



**Mkala & another v Kigo (Environment and Land Appeal E001 of 2023)
[2024] KEELC 5359 (KLR) (Environment and Land) (22 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5359 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VOI
ENVIRONMENT AND LAND
ENVIRONMENT AND LAND APPEAL E001 OF 2023**

EK WABWOTO, J

JULY 22, 2024

BETWEEN

ERNEST MWASAMBO MKALA 1ST APPELLANT

JUDITH MKANJANA KILUGHA 2ND APPELLANT

AND

BENSON MWANGI KIGO RESPONDENT

*(Being an Appeal against the Judgment of Hon. T. Sinkiyian (PM),
Senior delivered on 26th June 2023 in Voi ELC No. 23 of 2018 Ernest
Mwasambo Mkala and Judith Mkanjana Kilugha vs Benson Mwangi Kigo)*

JUDGMENT

1. This appeal arose from a Judgment rendered by Hon T. N. Sinkiyian, PM on 26th June 2023 in Voi ELC No 23 of 2018. The Appellants were the Plaintiffs in the suit. They sued the Respondents. The dispute in the suit revolved around the un surveyed portion known as Plot No 27 Sofia Plotini Squatter upgrading scheme Voi Municipality. The learned magistrate made a finding to the effect that the Appellants had failed to prove their case and proceeded to dismiss the suit with costs to the Respondent.
2. Aggrieved by the Judgment of the trial court, the Appellants brought this appeal. I will give a brief background to the appeal before I analyze and make findings on the issues that fall for determination in the appeal.
3. Through a plaint dated 4th October 2018, the Appellants sought, among other reliefs, an order compelling the Respondent to transfer the portion of un surveyed portion known as Plot No 27 Sofia Plotini Squatter Upgrading Scheme Voi Municipality to them, an order for specific performance of



the agreement dated 31st July 2007 and an order for the Respondent to sign transfer in default an order that the Registrar to cancel the Defendant's title and issue a new title deed of the suit property. The Appellants also sought for costs of the suit.

4. The suit was contested by the Respondent who filed a statement of defence dated 20th November 2018 disputing the averments made in the Plaint and urging the court to dismiss the suit.
5. At trial, viva voce evidence was taken. The trial court rendered a Judgment in which it made a finding that the Appellants had not proved their case to the required standard and dismissed the same with costs.
6. Aggrieved by the findings and disposal orders of the trial court, the Appellants brought this appeal through a memorandum of appeal dated 18th July 2023. They advanced the following verbatim grounds of appeal:
 1. That the learned magistrate erred both in law and in fact in dismissing the Appellants case/suit.
 2. That the learned magistrate erred in law and fact in failing to properly consider and appreciate the Appellants pleadings, evidence and submissions and therefore arriving at a wrong conclusion.
 3. That the learned magistrate erred in law and fact in finding that the Appellants failed to prove their case against the Respondent on a balance of probabilities.
7. On the basis of those grounds, the Appellants sought the following orders;
 - a. The judgment delivered on the 26th June 2023 dismissing the Appellants suit be set aside and to substitute the same with judgment in favour of the Appellants as prayed for in the Plaint.
 - b. The costs of this Appeal and suit be borne by the Respondent.
8. The appeal was canvassed through written submissions. The Appellants filed written submissions dated 17th May 2024 while the Respondents filed written submissions dated 30th May 2024.
9. The Appellants submitted on the following issues; the sale of the whole or portion of Plot No 27 Sofia Plotini and specific performance. It was submitted that the evidence given by the Appellants proved that the Respondent sold the whole plot being Plot No 27 Sofia Plotini. Counsel urged the court to refer to the part A and B of the sale agreement wherein the vendor agreed to sell to the Appellants the said plot. It was also submitted that the Respondent acknowledged receipt of Kshs 100,000/= being the final balance and purchase price in respect of the plot. It was also submitted that the Appellant had produced a letter dated 28th November 2008 by the Respondent to the Ministry of Lands and Settlement, Voi confirming that the Respondent had sold all his interests in the plot. The Appellants also produced a receipt for Kshs 5,000/= being payment of transfer of the said plot.
10. It was contended that during trial before the subordinate court, the Respondent had not controverted the evidence adduced by the Appellants.
11. On the issue of specific performance, it was submitted that the court erred and it ought to have ordered for specific performance for portion of the plot which the court believed was sold to the Appellants which we do not agree with because the evidence which was not rebutted is that the Respondent sold the said plot which the Appellants paid a transfer fees of Kshs 5,000/=
12. Counsel added that the evidence adduced by the Appellants demonstrated that they had proved their case to the required standard and were deserving of the reliefs sought. Counsel urged the court to allow the appeal.



13. The Respondent opposed the appeal through written submissions dated 30th May 2024. On the grounds of appeal, counsel argued that the Appellants had presented generalized complaints against the Judgment of the lower court without pointing out any specific errors or mistakes on part of the trial court. Counsel submitted that the trial court had set out the evidence of the parties in extenso the trial court had not erred in dismissing the Appellants suit before it. The court was urged to find that the Appeal lacks merit and dismiss the same with costs.
14. I have considered the entire record of the trial court; the grounds of appeal; and the parties' respective submissions. Parties did not agree on a common statement of issues falling for determination in this appeal.
15. The principles upon which a first appellate court exercises jurisdiction are well settled. The task of the first appellate court was summarized by the Court of Appeal in the case of *Susan Munyi v Kesbar Shiani* (2013)eKLR in the following words:

“As a first appellate court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyze, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions.

The above principle was similarly outlined in *Abok James Odera t/a A. J Odera & Associates vs John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR in the following words:

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of *Kenya Ports Authority v Kustron (Kenya) Limited* 2000 2 EA 212.”

16. The Court is of the view that the following are the key issues for determination by this court which can dispose the appeal. They are:-
 - i. Whether the trial court erred in law and fact in arriving at its decision.
 - ii. What are the appropriate reliefs to issue herein.
17. All the grounds of the memorandum of appeal as raised by the Appellants were to the effect that the Learned Magistrate erred in law and fact in arriving at her decision. The Appellants submitted that the Appellants had proved their case to the required standard. It was submitted that trial court did not allow the prayer for specific performance for the reasons that the Appellants prayed for a portion of Plot No 27 Sofia Plotini because the Appellants have a remedy to pursue the same through the County Government relevant department and that the court lacked technical capacity to resolve the issues of subdivision as there was no expert report tendered before Court.
18. The Appellants case before the trial court was that they entered into an agreement with the Respondent to purchase a portion of the unsurveyed which they paid a total sum of Kshs 300,000/- in different instalments. After completion of the purchase price the Respondent declined to transfer the property to them. The Respondent on the other hand averred that the parties herein had agreed to purchase the entire plot for a sum of Kshs 650,000/- for the same to be registered in the name of CMC Church Voi, however upon receipt of the purchase price and at the time of the transfer, the Appellants turned around and said they were purchasing the said plot for themselves but nevertheless the Defendant allowed them to claim a portion of the plot.



19. During trial, the Appellants adduced evidence confirming the said purchase of the said plot and denied that they were purchasing the same on behalf of the church.

20. From the evidence that was adduced herein during trial, the parties produced a sale agreement dated 30th July 2007. The said agreement was duly executed by the Appellants and the Respondent.

21. Clause A of the said agreement provided as follows;

“The vendor is the owner of the all that un-surveyed plot or parcel of land known as Plot No 27 Sofia Plotini squatter upgrading scheme Voi Municipality as contained in the original letter of allotment registered s Number 31680/II/144 dated 24th Janaury 2006 and shown in PDP No 109 Voi Municipality”

22. Evidence was also adduced to the effect that the Respondent acknowledged receipt of the sum of purchase price including the final balance of Kshs 100,000. The Appellants also produced a receipt for Kshs 5,000/= being payment of transfer of the said plot.

23. The Appellants also adduced evidence to the effect that vide a letter dated 28th November 2008, the Respondent wrote to the Ministry of Lands and confirmed that he had sold all his interest of the said plot to the Appellants and requested to have the anticipated title processed in their names. This entire evidence was not controverted by the Respondent.

24. From the evidence that was tendered herein, it emerged that the Respondent later changed tune and declined to transfer the suit property to the Appellants. The Respondent’s averments that the Plot was being bought in respect to CMC Church was not backed by any documentary evidence. Furthermore, the Respondent conceded the existence of the Appellants claim during trial.

25. It is worth noting that parties should always be aware of the consequences and repercussions before entering into any agreement. Parties should not merely enter into agreements with the sole purpose of not honouring them. When a person signed a document, that signature should denote an intention to be bound by the terms and conditions embodied in the signed document. The Respondent did not demonstrate misrepresentation, duress, mistake or fraud nor was it suggested that there were no prior negotiations culminating in the agreement. As such the Respondent is estopped from renegeing on the same terms on the sale agreement that he willfully consented to.

26. It is trite law that courts cannot rewrite the terms of the agreement between the parties neither can they create a new contract between the parties and have to simply rely on the terms and conditions of the agreement as agreed between the parties while deciding a dispute between those parties. This was emphasized in the cases of *National Bank of Kenya Ltd v Pipe Plastic Samkolit (K) Ltd* (2002) 2 E.A. 503, (2011) eKLR the Court of Appeal at page 507 stated as follows: -

“A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.”

In *Pius Kimaiyo Langat v Co-operative Bank of Kenya Ltd* (2017) eKLR the Court of Appeal further stated that: -

“We are alive to the hallowed legal maxim that it is not the business of Courts to rewrite contracts between parties, they are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved.”



27. Having considered the said evidence, it therefore follows that the Learned Magistrate erred when she held that the Appellants had not proved their case to the required standard and proceeded to dismiss the same. It is the finding of this court that indeed the Appellants had proved their case as against the Respondent and were entitled to the reliefs sought.
28. While considering the entire scope of Section 78 of the *Civil Procedure Act*, an appellant court has the powers to inter alia determine a case in finality and can also perform the same powers and duties as are conferred and imposed on the court of original jurisdiction when the suit was filed.
29. The Appellants sought several reliefs including specific performance by the Respondent as per the terms of the sale agreement that was executed by the parties. In respect to specific performance it is worth noting that the remedy of specific performance is an equitable remedy which is granted where it is demonstrated that a party has done all that he was expected to do under the contract or that he is ready and willing to perform his part. In *Gurdev Singh Birdi & another v Abubakar* (1997) eKLR the Court of Appeal held as follows:
- “It cannot be gainsaid that the underlying principle in granting the equitable relief of specific performance has always been under all the obtaining circumstances in the particular case, it is just and equitable 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...”
30. In *Reliable Electrical Engineers Ltd. v Mantrac Kenya Limited* (2006) eKLR, the court stated that: -
- “Specific performance like any other equitable remedy is discretionary and the Court will only grant it on well principles”
- “The Jurisdiction of 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 the formal requirements or mistake or illegality, which makes the contract invalid or enforceable. Even when a contract is valid and enforceable, specific performance will however not be ordered where there is an adequate alternative remedy. In this respect damages are considered to be an adequate alternative remedy where the claimant can readily get the equivalent of what he contracted for from another source. Even when damages an adequate remedy specific performance may still be refused on the ground of undue influenced or where it will cause severe hardship to the defendant.”
31. The evidence adduced herein clearly confirmed that the Appellants clearly discharged their obligations as per the sale agreement, and in the circumstances, the remedy of specific performance as prayed for by the Appellant is the most equitable and legally sound remedy to be issued in the case. The Appellant is clearly entitled to an order of specific performance.
32. This court having addressed itself on the earlier issues herein and further having found that the learned magistrate erred in dismissing the Appellants case in its entirety, it will proceed to set aside the said judgment of the Learned Magistrate and substitute the same with the appropriate and deserving reliefs as were sought by the Appellants.



33. On the issue of costs, by dint of the provisions of Section 27 of the *Civil Procedure Act*, costs are at the discretion of the court. Considering the circumstances of this appeal, this court directs each party to bear own costs of the appeal together with costs of the proceedings before the lower court.

Final orders

34. In conclusion, the Appeal succeeds and the judgment of the lower court is hereby set aside and substituted with the following orders;
- a. An order for specific performance is hereby issued compelling the Respondent to sign and transfer the portion of un surveyed portion known as Plot No 27 “Sofia Plotini” Squatter Upgrading Scheme Voi Municipality to the Appellants within 30 days from today.
 - b. In default to compliance with order (a) above within the stipulated timeline, the Land Registrar is hereby directed to cancel the Respondent’s title and issue a new title deed of Plot No 27 “Sofia Plotini” to the Appellants.
 - c. Each party to bear own costs of the appeal and costs of the trial court.

Judgment accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 22ND DAY OF JULY 2024.

E.K. WABWOTO

JUDGE

In the Presence of: -

N/A for the Appellants.

Ms. Atieno h/b for Mr. Muthami for the Respondent.

Court Assistant: Mary Ngoira.

