



**Gicheha v Mwema & another (Environment and Land Appeal 14 of 2024)
[2024] KEELC 13424 (KLR) (Environment and Land) (21 November 2024) (Judgment)**

Neutral citation: [2024] KEELC 13424 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIVASHA
ENVIRONMENT AND LAND
ENVIRONMENT AND LAND APPEAL 14 OF 2024**

MC OUNDO, J

NOVEMBER 21, 2024

BETWEEN

SIMON KARIUKI GICHEHA APPELLANT

AND

MOSES MWEMA 1ST RESPONDENT

JULIUS WANJAU 2ND RESPONDENT

*((Being an Appeal from the Judgement and Decree of the Hon. H.O Barasa,
Senior Principal Magistrate dated 22nd March 2022 in the Senior
Principal Magistrate's Court at Engineer E.L.C Case No. 21 of 2018))*

JUDGMENT

1. Before me for determination on Appeal is a matter which was heard and determined by Hon. H.O Barasa, Senior Principal Magistrate wherein upon considering the evidence of both parties, vide his Judgment dated 22nd March, 2022, the learned Magistrate had held that the Plaintiff had failed to prove his case against the 2nd Defendant on a balance of probability and proceeded to dismiss the same with costs. That the Plaintiff had however demonstrated that he had paid the sum of Kshs. 800,000/= to the 1st Defendant as part payment of the purchase price. The learned Magistrate thus ordered that the 1st Defendant pay the Plaintiff the said sum of Kshs. 800,000/= plus interest thereon at court rates from the date of filing the suit until payment in full together with costs.
2. The trial Magistrate further issued orders of specific performance against the 1st Defendant directing him to complete the conveyance and transfer of the property known as Nyandarua/Kiriti/1028 to the 2nd Defendant failure to which the Executive Officer (now Court Administrator) shall execute all the necessary documents for eventual transfer of the said land to the 2nd Defendant. That further, that the



balance of Kshs. 416,900/= due and owing to the 1st Defendant with regard to the contract between the 1st and 2nd Defendants be deposited in court within 90 days for collection by the 1st Defendant and lastly that the 2nd Defendant's costs be paid by the 1st Defendant.

3. The Appellant, being dissatisfied with the Judgement and Decree of the trial Magistrate has now filed the present Appeal based on the following grounds in his Memorandum of Appeal:
 - i. That the Learned Magistrate failed to appreciate the law while making the order for specific performance where there was no consent to transfer the land applied for and obtained as provided by the [Land Control Act](#).
 - ii. That the learned Trial Magistrate erred in fact and law in failing to find that the contract of sale between the 1st and 2nd Defendants was indeed rescinded and the 2nd Defendant was only entitled to a refund of the purchase price from the 1st Defendant.
 - iii. That the honorable Magistrate misapprehended and misapplied the rule of pleadings in considering matters that were not pleaded hence arriving at the wrong judgement/or finding.
4. The Appellant thus sought that the instant Appeal be allowed with costs and the judgement and Decree of the lower court be set aside and his suit be allowed with costs.
5. The 1st Respondent filed a Notice of Cross-Appeal dated 23rd June, 2022 to the effect that the Judgment dated 22nd March, 2022 be varied or reversed on the following grounds;
 - i. That the Learned Magistrate erred in fact and law that the agreement between the 1st and 2nd Respondents was terminated.
 - ii. The learned Magistrate erred in fact and law that there was no evidence of payment of Kshs. 550,000/= and Kshs. 30,000/= by the 2nd Defendant.
6. The 1st Respondent thus sought that his Cross-Appeal be allowed with costs and the judgement and decree of the lower court be set aside and the 2nd Defendant and the Plaintiff's suit be dismissed with costs.
7. The Appeal was admitted on 8th July, 2024 and directions issued for the same to be disposed of by way of written submissions wherein only the Appellant and the 2nd Respondent complied and filed their submissions which I shall summarize as herein under:

Appellant's submission

8. The Appellant, vide his written submissions dated 12th September, 2024, summarized the factual background of the matter before hinging his reliance in the decided case of Reliable Electrical Engineers (K) Ltd v Mantrac Kenya Limited [2006] eKLR to submit that the trial court erred when it ordered specific performance since the guiding principles were; existence of a valid contract, enforceable contract, alternative remedy, undue influence or hardship. That from the evidence before the trial court, the agreement between the 1st and 2nd Respondents had not been valid and/or enforceable since the same had lapsed in time and had not been extended, in contravention of the provision of Clause 6 of the said Agreement. That the Contract had been made on 30th June, 2010 and lapsed on or around 30th September, 2010 and that the 1st Respondent had provided an alternative remedy to the contract being a refund of the money that had been paid. That further, the Land Control Board Consent had never been issued hence the agreement had been void.



9. That in any case, there existed another contract entered into between the Appellant and the 1st Respondent wherein the parties had executed and applied for consent from the Land Control Board. That however, the said contract had been frustrated by the objection of the 2nd Respondent. That subsequently, the Appellant had been aggrieved by the holding of the court since the same had caused hardship to the Appellant and the 1st Respondent hence the trial court had been wrong in ordering for specific performance.
10. That the trial court had also erred in failing to find that the contract between the 1st and 2nd Respondents had rescinded pursuant to the provisions of Clause 6 of the said Contract. That indeed, the 1st Respondent had expressed himself in the letter of 1st December, 2010 that he was not willing to proceed with the sale of the land to the 2nd Respondent. That accordingly, the trial court had been wrong in finding that the Agreement between the 1st and 2nd Respondents had been valid.
11. Reliance was placed in the decided case of Isaac Ngatia Kihagi v Paul Kaiga Githui [2017] eKLR to reiterate that since the consent of the Land Control Board had neither been applied for nor obtained, the sale to the 2nd Respondent had been void. He thus prayed that the court finds that the lower court had been wrong in holding that the sale of land by the 1st Respondent to the 2nd Respondent was valid and for ordering specific performance. He thus urged the court to find in his favour and allow the instant appeal with costs.

2nd Respondent's Submissions

12. In response to the Appellant's Appeal and the 1st Respondent's Cross-Appeal and in opposition thereto, the 2nd Respondent vide his written submissions dated 4th October 2024, summarized in detail the factual background of the matter as well as the evidence that had been adduced by the parties at the trial court before framing his issues for determination as follows:
 - i. Whether there was a valid contract between the 1st and 2nd Respondents over the suit property, if so, was it terminated at any point?
 - ii. Whether there was breach of the contract, and if so, which party was liable and could an order of specific performance be maintained.
 - iii. Whether the lack of LCB Consent vitiated the contract between the 1st and 2nd Respondents.
 - iv. Whether there exist competing equitable interests over the suit property.
13. On the first issue for determination as to whether there was a valid contract between the 1st and 2nd Respondents over the suit property and whether the same had been terminated at any point, he submitted that the law of contract encompasses the freedom of parties to contract, that is, two or more parties having the freedom to enter into a legally binding contract enforceable in law based on their own terms and understanding. That further, in entering into a contract the parties were guided by the basic essentials of contract, that is, offer and acceptance, consideration, capacity, legality among others. Reliance was placed in the decided case of Fidelity Commercial Bank v Kenya Grange Vehicle Industries Limited [2017] eKLR.
14. That in the instant case, the 2nd Respondent had entered into a legally binding contract for the sale of land in writing with the 1st Respondent on 30th June, 2010 which contract contained the essential and/or terms of their agreement, that it was an offer by the 1st Respondent and an acceptance by the 2nd Respondent. That further, at the time of entering the agreement, both parties had the requisite



- capacity to contract wherein the consideration for the transaction had been payment of the purchase price thus the said contract for the sale of land had been valid and enforceable in law.
15. His further submission was that the said contract for the sale of land based on its salient terms had a completion date of 90 days, wherein they were expected to perform their obligations. That he had paid the Deposit as part of the purchase price and it had been upon the 1st Respondent to avail the completion documents to enable payment of the balance of the purchase price. That however, the completion documents were never availed since the 1st Respondent had disappeared without trace and later purported to terminate the sale agreement through a letter that was neither served upon the 2nd Respondent personally nor brought to his attention before attempting to enter into another agreement with a third party. It was thus his submission that at the point of entering into a new agreement, their sale agreement was still valid and enforceable and as such, the 1st Respondent lacked the requisite capacity to enter into a separate contract touching on the same parcel of land.
 16. On the second issue for determination as to whether there was a breach of the contract, the party responsible for the same and whether an order of specific performance could be maintained, he submitted that he had paid a deposit of the purchase price after conducting his own due diligence to establish the authenticity and legality of ownership of the suit property by the 1st Respondent. That the balance of the purchase price was to be paid within 90 days of executing the agreement and the same had been pegged on the 1st Respondent performing his end of bargain of applying for the Land Control Board's Consent, processing the transfer and completion documents and availing the same to the 2nd Respondent.
 17. That whereas he had dully performed his end of bargain, the 1st Respondent as the Vendor had started avoiding his obligations under the contract way past the completion date despite the 2nd Respondent's continually pursuing him to perform his part of the contract. He thus submitted that as at the completion date on 30th September, 2010, the 1st Respondent had been in breach of the contract for sale of land hence had been liable to compensate him for damages, if any and that he had also become entitled to an order of specific performance.
 18. His reliance was hinged on the definition of the term breach of contract from the Black's Law Dictionary, 9th Edition at page 213 to submit that it had been held time and again that parties to a contractual relationship were bound by their terms of agreement as at the time of entering and executing the same hence any derogation from the terms and/or obligations under the contract would amount to a breach of the agreement. Further reliance was placed in the decided case of Andrew Karemi Kingori v Joseph Waweru Njoroge [2018] eKLR where the court had cited the case of Thrift Homes Limited v Kays Investment Limited [2015] eKLR.
 19. That his willingness to pursue the contract had been evidenced by his willingness to deposit the balance of the purchase price in court for the 1st Respondent's collection upon transfer being affected to his name. That indeed, in compliance with the trial court's judgement, he had already deposited the balance of the purchase price in the sum of Kshs. 416,900/= in court for the 1st Respondent's collection. He placed reliance in the decided case of *Gurder Singh Birdi & Marinder Singh Ghatora v Abubakar Madhubuti, Civi Appeal No. 165 of 1996.*
 20. That it was also not disputed that the 2nd Respondent had been in occupation of the suit property from the date of executing the agreement a period close to 15 years wherein he had developed and heavily invested in the suit property in terms of horticulture and dairy farming. That subsequently, there would be no alternative adequate remedy available to him unless the order of specific performance had been granted so as to avoid any kind of hardships and irreparable damages occurring towards his



- end. He thus urged the court to uphold the trial court's decision that had granted the orders of specific performance. Reliance was placed in the case of *Benard Mulongo Mwanja v Charles Mbugua Ngugi* [2017] eKLR.
21. On the third issue for determination as to whether the lack of LCB consent had vitiated the contract between the 1st and 2nd Respondents, he submitted in the negative to the effect he had performed his obligations under the contract wherein he had taken possession of the suit property thus creating an overriding interest in the nature of a constructive trust. His reliance was hinged in a combination of decisions in the case of *Aliaza v Saul (Civil Appeal 134 of 2017)* [2022] KECA 583 (KLR) (24 June 2022) (Judgment) and *Kiplagat Kotur v Rose Jebor Kipngok* [2019] eKLR where the court had cited the case of *Macharia Mwangi Maina & William Kipsoi Sigei v Kipkoech Arusei & Another*.
 22. On the fourth issue for determination as to whether there existed a competing equitable interest over the suit property, he submitted that whereas both the Appellant and the 2nd Respondent claim to have entered into a valid contract with the 1st Respondent for the sale of the suit property, his contract had been first in time made on 30th June, 2010 wherein he had been willing and ready to complete the same. That the Appellant on the other hand had entered into a contract with the 1st Respondent on 7th December, 2010. He reiterated that their contract had incorporated time as being of essence wherein the sale was to be completed within 90 days that is by 30th September, 2010. That nevertheless, on the said completion date, the 1st Respondent had been unreachable having failed to perform his obligations of availing the completion documents while alleging that the local land board had been dissolved.
 23. That accordingly, their contract had been valid and enforceable as against a third party. No termination notice was ever properly served or brought to the attention of the 2nd Respondent.
 24. That whereas the Appellant herein had alleged to have acquired equitable interest over the suit property by virtue of payment of the deposit of the purchase price and was awaiting performance by the 1st Respondent of his obligations in order to pay the balance, no proof or evidence of payment of the said deposit had been availed at the trial court.
 25. Secondly it had not been true that the initial transaction between the 1st and 2nd Respondent had been cancelled and was no longer in operation. In any case, the Appellant had not proved existence of any fraudulent activity or misrepresentation as to how the 2nd Respondent had been in possession and occupation of the suit property for 15 years.
 26. It was his submission that pursuant to the existence of competing interests over the suit property, the equitable doctrine of 'where equities are equal, the first in time shall prevail' ought to apply. That his equitable rights ought to take priority over any other interests purported to have been created during the pendency of the agreement between the 1st and 2nd Respondents. He placed reliance on the decision in the case of *Gitwany Investment Limited v Tajmal Limited & 3 Others* [2006] eKLR.
 27. In conclusion, he submitted that he had acquired the equitable and beneficial interests over the suit property regularly and procedurally and that the same subsisted to date hence his interest should prevail as the first in time. That Appellant's claim over the suit property on the other hand did not lie hence he could only claim damages from the 1st Respondent in terms of the alleged purchase price already paid to him. That subsequently, the judgement that had been delivered on 22nd March, 2022 had been proper in the eyes of the law based on the evidence that had been adduced by the parties herein. He thus urged the court to uphold the decision and findings of the trial court while dismissing the Appellant's Appeal and 1st Respondent's Cross-Appeal herein with costs.



Determination.

28. I have considered the record of Appeal, the holding by the trial Magistrate, the written submissions by learned Counsel and the applicable law. Conscious of my duty as the first Appellate Court in this matter, I have to reconsider the decision Appealed against, assess it and make my own conclusions. See the case in *Selle vs. Associated Motor Boat Co. Ltd.* [1968] EA 123.
29. According to the proceedings herein, the Appellant instituted a suit against the Respondents in Senior Principal Magistrate's Court at Engineer ELC Case No. 21 of 2018 (Formerly Nakuru High Court Civil Case No. 151 of 2012) vide a Plaint dated 22nd April 2012 and Amended on 25th October, 2014 wherein he had sought for;
- i. A declaration that the contract for sale between the 1st and 2nd Respondent was rescinded and the 2nd Respondent's claim over the land lies on claim of refund of the purchase price.
 - ii. An order compelling the 1st Respondent to complete the sale of land to the Appellant and in the alternative, an order compelling the 1st Respondent to refund the amount paid to the 2nd Respondent by the Appellant for the purchase of the land with interest and that judgement be entered for the Appellant against the 1st Respondent for Kshs. 800,000/=.
 - iii. The Appellant had also sought for costs of the suit and interest.
30. Subsequent to the filing of the suit, the 1st Defendant/Respondent filed his Statement of Defence dated 8th July, 2021 wherein he had admitted to having entered into a sale agreement with the Plaintiff/Appellant but that the said agreement had been frustrated by the 2nd Defendant/Respondent who had placed an illegal caution on the suit property. That he had not performed his part of the agreement and had himself to blame and that any claim by the Plaintiff/Appellant should be directed to the 2nd Defendant/Respondent. He thus sought that the Plaintiff/Appellant's suit to be dismissed with costs.
31. The 2nd Respondent on the other hand vide his Statement of Defence dated 17th April, 2019 denied the allegations in the Plaint putting the Plaintiff to strict proof and stated that by a Sale Agreement dated 30th June, 2010, he had entered into a contract for sale of property known as Nyandarua/Kiriti/1028 with the 1st Respondent at a purchase price of Kshs. 1,500,000/= wherein he had paid the initial deposit of Kshs. 463,100/= and further sums of Kshs. 30,000/= and Kshs. 550,000/= leaving the balance of Kshs. 416,900/= as due and owing. That upon execution of the Agreement he had moved into the suit land and had been in peaceful occupation of the same to date carrying out extensive farming activities on large scale basis including horticulture and dairy farming therein. That despite his possession and occupation, the 1st Defendant/Respondent had refused and or neglected to obtain completion documents.
32. That he had discovered later on that the 1st Defendant was in the process of secretly seeking consent to transfer the suit property to a third party knowing that he had been in occupation of the said land. That on 17th January, 2011 he had received a letter dated 1st December 2010 to the effect that the suit property had been sold to another party wherein he had filed case No. HCCC No. 7 of 2011 at Nakuru which suit was eventually dismissed for want of prosecution because the 1st Defendant who was the Defendant in that suit had disappeared without trace. That he had then registered a caution against the suit property to protect his proprietary interest as a purchaser in the said property.



33. The 2nd Defendant thus made a claim against the 1st Respondent pursuant to the provisions of Order 1 Rule 24 and sought that the issues arising between them be determined in the trial as if the 1st Respondent had been a 3rd party for the following reliefs:
- i. The Plaintiff's suit against him be dismissed with costs.
 - ii. An order of specific performance do issue against the 1st Defendant compelling him to complete the conveyance and transfer of the property known as Nyandarua/Kiriti/1028 to the 2nd Defendant/Respondent.
 - iii. That in default of the 1st Defendant complying with (ii) above, the Executive Officer of the court be empowered and authorized to execute and seal all such documents, consents, transfers and/or any other conveyance instrument necessary for eventual transfer of parcel of land known as Nyandarua/Kiriti/1028 to the 2nd Defendant and that the Land Registrar do dispense with the production of the Original Title.
 - iv. That the balance of the purchase price due and owing to the 1st Defendant/Respondent by the 2nd Defendant/Respondent less the costs of the suit and penalty charges be deposited with the court for collection.
 - v. The costs of the suit be borne by the Plaintiff/Appellant and the 1st Defendant/Respondent.
34. The matter had proceeded for hearing wherein the Plaintiff/Appellant had adopted his witness statement and list of documents dated 22nd April, 2012 as his evidence in chief and had proceeded to testify as PW1 to the effect that he had entered into a Sale of Land Agreement with the 1st Defendant/Respondent for the purchase of L.R No. Nyandarua/Kiriti/1028 measuring 4 acres at a purchase price of Kshs. 1,400,000/= wherein he had paid an initial deposit of Kshs. 800,000/= in cash. That he did not take possession of the suit land because when he visited the same he, was told that the 2nd Defendant/Respondent had been claiming the suit land as well. That the said 2nd Defendant/Respondent had even placed a caveat on the suit property. His contention was that the 2nd Defendant/Respondent's claim over the suit property had been terminated vide a letter dated 1st December, 2010.
35. In cross examination by the Counsel for the 1st Defendant/Respondent, the Plaintiff/Appellant stated that he had established that the suit property had no encumbrances and that the earlier agreement had been cancelled hence the 1st Defendant/Respondent ought to have refunded the money that he had received from the 2nd Defendant/Respondent. That further, the 1st Defendant/Respondent had the capacity to enter into an agreement with him since the suit property had been vacant and the agreement between the 1st and 2nd Defendant/Respondent had been terminated.
36. When he was cross-examined by the Counsel for the 2nd Defendant/Respondent, he confirmed that he had entered into an agreement dated 7th December, 2010 with the 1st Defendant/Respondent for the purchase of plot No. Nyandarua/Kiriti/1028 wherein he had been given an original title deed. That he had conducted a search wherein the search result as at 26th November, 2010 had showed that the suit land had been registered in the name of the 1st Defendant/Respondent and that the same had no encumbrances. That he had learnt that there had been an earlier agreement between the 1st Defendant/Respondent and another person when he visited the suit land and found a worker therein who had told him that another person was claiming the suit land. That upon confronting the 1st Defendant/Respondent, he had admitted that whereas there had been an earlier agreement, the same had been cancelled. That however, he had not been aware that the 2nd Defendant/Respondent had already been on the suit property when he had bought it.



37. That whereas he was to pay the balance of the purchase price being Kshs. 600,000/= on taking possession of the suit property, he had not paid the said balance since the 1st Defendant/Respondent had not facilitated the transfer of the suit property to him because there had been a caveat on the suit property. That further, whereas he had been informed that the earlier transaction over the suit property between the 1st and 2nd Defendant/Respondent had been cancelled vide a letter, he was not aware if the said letter had been served upon the 2nd Defendant/Respondent neither was he aware of what had been going on in the suit property.
38. When he was referred to the 2nd Defendant/Respondent's statement in re-examination, he confirmed that the said 2nd Defendant/Respondent had admitted to having received the letter terminating the agreement.
- The Plaintiff/Appellant had closed his case.
39. The 1st Defendant/Respondent who testified as DW1 adopted his witness statement as well as his list of documents filed as evidence. He then testified that upon executing an agreement of sale between he and the 2nd Defendant/Respondent, he had received an amount of Kshs. 40,000/= in cash and Kshs. 461,100/= via a cheque wherein the balance of the purchase price was to be paid upon transfer of the suit land.
40. That since the transaction was to take 90 days, upon the lapse of the said period, he had terminated the said agreement and had been ready to refund the money paid to him by the 2nd Defendant/Respondent wherein he had thereafter entered into another agreement dated 7th December, 2010 with the Plaintiff/Appellant for sale of the same suit property. He confirmed that despite Plaintiff/Appellant having paid him a deposit of Kshs. 800,000/=, he did not however transfer the suit property to the Plaintiff/Appellant because the 2nd Defendant/Respondent had already placed a caveat on it.
41. In cross examination by the Counsel for the Plaintiff/Appellant, his response had been that the agreement between he and the 2nd Defendant/Respondent had been terminated by the time he was entering into the second agreement with the Plaintiff/Appellant. That he had neither applied for nor obtained the Land Control Board Consent to transfer the suit property to the 2nd Defendant/Respondent. That whereas he was aware that there had been a case between him and the 2nd Defendant/Respondent in Nakuru wherein he had been sued, the case had been transferred to Nyahururu, and he was not aware of what became of it.
42. On being cross-examined by the Counsel for the 2nd Defendant, he confirmed that he had entered into an agreement dated 30th June, 2010 with the 2nd Defendant/Respondent for the sale of the suit property at a purchase price of Kshs. 1,500,000/= wherein the 2nd Defendant/Respondent had paid a sum of Kshs. 40,000/= and then Kshs. 463,000 and that the balance of the purchase price was to be paid upon execution of the transfer. That Kshs. 463,000/= was to clear loan at Equity Bank for which the title to the suit property had been charged.
43. That the 2nd Defendant/Respondent did not make any more subsequent payments. That whereas the completion period had been 90 days, he had not transferred to suit property to the 2nd Defendant/Respondent within the said 90 days since the Land Control Board was not operational as it had been dissolved.
44. When he was referred to Paragraph 4 of the Agreement, he confirmed that the 2nd Defendant/Respondent had taken immediate possession of suit property and had been there since. That whereas the agreement had required service of the completion notice, he did not serve the same upon the 2nd Defendant/Respondent since he did not know that the 2nd Defendant/Respondent was willing



to complete the sale as the same had been cancelled. That he had not refunded the 2nd Defendant/Respondent the sum of the money that he had paid to him because he had not told him the manner in which he should refund the same.

45. In re-examination, he had reiterated that the Land Control Board had not been operational hence he could not transfer the suit property to the 2nd Defendant/Respondent. That he had neither received any additional payment of money from the 2nd Defendant/Respondent nor signed any additional documents. That the 2nd Defendant/Respondent had never told him how they could refund the money and that he was not supposed to be in communication with the 2nd Defendant's Counsel.

The 1st Defendant/Respondent had closed his case.

46. The 2nd Defendant/Respondent who testified as DW2 adopted his Witness Statement as well as his list of documents dated 26th April, 2019 as evidence in chief before testifying that he had bought a parcel of land measuring 5 acres from the 1st Defendant/Respondent at a price of Ksh. 300,000/= per acre wherein he had paid the purchase price in full and taken possession of the suit land. That they had executed an agreement for sale dated 30th June, 2010. That there had been a loan against the title to the suit property of Kshs. 463,100/= which he had cleared with the bank after which the title had been discharged. That he paid the 1st Defendant/Respondent a sum of Kshs. 40,000/= to enable him discharge the charge, a sum of Kshs. 30,000/= and 550,000/= on 11th July, 2010 and 7th September, 2010 respectively wherein he had acknowledged receipt hence the balance for the purchase price stood at Kshs. 416,000/=.

47. That immediately after paying the bank loan and pursuant to the agreement, he had taken possession of the suit property wherein he had been in occupation to date. That whereas he was to pay the balance of the purchase price within 90 days and upon the suit property being transferred to him, the 1st Defendant/Respondent had in breach of the terms of agreement disappeared before handing him the completion documents to facilitate the transfer of the suit land to his name. That it was after a lapse of 3 years that he heard that the 1st Defendant/Respondent had been showing the Plaintiff/Appellant the suit property and that the said Plaintiff/Appellant had been claiming 4 acres of land from him.

48. That whereas the Plaintiff/Appellant claimed to have bought land from the 1st Defendant/Respondent, his parcel of land had been 5 acres. That the agreement between him and the 1st Defendant/Respondent had been valid. That subsequently, he had filed a case in Nakuru and caused a caution to be placed on the suit property when he heard that someone else lay claim to his land. That the caution was subsisting to date. He had thus prayed that the suit land be transferred to him since he was ready to pay the balance of the purchase price through court. That in the event that the 1st Defendant/Respondent refused to sign the transfer documents, the court signs the same on his behalf.

49. In cross-examination by the Counsel for the Plaintiff, he confirmed that while the 1st Defendant/Respondent was known to him, he had come to know the Plaintiff/Appellant later on. His argument was that since the Plaintiff/Appellant's claim was valid, he should be paid by the 1st Defendant/Respondent. That whereas the completion period in the Agreement between him and the 1st Defendant/Respondent had been 90 days, he had not breached the said agreement. That after the 1st Defendant/Respondent disappeared for 3 years, they could not have extended the completion period. His contention was that he did not know when the Plaintiff/Appellant bought the suit land. That further, although the 1st Defendant/Respondent had disappeared with his money, he had been left on the suit property but lodged a caution on the same after learning of the second agreement.

50. That whereas he had received a letter dated 1st December, 2010 wherein the 1st Defendant/Respondent purported to have been willing to refund his money, he was in disagreement with the same since he had



already taken occupation of the suit property. He admitted that he was still owing the 1st Defendant/Respondent a sum of Kshs. 416,000/=

51. On being cross-examined by the Counsel for the 1st Defendant/Respondent, he confirmed that he had made the first payment by paying off the bank loan, while the second payment had been by way of cash in which the 1st Defendant/Respondent had acknowledged receipt. That they did not attend the Land Control Board since the 1st Defendant/Respondent had disappeared. That further, while in occupation of the suit property, the 1st Defendant/Respondent had asked him for subsequent payments wherein he had signed on the agreement for sale acknowledging receipt. That they did not go to the Advocate because he trusted the 1st Defendant/Respondent.
52. That whereas the completion period had been 90 days, the 1st Defendant/Respondent had disappeared. That it was true that the 1st Defendant/Respondent had stated that he no longer wanted to continue with the transfer in the letter that he had received from M/s Mwaura Kamau & Co. Advocates. When he was referred to Df exh 4, his response was that after he had received information that there had been another transaction going on, he had sued the 1st Defendant/Respondent in Nakuru High Court in the year 2011, but had not attended the proceedings therein. He however maintained that he had received orders to place a restriction on land.
53. In re-examination, he testified that while the letter from M/s Mwaura Kamau & Co. Advocates to the effect that the 1st Defendant/Respondent was not willing to proceed with the transaction was dated 1st December, 2010, he had received the same on 11th January, 2011 and that the agreement had still been valid when he received the said letter. That accordingly, the 1st Defendant/Respondent had no capacity to sell the suit property while their agreement had still been in force. That whereas the balance of the purchase price was to be paid upon the 1st Defendant/Respondent obtaining Land Control Board consent and transfer documents, he had disappeared hence the balance could not have been paid as at the completion date of 30th September, 2010.
54. He reiterated that when he got the information that the 1st Defendant/Respondent was attempting to transact with a third party at the Land Control Board, he had rushed there wherein he had been given the documents that the 1st Defendant/Respondent had presented. That whereas the 1st Defendant/Respondent had testified that apart from the amount that had cleared the Bank loan he had not received further payment from the 2nd Defendant/Respondent, the signatures by him appearing in the agreement had acknowledged receipt of subsequent payments. That the 2nd Defendant/Respondent had never been summoned by the police over the said signatures.
55. That the 1st Defendant/Respondent was the one who had not met his obligation as at the completion date. That he had caused a caution to be placed on the suit property which caution existed to date since one could not enter into another agreement during the existence of an earlier agreement.
56. I have considered the Plaintiff/Appellant's list of documents herein dated 22nd April, 2012 and filed on 27th April, 2012 which had been relied upon as evidence by the Plaintiff to wit;
 - i. A Letter dated 1st December, 2010 from Mwaura Kamau & Co. Advocates addressed to Julius K. Wanjau
 - ii. Sale Agreement dated 7th December, 2010 between Simon Kariuki Gicheha and Moses Mwema Gichohi.
57. I have also looked at the 1st Defendant/Respondent's list of documents dated the 29th July, 2021 which he relied upon in evidence to wit;



- i. Land Sale Agreement dated 30th June, 2010.
 - ii. Land Sale Agreement dated 7th December, 2010
 - iii. Letter from Mwaura Kamau & Co. Advocates.
58. The 2nd Defendant/Respondent's list of documents herein dated 26th April, 2019 comprised of;
- i. Copy of Sale Agreement dated 30th June, 2010 between the 1st and 2nd Defendants.
 - ii. Copy of receipts for payment/evidential acknowledgements at the back of the Agreement.
 - iii. Transfer of Land Form in favour of the Plaintiff signed by the 1st Defendant.
 - iv. Application for Land Control Board Consent by the 1st Defendant in favour of the Plaintiff.
 - v. Copy of Title Deed dated 6th June 1990.
59. It is not in contention that the 1st Respondent herein was the proprietor of the suit parcel of land L.R No. Nyandarua/Kiriti/1028 measuring 2.02 hectares approximately 4.991 acres wherein vide a sale agreement dated 30th June 2010, he had agreed to sale 5 acres to the 2nd Respondent at a purchase price of Kshs. 1,500,000/= That at the time of the agreement, the suit land had been charged to Equity Bank wherein the 2nd Respondent had discharged the same with an the initial deposit of Kshs. 463,100/=
60. It is further not in contention that on subsequent dates, the 2nd Respondent had paid further sums of Kshs. 30,000/= and Kshs. 550,000/= leaving the balance of Kshs. 416,900/= .That upon execution of the contract, the 2nd Respondent had taken possession and occupation of the suit land.
61. It is also not in contention that on the 7th December 2010, the 1st Respondent once again entered into another sale agreement with the Appellant herein for the sale of 4 acres of land comprised in L.R No. Nyandarua/Kiriti/1028 at a purchase price of Kshs. 1,400,000/= wherein he had paid an initial deposit of Kshs. 800,000/= in cash, but did not take possession of the suit land because the 2nd Defendant/ Respondent was in occupation and also lay claim to the same.
62. Upon considering the evidence adduced in the trial court I find the issues that stand out for my determination as follows;
- i. Whether there existed a valid contract between the 1st and 2nd Respondents
 - ii. Whether there existed a valid contract between the 1st Respondent and the Appellant.
 - iii. whether the Learned Magistrate erred in making the order for specific performance
63. Section 3(3) of the [Law of Contract Act](#) provides that no suit shall be brought on a contract for a disposition in an interest in land unless the contract upon which the suit is founded is;
- (i) is in writing;
 - (ii) is signed by all the parties thereto; and
 - (b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:
64. Looking at both agreements herein, I find that on the face of it, they were signed by the parties who appended their respective signatures which had been attested to as required under Section 3(3) (b) of the [Law of Contract Act](#). I therefore find the same to have been contracts within the stipulated provision of the law.



65. The next issue for determination is whether the same were valid. I find that a party cannot run away from the terms of its Agreement. It has often been stated that the Court's function is to enforce contracts that the parties enter into. It is trite that a court cannot rewrite the party's contract as was held by the Court of Appeal in National Bank of Kenya Limited v Pipe Plastic Samkolit Ltd [2011] eKLR.

66. A look at the first Sale Agreement dated the 30th June 2010 between the 1st Defendant as the vendor and the 2nd Defendant as the purchaser the same was executed in the following terms,

- a) The Vendor is the registered owner of Land Reference Number Nyandarua/Kitiri /1028 situate at Nyandarua district comprising of 5 acres of land.
- b) The Vendor has agreed to sell the entire portion of 5 acres of land to the Buyer herein at a consideration of Kenya Shillings One Million Five hundred and Thousand (1,500,000/=)

Now this Agreement witnesseth as follows:

1. The purchase price of the property shall be Kenya Shillings One Million, Five Hundred Thousand only (Ksh. 1,500 000/=).
2. Kenya Shillings Forty Thousand only (Ksh. 40 0,000/=) shall be paid upon the execution of this Agreement for Sale.
3. Kenya Shillings Four Hundred and Sixty Three Thousand, one Hundred only (Ksh. 463;100/=) shall be paid directly to Equity Bank Limited to offset the loan balance and enable discharge the title. The said amount shall be deemed to have been paid to the Vendor.
4. That immediately upon the release of the aforesaid monies, the Purchasers shall assume immediate occupation and possession of the subject property and shall be at liberty carry out any activities on the said land.
5. The balance of Kenya Shillings Nine Hundred and Ninety Six Thousand, Nine Hundred Only (Ksh. 996,900=) shall be paid upon obtaining a Land Board Control Consent and to transfer other documents to the name of the Purchaser. The Vendor shall take every effort to ensure successful land completion of the transaction.
6. This transaction shall take a period of Ninety (90) days unless both parties extend the period by consent.
7. Completion shall require the Vendor to provide the title the name of the Purchaser.
8. Upon receipt of the title to the property, the purchaser shall pay the balance o the purchase price.
The purchaser shall be responsible for stamp duty and registration charges.
10. This Agreement is subject to the 1989 Law Society Conditions of sale save where the same are amended or expressly excluded by the provisions of this Agreement. “

67. The terms of the agreement, I find were explicit and enforceable, wherein upon execution of the same the 2nd Defendant had paid Kshs. 40,000/= to enable the 1st Defendant to discharge the charge and Kshs. 463,100/= directly to Equity Bank Limited to offset the loan which payment I find were in tandem with clause 2 and 3 of the agreement.

68. Evidence on record which is not disputed is that pursuant to the release of the said monies, the 2nd Defendant had taken occupation and possession of the suit property wherein he proceeded to carry



out extensive farming activities on large scale basis including horticulture and dairy farming therein. This again was in tandem with clause 4 of the Agreement.

69. Clause 5 of the agreement was to the effect that the vendor was to take every effort to ensure successful and completion of the transaction, however from the evidence herein adduced, upon the 2nd Respondent having made payment of the monies alluded to in clause 2 and 3 herein above, he had also paid the 1st Respondent an additional sum of 30,000/= and Kshs. 550,000/= leaving the balance of Kshs. 416,900/=.

70. Clause 6 of the agreement stipulated that;

“This transaction shall take a period of Ninety (90) days unless both parties extend the period by consent.”

71. The terms of clause 5 of the agreement were very clear to the effect that;

“The balance of Kenya Shillings Nine Hundred and Ninety Six Thousand, Nine Hundred Only (Ksh. 996,900=) shall be paid upon obtaining a Land Board Control Consent and to transfer other documents to the name of the Purchaser. The Vendor shall take every effort to ensure successful land completion of the transaction.”

72. In essence therefore the clear interpretation of clause 5 and 6 was that the the parties had made time of the essence in the transaction wherein the balance of the purchase price was to be paid within 90 days of executing the agreement that is from 30th June 2010 and the same had been pegged on the 1st Respondent performing his end of bargain by applying for the Land Control Board’s Consent, processing the transfer and completion documents and availing the same to the 2nd Respondent but he had breached the terms of the said agreements as what had transpired next was that the 1st Respondent had gone into hiding and/ or disappeared only to purport to terminate the sale agreement 6 months later through a letter dated the 1st December 2010 from M/s Mwaura and Co. Advocates giving reasons that the 2nd Defendant had the failed to clear the balance. This is preposterous to say the least.

73. What was happening behind the scenes was that he had entered into a second sale agreement dated 7th December 2010 with the Appellant herein for the sale of four acres of land comprised in the same parcel of land that he had sold to the 2nd Respondent who had already taken occupation and possession of the same. Indeed the 2nd Respondent, in part performance of the agreement was in actual and constructive possession of the suit land and therefore he had equitable rights which were binding. (See *Macharia Mwangi Maina & 87 Others vs Davidson Mwangi Kagiri* [2014] eKLR.

74. The Court of Appeal in the case of *Twalib Hatayan & Another vs Saggar Ahmed Al- Heidy & Others* [2015] eKLR held as follows:

“A constructive trust is an equitable remedy imposed by the court against one who has acquired property by wrong doing. (see *Black’s Law Dictionary*) (Supra). It arises where the intention of the parties cannot be ascertained. If the circumstances of the case are such as would demand that equity treats the legal owner as a trustee, the law will impose a trust. A constructive trust will thus automatically arise where a person who is already a trustee takes advantage of his position for his own benefit (see. *Halsbury’s Laws of England supra* at para1453). As earlier stated, with constructive trusts, proof of parties’ intention is immaterial; for the trust will nonetheless be imposed by the law for the benefit of the settlor. Imposition of a constructive trust is thus meant to guard against unjust enrichment. In the present case, a constructive trust cannot be imposed or inferred since the suit premises



were yet to be transferred to the Third Party. Therefore, there is no unjust enrichment to be forestalled.”

75. The 1st Respondent having received part payment of the purchase price and having put the 2nd Respondent into possession of the suit land, had created a constructive trust in favour of the 2nd Respondent who had now acquired equitable rights which were binding.
76. The conduct of the 1st Respondent subsequent to having a charge on the suit land discharged by the 2nd Respondent, wherein he had obtained his title back and attempted to resell the property to the Appellant herein is evidence enough of a conniving and greedy person who was out to unjustly enrich himself.
77. I find that the second agreement entered into between the Appellant and the 1st Respondent on the 7th December 2010 during the subsistence of the 1st agreement dated the 30th June 2010 was null and void.
78. It was contended that the learned Magistrate erred by issuing an order of specific performance for the transfer of land to the 2nd Respondent where there was no consent to transfer the land applied for and obtained as provided by the *Land Control Act*.
79. In my view the terms of the contract were sufficiently stated as set out in the agreement for sale. The parties to the agreement are clearly identified. The property sold under the agreement for sale was sufficiently described and clearly identified. The price was also indicated wherein the 1st Respondent blatantly breached the same in an attempt to unjustly enrich himself. I am therefore persuaded, that the remedy of specific performance was available to the 2nd Respondent who had demonstrated that he had fulfilled all his obligations under the terms of the contract and further demonstrated proof that he was ready and willing to fulfill the last part of the same by depositing the balance of the purchase price in of Kshs. 416,900/= in court.
80. In the case of Michael Murithi Muthii v Cecilia Wanjiru Cooper alias Cecilia Wanjiru Ernest, Michael Ndungu Mbugua, Lily K. Musinga & Francis Kiarie Karikui [2021] KECA 964 (KLR) the court of Appeal had held as follows;

“As regards whether an order of specific performance was properly issued in the circumstances of this appeal, it is worth repeating that such an order is an equitable remedy issued at the discretion of the court. It will be issued where the judge is satisfied that it is equitable to grant it. As is the norm, an equitable remedy will not be granted to a party who does not deserve it, for example by reason of unclean hands or failure to himself to do equity. Where a judge has exercised his discretion, this Court will not interfere unless it is demonstrated that he misdirected himself in law, or he considered matters he should not have considered or he failed to considered matters he should have considered or that the decision is plainly wrong.”
81. In this regard I find that the learned trial magistrate exercised his discretion in issuing the order of specific performance as herein above stated and I cannot fault him.
82. On the issue of lack of consent from the Land Control Board in the execution of the agreement dated the 30th June 2010, this court is guided by the holding in *Aliaza v Saul (Civil Appeal 134 of 2017)* [2022] KECA 583 (KLR) (24th June 2022) (Judgment) where Mumbi Ngugi JA of the Court of Appeal sitting at Eldoret had observed as follows:

“...The failure on the part of the Respondent to obtain the necessary consent from the Land Control Board within the required period of six (6) months to enable the Appellant transfer



the suit land into his name does not render the transaction void. Equity and fairness, the guiding principles in Article 10 of *the Constitution*, require that the *Land Control Act* is read and interpreted in a manner that does not aid a wrongdoer, but renders justice to a party in the position of the Appellant.”

Kiage JA at paragraphs 46, 47 and 48 while agreeing with the conclusion and the reasoning of Mumbi Ngugi JA opined as follows; -

“It is time, I think, that this Court spoke in unmistakable terms that it would not, in this day and age, rubber-stamp fraud and dishonesty by holding as null and void agreements freely entered into by sellers of agricultural land, and which have been fully acted upon by the parties thereto, when those sellers, often impelled by no higher motives than greed and impunity, seek umbrage under the *Land Control Act*, an old statute of dubious utility in current times.

.....And that is how a once well-intentioned provision of law as set out by my sister Judge, now gets twisted, taken advantage of, and abused to divest a seller of his duty under contract. That is using the statute as a cloak and an alibi for fraud and dishonesty. It flies in the face of all that is right and just and honourable. And courts which are just and honourable, should put the matter right by requiring him to meet his just obligations and denying him the benefits of default and deceit.

Thus, whether on the basis of constructive trust or to avoid unjust enrichment as an equitable estoppel, the Respondent’s attempt to hide under the *Land Control Act* in the circumstances of this case must be named for what they are and rebuffed. And the Appellant should succeed.”

83. I have nothing useful to add.

84. Taking into account all the evidence, and in particular the conduct of the 1st Respondent, I find that the learned trial Magistrate cannot be faulted for having exercised his discretion in making an order for specific performance. Ultimately, I find that there is no merit in this appeal and cross appeal herein filed by the 1st Respondent which I proceed to dismiss with costs. The finding of the trial learned magistrate is herein upheld. It is so ordered.

DATED AND DELIVERED VIA TEAMS MICROSOFT AT NAIVASHA THIS 21ST DAY OF NOVEMBER 2024.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

