeals, Philis has made it clear that she is only interested in specific performance.
23. Should specific performance have been granted to Philis in the circumstances? The principles applicable to the equitable remedy of specific performance were summarised by Gicheru J.A. in *Gurdev Singh Birdi & Narinder Singh Ghatora as Trustees of Ramgharia Institute of Mombasa v Abubakar Madhbuti* [1997] eKLR as follows:

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, as is set out in paragraph 487 of Volume 44 of *Halsbury's Laws of England*, Fourth Edition, a plaintiff seeking the equitable remedy of specific performance of a contract:

"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, However, this rule only applies to terms which are essential and considerable. The court does not bar a claim on the ground that the plaintiff has failed in literal performance, or is in default in some non-essential or unimportant term, although in such cases it may grant compensation.

Where a condition or essential term ought to have been performed by the plaintiff at the date of the writ, the court does not accept his undertaking to perform in lieu of performance, but dismisses the claim."

24. Thus, the remedy of specific performance should only be granted when it is just and equitable so to do with a view to doing more perfect and complete justice. Specific performance will not be granted where there is an adequate alternative remedy such as damages.



25. From the material on record, there is dispute Philis and Richard entered into the sale agreement dated 26th April 2017. The terms of the agreement are plain, and it is not contested that Philis discharged her cardinal obligation in the agreement by paying the purchase price in full as agreed. Ordinarily, she would have been entitled to completion of the agreement by way of transfer of the portion purchased. The obligation to transfer was on Richard who was the vendor.
26. It must be emphasised that specific performance is an equitable relief whose aim is to do more perfect and complete justice. Philis averred at paragraph 16 of her plaint that she discovered that Richard sold portions of land parcel number South Kabras/Chesero/3289 to other buyers and that those other buyers were yet to obtain transfers. She added that Richard was continuing “to sell and oversell the land which may in turn defeat [her] claim.” She repeated similar statements at paragraphs 14 and 15 of her witness statement which she adopted as her testimony. She even stated that Richard was arrested by police on allegations of fraudulent sale of the land. She mentioned seven other buyers besides herself.
27. I have agonised whether specific performance can issue in the face of the multiple and allegedly fraudulent sales that Philis has referred to. She did not join the other buyers to her case. If an order for specific performance was to be made, there is grave risk that rights of the seven other buyers may be affected, yet they have not been afforded an opportunity to be heard. As an equitable relief, the mission of specific performance is to do more perfect and complete justice. Perfect and complete justice cannot be attained while trampling on the rights of others.
28. Philis had a chance and the choice to join the other seven buyers who she seems to know since she stated that they were summoned to Malava Police Station in respect of the transaction. Further, Philis had a choice to also pursue a refund of the purchase price. She has made it abundantly clear that clear that she is exclusively interested in specific performance. Specific performance cannot be granted where there is an adequate alternative remedy. In this case, a refund of the purchase price coupled with damages for breach of contract would be an adequate remedy to Philis. Alas, parties are bound by their own pleadings. The court cannot impose on Philis that which she neither desired nor sought.
29. I find that specific performance was not available to Philis in the circumstances.
30. In view of the foregoing discourse, Philis’ appeal (ELCA No E025 of 2022) is without merit and I therefore dismiss it. On the other hand, Eric’s appeal (ELCA No E023 of 2022) is meritorious and I therefore allow it. I set aside the judgment of the Subordinate Court and replace it with an order dismissing Philis’ case. Each party to bear own costs of both the consolidated appeals and the suit in the Subordinate Court.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 19TH DAY OF JUNE 2024.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Ms Luvayi for the Appellant

Mr Nyikuli for the Respondents

Court Assistant: M Nguyayi

