



REPUBLIC OF KENYA



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**Onyancha & another v Lagat (Civil Appeal E039 of 2022)
[2025] KEELC 672 (KLR) (20 February 2025) (Judgment)**

Neutral citation: [2025] KEELC 672 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
CIVIL APPEAL E039 OF 2022
JM ONYANGO, J
FEBRUARY 20, 2025**

BETWEEN

SAMSON ATEKA ONYANCHA 1ST APPELLANT

ABIUD OBURA ONYANCHA 2ND APPELLANT

AND

DAVID SONGOK LAGAT RESPONDENT

*(Being an appeal from the Judgment of Hon Christine Menya (SRM)
dated 4th November 2022 in Eldoret CMELC No 309 of 2019)*

JUDGMENT

1. Before me is an appeal that demands my most scrupulous attention; a challenge not merely to a decision, but to a principle of equitable justice. The Appellant contests the judgment rendered by the Honourable Christine Menya, Senior Resident Magistrate, dated 4th November 2022 in Eldoret CM ELC No. 309 of 2018. In the impugned judgment, the trial court, after hearing the parties and their witnesses, granted an order of specific performance in favour of the Respondent herein.
2. This appeal is not a mere procedural wrangling but a profound inquiry into whether the imposition of such an order rightly reconciles the structures of law with the dictates of fairness.
3. The Appellants contend that the imposition of the remedy of specific performance was disproportionate and unsuited to the particular circumstances of the case. It is my duty to determine whether the magistrate, in exercising her discretion, did so within the bounds of established legal principles and equitable fairness.



Background

4. At the core of this appeal is dispute over a sale agreement in respect to a parcel of land known as Kapkoi/Mabonde Block 1 (Ex-Prison) 334 measuring 2.0 Ha (suit land).
5. The Respondent herein moved the lower court vide a plaint dated 7th October 2015 seeking inter alia Orders to enforce a sale agreement dated 18th June 2015 between themselves and the Appellants herein and in addition sought to have the suit land transferred to their name.
6. Vide a judgment delivered by the trial court on 4th November 2022, the suit was allowed as prayed hence prompting the instant appeal.
7. The impugned judgment in Eldoret CM ELC No. 309 of 2018 is anchored on the grounds set out in the Appellants Memorandum of Appeal dated 17th November 2022 in which they contend that the Honourable magistrate erred in law and in fact by:
 1. Failing to observe that there was no valid/legal contract to bind the transfer of the parcel of land known as Kapkoi/Mabonde Block 1 (Ex-Prison) 334 measuring 2.0 Ha.
 2. Failing to observe and appreciate that the Respondent did not comply with the terms of Sale Agreement.
 3. Blindly re-writing the contract on behalf of the parties.
 4. Making a finding that the Respondent has discharged his burden of proof.
 5. Failing to observe that the 1st Appellant being the proprietor his interests are protected under section 24(a), 25 of the Land Registration Act No. 3 of 2012 and Article 40 of the Constitution of Kenya 2010.
 6. Failing to consider the evidence and submissions by the Appellants.
 7. Erring in law and fact generally hence arriving at the wrong decision.
8. The Appellants pray that this appeal be allowed and the judgment of the lower court be set aside and be substituted with an Order dismissing the suit with costs to the Appellants.
9. The appeal was canvassed by way of written submissions with both parties duly filing their submissions for consideration. The task before me is twofold: to assess the validity of the exercise of judicial discretion and to scrutinise whether the remedy prescribed truly harmonises the scales of justice.

Issues for Determination

10. Having given due consideration to the trial court proceedings, the Memorandum of Appeal, and the submissions by learned counsel, the authorities cited by the respective parties, and the law it is my considered view that the following issues emerge as pivotal points for determination:
 - i. Whether the trial magistrate erred in law and in fact by finding that there was a valid contract
 - ii. Whether the order of specific performance was warranted

Analysis and Determination

11. In my capacity as the first appellate court, I am tasked with a thorough reappraisal of the evidence and issues put before the trial court, scrutinising the record with care to form my own reasoned conclusions.



12. However, my mandate is circumscribed; I am not empowered to launch new inquiries, step beyond the bounds of the record, or address issues that were not raised or considered by the trial court. To act otherwise would be to exceed the clear limits of my jurisdiction, thereby compromising the very integrity of this appellate process and intruding upon the trial court's rightful domain of fact-finding.
13. This duty finds clear expression in Section 78 of the *Civil Procedure Act*, which defines the role of a first appellate court in no uncertain terms; to re-evaluate, reassess, and re-analyze the record in its entirety and reach its own independent conclusions. It is not a mere formality but a solemn obligation, ensuring that justice is not only done but manifestly seen to be done.
13. Similarly, the principle was espoused in *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123, as follows:

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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...”
14. In essence, the role of this court is not to merely echo the conclusions of the lower court but to reexamine the evidence in its entirety, all the while being ever mindful of the inherent limitations imposed by the reliance on the record alone.
15. The Appellants contend that the trial magistrate erred in finding that there was a valid sale agreement between themselves and the Respondent herein. They urge the court to be guided by Kenyan authorities that enunciate on what constitutes a valid sale agreement. See: *William Muthee Muthami v Bank of Baroda* [2014] eKLR, *Charles Mwirigi Miriti v Thananga Tea Growers Sacco Ltd & another* [2014] eKLR.
16. Learned counsel for the Respondent cited authorities that outline the essentials of a contract. See *Nelson Kivuvani v Yuda Komora & Another*, Nairobi HCCC No.956 of 1991, where the Court held that:

“the agreement for sale of land which contains the names of the parties, the number of the property, the purchase price and the conditions attached thereto, the obligations, express or implied, of each of the parties and signed and witnessed by two witnesses who signed against their names amount to a valid contract”.
17. Additionally, learned counsel for the Appellants cited authorities from other jurisdictions emphasizing the importance of intention for the formation of contract. Harris JA of the Court of Appeal of Jamaica in *Keith Garvey v Ricardo Richards* [2011] JMCA Civ 16 at paragraph 10 noted the significance of intention by the parties in the following terms:

“It is a well-settled rule that an agreement is not binding as a contract unless it shows an intention by the parties to create a legal relationship. Generally, three basic rules underpin the formation of a contract, namely, an agreement, an intention to enter into contractual relationships and consideration. For a contract to be valid and enforceable an essential terms governing the relationship of the parties must be incorporated therein. The subject matter



must be certain. There must be positive evidence that a contractual obligation, born out of an oral or written agreement is in existence.”

18. Moreover, the Supreme Court of United Kingdom in *RTS Flexible Systems Ltd v Moikerei Alois Muller GMBH & Co K. G.* [2010] UKSC 14:

“The general principles are not in doubt, whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon them, by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalized, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precaution to a concluded and legally binding agreement.”

19. I am in congruence with these authorities on the essence of a contract. A contract is not born of mere discussions or casual assurances; it emerges from a deliberate and structured agreement reflecting the parties’ mutual intent to be legally bound. Its foundation rests upon three essential pillars: offer, acceptance, and consideration, all of which must be certain and unequivocal. These principles ensure that an agreement is not merely an expression of goodwill but a legally enforceable commitment.

20. Thus, the law of contract demands not only certainty in terms but a demonstrable meeting of the minds, ensuring that obligations are legally binding and not merely aspirational.

21. An examination of the agreement for the sale of the suit land dated 18th June 2015 establishes that the three essentials of a contract were provided for. I will now proceed to examine whether the 3 essentials of a contract were met by the parties. The Appellants offered to sell the suit land for a consideration of Ksh. 1,500,000/- and the Respondent accepted. An evaluation of the agreement between the parties indicates that the Respondent paid a sum of Ksh. 750,000/ upon the execution of the agreement and the balance of was to be paid by 2nd July 2015.

22. I note that at the hearing, it was the Respondents own testimony that he did not pay the balance of Ksh. 750,000/- since he was not supplied with all documents that were to be availed by the Appellants. He further testified that he could not pay the balance of the purchase price before the transfer.

23. Notably, the terms of the agreement between the parties were as follows:

“ 5. That the balance of Kenya Shillings Seven Hundred and Fifty Thousand (Ksh. 750,000/=) only shall be paid on or before 2nd July 2015.

10. That the sellers to execute all necessary documents of transfer and hand over the original title deed to the purchaser upon completion of the entire purchase price.”

24. In my view, these terms are unequivocal. The documents necessary for the transfer were to be provided upon payment of the balance of Ksh. 750,000/- which was due on 2nd July 2015.

25. In his testimony, the Respondent also admitted that after payment of the Ksh. 750,000/- deposit for the purchase of the suit land, he was issued with a copy of the title deed which he produced as PEX 3. An examination of the title deed clearly indicates the suit land was registered on 28th May 2001 in the sole name of Samson Ateka of ID Number 0256461.



26. However, it is noteworthy that at the trial, it was the testimony of both Appellants that the 1st Appellant did not sign the sale agreement. The 2nd Appellant essentially testified that he entered into the agreement with the Respondent to sell the land registered in name of the 1st Appellant. It is also striking that the 1st Appellant disowned his witness statement during the hearing.
27. Moreover, the 2nd Appellant testified that he purchased the suit land in 2001 and registered it in the name of the 1st Appellant to hold as a trustee. The 2nd Appellant further acknowledged receiving the deposit of Ksh.750,000/-, signing the agreement and asserted that the suit land was his.
28. What emerges from the foregoing analysis is that the sale agreement dated 18th June 2015 was marred by several irregularities. The 2nd Appellant openly admits his intention of selling the property not registered in his name. The 1st Appellant for his part, appears indifferent to the 2nd Appellants actions insisting only that he was never party to any agreement to sell the suit land.
29. Meanwhile, the Respondent makes no attempt to justify his own breach of contract save for his assertion that he intended to pay the balance after the transfer was complete. Yet this self-imposed condition finds no support in the agreement itself. What emerges, then, is a transaction fraught with uncertainty.
30. In the impugned judgment of Eldoret CM ELC No. 309 of 2018, the magistrate finds that the “suit land belongs to the defendants jointly.” This assertion is contrary to the title to the suit property which names the 1st Appellant as the sole owner. I cannot subscribe to the conclusion reached by the learned magistrate. The assertion that the “suit land belongs to the defendants jointly” stands on no firm legal footing and stands in direct contradiction to the clear and incontrovertible evidence on record.
31. Learned counsel for the Respondent argues that from the 2nd Appellant’s testimony during the hearing, the magistrate rightly concluded that the 1st Appellant held the suit land in trust for the 2nd Appellant. Counsel for the Respondent has relied on several cases to buttress their argument. See: *Gissing v Gissing* [1971] AC 886, *Twalib Hatayan & another v Said Saggat Ahmed Al-Heidy & 5 others* [2015] eKLR, *Aggrey Ambani Ngaira v Patrick Kariungi* [2017] eKLR.
32. However, a trust is never a matter of presumption, it is a matter of proof. Courts do not deal in assumptions, nor do they act upon sentiments. Mere assertions, no matter how passionately advanced, are but empty vessels unless filled with concrete, compelling evidence. The trial court presumed trust without Appellants establishing sufficient evidence of the same. In my view, the 1st Appellant remains the only registered owner of the suit land as the contrary was not proved to the requisite standard. The argument that the 1st Appellant held the suit land in trust for the 2nd Appellant is therefore unsubstantiated and ultimately untenable.
33. Section 26 (1) of the [Land Registration Act](#) states as follows:

“The Certificate of Title issued by the Registrar upon registration ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner... and the title of that proprietor shall not be subject to challenge except..”
34. In matters of land ownership, the law does not deal in assumptions or informal arrangements; it speaks through the register, and the register here is unequivocal. To hold otherwise is to disregard the fundamental principle that title is the ultimate proof of ownership, not unsubstantiated claims. A court must not be swayed by conjecture or convenience; it must rest its determinations on firm legal principles.



35. The trial magistrate further notes that:
- “From the facts of case, the defendant jointly as I had earlier observed received half of the purchase price and it is not clear why they could have refused to take the balance.”
36. I once again find myself unable to agree with the learned magistrate’s reasoning. A scrutiny of the evidence on record reveals a different reality; the Respondent himself refused to pay the balance until the transfer was completed by the vendors in the transaction. This was not a mere delay or misunderstanding; it was a direct and undeniable breach of Clause 5 of the agreement, which explicitly required full payment by 2nd July 2015.
37. Contractual obligations are not subject to personal convenience or unilateral adjustments; they are binding commitments that must be honored as agreed. To suggest otherwise is to disregard the plain terms of the contract and undermine the very sanctity of contractual enforcement.
38. In view of the foregoing, I find that no binding contract existed between the 1st Appellant who is registered as the sole owner of suit land and the Respondent herein. In any case, the Respondent’s own conduct speaks against him. Having breached the terms of his agreement with the 2nd Appellant, he cannot now turn to the court and seek the equitable remedy of specific performance.
39. Learned counsel for the Respondent highlights the discretionary nature of specific performance and urges the court to be guided by the decision in *Reliable Electrical Engineers (K) Ltd v Mantrac Kenya Limited* [2006] eKLR where the court stated:
- “Specific performance, like any other equitable remedy, is discretionary and the court will only grant it on the well settled principles.”
40. In this case, the trial court’s discretion to grant specific performance was wholly misplaced. There was no valid agreement between the 1st Appellant (registered owner) and the Respondent; without privity of contract, the element of intent could not be ascertained and no enforceable obligation could arise. Equally, no trust was established between the 1st and 2nd Appellants that could justify saddling the former with responsibilities never undertaken. But perhaps most fatal to the Respondent’s claim was his own breach of contract. He failed to pay the balance of the purchase price within the stipulated time, flouting the very terms upon which he now seeks to rely.
41. Equity does not stretch out its hand to those who disregard their own obligations; a party who comes seeking its aid must do so with clean hands. To grant specific performance in these circumstances would not be a dispensation of justice but a distortion of it. I therefore find that the trial court erred in granting the remedy of specific performance to the Respondent.
42. I must note that the Respondent would have been better served by adopting a more measured approach in his pleadings, recognizing that specific performance is not granted as a matter of course but upon clear and established grounds. Where uncertainties exist, whether in the validity of the contract, the absence of privity, or even one’s own performance under the agreement; it is always prudent to plead in the alternative.
43. Had the Respondent sought, in addition to specific performance, a claim for damages or restitution, he would have positioned himself within the broader spectrum of equitable and legal reliefs available. The law does not insist on rigid remedies but provides avenues to ensure that a aggrieved party is not left without recourse. A claim structured with foresight would have acknowledged the possibility that



specific performance might not be granted and instead invited the court to consider alternative reliefs that align with the principles of justice and fairness.

44. Be that as it may, this is a court of law and a court of equity and equity detests unjust enrichment. This court is required to deliver substantive justice and not merely technical or procedural justice. Accordingly, the interests of justice will be served if the Respondent is granted leave to sue for recovery of the purchase price which he paid to the 2nd Appellant to avoid unjust enrichment on the part of the Appellants.
45. Ultimately, I find merit in the appeal and make the following final orders:
 - a. The appeal is allowed and the judgment delivered on 4th November 2022 in Eldoret CM ELC No. 309 of 2018 is hereby set aside and substituted with an Order dismissing the suit with costs.
 - b. In the interest of justice, the Respondent is granted leave to institute fresh proceedings in the lower court for recovery of part of the purchase price paid to the 2nd Appellant.

DATED, SIGNED AND DELIVERED, VIRTUALLY THIS 20TH DAY OF FEBRUARY 2025.

.....

J. M. ONYANGO

JUDGE

In the presence of:

Mr Mathai for Mr C. D Nyamweya for the Appellant

No appearance for the Respondent

Court Assistant - Hinga

