



**Okoba v Ajwang (Environment and Land Appeal 26 of 2021)
[2023] KEELC 20806 (KLR) (27 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 20806 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND APPEAL 26 OF 2021
LL NAIKUNI, J
SEPTEMBER 27, 2023**

BETWEEN

OTHANIEL AMIN OKOBA APPELLANT

AND

JOHN MDUDA AJWANG RESPONDENT

JUDGMENT

I. Preliminaries

1. This Judgment pertains to an appeal instituted by the Appellant herein – Othaniel Amin Okoba against the Respondent hereof. The appeal emanates from the Judgment delivered by the Principal Magistrate’s Court sitting at Taveta on 8th April, 2021. Being aggrieved by the said decision in the Civil case PMCC (Taveta) ELC No. 13 of 2019, the Appellant filed a Memorandum of Appeal dated 22nd April, 2021 and filed on the even date. In a nutshell, the whole borne of contention is the breach of the Sale Agreement for the alleged purchase and transfer of a portion of all That parcel of land known as “Taveta Scheme Phase 1/254 to be derived from the main land. (Hereinafter referred to as the Suit Land”) between the Appellant and the Respondent herein.
2. Prior to proceeding further, and taking That the Respondent never participated in this appeal at all and That seem to have been the trend during the trial at the Lower Court, the Court feels That the issue of service of the pleadings upon the Respondent is a paramount and pertinent one which needs to be dealt with first and fore most. From the records its evident That the Respondent was served with a 58 pages Records of Appeal dated and filed on 30th June, 2021. Indeed to That effect, there is an Affidavit of Service filed under Order 5 Rule 15 (1) of Civil Procedure Rules, 2010 dated 7th October, 2022 and 14th November, 2022 of one Mr. Michael I. O. Otieno a duly appointed Licensed Court Process Server, a holder of a Certificate bearing numbers CPS 04006 and Reference No. 0198 issued on 22nd January,



2021. In Particular the Court has lifted certain excepts of the said affidavit being the averments made out Paragraphs 2, 3 & 4 of the said Affidavit dated 7th October, 2022 to wit:-

Paragraph 2

That on 30th October, 2022, I received a Court Order in the above case from Messrs. Stephen Oddiaga & Co. Advocates with instructions to effect service upon John Mduda Ajwang the Respondent herein who resides in Taveta”.

Also under Paragraph 3

On receipt of the Court Order I made several attempts to trace the Respondent and I did eventually on 4th October, 2022 at around 2.30Pm locate the Respondent at California where I served him after explaining to him the contents of the Court order which he reluctantly accepted but declined to sign for the receipt of the same”.

3. Additionally, the Court has also cited the contents of Paragraphs 2 and 3 of the Affidavit of Service dated 14th November, 2022.

Paragraph 2

On 13th October, 2022 I received a Mention Notice from the firm of Messrs. Stephen Oddiaga & Co. Advocates with instructions to effect service upon John Mduda Ajwang the Defendant (sic) herein.

Paragraph 3

On 14th October, 2022, I proceeded to Taveta a place well known to me and located the Respondent at Taveta – California where I served him explaining to him the contents of the Mention Notice which he received but he declined to sign”.

4. Based on the above asserted evidence by the Licensed Process Server, on 15th November, 2022 being satisfied That indeed the Appellant had properly effected service of the Appeal and mention notice having been served for taking direction, despite of the absence by the Respondent and failure of him to either appoint and/or send a representative nor file any replies to the filed Appeal; the Honorable Court proceeded to provide directions. Directions were taken under the provisions of Sections 79 B and G of the Civil Procedure Act Cap 21 and Order 42 Rules 11, 13 and 18 of the Civil Procedure Rules, 2010.

The Honorable Court directed That the appeal be disposed off by way of Written Submissions with a given time frame. Pursuant to this, by the time of penning down this Judgement, it’s only the Appellant who complied accordingly.

II. The Appellant’s Case

5. As indicated, the Appellant was aggrieved by the decision by the Principal Magistrate in PMCC (Taveta) ELC No. 13 of 2019 delivered on 8th April, 2021. As a result, the Appellant decided to prefer the appeal through a Memorandum of Appeal under the following grounds: -
 - a. That the Learned Trial Magistrate erred in fact and in law by failing to appreciate That the Appellant was bound by his pleadings and ought not be granted a relieve not pleaded;



- b. That the Learned Trial Magistrate misdirected himself in law and in fact by granting orders not sought in the Appellant's pleadings;
- c. That the Learned Trial Magistrate erred in fact and in law in failing to appreciate and put into consideration the Appellant's evidence in support of his case;
- d. That the Learned Trial Magistrate erred in law and in fact in failing to appreciate That the standard proof required from the Appellant at the Trial Court was on a balance of probabilities;
- e. That the Learned Trial Magistrate erred in fact and in law in failing to award an order of specific performance as specifically pleaded by the Appellant in his pleadings;
- f. That the Learned Trial Magistrate erred in law and in fact in holding That despite the Appellant's evidence not having been controverted in any way and in addition to the Appellant having established his case at the trial, the suitable remedy in refund of a sum of Kenya Shillings Ninety Thousand (Kshs. 90,000.00);
- g. That the Learned Trial Magistrate erred in law and fact in failing in awarding the Appellant liquidated sum of Kenya Shillings Ninety Thousand (Kshs. 90,000.00) which the Appellant never pleaded at Trial;
- h. That the Learned Trial Magistrate erred in law and in fact in failing to appreciate and take into consideration That the Respondent accepting part payment of the purchase price and handing over the original title to the Appellant to hold as security he had committed himself to accept the balance and sign transfer documents;
- i. That the Learned Trial Magistrate erred in law and in fact in failing to appreciate and take into consideration That special damages must be specifically proved to be awarded;
- j. That the Learned Trial Magistrate erred in law and in fact in declining to award an order of specific performance compelling the Respondent to transfer the portion of land measuring 50x100 feet to the Appellant;
- k. That the Learned Trial Magistrate erred in law and in fact failing to appreciate That the Parties are bound by the hand written agreement That was adduced in Court; and
- l. That the Learned Magistrate erred in law and fact in writing a Judgment That was in at variance with the pleadings and against the weight of evidence adduced at trial.

From the said appeal, reasons whereof the Appellant prayed for Judgment to be entered against the Respondent under the following terms: -

- a. The appeal be allowed;
- b. The Judgement of the Trial Court in PMCC ELC No. 13 of 2019- Taveta delivered on 8th April, 2021 be set aside;
- c. Judgement be entered in favour of the Appellant against the Respondent as prayed for the Appellant's Plaint dated 3rd October, 2017; and
- d. The Court to award costs of the Appeal.



III. The Written Submissions by the Appellant

6. On 1st December, 2022 the Appellant through the Learned Counsel the Law Firm of Messrs. Stephen Oddiaga & Co. Advocates filed their Written Submissions dated 1st December, 2022. Messrs. Mwanzia Advocate commenced her submission by providing the Court with an introduction and a brief background of the matter from its initial stage. She stated That, initially the Appellant, as the Plaintiff then, filed the Mombasa High Court ELC No. 354 of 2017 against the Respondent but which was subsequently transferred to Magistrate’s court at the Taveta Law Court for hearing and final determination where it was allocated the new number PMCC No. 13 of 2019. The Respondent being the Defendant in the subordinate Court was dully served with summons and the pleadings but failed to neither enter appearance nor file a defence to the suit.
7. As a result, the Learned Counsel informed Court That the case proceeded on for hearing “Ex – Parte” as a formal proof. The Appellant had sought to have the suit land Taveta Taveta Scheme Phase 1/254 transferred to him based on duly executed Sale Agreement, terms and conditions stipulated thereof. The purchase price was for a sum of Kenya Shillings One Hundred and Fifty Thousand (Kshs. 150,000.00). From this Appellant had been able to pay a sum of Kenya Shillings Ninety Thousand (Kshs. 90,000.00) in installments remaining with a balance a sum of Kenya Shillings Sixty Thousand (Kshs. 60,000.00). According to the Learned Counsel the balance was to have been paid upon the transfer of the purchased portion of land to the Appellant. She stated That, despite of the Appellant having been always ready and willing to settle the outstanding balance but the Respondent had become blatantly reluctant to co - operate and finalize the sale transaction.
8. The Learned Counsel submitted That the appellate Court had a legal mandate on assessing, re – evaluating and re – analyzing the proceedings of the Sub – ordinate Court. To support he assertion on this issue, the Learned Counsel relied on several decisions being: *“[Jackson Kaio Kivuva - Versus - Penina Wanjiru Muchene \[2015\]](#) eKLR and [Abok James Odera T/A A.J Odera & Associates - Versus - John Patrick Machira T/A Machira & Co. Advocates \[2013\]](#) eKLR; [Gitobu Imanyara & 2 others - Versus - Attorney General \[2016\]](#) eKLR and Peters – Versus - Sunday Post Ltd (1958) EA 424.*

The Learned Counsel averred That the case instituted by the Appellant was not defended and hence it was erroneous to have entered Judgement for a liquidated sum of Kenya Shillings Ninety Thousand (Kshs. 90,000.00) which was not a remedy sought in the pleadings. The Learned Counsel advanced an argument That parties were bound by their own pleadings. The fact That the Appellant had never sought for the refund of the part purchase made by the Appellant, it was erroneous to have granted the order as it did. She emphasized and underscored the fact That the balance of being a sum of Kenya Shillings Sixty Thousand (Kshs. 60,000.00) was still being held by the Appellant’s Advocate and was ready to have it handed over to the Respondent upon him signing of the transfer documents.
9. Further, the Leaned Counsel submitted That parties were bound by their own pleadings. To buttress on this point, the Learned Counsel cited the following cases:- *“[Philmark Systems Co. Ltd -Versus- Andermore Enterprises \[2018\]](#) eKLR; [Galaxy Paints Company Ltd -Versus - Falcon Guards Ltd \[2000\]](#)eKLR; Civil Appeal No. 219 Of 1998; [Independent Electoral and Boundaries Commission & another -Versus- Stephen Mutinda Mule & 3 others \[2014\]](#) eKLR*

In conclusion, the Learned Counsel held That the Appellant’s evidence was uncontroverted. Indeed, according to the Counsel, the Appellant satisfied the legal requirement and standard upheld in all civil cases on proof of a balance of probabilities. The Counsel urged the Honorable Court grant the orders of specific performance as sought in the Plaint dated 3rd October, 2017 and allow the filed Appeal and the prayers as sought.



IV. Analysis and Determination

10. I have keenly considered all the filed pleadings being the Memorandum of Appeal dated 22nd April, 2021; the Record of Appeal dated 30th June, 2021; the Written Submissions and the cited authorities by the Appellant; the relevant Provisions of *the Constitution* of Kenya, 2010 and statutes. By the time of penning down this Judgement. As already pointed out, the Respondent had not filed pleadings whatsoever neither supporting nor opposing the filed Appeal whatsoever. Hence the Court will proceed to make a determination based on its merit.
11. For the Court to arrive at an informed, reasonable, just, fair and equitable decision, the Court has framed three (3) issues for its consideration and determination. These are:-
 - a. Whether the Appeal preferred by the Appellant through the filed Memorandum of Appeal dated 22nd April, 2021 has any Merit whatsoever;
 - b. Whether the parties herein are entitled to the relief sought herein; and
 - c. Who will bear the costs of the appeal.

Issue No. (a) Whether The Appeal Preferred By The Appellant Through The Filed Memorandum Of Appeal Dated 22nd April, 2021 Has Any Merit Whatsoever;

Brief Facts

12. Before embarking on the analysis of the sub-heading herein, the Honorable Court feels it imperative to extrapolate on the brief facts of the case. From the filed pleadings on, 26th January, 2013 the Appellant and the Respondent entered into a hand written sale agreement drafted in Kiswahili language for sale of a portion of land measuring 50x100 feet to the Appellant from the portion of land known as Taveta –Taveta Scheme Phase 1/254 which was registered to the Respondent.

These were the terms and conditions stipulated in the Sale Agreement: -

- a. The property to be sold was Land Reference 50x100 ft Plot;
- b. Purchase Price of Kenya Shillings One Hundred and Fifty Thousand (Kshs. 150,000.00);
- c. Deposit for the Purchase Price Kenya Shillings Fifty Thousand (Kshs. 50,000.00) and balance later on.

The agreement was witnessed by several witnesses.

From the facts, with passage of time the Appellant managed to pay a total sum to Kenya Shillings Ninety Thousand (Kshs. 90,000.00) and was to pay a balance of Kenya Shillings Sixty Thousand (Kshs. 60,000.00) which according to the Appellant was to be paid upon the Defendant causing the transfer of the said portion of the land to the Appellant. The Appellant informed Court That although he passed the original title deed to him but the Respondent appeared unwilling to transfer the land to the Appellant despite all efforts made and thus it was for this reason That he opted to institute this Suit.

The Appellant sought for an order compelling the Respondent to transfer the Suit portion of Land to him and costs of the Suit.

13. As indicated the Respondent never filed any defence and hence the suit proceeded unopposed. That is adequate on facts. Now turning to the issues under this sub-heading and this being an Appellant



Court, I wish to commence by fully agreeing with the Learned Counsel for the Appellant on the duty of an Appellate Court and from the cited cases of: “Abok James Odera (Supra) to the effect That:-

“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-analyze the extracts on the record and then determination whether the conclusion reached by the Learned Trial Judge are to stand or not and give reason either way”.

Additionally, on the same issue, I am compelled to rely on “the *Classicus locus*” decision of “*Selle – Versus- Associated Motor Boat Co. Limited (1968) E.A 123*” where the Court held: -

“I accept counsel for the respondent’s proposition That this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are That this 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. In particular, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either That he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (*Abdul Hammed Saif – Versus - Ali Mohamed Sholan (1955), 22 E.A.C.A. 270*).

Similarly, in the case of “*Peter –Versus - Sunday Post Limited 1958 E.A. 424*” Sir Kenneth O’Connor P. rendered the applicable principles as follows:-

“It is a strong thing for an appellate court to differ from the finding on a question of facts, of the judge who tried the case and who had the advantage of seeing and hearing the witnesses. An appellate court has indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon the evidence should stand. But this is a Jurisdiction which should be exercised with caution. It is not enough That the appellate court might itself have come to a different conclusion....”

14. Certainty, this Court has already diligently and meticulously discharged this duty as required by law and under the watchful guidance of these precedents. In particular the Court has been able to re - evaluate and re-assess the evidence adduced before the Trial Court as found from the 58 pages of the Record of Appeal and in particular the Contents found from Pages 29 to 58.

The Principles of The Law of Contract – Nature, Meaning and Scope of Contracts.

15. Now turning to the main issues under this sub – heading. Taking That the main substratum of this appeal on matters arising from a Sale Agreement for the sale of the suit land between the Appellant and the Respondent, terms and conditions stipulated thereof and the allegation of specific performance, this Court intends to have a keen assessment on the principles of the Laws of Contract and the breach of it thereof. Without wanting to turn this Judgement into an academic discourse, contracts, which include sale agreements, are governed by the provisions of the “The Laws of Contract, Cap. 23”, the *Land Act*, No. 6 of 2012 among other Laws of Kenya. Contract is an agreement entered between one or more than one person with another or others creating an obligation for a consideration and its enforceable or recognizable in law. There are other definition of Contract as being a promise or a set of promise, for breach of which the law gives a remedy or the performance of which the law in some way recognized as a duty. It is trite law That Courts cannot re – write contracts for parties, neither



can they imply terms That were not part of the Contract. In the case of: “Rufale – Versus – Umon Manufacturing Company (Ramsboltom) (1918) LR 1KB 592, Scrutton L.J held as follows:

“The first thing is to see what the parties have expressed in the contract and then an implied term is not to be added because the court thinks it would have been reasonable to have inserted it in the contract” .

Indeed, Courts do not make contracts to parties. Courts do not even try to improve the contracts which the parties have made themselves. If the express terms are perfectly clear and ambiguity, there is no choice to be made between different meanings. The clear terms must be applied even if the court thinks some other terms could have been more suitable.

16. To elaborately unravel the matter further and indepth, this Court wishes to pose the following two (2) basic issues:-
- (a) Was the sale agreement entered between the Appellant and the Respondent legally binding and hence valid; and if so;
 - (b) What are the available legal remedies for the Parties herein.

To respond to these two (2) issues I am compelled to seek refuge from the Provisions of Sections 3 (3) of Law of Contract Cap 23 and Sections 38 to 40 of the Land Act No. 6 of 2012. At this juncture, there, there will be need to assess the validity of Contract in sale of land. These are provided for under both the provisions of Sections 38 and 39 of the Land Act, No. 6 of 2012 which states:-

Section 38 (1):- “Other than as provided by this Act or by any other written law no suit shall be brought upon a Contract for the disposition of an interest in land:-

- a. The Contract upon which the suit is founded:
 - i. Is in writing;
 - ii. Is signed by all the parties thereto; and
 - iii. the signature of each party signing has been attested to by a witness who was present when the contract was signed by such party.

Section 39:- “If, under a contract for the sale of land, the Purchaser has entered into possession of the land, the Vendor may exercise his or her contractual right to rescind the contract by reason of a breach of the contract by the Purchaser by:-

- a. Resuming possession of the land peaceably; or
- b. Obtaining an order for possessions of the land from the court in accordance with the provisions of Section 41.

17. Further, the provision of Section 40 of the Land Act, No. 6 of 2012 provides for the damages from the breach of Contract. It provides:-

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- (1) “Nothing in Section 39 of the Act prevents a vendor from claiming damages and Mesne Profits from the Purchaser for the breach of a Contract of sale or for breach of any other duty to the Vendor which the Purchaser may be under independently of



Contract or effects the amount of damages That the Vendor may claim..”

- (2) Any term express or implied in a contract or other instrument That conflicts with this section shall be inoperative.

18. Defining the term “Breach of Contract” based on the definition from the Black Laws Dictionary to mean:-

“ A violation of a contractual obligation failing to perform one’s own promise, by repudiating it or interfering with another’s performance. A breach may be one by non performance or by reputation or by both. Every breach gives rise for a claim of damages and may give rise to other remedies....”

In the case of: “Photo Production – Versus – Securicor Limited (1980) AC 827 at page 848 Lord Diplock remarked That a characteristically, commercial contracts are a source of primary legal obligations upon each party to it to procure That whatever has been promised will be done.....Every failure to perform a basic term of contract, is a breach of contract. The secondary obligation on the part of the contract on the part of the contract breaker to which it gives rise by....common law is to pay monetary compensation to the other party for the loss sustained by him in consequence of breach”.

The other issue raised was on time. According to Laws of England (4th Edition) Vol. 9 Para. 481 Page 338 holds:-

“ The modern law, in the case of contracts of all types, may be summarized as follows:- Time will not be to be of the essence unless (1) the parties expressly stipulates That conditions as to time must be strictly complied with; or (2) the nature of the subject matter of the contract or the surrounding circumstances show That the time should be considered to be of the essence; or (3) a party who has been subjected to unreasonable delay gives notice to the party in default making time of the essence. Even if time is not of essence a party who fails to perform within the stipulated time will be liable in damages”.

19. Based on the above cited legal principles, I now wish to directly apply these legal principles to the instant case. It is not disputed That the Appellant and the Respondent herein did execute a sale agreement for the sale of the suit land terms and conditions stipulated thereof. Essentially, the purchase price was a sum of Kenya Shillings One Hundred and Fifty Thousand (Kshs. 150, 000.00/=) the Purchase Price was for a sum of Kenya Shillings One Hundred and Fifty Thousand (Kshs. 150,000.00) and of which a sum of Kenya Shillings Ninety Thousand (Kshs, 90,000.00) was paid off in three (3) installments in addition to the initial deposit of Kenya Shillings Fifty Thousand (Kshs. 50,000.00) leaving a balance of a sum of Kenya Shillings Sixty Thousand (Kshs. 60,000.00) which the Appellant emphasizes he was willing and ready to pay but upon the Respondent causing the transfer of portion of land. Further, the Appellant insisted That it’s the Respondent who had blatantly refused to sign the transfer documents despite having handed over the original title deed to the Appellant. In the given circumstances, the major question this court needs to answer is whether there has been any breach of Contract or not and the consequences therefrom. Undoubtedly, in the instant case, and from surrounding facts and inferences in the matter, this Honourable Court will not hesitate to conclude That the Appellant was in utter breach of the terms from the duly executed agreement for the sale of the suit land. I dare say That, it has been adequately proved That there was failure to make the payment of the outstanding balance, wrongful possession of the suit property and failure to comply with the terms of the sale agreements.



20. From the above, there is no dispute and I fully concur with the Learned Trial Court That indeed the Sale Agreement fulfils these ingredients having been signed and witnessed by several witnesses. Then That brings one to the second concern on whether the Parties to the contract fully complied with the terms and condition of the agreement. I discern here That the Learned Magistrate from the contents of the proceedings on Pages 51 to 58 of the Record of Appeal has graphically appreciated the terms of the sale agreement so well. The Learned Magistrate noted the Purchase Price was for a sum of Kenya Shillings One Hundred and Fifty Thousand (Kshs. 150,000.00) and of which a sum of Kenya Shillings Ninety Thousand (Kshs, 90,000.00) was paid off in three (3) installments in addition to the initial deposit of Kenya Shillings Fifty Thousand (Kshs. 50,000.00) leaving a balance of a sum of Kenya Shillings Sixty Thousand (Kshs. 60,000.00) which the Appellant emphasizes he was willing and ready to pay but upon the Respondent causing the transfer of portion of land. Further, the Appellant insisted That it's the Respondent who had blatantly refused to sign the transfer documents despite having handed over the original title deed to the Appellant. Indeed, the Appellant though without any proof informed Court to demonstrate his willingness and indeed him having deposited the balance of the purchase price with his Advocate and was only waiting the signing of the transfer documents by the Respondent to have it released.

21. From all these, the Appellant as one of its grounds in the Appeal has vehemently criticized the legal reasoning taken by the trial Court and stand in deciding to have the Respondent refund the Purchase Price the sum of Kenya Shillings Ninety Thousand (kshs. 90,000.00) on three (3) grounds That the Learned Magistrate erred in not keenly assessing terms of the agreement.

Secondly, misinterpreting the concept of specific performance and finally granting the Respondent what had not been pleaded nor supported as parties were bound by their own pleadings. In as I fully concur with the Learned Counsel for the Appellant on these very sounding legal principles but quickly step aside to correct the Counsel all these principles depend on circumstances and facts where the Court has unfettered and wide discretionary powers and latitude specific performance like any other equitable remedy are discretionary and will be granted on well settled principles.

22. I discern That from my own critical assessment of the Sale Agreement I have not seen anywhere the parties have placed any condition to the sale. My assessment is That the sale was to have been completed immediately upon the signing of the agreement. I am still to come across where the Appellant derives the condition That the balance was to be paid upon the signing of the transfer documents. If That was what the Parties intended I wonder what is this That prevented them from stating so. Indeed, it was at That point That the Appellant should have stuck to his foot and insisted on the completion clause and the documents being inserted as a Provision in the Sale Agreement. I fully empathize with the Appellant but the more reason That why parties in such complex conveyancing transaction then ought to seek for professional legal advice. It's neither a formality nor a cosmetic affair. Just for That ignorance the Appellant has to bear the brand. To this extend the Learned Magistrate was purely correct and took proper decision.

Issue No. (b) Whether The Parties Herein Are Entitled To The Relief Sought Herein

23. Under this sub-heading having elaborately stated That the Sale agreement was valid and That Parties are bound by the terms of the Sale Agreement there was no condition placed in the Sale Agreement to have Respondent first sign the transfer documents to have enabled the transfer of the land to the Appellant the matter is already concluded.

Ideally and for the benefit of doubt what the Appellant should have done as an available legal remedy and taking That he was in possession of the original title and fully performed his part of the bargain was to sue the Respondent for specific performance and if he still failed to get the cooperation of



the Respondent to seek for orders of the Court through the Execution Officer duly execute the Land Control Board and Transfer documents for sub-division and transfer but That I dare say That this would only be applicable where the Appellant had fully performed all the terms the contract which he had undertaken to perform whether expressly or by implication and which he ought to have performed at the date of the writ in action. It's neither helpful nor adequate to merely say without any empirical evidence the balance of Kenya Shillings Sixty Thousand (Kshs. 60,000.00) was in possession of his Advocates and was only waiting for the Respondent to sign the transfer documents.

On this point, I fully agree with the Learned Magistrate on all aspects. I have noted That the trial Court ably relied on the cases of:- “Gurdev Singh Birdi And Narinder Singh Ghatora As Trustees Of Ramgharia Institute Of Mombasa–Versus- Abubakar Madhbuti Court of Appeal Civil Appeal No. 165 of 1996 & Thrift Homes Limited – Versus - Kenya Investment Limited 2015 eKLR, I and the following other cases being “Reliable Electrical Engineers (K) Ltd – Versus - Mantrac Kenya Limited [2006] eKLR. “Kenya Power and Lighting Company Limited – Versus - Nathan Karanja Gachoka & another [2016] eKLR the Court held:

I am of the opinion That uncontroverted evidence must bring out the fault and negligence of a Defendant and That a Court should not take it truthful without interrogation for the reason only That it is uncontroverted. A Plaintiff must prove its case too upon a balance of probabilities whether the evidence is unchallenged or not”.

The Blacks' Law Dictionary 9th Edition Page 213 defined a breach of contract as: -

A violation of a contracted obligation by failing to perform one's own promised by repudiating or by interfering with another Parties performance. A breach may be one by non-performance or by repudiation or both. Every breach gives rise to a claim for damages may give rise to a claim for damages and may give rise to other remedies. Even if the injured party sustains no pecuniary loss or unable to show such loss with sufficient certainty he has at least a Claim for nominal Damages.....”

From the instance case, I reiterate That the Appellant was the main cause of the breach despite having the original title from the Respondent who was only holding on sum of Kenya Shillings Ninety Thousand (Kshs. 90,000.00) failed to pay off the balance a sum of Kenya Shillings (Kshs. 60,000.00). In all certain means and based on the surrounding facts and inferences herein, indeed the Appellant contributed to the breach of the contract. It is a case where the English idiom goes “You made the bed lay on it” and “You cannot eat the cake and have it”. Hence the appeal must fail.

Issue No. (c) Who Will Bear The Costs Of The Appeal.

24. It is now well established That the issue of Costs is at the discretion of Courts. Costs mean the award That a party is granted at the conclusion of any process, legal action or proceeding in any litigation. The proviso of the provision of Section 27(1) of the *Civil Procedure Act*, Cap 21 holds That costs follow the events (See the Court of Appeal cases of “Cecilia Karuru Ngayu – Versus – Barclays Bank of Kenya & Another [2016] eKLR while quoting with approval the case of “Republic -Versus – Rosemary Wairimu Munene ex – parte Applicant – Versus – Ihururu Dairy Farmers Co- operative Society Limited (2014) eKLR; and Supreme Court case of “Jasbir Rai Singh – Versus – Tarchalan Singh (2014) eKLR held thus:-

“The basic rule on attribution of costs is That costs follow the event...it is well recognized That the principle costs follow the event is not be used to penalize the losing party; rather it



is for compensating the successful party for the trouble taken in prosecuting or defending the case.”

25. In the instant case, taking That the appeal ha not been successful the Appellant has to pay the Costs of the Appeal.

V. Conclusion and findings

26. Having caused an in-depth analysis to the issue raised herein by the Honorable Court, I am of the view the Appellant has failed to prove its appeal. For avoidance of doubt I proceed to make the following specific orders: -
- a. That Judgement be and is hereby entered that the appeal preferred herein by the Appellant is unmeritorious and hence be dismissed in its entirety with costs;
 - b. That the Judgement delivered on 8th April, 2021 in PMCC (Taveta) ELC NO. 13 of 2019 by the Learned Magistrate be and is hereby upheld;
 - c. That an order be and is hereby made for the Appellant to henceforth within the next Seven (7) days from the date of this Judgement to release the Original Certificate of the title deed for the suit land to the Respondent; and
 - d. That the costs of the Appeal to be borne by the Appellant.

It Is So Ordered Accordingly

JUDGEMENT DELIEVERD THOUGH MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 27TH DAY OF SEPTEMBER 2023.

HON. MR. JUSTICE L.L. NAIKUNI

ENVIRONMENT AND LAND COURT AT MOMBASA

