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Kulankash v Okeyo & another (Environment and Land Appeal 11 of 2020) [2025] KEELC 3547 (KLR) (25 April 2025) (Judgment)

Neutral citation: [2025] KEELC 3547 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ENVIRONMENT AND LAND APPEAL 11 OF 2020

MD MWANGI, J

APRIL 25, 2025

BETWEEN

PHILIP KIRAPEI KULANKASH .... APPELLANT

AND

ODONGO MARK OKEYO .... 1ST RESPONDENT

THE REGISTRAR, KAJIADO .... 2ND RESPONDENT

(Being an appeal from the whole judgment, orders and decree of Hon. M. Kasera in CMCC NO. 550 of 2017 between Philip Kirapei Kulankash -vs- Odongo Mark Okeyo issued on the 28th of May 2021 at Kajiado)

JUDGMENT

Background.

1. The appeal before me is against the judgment of Hon. M. Kasera (SPM) issued in Kajiado CMCCC 505 of 2017 delivered on 28th May 2021. The Appellant who was the Plaintiff in the case before the subordinate court in his memorandum of appeal dated 10th July 2020, listed 7 grounds of appeal as follows:-

   a. The Learned Trial Magistrate erred in law and fact by ordering specific performance of the agreement dated 8th March 2010 that was statutorily time barred.

   b. The Learned Trial Magistrate erred in law and fact by allowing the prayer for specific performance whereas the *Land Control Act* provides that the only remedy for any transaction which becomes void under the Act is recovery of consideration paid.

c. The learned Trial Magistrate erred in law and fact by failing to find that the transaction between the parties was void by operation of the law for failure to procure the Land Control Board consent.

d. The Learned Trial Magistrate erred in law by relying on the doctrines of Equity to void clear statutory provisions of the *Land Control Act*, Cap 302, Laws OF Kenya.

e. The Learned Trial Magistrate erred fundamentally by invoking the doctrines of equity and ignoring the express provisions of the *Land Control Act*.

f. The Learned Trial Magistrate erred in law and fact by ordering specific performance of the contract dated 8th March 2010 which is not enforceable as no land control board consent was procured within 6 months of making the agreement.

g. The Learned Trial Magistrate erred in law and fact by ordering the transfer of the parcel of land known as Kajiado/Kitengela/17228 by the Appellant to the 1st Respondent within 60 days which was not part of the contract as agreed by parties.

2. The Appellant therefore sought for orders;

i. That the judgment, order and decree of the Learned Trial Magistrate be set aside.

ii. That the prayers in the plaint dated 22nd November 2017 be allowed.

iii. That the 1st Respondent herein to bear the costs of this appeal.

3. The Appellant who was the Plaintiff in the case before the Trial Magistrate had in his plaint pleaded that he and the 1st Respondent herein had entered into an agreement for sale of the entire parcel of land known as Kajiado/Kitengela/17228 on 8th March 2010 for the sum of Kshs. 3,736,000/. The 1st Respondent had paid him a sum of Kshs. 300,000/- as a deposit of the purchase price upon execution of the agreement.

4. It was the Appellant's case that the 1st Respondent did not pay him any other amount of money towards the purchase of the said property. He accused the 1st Respondent of taking advantage of his illiteracy to draft a skewed, imbalanced and unfair agreement and further imposing a colossal sum of Kshs. 756,000/- as legal fees.

5. The Appellant insisted that the 1st Respondent in his capacity as the advocate in conduct of the transaction for both parties and doubling as the purchaser imposed illegal, vague, oppressive, and punitive terms to the contract which he particularized at paragraph 11 of his plaint. The 1st Respondent further on 5th March 2016 placed a caution against the Appellant's title restricting dealings on the land, citing a 'purchaser's interest' in furtherance of the agreement referred to earlier thereby curtailing the Appellant's proprietary rights over the subject property. He termed the actions of the 1st Respondent as unlawful, illegal, unfair and unjustified.

6. The Plaintiff prayed for an order that the agreement dated 8th March 2010 be voided, liquidated damages of Kshs. 375,600/- being 10% of the purchase price, an order for removal of the caution lodged on his title by the 1st Respondent and costs of the suit.

Responses to the suit by the Appellant

7. In response to the suit by the Appellant, the 1st Respondent who was the 1st Defendant in the case before the trial court filed a statement of Defence and Counter-claim dated 30th January 2018. He

averred that he had actually paid the Appellant a further Kshs. 1,000,000/- in addition to the deposit of Kshs. 300,000/-; further the 1st Respondent asserted that it was a term of the contract between him and the Appellant that Kshs. 756,000/- of the purchase price was to be used to cover legal expenses leaving a balance of Kshs. 1,700,000/- which was to be paid by the 1st Respondent (Purchaser) to the vendor (Appellant), upon successful registration of the transfer in the name of the 1st Respondent. Adding the amount assignable to legal fees, the 1st Respondent insisted that the remaining balance of the purchase price was Kshs. 1,700,000/- only which he was ready and willing to pay in accordance with the terms of the agreement.

8. The Defendant denied the allegations of illegalities, misrepresentation, vagueness and breach of terms of the agreement pleaded and particularized by the Appellant in his plaint. He stated that the terms of the agreement were drafted and explained to the appellant and he understood and signed the agreement before another advocate upon confirmation that he understood the terms therein.

9. The 1st Respondent in the Counterclaim while reiterating the averments in his statement of Defence accused the Appellant of breaching the sale agreement without just cause and or excuse by falling to avail the completion documents as outlined in the agreement. He reiterated that he had the money ready to pay the balance of the purchase price as stipulated above, but the Plaintiff had refused to accept the money. He enumerated the particulars of breach at paragraph 21 of the statement of Defence and Counterclaim.

10. The 1st Respondent prayed for judgment against the Appellant for specific performance, damages for breach of contract with interest at court rates and costs.

11. In his impugned judgment delivered on 28th May 2020, Hon. M. Kasera (SPM) found in favour of the 1st Respondent and allowed the prayer for specific performance directing the transfer of the title to the suit property to the 1st Respondent within 60 days of the date of the judgment. He further directed the 1st Respondent to pay the balance of the purchase price, Kshs. 1,700,000/- within 60 days of receipt of the title deed. The costs (presumably of the suit and counter-claim) were awarded to the 1st Respondent.

Directions on the hearing of the Appeal.

12. The court's directions were that the appeal be canvassed by way of written submissions. The parties duly complied by filing their respective submissions. The submissions now form part of the record of this court and I have had the benefit of reading and considering them in writing this judgment.

Issues for determination.

13. Having carefully considered the memorandum of appeal, the record of appeal in its entirety and the submissions by the parties; the issues for determination in this court's opinion and as correctly identified by the parties are;

    a. Whether the 1st Respondent counter-claim was statutorily time barred.

    b. Whether the agreement between the parties was void for failure to procure the Land Control Board consent.

    c. Whether the principles of equity can be used to avoid clear statutory obligations.

    d. Whether specific performance was available to the 1st Respondent as a relief in the circumstances of this case.

e. What remedy was available to the 1st Respondent if at all?

Analysis and determination

14. This being a first appeal, I am conscious of the mandate of a first appellate court to re-evaluate the evidence before the trial court as well as the judgment or ruling and arrive at its own independent conclusion on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to fresh scrutiny and make conclusions about it as stated in the now well-known case of Selle and another –vs- Associated Motor Boat Company Limited & others (1968) EA 123.

15. Mativo J in Mursal & another v Manese (suing as the legal administrator of Dalphine Kanini Manesa) (Civil Appeal E20 of 2021) [2022] KEHC 282 (KLR) (6 April 2022) (Judgment) held that,

> "A first appellate court is mandated to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand."

16. Emphasizing on the critical role of the first appellate court, the Judge stated that'

> "A first appellate court is the final court of fact ordinarily and therefore a litigant is entitled to a full, fair, and independent consideration of the evidence at the appellate stage. Anything less is unjust. The first appeal has to be decided on facts as well as on law. In the first appeal parties have the right to be heard on both questions of law as also on facts and the first appellate court is required to address itself to all issues and decide the case by giving reasons. While considering the scope of Section 78 of *Civil Procedure Act*, a court of first appeal can appreciate the entire evidence and come to a different conclusion."

17. I will proceed to determine the identified issues.

A. Whether the 1st Respondent's counterclaim was time barred.

18. This issue was brought up for the 1st time by the Appellant in his submissions before this court. He submitted that the 1st Respondent's counter-claim was premised on a contract being the agreement between him and the 1st Respondent dated 8th March 2010, for the sale of suit property. He averred that the agreement was statutorily time barred in light of Section 4(1) of the *Limitation of Actions Act*.

19. The Appellant's position as expressed in the submissions was that the wording of Section 4(1) of the *Limitation of Actions Act* means that no one shall have the right or power to bring an action based on a contract after the end of six (6) years from the date on which the cause of action accrued. He opined that the cause of action in this matter arose on 8th March 2010 and was therefore time barred by the time of filing the counterclaim.

20. The Appellant cited various decisions to support his argument. He referred to Kiamokama Tea Factory Company Limited –vs- Joshua Nyakoni (2015) eKLR, Richard Toroitich –vs- Mike K. Lelmet & 3 others (2014) eKLR, as well as South Nyanza Company Limited –vs- Dickson Aoro Owuor (2017) eKLR.

21. The Appellant submitted that given that the counterclaim was filed after 6 years and without leave; the court lacked the jurisdiction to entertain the matter.

22. The 1st Respondent in his submissions pointed out that the Appellant was raising the issue of time bar as a new issue opening a new and strange litigation at the appellate stage. The issue had not been pleaded and was therefore not canvassed before the trial court. The 1st Respondent submitted that Order 2 rule 4 of the Civil Procedure Rules requires any relevant statute of limitation to be specifically pleaded. A party must not therefore be allowed to open up a new issue at the appellate stage as doing the same amounts to a breach of the right to a fair hearing.

23. The 1st Respondent referred to various decisions to support his position including the decision in the case of Mary Kitsao Ngowa & 36 others –vs- Krystalline Limited (2015) eKLR, Standard Chartered Financial Services Limited & 2 others -vs- Manchester outfitters & 2 others (2016) eKLR, Florence Nyaboke Machani –vs- Mogere Amosi Ombui & 2 others (2015) eKLR and Mary Akai Lutere –vs- Johnstone Kamau Mwangi (2020) eKLR.

24. Indeed, Order 2 rule 4 of the Civil Procedure Rules is categorical on matters that must be specifically pleaded. It provides that;

> " A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant Statute of limitation or any fact showing illegality –
>
> a. Which he alleges makes any claim or defence of the opposite party not maintainable;
>
> b. Which, if not specifically pleaded, might take the opposite by surprise; or
>
> c. Which raises issues of fact not arising out of the preceding pleading.
>
> (2) without prejudice to sub-rule (1), a defendant to an action for the recovery of land shall plead specifically every ground of defence on which he relies, and a plea that he is in possession of the land by himself or his tenant shall not be sufficient."

25. Limitation is one of the issues that must be specifically pleaded. Where it is not, the party seeking to rely on it is barred from raising it in the submissions and more particularly at the appellate stage. As the Supreme Court of Kenya stated in the case of Florence Nyaboke (supra), if the court were to admit and determine such issues, the court would be determining them in the first instance which would be contrary to established principles and the design of the judicial system.

26. The Appellant cannot now raise the issue of limitation in this court having not pleaded it in his defence to the counterclaim, and cannot fault the learned Magistrate for not addressing that issue as he purports to do in his submissions before this court.

27. I will leave at that, but suffice it to say that in determining whether a suit or a counter-claim premised on an alleged breach of contract is time-barred, the consideration is not the date of the contract but as clearly put in Section 4 (1) of the *Limitation of Actions Act*, the date on which the cause of action arose i.e. the date on which the " alleged breach" was committed.

28. In this case, I am not the least convinced that the counterclaim by the 1st Respondent was time-barred.

B. Whether the agreement between the parties was void for failure to procure the Land Control Board consent within the stipulated timelines.

29. It is not in dispute in this case that the suit property was agricultural property and was subject to the provisions of the *Land Control Act*. The mandatory Land Control Board consent provided for under the Act was not obtained in this case. The 1st Respondent blames the Appellant for failure to obtain the consent.

30. Under Section 6 of the *Land Control Act*, transactions affecting land, 'shall be void for all purposes unless the Land Control Board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with the Act'. Such transactions include the sale and or transfer of any agricultural land.

31. From the clear reading of the statute, a transaction affecting land as the sale in this case, is rendered void by failure to obtain the Land Control Board consent. In a recent case, the UK Supreme Court citing Lord Hope in the case of Imperial Tobacco Limited –vs- Lord Advocate (2012) UKSC 61; 2013 SC (UKSC) 153 at paragraph *14*, had this to say on interpretation of a statute:-

> " The best way of ensuring that a coherent, stable and workable outcome is achieved is to adopt an approach to the meaning of a statute that is constant and predictable. This will be achieved if the legislation is construed according to the ordinary meaning of the words used."

32. In my considered view, the *Land Control Act* is clear and unambiguous on the fate of transactions affecting land where the consent of the Land Control Board is not procured. The Statute is categorical that the transaction is rendered void. That must be the fate of the transaction between the parties herein.

33. As the Court of Appeal observed in the case of David Sironga Ole Tukai –vs- Francis Arap Munge & 2 others (2014) eKLR, there have been numerous decisions from both the Court of Appeal and the High Court spanning over 47 years since the enactment of the *Land Control Act*. The decisions have been consistent on the effect of failure to comply with the provisions of the *Land Control Act*. The Court of Appeal rightly observed that;

> " The reason behind the above stringent provisions of the Act is to be found, in our view, in the rationale of the 'Land Control Legislation. Before enactment in its present form, the *Land Control Act* had existed in one form or another in the colonial period. Writing on a previous version of the same law namely, the Land Control (Native Lands) ordinance (No. 28 of 1959), the eminent Kenyan Legal Scholar, the late Prof. H.W.O Okoth Ogendo captured the purpose of the legislation thus;
>
> "The purpose of the Land Control (Native Lands) Ordinance was to protect uninitiated peasants from improvident use of their rights under the new tenure system. Even though individualization was seen as necessary precondition to the planned development of the African areas, it was also appreciated that it could lead to many other problems more difficult to solve than the ones it was intended to eliminate. The Royal Commission had warned, for example, that in many peasant communities individualization had led to 'the emergence of a chronic state of indebtedness, the continued fragmentation of holdings and the unproductive accumulation and holding of land by a few individuals in circumstances of little income-earning opportunity for those who have parted with the land"". (See Tenants of the Crown, Acts Press (1991) page 74).

34. The Court of Appeal concluded that the departure from previous decisions by the Learned Judge was not informed by any serious reasons. The court reiterated that failure to obtain the consent of the Land

Control Board required under section 6(1) of the *Land Control Act* rendered the transaction void. This court is bound by the decision of the Court of Appeal.

35. I am aware of the other decisions by the Court of Appeal cited by the 1st Respondent expressing a different opinion. The decision in the David Sironga case (supra) finds further support in the fact that when the people of Kenya adopted, enacted and gave themselves *the Constitution* of Kenya 2010, they under Article 68 thereof commanded parliament to revise, consolidate and rationalize existing Land Laws. The fifth schedule of *the constitution* spelt out timeline for compliance with that dictate as four years.

36. The Parliament of Kenya indeed revised, rationalized and consolidated various Land Statutes. In the process, Parliament repealed various Acts including the Indian Transfer of Property Act, 1882. The Government Lands Act, the Registration of Titles Act, The Registered *Land Act*, the Way leaves Act and The Land Acquisition Act.

37. In its wisdom, Parliament, the institution vested with the legislative authority of the Republic of Kenya by the people of Kenya left the *Land Control Act*, Cap 302 of the Laws of Kenya, intact. It is therefore remains one of the Laws of Kenya.

38. Former Chief Justice of the USA John Marshal stated that;

> "Judicial power, as contra distinguished from the power of the laws, has no existence; courts are the mere instruments of the law and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and when that is discerned, it is the duty of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the Judge, always for purpose of giving effect to the will of the legislature; or in other words to the will of the law."

39. The will of the law is clear to my mind in as far section 6 of the *Land Control Act* is concerned.

C. Whether the principles of equity can be used to avoid clear statutory provisions, and whether specific performance was available to the 1st Respondent in the circumstances of the case.

40. I tie these two issues together for good reason. Specific performance is an equitable remedy.

41. The jurisprudence on specific performance is well settled in this country. In the case of Reliable Electrical Engineers Limited –vs- Mantrac Kenya Limited (2006) eKLR, Maraga J (as he then was), stated that: -

> "The jurisdiction of specific performance is based on the existence of a valid enforceable contract. It will not be ordered if the contract suffers from some defect, such as failure to comply with the formal requirements or mistake or illegality which makes the contract invalid or unenforceable. Even when a contract is valid and enforceable, specific performance will however not be ordered where there is adequate alternative remedy. In this respect damages are considered to be an adequate alternative where the claimant can readily get the equivalent of what he contracted for from another source. Even when damages is an adequate remedy specific performance may still be refused on the ground of undue influence or where it will cause severe hardship to the Defendant."

42. In the case of Amina Abdul Kadir Hawa –Vs- Rabinder Nath Anand & Another (2012) eKLR, the court held that one of the parameters to be met or demonstrated to exist was that,

> " .....the party entitled to earn the relief has to demonstrate that he/she has fulfilled all his/her obligations under the terms of the contract. Or alternatively that there is demonstrated proof that he/she is ready and willing to fulfil the same."

43. In the case of Thrift Homes Ltd –Vs- Kays Investment Ltd (2005) eKLR, the court stated that: -

> " Specific performance, like any other equitable remedy, is discretionary and the court will only grant it on well settled principles. The jurisdiction of specific performance is based on the existence of a valid, enforceable contract. It will not be ordered if the contract suffers from same defect, such as failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or unenforceable."

44. The question then that this court must consider is whether there was a valid enforceable contract between the parties in this case. My finding on issue Number 2 was that the contract between the parties was rendered void by failure to obtain the land control board consent. That means the contract became unenforceable or invalid. This would alone would disentitle the 1st Respondent the order of specific performance.

45. Conscious of this deficiency in his case, the 1st Respondent ingeniously introduced the aspect of a constructive trust which however had not been pleaded in his counterclaim. As this court found in considering the 1st issue, the 1st Respondent cannot now raise the new issue of the existence of a constructive trust in this court. This court would be determining the issue in the 1st instance which would be against established principles and the design of the Judicial system. It is noteworthy that the 1st Respondent had not filed any cross appeal.

46. This court has consistently held that parties in litigation are bound by their pleadings. There are numerous authorities in support this position.

47. The Court in the case of the Independent Electoral and Boundaries Commission –Vs- Stephen Mutinda Mule & 3 others (2014) eKLR, was categorical on the issue. It affirmed that parties in litigation are bound by their pleadings. The court in the case cited with approval the decision by the Malawi Supreme Court of Appeal in Malawi Railways Ltd –Vs- Nyasulu (1998) MWSC 3, where the court quoted an article by sir Jacob entitled 'The present importance of pleadings' published in 1960 where the author had stated that;

> " As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rule of pleadings.....for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might feel aggrieved for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing

him at all and thus be a denial of justice. In an adversarial system of litigation therefore, it is the parties themselves who set the agenda for trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any other business" in the sense that points other than those specific may be raised without notice."

48. In the case of Raila Odinga & Another –Vs- IEBC & 2 others (2017) eKLR, the Supreme Court of Kenya pronounced the essence of pleadings and stated that;

> " It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings."

49. It was too late in the day for the 1st Respondent to introduce the issue of trust at the appellate stage.

50. Even if the court were to consider the issue of trust it would not be applicable in this case. In the above cited case of David Sironga Ole Tukai –Vs- Francis Arap Muge & 2 others (supra), the Court of Appeal was emphatic that,

> " .....granted the express, unequivocal and comprehensive provisions of the *Land Control Act*, there is no room for the courts to import doctrines of equity into the Act. This is the simple message of section 3 of the *Judicature Act*. Consequently, invocation of equitable doctrines of constructive trust and estoppel to override the provisions of the *Land Control Act* has, in our view, no legal foundation. We have also noted that this Court had previously held in a line of consistent decisions and in very clear terms, that there was no room for application of the doctrines of equity in the *Land Control Act*. Those previous judgments were not referred to in the judgment in Macharia Mwangi Maina & 87 Others V Davidson Mwangi Kagiri (supra)."

51. Secondly the provisions of section 6(2) of the *Land Control Act* are explicit that:

> " For the avoidance of doubt it is declared that the declaration of a trust of agricultural land situated within a land control area is a dealing in that land for the purposes of subsection (1).

52. The Court of Appeal made reference to its decision in Daniel Ng'ang'a Kiratu V Samuel Mburu (supra) where it stated that;

> " Section 6(2) of the *Land Control Act* was introduced on 24th December 1980 by *Act No 13 of 1980* to undo the judgment of the High Court in Gatimu Kinguru V Muya Gathangi (supra) where Madan, J., as he then was, held that creation of a trust over agricultural land in a land control area did not constitute "other disposal of or dealing" for the purposes of section (1) of the *Land Control Act* and therefore did not require the consent of the Land Control Board."

53. In the case of Daniel Ng'ang'a Kiratu V SAMUEL MBURU the Court, relying of section 6(2) of the *Land Control Act* reiterated that declaration of trust over agricultural land required consent of the Land Control Board. Therefore,

> "By relying on Gatimu Kinguru V Muya Gathangi (supra) whose effect had been undone by the amendment, which brought in section 6(2), the decision of this Court in Macharia Mwangi Maina & 87 Others V Davidson Mwangi Kagiri (supra), was clearly per incurium. On the same vein even the judgment of the High Court in Mwangi & Another V Mwangi [1986] KLR 328 which was cited in Macharia Mwangi Maina & 87 Others was also per incurium because it was based on Gatimu Kinguru without realizing that the latter decision had been overridden by *Act No 13 of 1980*."

D. What remedy, if any, is available to the 1st Respondent?

54. The only remedy available to the 1st Respondent is as provided under Section 7 of the *Land Control Act*. The section provides that if any money or valuable consideration has been paid in the course of a controlled transaction that has become void under this Act, the money shall be recoverable as a debt by the person who paid it from the person to whom it was paid.

55. The Appellant in this case has expressed his willingness to refund the monies paid. The principle against unjust enrichment in addition to the express provisions of the *Land Control Act* dictates that the money paid in a voided transaction be refunded.

56. Accordingly, the Appellant is hereby ordered to refund the 1st Respondent, the sum of Kshs. 2,056,000/- with interest at court rates from the date of filing suit until payment in full.

57. On the issue of costs; the court considering the circumstances of this case awards the costs of this appeal and the suit and counterclaim to the 1st Respondent against the Appellant.

58. The conclusion of this matter is that the judgment, order and decree of the Learned Trial Magistrate Hon. M. Kasera (SPM) issued in Kajiado CMCCC 505 of 2017 (Philip Kirapei Kulankash -vs- Odongo Mark Okeyo & Another) delivered on 28th May 2021 is hereby set aside and substituted with an order entering judgement in favour of the 1st Respondent against the Appellant for the sum of Kshs. 2,056,000/- with interest at court rates from the date of filing suit until payment in full.

59. The costs of this appeal and the costs of the suit and counterclaim in Kajiado CMCCC 505 of 2017 (Philip Kirapei Kulankash -vs- Odongo Mark Okeyo & Another) are awarded to the 1st Respondent against the Appellant.

It is so ordered.

DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 25TH DAY OF APRIL 2025.

M.D. MWANGI

JUDGE

In the virtual presence of:

Ms. Katsao for the Appellant

Mr. Okeyo for the 1st Respondent

N/A for the 2nd Respondent

Court Assistant: Mpoye

M.D. MWANGI

JUDGE