



REPUBLIC OF KENYA



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**Gitau v Shani & another (Appeal E004 of 2023)
[2024] KEELC 13728 (KLR) (9 December 2024) (Judgment)**

Neutral citation: [2024] KEELC 13728 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE**

APPEAL E004 OF 2023

AE DENA, J

DECEMBER 9, 2024

BETWEEN

PETER GITAU APPELLANT

AND

DANIEL OUMU SHANI 1ST RESPONDENT

NELLIE AKINYI SHANI 2ND RESPONDENT

JUDGMENT

1. This judgement is in respect of judgement of Honorable Sandra A. Ogot, Principal Magistrate delivered on 15th September 2023 in Msambweni ELC Suit No. E004 of 2021 pitting the Respondents herein and the Appellant Peter Gitau.
2. The suit was commenced by a plaint dated 22nd April 2021. The Plaintiffs case was that they entered into a sale agreement dated 20/08/2020 with the Defendant to purchase a portion measuring 0.2 Hectares of the Defendants property, Parcel Number Kwale/Ukunda S.S/1702 which measured 0.279 Hectares. The agreed purchase price was Kshs. 2,200,000/-. That the Plaintiff paid a deposit of Kshs.900,000/- as per the agreement and the Defendant was to execute all necessary documents for the subdivision and transfer the agreed portion to the Plaintiffs. That the balance of the purchase price being Kshs. 1,300,000/- was payable upon successful transfer of the said portion and or within 90 days of the date of the Sale Agreement. That before the Defendant finalised the subdivision at the request of the Defendant, the Plaintiff on 22/10/2020 made a further part payment of Kshs 600,000/- to the Defendant to enable the Defendant salvage another of his properties which was being auctioned by a Bank.
3. It is pleaded that the Defendant commenced the subdivision process where he obtained the Land Control Board consent dated 14/10/2020 for the same and executed mutation forms through a surveyor. That the subdivision for the Plaintiffs portion and the Defendants remaining portion were



awaiting registration as Kwale/Ukunda SS/2173 and Kwale/Ukunda SS/2173 respectively. That the attendant amendments to the Registry Index Map (RIM) were also awaiting registration. Further that the registration was never finalised by the surveyor since the Defendant thwarted the process. That since then the Defendant has refused and failed to facilitate the registration and transfer of the portion to the Plaintiff and threatened to terminate the sale agreement despite the Plaintiffs not being in default of any term of the agreement.

4. It is averred that the defendant was in breach of contract by interalia frustrating the completion of registration of the plaintiff portion by threatening the surveyor, refusal to avail all completion documents, maliciously revoking the agreement of sale without reason, refusal to execute all requisite documents for transfer to the Plaintiffs, frustrating the surveyors and failing to pay survey fees. The Plaintiff sought the following verbatim prayers against the Defendants; -
 - a. Orders of specific performance against the Defendant to the sale agreement dated 20th August 2020 entered between the parties herein
 - b. In default by the Defendant to enter appearance and or comply with order a) above the Deputy Registrar-Mombasa Law Courts and or this Honorable Court to execute all the requisite transfer documents in favour of the Plaintiffs with regards to all that parcel of land allocated Number Kwale/Ukunda S.S/2173
 - c. General Damages for breach of contract by the Defendant
 - d. Any other remedy deemed appropriate by this Honourable court.
 - e. Costs and Interest of the suit.
5. The Defendant denied all the allegations raised in the plaint. He denied appearing before or signing any application for LCB Consent. That he was never presented with any mutation forms to execute for purposes of the subdivision. That the Plaintiff had been forcing him to execute completion documents for a non-existing property title deed. The Defendant avers that he surrendered the original title for Kwale Ukunda S.S 1702 together with other completion documents to Lyna Moraa the joint advocate for the sale which he listed in paragraph 12 of the Defence. Allegations of forgery of his signatures on the LCB application, mutation forms, breach of contract and damage to property to wit destruction of trees by the Defendant in a bid to take possession and impersonation have been raised. The Defendant stated he had justifiable grounds to terminate the contract. He denies ever receiving completion notice. The Defendant states he is ready and willing to refund the deposit paid and terminate the sale agreement together with its addendum.
6. The learned Magistrate after hearing the parties and analysing the evidence presented, found in favor of the Plaintiff. The trial court allowed the reliefs as sought in the Plaint, in the judgement dated 15/09/23. The prayers sought have already been outlined elsewhere in this judgement.

The Appeal

7. The Defendant aggrieved by the entire judgement of the trial court has lodged the instant appeal vide Memorandum of Appeal dated 27th September 2023. The following are the verbatim grounds of appeal
 - a) The learned trial magistrate erred both in law and in fact by in finding that the appellant was in breach and allowing the claim of specific performance and general damages.
 - b) The learned trial magistrate erred both in law and in fact by in disregarding all the evidence presented by the appellant in support the various breaches of contract committed by



the respondents thereby reaching a wrong decision in awarding and or allowing specific performance.

- c) The learned trial magistrate erred both in law and in fact by in disregarding the contractual obligations set for both parties and focused on the appellants obligations thereby thereby reaching a wrong decision in awarding specific performance.
- d) The learned trial magistrate erred both in law and in fact by admitting into evidence, hearsay evidence given by the respondents.
- e) The learned trial magistrate erred both in law and in fact by contradicting her self on matters of facts citing subdivision had not been carried out yet order for execution of transfer documents for a specific parcel that is unknown.
- f) The learned trial magistrate erred both in law and in fact by failing to consider admissions of breach by respondents in their obligations thereby reaching a wrong decision in awarding specific performance.
- g) The decision of the trial magistrate was plainly biased and unfair against the appellant by relying on testimonials and hearsay evidence adduced by respondents witness who in law are bound by the principal of confidentiality.
- h) The decision of the trial magistrate was plainly biased and unfair against the appellant who had overwhelming documentary and testimonial evidence and deciding the case against the weight of the evidence on record.
- I) The learned trial magistrate erred both in law and in fact by contradicting and failing to consider if appellants alleged breach of contract was a possibility if the respondents witness held and still holds all documents to date.
- J) The learned trial magistrate erred both in law and in fact by disregarding the appellants unchallenged documentary evidence as opposed to hearsay statements by the respondents.
- K) The learned trial magistrate erred both in law and in fact by making her own assumptions and conclusions of facts and citing to matters not in evidence or pleaded.
- l) The learned trial magistrate erred both in law and in fact by stating in the court's determination matters not pleaded by any party but rather imposing opinions that indicate basis.
- m) The learned trial magistrate erred in both law and in fact by disregarding in the determination all contracts between the parties and thus focusing on that which favours the Respondents and does not find the Respondents in further breach of contract.
- n) The learned trial magistrate erred in both law and in fact by citing erroneous and irregular requirements in regards to matters of spousal consent in the determination of the judgement.
- o) The learned trial magistrate failed to appreciate the Appellants and his witnesses testimonies and disregarded it all together and decided the case against the evidence tendered thereby occasioning tremendous miscarriage of justice to the Appellant.
- p) The learned trial magistrate failed to consider submissions and authorities by counsel for the Appellant and failed to critically analyse the same and accord its due weight particularly on the issue of adherence to the strict terms of contract by party claiming specific performance matters of subdivision of land and spousal consent in land thereby occasioning a miscarriage of justice.



- q) The learned trial magistrate failed to appreciate the conditions required for specific performance to be awarded by the court
 - r) The decision of the trial magistrate was plainly biased and unfair against the appellant by giving an award and orders that would in turn rewrite and or negate the terms of the existing contracts between parties
 - s) The learned trial magistrate failed to appreciate the obligations required of the Respondents in order to award specific performance.
 - t) The learned trial magistrate raises contradiction by awarding both specific performance and damages
 - u) The learned trial magistrate erred both in law and in fact by failing to properly take into account the clean hands doctrine (he who comes into equity must come with clean hands).
8. The Appellant prays that;-
- 1. The appeal be allowed
 - 2. The finding of the lower court and more specifically the judgement of the Principal magistrate court Msambweni delivered on 15th September 2023 be set aside and be substituted with an order dismissing the suit with costs.
 - 3. Costs be awarded to the appellant both in the appeal and in ELC Suit No. E004 of 2021
 - 4. This Honorable court be pleased to make such further and other orders as it may deem just in the circumstances of the case.

Disposal of the Appeal

- 9. The appeal was argued by way of written submissions. The Appellants submissions are dated 5th June 2024 and the Respondents are dated 23rd April 2024.
- 10. The Appellants reviewed the evidence of PW1 and highlighted incidents of confirmation and admissions as well as pointed the contradictions therein. It was submitted that PW2 who was the mutual advocate for the transaction and the only witness contradicted the averments by PW1. That PW2 instead confirmed and admitted to gross irregularities and lies by the Respondent. The instances are enumerated in the submissions including that Plaintiffs exhibit 4 that may have been obtained fraudulently and the non-involvement of the defendant in the subdivision and which subdivision was an illegal action by the Plaintiff and contrary to the terms of contract. The courts attention was also drawn to contradictions by DW2 of PW1 evidence while confirming the gross irregularities. These included there being no new beacons on the suit property and that the Plaintiff always visited alone.
- 11. It is submitted all the above depict the plaintiff as a habitual and unremorseful liar.
- 12. The 1st and 2nd Respondents were very brief in their submissions. They condensed the grounds of appeal in two main grounds those revolving around the terms of the agreement (A,B,C,D,E,F,I,M,P,S,T,U). Referring to clause 4 of the agreement it was submitted that the deposit of the purchase price was paid by the plaintiff and the balance was payable upon successful transfer. The appellant refused to comply with the terms of the agreement to subdivide the property, hand over completion documents and executing the transfer forms and have the transfer effected to the Plaintiffs names. That the appellant admitted he did not handover the completion documents. It is submitted



that the trial court properly analysed the plaintiffs evidence and arrived at the conclusion that the appellants breached the agreement.

13. It was contended that the jurisdiction of specific performance is based on the existence of a valid enforceable contract as held in the case of Gilbert Kimani Nyumu Vs Gideon Kipkoech (2019)eKLR. That the Appellant never sought a declaration that the agreement of sale was invalid. There was no evidence availed by the appellant to confirm the respondents were in breach of the agreement for sale. The court was referred to page 154 to 159 of the record of appeal where the trial court addressed issues of breach.
14. The Respondent further condensed grounds G,H,J,K,L,N,O,R,T,V as dealing with the evidence produced and relied upon by the trial court. That the appellant has failed to point out the specific hearsay evidence relied upon by the court in making the decision. That the orders issued were specifically pleaded and proven and no orders were issued beyond what was pleaded. That in the event the court issued orders outside the pleadings it had a wide discretion to do so for justice and expediency. The court was invited to dismiss the appeal with costs as lacking in merit.

Analysis and Determination

15. The duty of an appellate court is stipulated under Section 78 of the [Civil Procedure Act](#) which states as follows

“Subject to such conditions and limitations as may be prescribed, an appellate court shall have power;

- (a) to determine a case finally;
- (b) to remand a case;
- c. to frame issues and refer them for trial;
- d. to take additional evidence or to require the evidence to be taken;
- (e) to order a new trial.

(2) Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.”

16. This is a first appeal. The court will be guided by the case of Selle Vs. Associated Motor Boat Co. (EA.123) that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.
17. I have reviewed the grounds of appeal set out hereinabove. Based on the pleadings and proceedings at the trial court, and the rival arguments proffered by both sides, it is my considered view that the following issues will suffice for purposes of best dispensing this appeal.
 1. Was the Defendant Appellant in breach of the sale agreements.
 2. Was the Defendant entitled to rescind the agreement.
 3. Whether the trial court erred in granting orders for specific performance and general damages.



4. Costs.
18. To avoid repetition the court will address the 1st and 2nd issues concurrently. The Plaintiff state in their witness statement that the Defendant breached the terms of the sale agreement dated 20/8/2020 by refusing to avail all completion documents and frustrating the final process of registering the parcel of land known as Kwale/Ukunda SS 2173 at the land registry.
 19. Firstly, the burden of proof lay on the Plaintiffs to prove the particulars of breach laid out in paragraph 14 of the Plaint. This is in accordance to section 107 of the *Evidence Act* Chapter 80 of the Laws of Kenya.
 20. The learned Magistrate acknowledged the existence of the sale agreement dated 20th August 2020 and the addendum dated 2nd September 2020. These two agreements were not contested by any of the parties. What is in issue is the implementation of the terms thereof to finality culminating into its rescinding by the Defendant.
 21. Back to the issue of breach of the agreement. The learned Magistrate made a finding that no evidence was tendered to suggest that the Plaintiff breached any term of the agreement for sale.
 22. What were the terms of the agreement and the addendum as to the payment of the balance of the purchase price? Clause 4 of the agreement dated 20/8/20 provides that ‘The remaining balance of Kenya Shillings One Million three hundred thousand (Kshs.1,300,000) to be paid upon successful transfer.’ The addendum agreement dated 2nd September 2020 was produced as part of the Defendants bundle. I note that clause 4 above was amended by clause 2(a) of the addendum agreement thus ‘the remaining balance Kenya Shillings One Million Three Hundred Thousand (Kshs1,300,000/=) to be paid upon subdivision.’ This confirms that the balance was to be paid upon subdivision and not upon transfer. Indeed, the trial court made a finding that the plaintiff paid the deposit and later another Kshs. 600,000/- and that the balance was payable upon subdivision of the property.
 23. The other breach pleaded at paragraph 14 (VI) of the plaint is the failure on the part of the Vendor to pay for the subdivision of the property. Indeed Clause 9 of the above agreement is to the effect that ‘The Vendor shall pay for the subdivision’. The trial court concluded that the evidence showed that the Defendant did not facilitate the subdivision. Did the Defendant meet his part of the bargain?
 24. But then I asked myself who was to undertake the subdivision. My review of the agreement reveals that other than the vendor paying for the subdivision the agreement did not state who was to undertake the subdivision. However, the Plaintiff produced whatsapp message correspondence between himself and the Defendant from 16/10/2020 to 22/10/2020. The conversation shows that the Defendant was indeed causing for the undertaking of the survey until a point when his designated surveyor who is identified as Gitau is said to have been transferred from Kwale to Kinango. The Defendant then mentions a new surveyor whom he promises to link up with PW2 to expedite and finalise the same. PW2 confirmed in her evidence that the Defendant had engaged a surveyor Gitau at lands but the subdivision was never completed.
 25. It is clear from the above that on the part of the Defendant he did not progress the subdivision to conclusion though he started it and even paid for it as evidenced by Mpesa transfer to Mr. Samuel Gitau produced as evidence. The bottom line however is that the Defendant did not complete the subdivision in any case he denies signing any mutation forms or signing any application form to the LCB for the same.
 26. In terms of the subdivision the Defendant was indeed in breach of the agreement as the Plaintiffs had fulfilled their part of the bargain by paying the deposit including a further sum of Kshs.600,000/=.



27. Are there any other breaches that are attributed to the Defendant? These were pleaded as refusal to sign all requisite documents and avail all completion documents required to effect the transfer of the subdivided portion. The Defendants case is that he submitted the original title deed to Kwale Ukunda SS 1702 copies of his Identification card and KRA Pin Certificate. PW2 confirmed to the court she indeed was supplied with these documents and was still holding the original title. But were these all the completion documents required? Clearly not. DW1 testimony is that after signing the addendum agreement and engaging Mr. Samuel Gitau he waited to be issued for his execution, applications for consent of the LCB to subdivide by the advocate and land mutation forms by the surveyor thereafter.
28. The witness added he was later shocked to hear from PW2 in January 2021 that the Plaintiff had indicated the new title numbers for the subdivision were out and was demanding the original title deed. The Defendant disowned this process stating that he was never involved at all by the vendor in the entire process from procuring LCB consent, signing mutations or authorising Gabriel Mwangoma to undertake the subdivision neither had he authorised PW1 to undertake the process on his behalf. That later he learnt that PW1 was on the ground clearing the entire land which he DW1 attended and confirmed. That due to all these DW1 wife vowed never to give spousal consent. That consequently he instructed his current lawyer on record to terminate the contract.
29. The trial court was not convinced with the above narrative. The trial court made a finding that the Defendant never proved that the Plaintiff forged his signatures. That there was no handwriting expert to verify the alleged forgery. The trial court concluded that that there was no fraud on the part of the Plaintiff as alleged and the Defendant had made up this narrative looking for a way out of completing the agreement among other reasons.
30. I have reviewed the trial court analysis on the issue of fraud and I will agree with the trial court to the extent that all this was an afterthought on the part of the Defendant. Why do I say so? Firstly the Defendant does not in his witness statement or his oral testimony give the particulars of the surveyor he engaged or the further steps he took from the point Mr. Gitau was transferred to Kinango. Did he link up a new surveyor to PW2? He conceded during cross examination that he never got another surveyor. DW1 conceded in cross examination thus ' Yes, I (sic) aware that under contract I was to ensure that subdivision is finished.' Despite this knowledge he does not even bother to inquire of the progress of the subdivision he just sat and waited to be brought documents yet he had commenced the exercise.
31. DW1 does not at all make reference to the allegations stated hereinabove yet the letter was written in the subsequent month of February post his learning from PW2 the mutual advocate about the new title numbers. It is noteworthy that the email dated 18/2/21- from DW1 lawyer to Moranga communicates the Vendors desire to rescind the agreement of sale citing clause 6.4.3. No reasons for the rescission is given. There is no mention of fraud, breach on the part of the plaintiff or even spousal consent. It is only later in the letter dated 2nd April 2021 that issues of the fraud and the alleged Plaintiffs actions were given as the reasons for opting out.
32. The above emboldened me to agree with the trials court finding that the Defendant was looking for a way out of the agreement before it crystalised.
33. Moreover as to the findings on fraud the burden of proof was on the Defendant to prove fraud was committed in the manner of forgery of his signatures. I'm aware that the standard of proof for fraud is slightly higher than that of a balance of probabilities - Vijav Morajaria vs Nansingh Madhusingh Darbar & Anor (2000) eKLR, Umilla w/o Mahendra Shah vs Barclays Bank International Limited & Anor (1979) KLR. The only way to prove the forgery was by way of an expert witness and I agree with trial court argument that in the absence of such a report the court could not make a finding of fraud.



34. Having agreed with the trial courts finding on the foregoing I must now proceed to discuss whether the Plaintiff was entitled to the order of specific performance. This is an issue that was framed by the trial court arising from the prayer (a) of the Plaint. The Plaintiff prayed for orders of specific performance against the Defendant to the sale agreement dated 20th August 2020 entered between the parties. The court was guided by the dictum in the judgement of the court in QPKA Limited Vs. [*Kenyatta Hospital Association \(KHA\) t/a Nairobi Hospital \(Civil Case E648 of 2021\)*](#) 2021 KEHC 282 (KLR) Commercial and Tax). The key ingredients for the grant of an order of specific performance I picked from the extract cited by the trial magistrate from this decision is firstly there must be a valid enforceable contract/agreement. In this regard the learned magistrate found in the affirmative though I must state there was no contest on the enforceability of the contract. Secondly it is an equitable remedy and therefore available at the courts discretion. Thirdly it is rarely granted except where there is no adequate alternative remedy. The plaintiff is enjoined to demonstrate that damages would not be an adequate remedy.
35. Arising from the case law cited by the court above, the learned magistrate was to be guided by the foregoing requirements in exercising the discretion. The trial magistrate exercised her discretion in favor of the Plaintiff largely on the basis that ‘ the fact that Plaintiffs never asked for their money back is a clear indication that damages would not be a sufficient remedy for them. The focus being that specific performance will do more perfect and complete justice than an award of damages.
36. In my view it was not in the place of the court to impute for the Plaintiff that damages would not be an inadequate remedy. The mere fact that the Plaintiffs never called back for the investment they had already made on the property cannot be said to be a demonstration that an award of damages would not be adequate. The burden was on the Plaintiff to demonstrate that indeed damages would not be an adequate remedy. For this reason, I keenly perused PW1 evidence in chief and there was no intimation that an award of damages would be inadequate and in what way and or why. The witness was never led into this. I agree with the Defendants submission that during the suit the plaintiff did not exhibit any form of irreparable loss that would have occurred if the contract was not completed. Infact an opportunity for him arose when PW1 was shown during cross examination, the bankers cheques for refund (Defendants list of documents of 21/06/2021) which he never seized.
37. On the above alone I would state the discretion to award an order of specific performance was exercised wrongly.
38. What about alternative remedy? In this regard I will revert to the terms of the agreement. Clause 13 of the original agreement was amended to provide for the vendor issuing a cancellation notice to refund all the deposit paid. The learned trial court did not consider this part of the addendum yet both parties had by signing the addendum agreed that a refund would be an alternative remedy. I have already shown nowhere does PW1 demonstrate why a refund of the money paid would not suffice. I think I have said enough to show why an order of specific performance ought not to have issued.
39. I must address the component of the award of damages made by the trial court. Order No. C of the judgement states thus;-
- As specific performance has been ordered, the court will grant a nominal award for General Damages for breach of contract by the Defendant as the Defendant greatly inconvenienced the plaintiff with his actions. The same is awarded at Kes.100,000/=.’
40. The objection to the above is found in ground v) of the Memorandum of Appeal to the effect that this raises contradiction by awarding both specific performance and damages. Can both reliefs be awarded at the same time? My understanding of order number C) above is that the trial magistrate was conscious



of the fact that an order of specific performance had already issued and therefore the minimal award in general damages. I note that General damages were pleaded. The Appellant did not lead the court to any authorities in support of his objection. However it is a well-established and settled principle of law that general damages cannot be awarded for breach of contract see the Court of Appeal decision in Kenya Tourist Development Corporation v Sundowner Lodge Limited [2018] eKLR.. It is therefore my finding that there was no basis upon which to grant the general damages.

41. The upshot of the foregoing would be to set aside the orders of specific performance and the attendant orders for its enforcement and general damages. Where does this decision leave the Respondent Plaintiff? It follows that the investment made by the Plaintiff is not in dispute. The Defendant indeed received the sum of Kshs. 1,500,000/= in two instalments of Kshs. 600,000 paid on 22nd October 2020 and the deposit of Kshs. 900,000/=. PW1 alleged to have paid Kshs.40,000/= to Mr. Gabriel Mwangoma for the survey but there was no proof tendered in court in this regard. DW1 case is that he refunded Kshs. 1,500,000/= vide bankers cheque. On record is a letter dated 16th June 2021 from the firm of Kithinji Mutembei & Associate Advocates enclosing bankers cheques No. 016150 and 016151 Equity Bank bought in favor of and the name of purchasers Daniel Oumu Shani. The letter states it was to serve as a refund in full amount paid to the vendor. Copies of two cheques were presented in evidence by the Defendants. This letter forwarding the cheques was not specifically responded to by Mr. Mungai for the Plaintiffs. Being bankers cheques I have no option but to assume that the money was paid as indicated in the said cheques.
42. The upshot of the above is that the Appeal succeeds to the extent that the orders of specific performance, the orders of enforcement thereof and general damages ought not have issued as a result. Consequently, the final orders in the judgement delivered on 15th September 2023 must collapse and are hereby set aside. The effect is that the suit ELC Suit No. E004 of 2021 is dismissed.
43. Parties to bear their own costs in ELC Suit No. E004 of 2021. Costs of the Appeal herein are awarded to the Appellant.

Orders accordingly.

JUDGEMENT DATED SIGNED AND DELIVERED THIS 9TH DAY OF DECEMBER 2024.

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A E DENA

JUDGE

Mr. Mutembei for the Appellant

Mr. Mungai for the Respondent

HON. LADY JUSTICE A.E DENA

