



**Bank of Africa Limited v Kikambala Housing Estate Limited & another (Environment & Land Case 355 of 2016) [2024] KEELC 5685 (KLR) (18 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5685 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND CASE 355 OF 2016  
EK MAKORI, J  
JULY 18, 2024**

**BETWEEN**

**BANK OF AFRICA LIMITED ..... PLAINTIFF**

**AND**

**KIKAMBALA HOUSING ESTATE LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**THE LAND REGISTRAR KILIFI ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. By way of a Plaint dated 20<sup>th</sup> December 2016 filed on 22<sup>nd</sup> December 2016, the Plaintiff seeks the following orders:
  - a. A declaration that the 1<sup>st</sup> Defendant's failure/neglect and refusal to execute the instrument of surrender of the freehold estate in respect to Title No. Kilifi/ Mtwapa/867, as well as the lease regarding the leasehold interest for Kilifi/ Mtwapa/ 867, is in breach of the 1<sup>st</sup> Defendant's obligations as contained in the Agreement to Create Security dated 28<sup>th</sup> October 2013.
  - b. An order of specific performance compelling the 1<sup>st</sup> Defendant to avail its Directors to the 2<sup>nd</sup> Defendant at the Kilifi Land Registry in Kilifi Town within 14 days of the date of such order and further compelling the 1<sup>st</sup> Defendant to execute the surrender of the freehold estate in respect to Title No. Kilifi/ Mtwapa/ 867, as well as the lease regarding the leasehold interest for Kilifi/ Mtwapa/ 867, in addition to any other documents as shall be required by the Registrar of Lands Kilifi for purposes of issuance of the leasehold title,
  - c. In default of compliance with order (b) above, the 2<sup>nd</sup> Defendant be compelled to transmit the instrument of surrender and the lease concerning Title No. Kilifi/ Mtwapa/867 to the Deputy Registrar of this Court and the Deputy Registrar, in such an event, be directed by this Court to execute the said instrument of Surrender and the said Lease on behalf of the 1<sup>st</sup> Defendant



under seal of this Court in addition to any other documents as shall be required by the Registrar of Lands Kilifi for purposes of issuance of the leasehold title;

- d. An order compelling the 2<sup>nd</sup> defendant to make such entries as are necessary to close the freehold register and open the leasehold register and to register the 1<sup>st</sup> Defendant as the leasehold proprietor of Kilifi/ Mtwapa/867 and contemporaneously with such registration of the instrument of Surrender and the Lease, the 2<sup>nd</sup> Defendant to issue a Certificate of Lease for Title No. Kilifi/ Mtwapa/867, which the 2<sup>nd</sup> Defendant shall retain after issuance, subject to further orders as set out below;
  - e. An order of Specific Performance compelling the 1<sup>st</sup> Defendant to execute a legal charge in respect to the leasehold interest in Kilifi/ Mtwapa/867 in favour of the Plaintiff in the format set out in the Agreement to Create Security between the 1<sup>st</sup> Defendant and the Plaintiff dated 28<sup>th</sup> October 2013 within 14 days after the issuance of a Certificate of Lease pursuant to Order (d) above;
  - f. In default of Order (e) above, the Plaintiff is to present the legal charge concerning Title No. Kilifi/ Mtwapa/867 in the format set out in the Agreement to Create Security dated 28<sup>th</sup> October 2013, to the Deputy Registrar of this Court and the Deputy Registrar, in such an event, be directed by this Court to execute the said legal charge on behalf of the 1<sup>st</sup> Defendant under the seal of this Court.
  - g. The 2<sup>nd</sup> Defendant be directed to register the Plaintiff's legal charge in the leasehold register for Title No. Kilifi/ Mtwapa/ 867 after execution of the same pursuant to Order (e) or (f) above within three days of presentation for registration subject to the same complying with the requirements of the law and upon the Plaintiff's due payment of stamp duty and the requisite registry fees and to after that release the duly registered legal charge, the lease and the Certificate of lease to the Plaintiff and the Plaintiff's duly authorized agent.
  - h. Costs of and incidental to this suit.
  - i. Any other or further relief this Court may deem fit to award.
2. This Court (Oloa J.) ordered that this matter be heard simultaneously with Malindi, ELC No. 207 of 2015, consolidated With Malindi ELC No. 61 of 2015, 227 of 2015, 234 of 2015, 16 of 2016, 202 of 2016, 128 of 2018 & 147 of 2018 - Amina Mohamed Kasinga & 22 others v Kikambala Housing Estate Limited and another, and Bank of Africa Kenya Limited Interested Party on 29<sup>th</sup> May 20117, as the orders emanating from this suit, will ultimately bind the suits mentioned above and vice versa.
  3. The Plaintiff, through Felix Muhati, its Senior Recoveries Officer who testified as PWI and adopted his written statement, averred that it was the financier of the development and construction of the housing units erected on the property known as Title Number Kilifi/ Mtwapa/867 and presently has a registrable but unregistered interest in the suit property. In contrast, the 1<sup>st</sup> Defendant was and still is the registered proprietor of all that freehold interest in the suit property. Upon request from the 1<sup>st</sup> Defendant, Plaintiff agreed to extend certain banking facilities available to the 1<sup>st</sup> Defendant with a term loan in the maximum principal sum of Kshs. 364,000,000/-.
  4. The Bank also alleged that as security for the various banking facilities advanced to the 1<sup>st</sup> Defendant, the latter charged the suit property to the Plaintiff through a first fixed legal charge dated 19<sup>th</sup> September 2012. The original Charge was duly registered on the register and title of the suit property on 24<sup>th</sup> September 2012.



5. The Bank stated that upon obtaining advice from the 1<sup>st</sup> Defendant's surveyor that the final step of the Change of User process required an unencumbered title, the 1<sup>st</sup> Defendant requested the Plaintiff to execute a Discharge of the Original Charge to enable the 1<sup>st</sup> Defendant to obtain a certificate of lease.
6. The Plaintiff (the Bank) further asserted that it agreed with the 1<sup>st</sup> Defendant to create security dated 28<sup>th</sup> October 2013, setting out the terms upon which the Plaintiff would discharge its security over the suit property. That despite demand and notice of intention to sue, the 1<sup>st</sup> Defendant failed/ refused and neglected to fulfill its obligations under the provisions of the Agreement to Create Security dated 28<sup>th</sup> October 2013. It asserts that the 1<sup>st</sup> Defendant is in breach of the terms of the Agreement to Create Security dated 28<sup>th</sup> October 2013 and that the Plaintiff's cause of action against the 1<sup>st</sup> Defendant is for orders of specific performance of the said Agreement as enumerated in the plaint.

### **The Defence.**

7. In response, the 1<sup>st</sup> Defendant filed a Statement of Defence on the 21<sup>st</sup> day of March 2018 and called two witnesses at the trial, Aziz Mwidani (its General Manager) DW1, and Osman Elsek, (its Director) DW2, who adopted their filed statements and admitted that various agreements existed for selling housing units to the Plaintiffs in Malindi ELC 207 of 2015 as consolidated with Malindi ELC 61 of 2015, 227 of 2015, 234 of 2015, 16 of 2016, 202 of 2016, 128 of 2018, and 147 of 2018. According to it, the delay in transferring and issuing subleases to the Plaintiffs aforesaid was caused by the delay in the Plaintiff in this suit obtaining the leasehold title of the suit property in good time.
8. According to the 1<sup>st</sup> Defendant, the original Freehold Title over the suit property was handed over to Plaintiff by the 1<sup>st</sup> Defendant in 2012 for onward transfers to the government for the issuance of a 99-year Leasehold Title deed. After that change, the Leasehold Title with a disputed loan amount that had been advanced to the 1<sup>st</sup> Defendant by the Plaintiff for the construction of all the 308 houses erected on the suit property was to be charged.
9. Further, in addition to the fact that the Plaintiffs in Malindi ELC 207 as consolidated with ELC 61 of 2015, 227 of 2015, 234 of 2015, 16 of 2016, 202 of 2016, 128 of 2018, and 147 of 2018 alongside the prohibitory orders issued on 28<sup>th</sup> December 2016 emanating from this suit, which orders prevented the 1<sup>st</sup> Defendant from proceeding to execute the surrender instrument and lease to enable issuance of the Leasehold Title for onward transfer of subleases to the Plaintiffs herein.
10. It was the testimony of the 1<sup>st</sup> Defendant that it has been keen to issue sublease titles to the Plaintiffs in the consolidated suits. If there are any liabilities attributed to the 1<sup>st</sup> Defendant, the same should be ascribed to the Plaintiff herein. As such, the Plaintiff should be accountable and settle all financial liabilities emanating from the protracted litigation in this suit, the consolidated suits before this Court, and those pending before the Mombasa High Court.

### **Submissions by the Plaintiff**

11. The Plaintiff filed submissions through the firm of Kairu & McCourt Advocates on the 28<sup>th</sup> day of February 2024. Counsel submitted that the evidence tendered illustrates the intention of Plaintiff and 1<sup>st</sup> Defendant, the terms of loan facilities extended to the 1<sup>st</sup> Defendant, and the security offered for the loans. According to him, the issue of Change of User became a problem due to the mandate tussle between the National Land Commission and the Ministry of Lands, whose responsibility was to undertake functions such as the extension, renewal, and issuance of leasehold titles. On this, he relied on the opinion of the National Land Commission [2015] eKLR Advisory Opinion Reference No. 2 of 2014, dated 2<sup>nd</sup> December 2015.



12. Counsel also submitted that the 1<sup>st</sup> Defendant used the delay to renege on its obligations to execute the new lease to enable a Charge to be registered in Plaintiff's favour. It was also submitted that the 1<sup>st</sup> Defendant failed to execute the surrender instrument and lease to complete the Change of User process.
13. Counsel submitted that this Court ought to exercise its discretion and apply the equitable remedy of specific performance in favour of the Plaintiff as the principle of equity has been elevated to a constitutional edict by virtue of Article 10 (2) (b) of *the Constitution* as held by the Court of Appeal in the case of Willy Kitilit v Michael Kibet [2018] eKLR. He also submitted that a valid, enforceable contract must exist for the remedy of specific performance to be applicable. Since this involves registering a Charge, the same must satisfy the conditions of Section 3 (3) of the *Law of Contract Act* Cap 23.
14. In determining the issue of whether the Agreement to Create Security was never signed and, therefore, a nullity, he submitted that this issue, as raised by the 1<sup>st</sup> Defendant, fails to take into consideration the effect of the four Letters of Offer and the Partial Settlement Agreement entered between the Plaintiff and the 1<sup>st</sup> Defendant and some Plaintiffs in the consolidated suits. All confirm the intentions of the parties to register a charge on the suit property. He submitted that the 1<sup>st</sup> Defendant is estopped by its conduct from pleading that the Agreement to Create Security is invalid.
15. He contended that Plaintiff, at the 1<sup>st</sup> Defendant's behest, discharged its Charge dated 19<sup>th</sup> September 2012 to enable a Change of User in consideration of a new charge being registered on the latest title to secure the loans advanced to the 1<sup>st</sup> Defendant. He relied on the case of Thrift Homes Limited v Kays Investment Limited [2015] eKLR and the Ugandan Supreme Court decision in Manzoor v Baram [2003] 2 E.A, page 580.
16. He further argued that there is no other adequate remedy as the 1<sup>st</sup> Defendant has continued diluting the security and claiming losses from the Plaintiff. He relied on the case of African Cotton Industries Limited v Rural Development Services Limited [2021] eKLR.

#### **Submissions by the 1<sup>st</sup> Defendant**

17. The 1<sup>st</sup> Defendant filed submissions on the 7<sup>th</sup> day of August 2023 through the firm of Mosiara V.N & Co. Advocates identifying five (5) issues for the determination of this Court: Why and who caused the delay in issuing sublease titles to the Plaintiffs in the consolidated suits, whether the 1<sup>st</sup> Defendant took deliberate efforts to issue sublease titles to the Plaintiffs in the consolidated suits, who ought to bear the liabilities for failure and delay in issuing the sublease titles, whether the Plaintiff is entitled to the prayers sought and a determination on costs.
18. Ms. Mosiara submitted that the Change of User was completed by the 1<sup>st</sup> Defendant on or before May 2012 and that Plaintiff was aware of the same. Therefore, the 1<sup>st</sup> Defendant trusted and assumed that the Plaintiff would act accordingly. Upon receiving all the completion documents and the freehold title, there was a legitimate expectation: Plaintiff was first to convert the freehold title and then charge the leasehold title with the change of user endorsed thereon. Reliance was placed on the case of Communications Commission of Kenya & 5 others v Royal Media Services & 5 others as cited in Five Forty Aviation Limited v Kenya Revenue Authority & 3 others [2017], and in Republic v Principle Secretary, Ministry of Transport, Housing and Urban Development Ex Parte Soweto Residents Forum CBO [2019]eKLR, where the Court held that legitimate expectation would arise when a body, by representation or by past practice, has aroused an expectation that is within its power to fulfill.



19. In light of the decision in Five Forty Aviation Limited v Kenya Revenue Authority case, the Plaintiff ought to have asked whether, by charging the freehold title deed, there would have been any unfair or unwarranted delays and damages occasioned to the 1<sup>st</sup> Defendants and its customers by its unlawful charging of a freehold title instead of the leasehold title. According to the 1<sup>st</sup> Defendant, when it handed over all the changes in user documents and the original freehold documents to Plaintiff, Plaintiff made them sign blank page documents, which it retained.
20. Ms. Mosiara averred that 1<sup>st</sup> Defendant had handed over all change of user documents and the original freehold title by May 2012, and therefore, the Plaintiff herein had ample time to complete the Conversion of the freehold Title to Leasehold title, with the change of user endorsed thereon, and ultimately charge the Leasehold title. According to her, the delay was caused by charging the freehold title on 24<sup>th</sup> September 2012 and the subsequent four years of delay of the Plaintiff herein to rectify its negligence.
21. She stated that the 1<sup>st</sup> Defendant had no objection to the Plaintiffs in the consolidated suits having their sublease titles issued, save for the delays beyond its control.
22. On the issue of costs, the Court was implored to find that since most of the delays were attributed to Plaintiff, herein, it pays all the costs and any other liabilities, such as interests.

### **Analysis and Determination.**

23. From the materials, evidence, and submissions placed before me, I frame the following issues for the determination of this Court - whether the Agreement to Create Security dated 28<sup>th</sup> October 2012 is enforceable and whether the Plaintiff in this Suit is entitled to the expansive declaratory orders sought in the plaint emanating from the agreement to create Security aforesaid and who should bear the costs of this suit.
24. The Plaintiff discharged its legal charge over Kilifi/ Mtwapa/867 (Suit Property) to enable the 1<sup>st</sup> Defendant to present an unencumbered freehold title to the Chief Land Registrar to enable the surrender of the freehold estate in and to the property to the Government of Kenya in exchange for a leasehold interest and title. From the record, the Plaintiff's discharge was conditional upon the execution and registration of another charge immediately upon issuing the Certificate of Lease to the Plaintiff. As it were, the Plaintiff and the 1<sup>st</sup> Defendant's agreement on the terms of the Discharge of Charge was set out in the Agreement to Create Security dated 28<sup>th</sup> October 2013.
25. Further, the surrender and the lease were sent to the 2<sup>nd</sup> Defendant by the Chief Registrar for execution by the 1<sup>st</sup> Defendant, registration, and issuance of a Certificate of Lease. Still, despite being informed of this position, the 1<sup>st</sup> Defendant refused and neglected to present its Directors at the offices of the 2<sup>nd</sup> Defendant and has further declined to execute the new charge. The 1<sup>st</sup> Defendant is, therefore, in breach of the Agreement to Create Security dated 28<sup>th</sup> October 2013.
26. The purpose of that Agreement was to facilitate the Discharge of Charge and the issue of a new Leasehold title and a fresh first fixed Legal Charge. In support of that Agreement, the 1<sup>st</sup> Defendant executed further additional securities for the monies advanced to develop housing units, some already sold to the Plaintiffs in the consolidated suits: namely, a First Further Debenture, Guarantee and Indemnity, and Personal Guarantee and Indemnity, all dated 28<sup>th</sup> October 2013.
27. On the first issue for determination, I have analyzed the defence, averment, and testimony by the 1<sup>st</sup> Defendant, and paragraph 7 alleges that the Agreement to Create Security was never signed and is, therefore, a nullity. Going by the subsequent documents signed between the parties, this assertion is



far from the truth, considering the effect of the other documents produced as evidence, the Letters of Offer dated 16<sup>th</sup> April 2012, 30<sup>th</sup> August 2012, 26<sup>th</sup> March 2013 and 11<sup>th</sup> April 2014, which capture the amount lent, purpose of the loan and the security given for the loan. The first 3 Letters of the Offer, Clause 9.1.2, clause 9.1.2 (ii), clause 9.1.1 (ii), and Clause 9.1.2(ii), respectively, indicate that part of the security was a Legal Charge on the suit property. The suit property was charged in favour of the Plaintiff for Kshs. 270, 000,000.00 on 24<sup>th</sup> September 2012.

28. Significant too in this discussion is the Partial Settlement Agreement dated 11<sup>th</sup> June 2018, which committed the 1<sup>st</sup> Defendant to sign the Surrender Instruments and the lease of the suit property to enable the release of the lease Certificate and registration of 125 subsequent sub-lease and further that the 1<sup>st</sup> Defendant would charge the lease Certificate in favour of the Plaintiff for Kshs. 364,000,000.00. This position is repeated several times throughout the entire Agreement, and the 1<sup>st</sup> Defendant was to execute a legal charge in favour of the Plaintiff in the format set out in the Agreement to Create Security dated 28<sup>th</sup> October 2013. The Plaintiff committed to executing Partial Discharge on 125 units, and the parties agreed not to sell the remaining 183 units pending the decision in Mombasa HCCC No.58 of 2015 consolidated with Mombasa HCCC No.2 of 2018. If honoured by the 1<sup>st</sup> Defendant, the Partial Settlement Agreement would have finalized all the Malindi cases simultaneously pending judgment before this Court. In the Partial Settlement Agreement, the 1<sup>st</sup> Defendant agreed to Charge the lease Certificate for Kshs. 364,000,000.00 (the disputed principal amount) and to further amend the Charge once an audit is conducted and the Auditor Reports on a new principal amount. Furthermore, the figure of Kshs. 364,000,000.00 is also reflected in the 4<sup>th</sup> Letter of Offer dated 11<sup>th</sup> April 2014, which document was also executed by the parties. It is also noteworthy that any proceeds of the sale of units ought to have been forwarded by the 1<sup>st</sup> Defendant to an escrow account held with the Plaintiff. This included balances held in previous escrow accounts at Kenya Commercial Bank and Housing Finance Kenya. However, the 1<sup>st</sup> Defendant failed to do so. The preceding confirms the parties' intentions.
29. In *Macharia Mwangi Maina & 87 Others v Davidson Mwangi Kagiri* [2014] eKLR, the Court of Appeal observed that:
- “We are of the considered view that the doctrines of proprietary estoppel and constructive trust are applicable and the respondent cannot renege. As Lord Bridge observed in *Lloyds Bank Plc – vs- Rosset*, (1991) 1 AC 107,132, a constructive trust is based on “common intention” which is an agreement, arrangement or understanding actually reached between the parties and relied on and acted on by the claimant. In the instant case, there was a common intention between the appellants and the respondent in relation to the suit property. Nothing in the *Land Control Act* prevents the claimants from relying upon the doctrine of constructive trust created by the facts of the case. The respondent all along acted on the basis and represented that the appellants were to obtain proprietary interest in the suit property. Constructive trust is an equitable concept which acts on the conscience of the legal owner to prevent him from acting in an unconscionable manner by defeating the common intention. As was stated by Lord Reid in *Steadman – vs- Steadman* (1976) AC 536, 540,
- “If one party to an agreement stands by and lets the other party incur expense or prejudice his position on the faith of the agreement being valid he will not then be allowed to turn around and assert that the agreement is unenforceable”.
30. I believe that despite the agreement having no signature by the 1<sup>st</sup> Defendant, the doctrine of constructive trust applied to the agreement between the Plaintiff and the 1<sup>st</sup> Defendant. Based on



my analysis and the fact that upon request from the 1<sup>st</sup> Defendant, Plaintiff agreed to make available certain banking facilities to the 1<sup>st</sup> Defendant with a term loan in the maximum principal sum of Kshs. 364,000,000/-. Further, Plaintiff, as security for the various banking facilities, advanced to the 1<sup>st</sup> Defendant, and the latter charged the suit property to Plaintiff by way of a first fixed legal charge dated 19<sup>th</sup> September 2012. The original Charge was duly registered on the register and title of the suit property on 24<sup>th</sup> September 2012. As it were, all these agreements are not disputed by the 1<sup>st</sup> Defendant, and as such, it cannot claim that the Agreement was a nullity. The evidence and documents presented by the Plaintiff and the 1<sup>st</sup> Defendant unequivocally demonstrate their clear commitment to the suit property, which I find compelling and unambiguous.

31. On the 2<sup>nd</sup> issue for determination on whether the Plaintiff is entitled to the prayer of specific performance sought in the Plaint, the Plaintiff herein has tendered evidence and established before the Court that it discharged its legal charge over Kilifi/ Mtwapa/867 (Suit Property) to enable the 1<sup>st</sup> Defendant present an unencumbered freehold title to the Chief Land Registrar to allow the surrender of the freehold estate to the Government of Kenya in exchange for a leasehold interest and title. I also reckon from the record that the Plaintiff's discharge was conditional upon the execution and registration of another charge immediately upon issuing the Certificate of Lease to the Plaintiff. As it were, the Plaintiff and the 1<sup>st</sup> Defendant's agreement on the terms of the Discharge of Charge was set out in the Agreement to Create Security dated 28<sup>th</sup> October 2013. The 1<sup>st</sup> Defendant failed to execute the surrender instruments and lease to complete the change of user process.
32. In support of the preceding proposition, I have been persuaded by the Court of Appeal's observation in the case of Gurdev Singh Birdi & Narinder Singh Ghatora As Trustees of Ramgharia Institute of Mombasa v Abubakar Madhbuti [1997] eKLR. The Court of Appeal emphasized that the underlying principle in granting equitable relief of specific performance is to do more perfect and complete justice under all the circumstances obtained in the particular case:

“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.”

33. In this case, the 1<sup>st</sup> Defendant has continued to receive proceeds from the sale of the housing units at the expense of the loan facility that Plaintiff advanced; this runs contra the doctrine of unjust enrichment, which is a legal principle that prevents a person from retaining money or some benefit derived from another, against their conscience that he should keep it and, in justice, restore it to the Plaintiff. In this case, the 1<sup>st</sup> Defendant, upon the circumstances of the case, is obliged by the ties of natural justice



and equity to make restitution. In the case of *Willy Kimutai Kitilit v Michael Kibet* [2018] eKLR, the Court of Appeal held, among other things, that:

“The doctrine of equity is part of our laws, although Section 3 of the *Judicature Act* subordinates common law and the doctrine of equity to *the constitution* and written law in that order. Section 3(3) of the *Law of Contract Act* and Section 38(2) of the *Land Act*, as amended, stipulate that the requirement that contracts for the disposition of an interest in land should be in writing does not affect the creation or operation of a resulting, implied or constructive trust. The equity of proprietary estoppel is omitted, but as in the decision in *Yaxley –vs- Gots* [2000] ch. 162 (*Yaxley’s case*) on which the court in *Macharia Mwangi Maina* decision relied, amongst others, shows that the doctrine of constructive trust and proprietary estoppel overlaps, and both are concerned with equity’s intervention to provide relief against unconscionable conduct.”

34. In conclusion, In determining this issue, I will also be guided by the case of *Reliable Electrical Engineers (K) Ltd v Mantrac Kenya Limited* [2006], where Maraga J. (as he then was) stated:

“Specific performance, like any other equitable remedy, is discretionary, and the court will only grant it on the well-settled 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 unenforceable. Even where a contract is valid and enforceable, specific performance will not be ordered without an adequate alternative remedy. In this respect, damages are considered an adequate alternative remedy where the claimant can readily get the equivalent of what he contracted for from another source. Even where damages are not an adequate remedy, specific performance may still be refused because of undue influence or where it will cause severe hardship to the defendant.”

### **Conclusion and disposition**

35. Having established that there was a valid agreement between Plaintiff and 1<sup>st</sup> Defendant and carefully analyzing the facts and evidence placed before this Court, Plaintiff has proved its case and is entitled to the prayers sought in the plaint as follows:

- a. A declaration be and is hereby issued that the 1<sup>st</sup> Defendant’s failure/neglect and refusal to execute the instrument of surrender of the freehold estate in respect to Title No. Kilifi/ Mtwapa/867, as well as the lease regarding the leasehold interest for Kilifi/ Mtwapa/ 867, is in breach of the 1<sup>st</sup> Defendant’s obligations as contained in the Agreement to Create Security dated 28<sup>th</sup> October 2013.
- b. An order of specific performance be and is hereby issued compelling the 1<sup>st</sup> Defendant to avail its Directors to the 2<sup>nd</sup> Defendant at the Kilifi Land Registry in Kilifi Town within 14 days of the date of this judgment and further compelling the 1<sup>st</sup> Defendant to execute the surrender of the freehold estate in respect to Title No. Kilifi/ Mtwapa/ 867, as well as the lease regarding the leasehold interest for Kilifi/ Mtwapa/ 867, in addition to any other documents as shall be required by the Registrar of Lands Kilifi for purposes of issuance of the leasehold title,
- c. In default of compliance with order (b) above, the 2<sup>nd</sup> Defendant be compelled to transmit the instrument of surrender and the lease concerning Title No. Kilifi/ Mtwapa/867 to the Deputy Registrar of this Court and the Deputy Registrar, in such an event, be and is hereby directed by this Court to execute the said instrument of Surrender and the said Lease on behalf of the 1<sup>st</sup>



Defendant under the seal of this Court in addition to any other documents as shall be required by the Registrar of Lands Kilifi for purposes of issuance of the leasehold title;

- d. An order be and is hereby issued compelling the 2<sup>nd</sup> defendant to make such entries as are necessary to close the freehold register and open the leasehold register and to register the 1<sup>st</sup> Defendant as the leasehold proprietor of Kilifi/ Mtwapa/867 and contemporaneously with such registration of the instrument of Surrender and the Lease, the 2<sup>nd</sup> Defendant to issue a Certificate of Lease for Title No. Kilifi/ Mtwapa/867, which shall be retained by the 2<sup>nd</sup> Defendant after issuance, subject to further orders as set out below:
- e. An order of Specific Performance be and is hereby issued compelling the 1<sup>st</sup> Defendant to execute a legal charge in respect to the leasehold interest in Kilifi/ Mtwapa/867 in favour of the Plaintiff in the format set out in the Agreement to Create Security between the 1<sup>st</sup> Defendant and the Plaintiff dated 28<sup>th</sup> October 2013 within 14 days after the issuance of a Certificate of Lease pursuant to Order (d) above;
- f. In default of Order (e) above, the Plaintiff be and is hereby ordered to present the legal charge concerning Title No. Kilifi/ Mtwapa/867 in the format set out in the Agreement to Create Security dated 28<sup>th</sup> October 2013, to the Deputy Registrar of this Court and the Deputy Registrar, in such an event, be and is hereby directed by this Court to execute the said legal charge on behalf of the 1<sup>st</sup> Defendant under the seal of this Court.
- g. The 2<sup>nd</sup> Defendant be and is hereby directed to register the Plaintiff's legal charge in the leasehold register for Title No. Kilifi/ Mtwapa/ 867 after execution of the same pursuant to Order (e) or (f) above within three days of presentation for registration subject to the same complying with the requirements of the law and upon the Plaintiff's due payment of stamp duty and the requisite registry fees and to after that release the duly registered legal charge, the lease and the Certificate of lease to the Plaintiff and the Plaintiff's duly authorized agent.
- h. Pursuant to findings in Malindi ELC 207 2015, the implementation of the orders above is to be simultaneous with the partial settlement agreement dated 11<sup>th</sup> June 2018.
- i. To achieve the preceding, Orders of inhibition placed on land title No.Kilifi/Mtwapa/867 be removed.
- j. The 1<sup>st</sup> Defendant shall bear the costs of this suit.

**DATED, SIGNED, AND DELIVERED VIRTUALLY AT MALINDI ON THIS 18<sup>TH</sup> DAY OF JULY 2024.**

**E. K. MAKORI**

**JUDGE**

In the Presence of:

Mr. McCourt, for the Plaintiff

Ms. Mosiara, for the 1<sup>st</sup> Defendant

Mr. Munga for the 2<sup>nd</sup> Defendant.

Happy: Court Assistant

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