



Enable Investment Limited v Kiania & another (Environment and Land Appeal E007 of 2023) [2024] KEELC 5844 (KLR) (14 August 2024) (Judgment)

Neutral citation: [2024] KEELC 5844 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL E007 OF 2023**

**BM EBOSO, J
AUGUST 14, 2024**

BETWEEN

ENABLE INVESTMENT LIMITED APPELLANT

AND

JOHN NJENGA KIANIA 1ST RESPONDENT

JOSEPH KIMANI GATHECA 2ND RESPONDENT

((Being an Appeal against the Judgment of Hon J A Agonda, Principal Magistrate, delivered on 19/12/2022 in Ruiru Principal Magistrate Court MCL & E Case No E086 of 2021))

JUDGMENT

1. This appeal challenges the Judgment rendered by the Senior Principal Magistrate Court at Ruiru [Hon J A Agonda PM] on 19/12/2022 in Ruiru SPMC E & L Case No. E86 of 2021. Joseph Kimani Gatheca [the 2nd respondent in this appeal] was the plaintiff in the trial court. John Njenga Kiania [the 1st respondent in this appeal] was the 1st defendant in the said suit. Enable Investment Limited [the appellant in this appeal] was the 2nd defendant in the suit. One of the key issues that fell for determination in the dispute in the trial court was whether the equitable remedy of specific performance was available to the 2nd respondent in relation to land parcel number Ruiru Township/373 [hereinafter referred to as “the suit property” or “the suit land”] pursuant to a sale agreement dated 18/11/2020. This is, invariably, one of the key issues that this first appellate court is expected to dispose in this appeal. Before I do that, I will briefly outline: (i) the background to the appeal; (ii) the grounds of appeal; and (iii) the parties’ respective submissions.

Background

2. The suit in the lower court was initiated by the 2nd respondent through a plaint dated 17/6/2021. The 2nd respondent sought: (i) a declaration that the charge registered on the suit property on 25/1/2021



in favour of the appellant was null and void; (ii) a mandatory order directing the 1st respondent to specifically perform the agreement entered into between him and the 2nd respondent and specifically to transfer the suit property to the 2nd respondent on the 2nd respondent finalizing payment of the balance of the purchase price; (iii) an order directing the Executive Officer-Ruiru Court to sign the transfers and other relevant documents in favour of the 2nd respondents for eventual registration; (iv) a mandatory injunction restraining the defendant against interfering with the suit property; and (v) an order awarding the 2nd respondent costs of the suit.

3. The 2nd respondent's case was that on 18/11/2020, he entered into an agreement for sale with the 1st respondent, for purchase of the suit property at Kshs 10,000,000. The 2nd respondent contended that he paid Kshs 2,000,000 and transferred his property, land parcel number Ruiru/Ruiru East Block 2/17811 valued at Kshs 2,000,000 to the 1st respondent, making a total deposit of Kshs 4,000,000. The 2nd respondent further contended that he was willing to pay the remaining balance of Kshs 6,000,000. It was the 2nd respondent's case that the charge registered on the suit property was so registered illegally and unprocedurally with the sole aim of defeating his interest in the suit property.
4. The 1st respondent entered appearance and subsequently filed a defence dated 21/3/2022. His case was that he was the registered owner of the suit property and that he had held the title to the suit property since 1999. The 1st respondent admitted that he indeed entered into a sale agreement with the 2nd and received the deposit of Kshs 4,000,000 as averred in the plaint. He added that he took a loan from the appellant, adding that the loan amount was Kshs 280,000 only and that he fully repaid the loan and the interest. The 1st respondent denied receiving a loan of Kshs 2,000,000 from the appellant. He contended that the impugned charge was unprocedurally registered against the suit property without his knowledge. The 1st respondent further contended that although he was agreeable to transferring the suit property to the 2nd respondent, he could not do so unless the charge was removed.
5. The appellant entered appearance and filed a defence dated 10/8/2021. He subsequently filed a defence and counterclaim dated 15/7/2022, almost a year later. Its case was that the 1st respondent was indebted to it in excess of Ksh 3,000,000. The appellant contended that it registered a charge against the suit property in its favour to secure a loan of Kshs 2,000,000, together with interest and other charges set out in the charge document. The appellant added that the 1st and 2nd respondents committed an offence when they dealt in a property that had been duly charged.
6. Upon conducting trial and receiving submissions, the trial court rendered itself on the dispute as follows:

“I am satisfied that the plaintiff has proved his claim against the defendant and that he is entitled to the reliefs sought in the plaint. Further, for the above reasons, the court findings that the plaintiff in the counterclaim has failed to prove his claim to the required standard of probabilities. I therefore enter judgment for the plaintiff against the defendants jointly and severally for: [sic]

1. A declaration is hereby issued that the charge registered on the suit land on 25th January 2021 in favour of 2nd defendant is illegal, null and void.
2. An order issued to 1st defendant to specifically perform the agreement entered between him and the plaintiff and specifically transfer the suit land to the plaintiff on the plaintiff finalizing the balance of the purchase price failure of which, the executive officer, Ruiru Court to sign the transfers and other relevant documents in favour of the plaintiff for eventual registration.



3. A mandatory injunction is issued against the defendants to cease interference with the suit property.
4. The counterclaim is hereby dismissed entirely with costs.
5. The 2nd defendant condemned to pay the costs of this suit and counterclaim to the plaintiff.”

Appeal

7. Aggrieved by the Judgment of the trial court, the appellant brought this appeal, advancing the following 24 grounds:
 1. The learned magistrate erred in law and fact in finding that the appellant did not obtain spousal consent while executing the charge instrument.
 2. That the learned magistrate erred in law and fact by failing to consider the evidence adduced in court by the appellant which includes spousal consent by one Margaret Muthoni Njenga and receipt of monies dated 28/6/2019.
 3. That the learned magistrate erred in law and fact in disregarding the evidence in form of an affidavit dated 26/6/2019 signed by the 1st respondent herein to acknowledge and accept the loan which would be secured by a charge over the suit property.
 4. That the learned magistrate erred in law and fact in disregarding key issues being that the 1st respondent had full knowledge and understanding of the charge instrument whose terms were consensually proposed and agreed upon with independent legal representation before registration.
 5. That the learned magistrate erred in law and fact by failing to consider that the 1st respondent settled only the first installment of an amount of Kshs 50,000 defaulting in payment of the rest of the principal amount and accrued interest.
 6. That the learned magistrate erred in law and fact by failing to consider that no evidence was adduced in court to prove that the 1st respondent made further payments to settle the loan. [sic]
 7. That the learned magistrate erred in law and fact in failing to note that the 1st respondent did not avail evidence to prove that he withdrew from the agreement terms of the charge instrument.
 8. That the learned magistrate erred in law and fact in finding that the charge was invalid yet it was duly executed, witnessed, certified and validly registered as according to Section 45 of the *Land Registration Act*, 2012.
 9. That the learned magistrate erred in law and fact by shifting the evidentiary burden of proof to the appellant while the documents are validly registered by relevant public officers in the Land Registry.
 10. That the learned magistrate erred in law and fact in failing to consider that no steps have been undertaken by the chargor, the 1st respondent herein, to discharge the charge.
 11. That the learned magistrate erred in law and fact by introducing and considering facts and evidence that were never presented in court such as the appellant exercising the power of sale and public auction, a fact that was not alleged by either parties.



12. That the learned magistrate erred in law and fact by misinterpreting the evidence produced in court leading to erroneous findings.
 13. That the learned magistrate erred in law and fact in finding that the sale agreement between the 1st and 2nd respondents is valid.
 14. That the learned magistrate erred in law and fact by ignoring substantial elements touching on the invalidity of the sale agreement entered into by the 1st and 2nd respondents herein.
 15. That the learned magistrate erred in law and fact in failing to note that the 1st and 2nd respondents lacked capacity to enter into a sale agreement and were not in possession of title documents.
 16. That the learned magistrate erred in law and fact by failing to note that no receipts were produced as evidence of payment of the deposit amount being two million (Kshs 2,000,000) as stipulated in the sale agreement.
 17. That the learned magistrate erred in law and fact by failing to consider that no spousal consent was obtained nor had been rendered in court by the 2nd respondent in regard to the said sale agreement and purported transfer of the land.
 18. That the learned magistrate erred in law and fact by failing to note the 1st and 2nd respondents knew that the suit property was not free from encumbrances but falsely agreed that there was no adverse claim on the property or dispute regarding ownership.
 19. That the learned magistrate erred in law and fact by failing to consider that the sale agreement expired in February 2021, 90 days having lapsed as according to the contract and that no variation was made by either the 1st and 2nd respondent in extending the term of the contract thus the agreement stood invalid and unenforceable in law and could not be remedied by way of specific performance.
 20. That the learned magistrate erred in law and fact by holding that the allegations of fraud had been proved while no evidence was produced in court by the respondents on the same.
 21. That the learned magistrate erred in law and fact in finding that the counter-claim had not been proved to the required standard.
 22. That the learned magistrate erred in law and fact in failing to consider the appellant's submissions in court.
 23. That the learned magistrate erred in law and fact by failing to consider all matters before her and by relying on procedural and legal technicalities to deny the appellant justice.
 24. That the learned magistrate erred in law and fact in turning the appellant away from the seat of justice and failing to exercise her discretion judiciously.
8. The appellant urged this court to: (i) allow the appeal and reverse the decree of the trial court; (ii) allow the appellant's counterclaim; (iii) as an alternative to (i) and (ii) above, decree that a new trial be held; and (iv) award the appellant costs of the appeal.

Appellant's Submissions

9. The appeal was canvassed through written submissions dated 30/11/2023, filed by M/s Mwaniki Gitau & Company Advocates. Counsel for the appellant faulted the lower court for believing in the allegations made by the respondents even though they were not proved to the required standard.



- Counsel argued that the trial magistrate disregarded compelling evidence of an affidavit sworn by the 1st respondent on 26/6/2019 outlining the terms of the loan, including the term that the loan amount was Ksh 500,000, to be repaid in monthly instalments of Kshs 50,000. Counsel added that the 1st respondent's claim that the loan amount was Kshs 280,000 were unsubstantiated.
10. Counsel contended that the bank deposit slip of Ksh 50,000 alleged by the 1st respondent to be payment for the interest accrued on the loan related to payment of the 1st instalment. Counsel faulted the honourable trial magistrate for believing the contradictory testimonies of the 1st respondent and DW2 that spousal consent was not given before registration of the Charge against the suit property. Counsel contended that the appellant tendered, as evidence, a consent duly signed by the 1st respondent's wife. Counsel argued that the 1st respondent neither produced evidence to prove his marriage to DW2 nor that the suit property was part of their matrimonial property.
 11. Counsel faulted the honourable trial magistrate for her finding that the allegations of fraud and collusion had been proved. Counsel contended that no admissible evidence was adduced to show that the appellant registered the charge fraudulently. Counsel added that the totality of the evidence adduced during trial showed that the 1st respondent was not coerced to execute the charge which after due execution and registration was legal and binding. Counsel contended that the lower court having established that there was a valid charge, it erred in subsequently finding that the sale agreement between the 1st and 2nd respondent was valid.
 12. Counsel for the appellant contended that the 1st and 2nd respondents never sought consent to transfer the encumbered suit property from the chargee, which counsel contended was contrary to the provisions of clause 6.7 of the Charge; Section 87 of the [Land Act](#) and Section 59 of the [Land Registration Act](#).
 13. Counsel submitted that the 2nd respondent was not an innocent purchaser, noting that the sale agreement was dated 18/11/2020 but the exhibited search was obtained on 11/1/2021. Counsel faulted the 2nd respondent for not conducting a search prior to entering into the sale agreement. Counsel further submitted that no receipt was produced to prove payment of the deposit of Ksh 2,000,000, adding that this undermined the credibility of the alleged sale agreement.
 14. Counsel contended that a perusal of the sale agreement between the 1st and the 2nd respondents indicated that the contract was to expire in February 2021. Counsel added that 90 days had lapsed since the expiry of the contract but neither of the parties made variations to extend the contract. Counsel urged this Court to set aside the lower court's decision and allow the appeal.

1st Respondents' Submissions

15. The 1st respondent opposed the appeal through written submissions dated 6/6/2024 filed by Matiri Mburu & Chepkemboi Advocates. The 1st respondent's counsel contended that the 1st respondent did not collude with the appellant to register a charge against the suit property. Counsel added that it was the appellant who fraudulently and unprocedurally registered a charge against the suit property in a bid to defraud the 1st respondent. Counsel argued that the 1st respondent obtained a loan of Kshs 280,000 from the appellant pursuant to the agreement dated 28/6/2019. Counsel added that during trial, the 1st respondent produced evidence of repayment of the loaned amount together with interest of Kshs 50,000 which was paid in the appellant's Co-operative Bank Account. Counsel contended that, indeed, the 1st respondent swore an affidavit dated 26/6/2019 with the intention of borrowing a sum of Kshs 500,000, but later on abandoned the idea of taking the loan. Counsel faulted the appellant for failing to produce evidence to show that the Kshs 500,000 they alleged to have loaned the 1st respondent was applied for, processed and disbursed. Counsel further faulted the appellant for failing



to explain how the sum of the Kshs 500,000 they alleged to have loaned to the 1st respondent increased to Kshs 2,000,000 within a period of five months. Counsel contended that the appellant was fixated on the Charge without bothering to demonstrate how the amount purportedly secured by the charge was disbursed to the 1st respondent. Counsel added that the Court should first establish that money was indeed borrowed and disbursed to the 1st respondent before considering the issue of the alleged spousal consent.

16. Counsel contended that the Court must be careful in ordering retrial in favour of a losing party in order not to help that losing party to patch up evidence for the 2nd time. Counsel submitted that there were neither errors nor illegalities to render the original trial a nullity nor was there a miscarriage of justice. Counsel contended that there was no need to order a retrial as the trial magistrate had powers to either take additional evidence or direct the trial court to take such evidence under Section 78 (1)(d) of the *Civil Procedure Act*. Counsel relied on the decision in the case of *Ukha Kolhe vs State Maharashtra* [1964] 1SCR 926.
17. Counsel submitted that the trial magistrate made a determination according to the law, and therefore this Court should not be misled to order a re-trial where none is warranted. Counsel relied on the decisions in *Civil Appeal Case No. 57 of 2017: Machakos Robert Kathathi vs Francis Kivuva and Merali and Others vs Republic* (1971) HCD No. 145. Counsel contended that the decision to order a retrial was subject to judicial discretion hence it ought not be exercised capriciously. Counsel further contended that the Court ought to investigate whether the irregularity is reason enough to warrant an order for retrial. Counsel added that there was no reason to warrant an order for retrial. Counsel urged the Court to dismiss the appeal and award the 1st respondent costs of the appeal.

2nd Respondent's Submissions

18. The 2nd respondent opposed the appeal through written submissions dated 31/1/2024 filed, by Njonjo & Mutero Advocates LLP. Counsel for the 2nd respondent submitted that the appellant failed to show the trial court how the loan of Kshs 2,000,000, allegedly given to the 1st respondent, was applied for, approved, disbursed and how the suit property was procedurally registered as security, adding that the lower court properly found the charge to be improper and properly issued an order cancelling it. Counsel contended that the appellant had no basis to challenge the impugned Judgment, adding that the appeal was unmerited and ought to be dismissed. Counsel submitted that Section 107 of the *Evidence Act* provided that one ought to prove allegations made.
19. Counsel submitted that during trial, the validity of the charge was challenged on the ground that no spousal consent existed. Counsel argued that the charge having been registered without consent of the then registered owner of the suit property and in the absence of actual disbursement of the Kshs 2,000,000 secured by the charge, the charge was void ab-initio whether consented to by the spouse or not.
20. Counsel contended that the affidavit alleged to have been sworn by the 1st respondent related to a 2019 loan, yet the subject undated charge was registered in 2021. Counsel submitted that the 1st respondent was able to prove the elements of fraud and impropriety on the part of the appellant. Counsel added that the charge was simply a contract and if no money was advanced by the appellant then the charge could not stand, noting that the contract was breached. Counsel argued that even if the charge was lawful, the only remedy the appellant had against the 1st respondent was to exercise their statutory power of sale as opposed to having the suit property transferred to themselves. Counsel faulted the appellant for its alternative prayer to have a new trial. Counsel added that no reason had been adduced as to why a new trial would be necessary. Counsel relied on the decision in the cases of *Ahmed Sumar vs Republic* [1964] EA 481, *Manji vs Republic* [1966] EA 343, *Mujimba vs Uganda* [1969] and *Merali*



& Others vs Republic [1971] 221. Counsel urged the Court to dismiss the appeal and award the costs to the respondent.

Analysis and Determination

21. I have read and considered the original record of the trial court; the record filed in this appeal; the grounds of appeal; and the parties' respective submissions. I have considered the legal frameworks and the jurisprudence relevant to the issues that fall for determination in the appeal. Taking into account the pleadings, the grounds of appeal, and the submissions tendered, the following are the key issues that fall for determination in the appeal:

- (i) Whether the equitable remedy of specific performance was available to the 2nd respondent in the circumstances of the case;
- (ii) Whether the charge registered against title number Ruiru Township/373 in favour of the appellant was procured fraudulently;
- (iii) Whether the appellant was entitled to the reliefs sought in the counterclaim. I will analyse and dispose the issues sequentially in the above order. Before I do that, I will briefly outline the principle that guides this court when exercising appellate jurisdiction.

22. This is a first appeal. The principle upon which a first appellate court exercises jurisdiction is well settled. The task of a first appellate court was summarized by the Court of Appeal in the case of Susan Munyi v Keshar Shiani (2013) eKLR as follows:

“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.”

23. The principle was similarly outlined in Abok James Odera t/a A. J Odera & Associates v John Patrick Machira t/a Machira & Co Advocates [2013] eKLR as follows:

“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.”

24. Was the equitable remedy of specific performance available to the 2nd respondent in the circumstances of the case? The principle upon which the remedy of specific performance of a contract for sale of land is granted are well settled. In their book THE LAW OF REAL PROPERTY, Seventh Edition, The Rt Hon Sir Roberty Megarry and Sir William Wade set out the following principles that govern the exercise of jurisdiction to grant the equitable remedy of specific performance in land disputes:

“This remedy is purely equitable, and in principle is confined to cases where the common law remedy of damages is inadequate. But land is always treated as being of unique value, so that the remedy of specific performance is available to the purchaser as a matter of course; and even though the vendor is merely concerned to obtain the purchase-money, so that he could be adequately compensated in damages for the purchaser's refusal to complete, the remedy of specific performance is equally available to him”



25. The two authors add thus:

“Like other equitable remedies, specific performance is discretionary. However, the court’s discretion is governed by settled principles. Examples of where the remedy may be refused include the following:

- i. in proper cases where there is mistake or great hardship, even though these do not invalidate the contract at law.
- ii. where there has been delay causing injustice to the other party
- iii. whether the vendor would be required “to embark upon difficult or uncertain litigation in order to secure any requisite consent or obtain vacant possession.
- iv. where the property is being used for illegal purposes, which would make the purchaser liable to prosecution, even though on this ground he has no right to terminate the contract; or
- v. where the vendor’s title is doubtful but he has failed to disclose the known cause of that doubt and the purchaser has agreed to accept any defects that there may be.

In these cases the contract will remain binding at law, so that the party in default will be liable in damages, but equity will not assist with a decree of specific performance. On the other hand, specific performance may be decreed before the legal time for performance has arrived if there has been an anticipatory breach, e.g. by repudiation”

26. In *Reliable Electrical Engineers (K) Ltd v Mantrac Limited* [2006]eKLR Maraga J [as he then was] summed up the relevant principles as follows:

“Specific performance like any other equitable remedy is discretionary and the court will only grant it on well laid 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 and unenforceable. Even when a contract is valid and enforceable, specific performance will however not be ordered where there is an adequate alternative remedy.”

27. In the suit leading to this appeal, the 2nd respondent sought an order of specific performance in relation to the sale agreement dated 18/11/2020. Through the said sale agreement, the 1st respondent agreed to sell to the 2nd respondent land parcel number Ruiru Township/373 at an agreed purchase price of Kshs 10,000,000. The 2nd respondent contended that he paid to the 1st respondent deposits totaling Kshs 4,000,000. At the time of trial, the balance of the purchase price [Kshs 6,000,000] was still held by the 2nd respondent’s advocate and was to be forwarded upon provision of all completion documents.

28. It emerged through pleadings and evidence that, prior to entering into the sale agreement dated 18/11/2020, the 1st respondent entered into two successive loan agreements pursuant to which he pledged the original title relating to parcel number Ruiru Township/373 to creditors as security for the loans. The first loan agreement was between the 1st respondent and one Samuel Thumi Githiri. The year of the loan agreement was cut out during the photocopying of the relevant exhibit. The subsequent loan agreement, dated 28/6/2019, was a buy-off of the first loan. It was between the



appellant and the 1st respondent. Under the said loan agreement dated 28/6/2019, the debt that the 1st respondent owed to Samuel Thumi Githiri was assigned to the appellant. With consent of the 1st respondent, the original title which had been pledged to Samuel Thumi Githiri as security was handed over and pledged to the appellant as security to secure a sum of Kshs 280,000.

29. It is clear from the evidence on record that while aware that the original title was still pledged to and held by the appellant as security for money borrowed, the 1st respondent purported to sell the same title to the 2nd respondent. At Clause 98.2 of the sale agreement, the 1st respondent warranted that he had made full disclosure to the 2nd respondent. There was, however, no mention of the fact that the title which the 1st respondent purported to sell to the 2nd respondent had been pledged to the appellant and was still held by the appellant as security for money borrowed.
30. Subsequent to the signing of the sale agreement dated 18/11/2020, a legal charge was registered against the title on 25/1/2021 in favour of the appellant. In his defence and evidence against the claim by the 2nd respondent, the 1st respondent tried to disown the charge. He, however, did not bother to challenge the charge through a primary suit or a counterclaim. Similarly, there was no evidence of any steps he took to seek redress through the criminal justice system, notwithstanding his contention that the charge was registered unprocedurally without his knowledge. Further, he did not plead fraud in the registration of the charge. I will say more on the charge when discussing the second and third issues.
31. From the above analysis, it is clear that the title which the 1st respondent purported to sell to the 2nd respondent had been pledged as security for money borrowed and was not available for sale to the 2nd respondent unless the 1st respondent redeemed it. Secondly, as at the time of trial, the title was charged to the appellant and was not available for conveyance to the 2nd respondent.
32. The 1st respondent exhibited three receipts which he contended constituted evidence of repayment of the loan which the title had secured. Although critical details such as the dates of the three exhibited receipts are unclear, it is clear that the sums in the three receipts make a total of Kshs 150,000. At the time of pledging the title, the principal loan was Kshs 280,000. Clearly, there was no evidence of full redemption of the title. That is not all.
33. In their respective wisdom, parties to the agreement dated 18/11/2020 agreed on the appropriate remedies that would be available to them in the event that either party failed to complete the contract. The mutually agreed remedy available to the purchaser was a “penalty of 35% of the purchase price”. This was contained in clause 7.3 which provided as follows:

“If the purchaser fails to comply with any of the conditions hereof or if the condition subject to which this sale is made including the condition relating to the completion of the sale the vendor may give to the purchaser at least thirty (30) days’ notice in writing confirming the vendors readiness to complete the sale in all respects and specifying the default and requiring the purchaser to remedy the same before the expiration of such notice and if the purchaser shall fail to comply with such notice this agreement shall stand rescinded and the vendor shall return all the money paid to them by the purchaser without any deductions.

If the vendor fails to comply with his obligations under this agreement, the purchaser may give the vendor thirty (30) days’ notice in writing to comply with his obligation and such notice shall specify the default and require the vendor to make it good within 30 days of such notice (time being of the essence) and if the vendor then fails to comply with the notice, the purchaser may at the purchaser’s discretion and without prejudice to the purchaser’s other rights and remedies rescind this agreement and the vendor shall forthwith refund all the deposit paid, to the purchaser and a penalty of 35% of the purchase price shall be paid



to the purchaser as damages for breach of this contract or non-completion owing to the vendor's fault.”

34. Clearly, the contractual remedy available to the 2nd respondent was a refund of the sum of Kshs 4,000,000 plus 35% of the purchase price. For the above reasons, this court finds that the equitable remedy of specific performance was unavailable in the unique circumstances of the dispute that was before the trial court. The trial court therefore erred in granting the remedy in the above circumstances.
35. Was the charge registered on 25/1/2021 procured fraudulently? The allegations of fraud in the procurement of the charge was made by the 2nd respondent. As earlier noted, the 1st respondent elected not to challenge the Charge. The standard of proof of allegations of fraud is higher than proof of on the balance of probabilities.
36. In *Koinange & 13 Others vs Charles Karuga Koinange* [1986] KLR the court held that:
- “When fraud is alleged by the Plaintiffs the onus is on the Plaintiffs to discharge the burden of proof. Allegations of fraud must be strictly proved, although the standard of proof may not be so heavy as to require proof beyond a reasonable doubt, something more than a balance of probabilities is required.”
37. In *Kinyanjui Kamau v George Kamau* [2015] eKLR the court stated thus:
- “It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo vs Ndolo* [2008]1KLR (G & F) 742 wherein the court stated that “.. we start by saying that it was the Respondent who was alleging that the will was a forgery and the burden to prove the allegation lay squarely on him. Since the Respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely; proof upon a balance of probabilities; but the burden of proof on the Respondent was certainly not one beyond a reasonable doubt as in criminal cases...”`
38. The 1st respondent was the chargor. He did not plead fraud in his defence. He did not present evidence of any civil or criminal proceedings or steps which he took to ventilate any allegation of fraud. On its face, the charge presented by the appellant showed that it was signed by John Njenga Kiania [the 1st respondent] before an advocate. It also showed that Margaret Muthoni Njenga [alleged spouse of the 1st respondent] gave spousal consent to the charge in the presence of an advocate. The charge was subsequently registered on 25/1/2021. The 1st respondent did not contest the fact that he gave the original title to the appellant as security. Lastly, it emerged from the evidence that was before the trial court that the title had been pledged to the appellant as security long before the agreement dated 18/11/2020 was entered into. During trial, the two respondents did not lead appropriate evidence to challenge the signatures on the charge. In the above circumstances, there was no proper basis to warrant a finding of fraud on part of the chargee [the appellant]. That is the finding of the court on the second issue.
39. Is the appellant entitled to the reliefs sought in the counterclaim dated 15/7/2022? Through the counterclaim, the appellant sought:
- (i) a declaration that the sale agreement dated 18/11/2020 was null and void ab initio and “should be struck out in limine”;
 - (ii) a mandatory injunction restraining the respondents from dealing with the suit property;
 - (iii) an injunction compelling the 1st respondent to fulfil his obligations under the charge;



- (iv) an order appointing a receiver of the income of the charged property;
- (v) an order of eviction against the 1st respondent;
- (vi) an order for accounts of all monies obtained from the suit property from the date of default;
- (vii) general damages; and (viii) costs of the suit.

40. The rights of a chargee are spelt out in Section 80 of the [Land Act](#) which provides as follows:

- “(1) Upon the commencement of this Act, a charge shall have effect as a security only and shall not operate as a transfer of any interests or rights in the land from the chargor to the chargee but the chargee shall have, subject to the provisions of this Part, all the powers and remedies in case of default by the chargor and be subject to all the obligations that would be conferred or implied in a transfer of an interest in land subject to redemption.
- (2) In the case of the charge of a lease, the chargee shall not be liable to the lessor for rent or in respect of the covenants and conditions contained or implied in the lease to any greater extent than would have been the case if the charge had been by way of a sublease. (3) Every charge instrument shall contain—
- (a) the terms and conditions of sale;
 - (b) an explanation of the consequences of default; and
 - (c) the reliefs that the chargor is entitled to including the right of sale.”

41. In the suit giving rise to this appeal, the appellant exhibited the instrument of charge which indicated that the charge was intended to secure a principal sum of Kshs 2,000,000. In addition, the appellant exhibited an agreement dated 28/6/2019 relating to the buy-off of a loan of Kshs 280,000 which the 1st respondent owed to Samuel Thumi Githiri. No other evidence was presented to the court by the appellant in relation to the actual disbursement of the intended loan of Kshs 2,000,000. On his part, the 1st respondent presented three receipts totaling Kshs 150,000 and contended that they related to the repayment of the loan of Kshs 280,000. Neither the trial court nor this court knows the exact extent of indebtedness of the 1st respondent to the appellant, if any. Not a single loan account statement was presented to the trial court.

42. Secondly, the rights of a chargee are regulated by statute. Specifically, Section 90 of the [Land Act](#) contains elaborate steps which the chargee must take before pursuing any of the available remedies. One such step is the service of a statutory notice on the chargor. No evidence of any such notice was exhibited before the trial court.

43. Without proof of disbursement and without proof of service of statutory notice, I do not think the appellant’s rights under the charge can be said to have crystallized. I do not therefore think the appellant was entitled to any of the reliefs that they sought in the counterclaim. Suffice it to state that, if the 1st respondent owes the appellant any money, he is entitled to redeem his title by paying the money owed. The right to redeem cannot be casually lost through a counterclaim that is brought without prior compliance with the requirements of the statute. For the above reasons, the counterclaim stands to be struck out as opposed to a dismissal order.



44. Before I dispose the appeal, I will comment on the 24 grounds of appeal which the appellant outlined in the memorandum of appeal. The 24 grounds were, by and large, repetitive and clearly an unnecessary “overkill”. The ability to frame concise grounds of appeal and concise issues for determination in an appeal is an important tool in litigation. I do not think the 24 grounds of appeal which the appellant presented were all necessary.
45. On costs, this appeal has partially succeeded and partially failed. In the circumstances, parties will bear their respective costs of the appeal.
46. In light of the above findings, this appeal partially succeeds and is disposed as follows:
- a. The decree in Ruiru SPMC E & L Case No E086 of 2021 is set aside and is replaced with the following orders.
 - i. The 1st respondent, John Njenga Kiania, shall be at liberty to redeem title number Ruiru Township /373 and shall thereafter be at liberty to complete the sale of the said property to the 2nd respondent within 90 days from today.
 - ii. In default, the 1st respondent [John Njenga Kiania] shall refund the 2nd respondent [Joseph Kimani Gatheca] the sum of Kshs 4,000,000 and further pay him the contractual penalty of Kshs 3,500,000 making a total of Kshs 7,500,000.
 - iii. The above sums shall attract interest at court rate from the date of filing suit in the trial court.
 - iv. The counterclaim by the appellant [Enable Investment Limited] shall be marked struck out with no order as to costs.
 - v. The 1st respondent [John Njenga Kiania] shall pay the 2nd respondent [Joseph Kimani Gatheca] costs of the suit in the lower court but there shall be no award of costs to the appellant [Enable Investment Limited].
 - b. Parties shall bear their respective costs of this appeal.
 - c. For avoidance of doubt, the platform for execution of these orders shall be the trial court file.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 14TH DAY OF AUGUST 2024

B M EBOSO

JUDGE

In the Presence of: -

Mr Njonjo for the 2nd Respondent

Court Assistant: Melita

