Nasimiyu v Chirchir & another (Environment and Land Appeal E005 of 2021) [2022] KEELC 15419 (KLR) (20 December 2022) (Judgment)

Neutral citation: [2022] KEELC 15419 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT AND LAND APPEAL E005 OF 2021

FO NYAGAKA, J

DECEMBER 20, 2022

BETWEEN

ESTHER CHESOLI NASIMIYU ..... APPELLANT

AND

MOSES KIPLAGAT CHIRCHIR ..... 1ST RESPONDENT

JAFRED TADAYO ..... 2ND RESPONDENT

(Being an appeal against the judgment and decree of the Hon. M.I.G. Morang'a Senior Principal Magistrate in Kitale CMCC Land Case No. 3 of 2018, delivered on 1st March, 2021)

JUDGMENT

The Background and Pleadings

1. The Appellant filed Kitale Land Case No 3 of 2018 against the Defendants vide a Plaint dated February 8, 2018. Together with the Plaint was a Notice of Motion dated the same date. The prayers in the Notice of Motion were for, among others, an order of injunction against the Defendants pending the determination of the suit. As at the time of determination of the suit, the prayers were spent. In the Plaint, it was pleaded that the Plaintiff who was the legal administrator of her late husband's estate was the legal registered owner of land parcel LR No Moi's Bridge/Moi's Bridge Block 12/(Ex-Cullen)59. The Plaintiff averred further that vide an agreement made on February 19, 2010, her late husband, one Makokha Benard Wafula, and the 1st Defendant sold one (1) acre to the 1st Defendant from the said parcel of land that she was now registered as proprietor as stated above. The agreed sum was Kshs 400,000/= of which a payment of Kshs 280,000/= was paid upon execution of the agreement and the balance of 120,000/= was payable on or before end of August 2010. She averred further that the 1st Defendant had since sold the 1-acre to the 2nd Defendant who intended to till it. Her further claim was that the 2nd Defendant had been threatening her to give his title to the one (1) acre yet he was a stranger thereto. She prayed for the following reliefs:

a. Cancellation of the sale agreement dated February 19, 2010.

b. A declaration that the 1st Defendant is in breach of the agreement.

c. An eviction order issued against the defendants.

d. Costs of the suit.

2. The Defendants instructed their Advocates who filed a Notice of Appointment of Advocates on February 19, 2018 and their Defence and Counterclaim dated February 19, 2018 on July 12, 2018. In the Defence they averred that the suit was time barred pursuant to the provisions of the *Limitation of Actions Act*, Chapter 22 of the Laws of Kenya. Their contention was that the agreement sought to be canceled was entered into eight (8) years before the filing of the suit, specifically, on April 1, 2010, and not February 19, 2010. They averred further that by the said agreement the 1st Defendant purchased one (1) acre from the Plaintiff's now deceased husband for the sum of Kshs 400,000/=. They also raised the defence of estoppel by virtue of the fact that the 1st Defendant had paid a deposit of Kshs 280,000/= upon execution of the agreement and completed the balance of the purchase price, being Kshs 120,000/=, through payments made by him on two dates specified as September 5, 2010 and October 11, 2010. It was their averment that upon the completion of the purchase price, the 1st Defendant was put into possession of the suit property hence his rights on the title accrued by way of a constructive trust.

3. The 2nd Defendant too averred that he entered into an agreement with the 1st Defendant on August 11, 2014 to purchase one (1) acre from him at a consideration of Kshs 650,000/=. He then went into possession of the suit land from the 1st Defendant on October 1, 2014, fenced the same and made developments on it, including planting trees thereon and building houses thereon. He averred that the Plaintiff having been staying on the part of the suit land that was not sold knew of the agreement between the Defendants but never complained about it. He stated that having stayed on the land for four (4) years, his rights over the land had crystallized and become binding on the title. He averred further that the 1st Defendant having made full payment of the purchase price to the initial vendor passed good title to him (the 2nd Defendant) as an innocent purchaser for value. He stated that the Plaintiff was thus registered in trust for herself and the 2nd Defendant.

4. The 2nd Defendant pleaded further that when he purchased the one (1) acre, the land was still registered in the name of the Plaintiff's late husband. That the title was only registered in the Plaintiff's name on August 9, 2016 pursuant to the Certificate of Confirmation of Grant issued in Kitale High Court Succession Cause No 126 of 2015 on August 3, 2016. He pleaded that since he bought the land from the 1st Defendant when he (the 1st Defendant) owed no money to the 2nd Defendant (sic) as the same was 'cleared' by October 11, 2010 and duly witnessed by one Stanley Mosben, he was an innocent purchaser for value. He pleaded further that he made some payment for the processing of the title to land parcel LR No Moi's Bridge/Moi's Bridge Block 12/(Ex-Cullen)59 so that the Plaintiff could transfer the 1 acre therefrom to him. He stated that he was issued with a receipt dated September 13, 2014 in the Plaintiff's late husband's name. He pleaded further his surprise that the Plaintiff wanted to renege on her agreement hence pleaded the doctrine of estoppel.

5. The 2nd Defendant then raised a Counter-claim based on the agreement allegedly made on August 11, 2014 between the 1st Defendant and himself. He pleaded that having been put into possession by the 1st Defendant on October 1, 2014 while the Plaintiff resided on the part of the suit land, the Plaintiff cannot claim that she did not know about the agreement between him and the 1st Defendant. He averred that the Plaintiff was aware of his agreement with the 1st Defendant. His further averment

was that when he bought the land, it was still registered in the name of the Plaintiff's late husband and it remained so until August 9, 2016 when it was transferred to the Plaintiff vide the succession proceedings stated above. He reiterated his claim of being an innocent purchaser for value in the circumstances and that the Plaintiff held the title to the one (1) acre in trust for him since the 1st Defendant transferred good title to him. He repeated that the Plaintiff's claim that her late husband was not paid the sum of Kshs 120,000/= was baseless, false and malicious.

6. He also pleaded that he paid some money, at the Plaintiff's request, for the processing of the entire title of LR No Moi's Bridge/Moi's Bridge Block 12/(Ex-Cullen)59 in the Plaintiff's name so that she would transfer the one (1) acre to him. He pleaded that he was an innocent purchaser. He pleaded further that he was issued with a receipt dated September 13, 2014 in the name of the late husband to the Plaintiff. He pleaded innocent purchase for value and estoppel as a defence to the Plaintiff's claim. He prayed for an order that the Plaintiff does transfer the one (1) acre of land comprised in the above-stated title into his name in default of which the Executive Officer of the Court to execute all statutory forms to facilitate the transfer of the one (1) acre to him. He also prayed for costs of the Counter-claim, and the dismissal of the Plaintiff's suit with costs.

7. The Plaintiff replied to the Defence and filed a Defence to the Counterclaim. The pleading was dated July 26, 2018 and filed the same date. She joined issue with the Defence and reiterated the contents of the Plaint. She denied the contents of each of the paragraphs of the Counterclaim. She stated that contrary to the averment that the 1st Defendant was put in possession by her late husband, he did not complete the purchase price but forcefully entered thereon and began occupying it. She denied knowledge of the agreement between the 1st and 2nd Defendants, and averred that was not a party thereto and put both Defendants to strict proof thereof. She then prayed that her claim be allowed and the Counterclaim be dismissed with costs.

8. Together with the Defence and Counterclaim, the Defendants raised a preliminary objection dated the same date as the Plaint. The Preliminary Objection was disposed of and the matter proceeded to full hearing. On May 21, 2018, the trial magistrate found that the Preliminary objection was premature and dismissed it, with an order that costs abide the outcome of the case.

9. At the conclusion of the hearing, the learned trial Magistrate dismissed both the Plaintiff's case on account of the finding that the suit was statutory barred and found that the Counterclaim failed. She ordered each party bear own costs.

The Appeal

10. Being aggrieved by the judgment of the trial Court, on April 12, 2022 the Appellant filed her Amended Record of Appeal dated April 6, 2021. On October 24, 2022, the Respondents, with leave of the Court, filed a Supplementary Record of Appeal dated the same date. The Memorandum of Appeal filed on March 31, 2021 which was part of the Amended Record of Appeal contained five (5) grounds of the appeal. The appellant's Memorandum of Appeal dated March 26, 2021 raised five (5) grounds of appeal. These were that:-

    1. That the learned trial magistrate erred in fact and law in holding that the appellant's claim was time–barred whereas the completion date of the agreement the subject matter of the suit was August, 2010, and the suit was in February 2018 before the expiry of 12 years as stipulated by Section 7 of the *Limitation of Actions Act*.

    2. That the learned magistrate erred in law in assuming that there was a valid sale agreement to cancel when there was none since the sale did not receive sanction of the Land Control Board

for the area within the mandatory 6 months, and further failed to grant the appellant relief in the form of an order for eviction as sought in the Plaint.

3. After properly finding that the 1st Respondent did not pay full purchase price of Kshs 400,000/= as stipulated in the agreement of April 1, 2010 the learned magistrate erred in failing to grant the plaintiff the reliefs sought and sending her away empty handed.

4. The learned magistrate erred in law and fact in failing to hold that the appellant did prove her case on a balance of probabilities in the face of the ample evidence before her.

5. That the judgement was against the weight of evidence.

11. The appellant prayed that the appeal be allowed in its entirety; that the order dismissing the appellant's suit be set aside and be substituted with an order granting her judgment with an order for eviction of the respondents from Title Number No Moi's Bridge/Moi's Bridge Block 12/(Ex-Cullen)59; and costs of the appeal and of the subordinate court.

12. The Respondent's Notice of Cross-Appeal dated February 25, 2022 is based on the following grounds: -

1. The learned Magistrate erred in law and fact by dismissing the 2nd Respondent's counter claim yet the 2nd Respondent had proved his case on a balance of probabilities as required by the law.

2. The learned Magistrate erred in law and fact by failing to appreciate that the 2nd Respondent was a bona fide purchaser for value without notice hence he had a good title to the suit land which he had purchased from the 1st Respondent at a consideration.

3. The learned Magistrate erred in law and in fact by declining to order Appellant to execute the transfer forms in favour of the 2nd Respondent yet evidence had been tendered to show that the 1st Respondent did not owe the Appellant any sum in respect of the suit land.

4. The learned Magistrate erred in law and in fact by failing to appreciate the best evidence rule and particularly that documents must be proved by primary evidence as provided in Sections 64, 65, 66 and 67 of the *Evidence Act*, Cap 80 Laws of Kenya.

5. The Learned Magistrate erred in law and fact by declining to issue a decision that would have helped to solve the problem that had been taken to court. The decision she delivered left the parties in the same position they were in before they filed the suit.

6. The Learned Magistrate erred in law and fact by declining to award the Respondents costs of the suit yet costs follow the event.

13. The Appellants urged this Court to allow the appeal, set aside finding of the trial Court that the suit was statute-barred and dismiss the cross-appeal. The 1st and 2nd Respondent prayed for the dismissal of the Appeal while the 2nd Respondent prayed for the cross-appeal to be allowed with costs.

Submissions

14. When this Appeal was admitted for hearing and directions given on it, the Court ordered that both the Appeal and Cross-Appeal be disposed by way of written submissions. The Appellants filed theirs dated July 26, 2022 on the same date. The Respondents filed theirs dated October 25, 2022 on the same date too.

15. In her submissions, the Appellant first summarized the pleadings, facts and evidence of the case and I need not repeat them here. She then submitted on three issues that she set out. The first one was

whether or not the suit was statutory-barred. On it she stated that it was not because the issue before the Court was a land matter based on a contract between the Plaintiff's husband and the 1st Defendant and the suit was one of an action to recover land. This was subject to 12 years as provided for under Section 7 of the *Limitation of Actions Act*. Thus, the suit having been filed just under 8 years was still in time. She relied on the case of *Avtar Singh Bhamra & another v. Oriental Commerical Bank, HCC No 53 of 2004* which held that a preliminary objection must stem from pleadings. She then summed it that since the Court decided on the Preliminary Objection, the same was not open for the Court to once again decide on it. She also relied on the case of *Dickson Ngige Ngugi v Consolidated Bank Ltd (Formerly Jimba Credit Corporation Limited & another [2020] eKLR*. It dealt with the issue of a preliminary objection taken on account of a suit being statue-barred. In it the Court stated that once the Court is satisfied as such, it lacks jurisdiction to proceed with the case.

16. The second issue was whether or not the sale agreement made on April 1, 2010 was valid to be cancelled and whether eviction should issue. On this she submitted that the transaction having proceeded in the absence of a land control board consent to subdivide and transfer the land, it offended Section 6 of the *Land Control Act*, Chapter 302 of the Laws of Kenya. She relied on the case of *Leonard Njonjo Kariuki v Njoroge Kariuki alias Benson Njonjo, CA No 26 of 1979*. It held that a transaction that went against the provisions of Section 6 of the *Land Control Act* was void. She then submitted that the Defendants did not bring themselves within the provisions of Section 8(1) of the Act on extension of time to apply for the consent from the relevant Board. She also relied on the case of *Willy Kimutai Kitilit v Michael Kibet [2018] eKLR* on a transaction on agricultural land absent of a consent from the land control board being void ab initio. Again, on whether the full payment of the sum of Kshs 400,000/= was made, she submitted that the Court was correct in casting doubt as to the receipt of the balance of Kshs 120,000/=. It was not proved that the payment had been made.

17. The third issue was whether or not the Plaintiff proved her case on a balance of probabilities. She submitted that she proved so from the totality of the evidence on record. She relied on the case of *Kanyungu Njogu v Daniel Kimani Maingi [2000] eKLR*. She prayed that the Appeal be allowed and the Cross-Appeal dismissed with costs.

18. The Respondents submitted that contrary to the assertions by the Appellant, they had filed submissions in the lower Court in respect of the preliminary objection which was dismissed by the trial Court. They submitted that the said document was attached at page 63 of her Amended Record of appeal dated April 6, 2022. They then submitted that the trial Magistrate erred in dismissing it as premature. They then submitted that the Court rightly dismissed the plaintiff's case for being statutory barred. Their view was that the Plaintiff's suit was based on the law of contract and not for recovery of land. They stated that the substratum of the plaintiff's case was based on a sale agreement made on April 1, 2010 which the plaintiff sought to have it cancelled. They submitted further that the suit was filed after a period of 7 years and 2 months from the time of entry into the contract. That was contrary to the *Limitation of Actions Act* which limits to the period to six (6) years. They relied on Section 4(1) of the Act which provides that no actions founded on contracts may be brought upon the expiry of a period of 6 years. They then stated that the Plaintiff did not bring the suit within the exceptions contemplated in Sections 24 to 28 of the *Limitation of Actions Act*. They relied on the case of *Dennis Koikai Naisho v Eric Tipis & 3 others [2019] eKLR* where the Court upheld a Preliminary Objection based on an agreement which was said to be statute barred. They also relied on the case of *Charles Njihia Ndung'u v Mercy Wamaitha Kaburi [2018] eKLR* when the court was faced with the question of deciding whether an agreement for sale of land that was entered into on December 3, 2009 was still valid in a suit filed in the year 2017.

19. Also, they relied on the case of *Bosire Ongero v Royal Media Services [2015] Eklr*, where the court held that the issue of limitation goes to the jurisdiction of the court to entertain claims. They also submitted based on the cases of *Kennedy Mureithi and another v Peterson Karimi Gacewa [2016] eKLR* on limitation of time, and *Michael Maina Nderitu v Kenya Power and Lighting Co Ltd & another [2013] eKLR*. They then discounted the appellant's submissions on this ground of appeal

20. On whether there was a breach of the agreement dated April 1, 2010, they submitted that the learned magistrate was wrong in holding that there was beach of the agreement dated April 1, 2010 since the purchase price was not paid in full by the end of August, 2010, their submission was that the balance of Ksh 120,000/= was cleared in two instalments of Kshs 115,000 on September 5, 2010 and Kshs 5000/= on October 11, 2010 hence no breach occurred. They relied on Section 120 of the *Evidence Act*. The provision is to the effect that on estoppel that when one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing.

21. They also submitted that in absence of the Report by the Director of Criminal Investigation (DCI) on the authenticity of the signatures on both P. Exhibit 4 which was incomplete and D. Exhibit 1 the trial magistrate ought to have applied the best evidence rule in line with Section 67 of the *Evidence Act* and therefore the original agreement produced as D. Exhibit 1 superseded the copy produced by the Plaintiff as Exhibit 4. They then submitted that the trial magistrate erred in holding that it was incumbent on the defence to prove that the back of the sale agreement they were relying on was genuine considering that the magistrate had already stated that the signatures were never disputed by the Plaintiff.

22. On whether the 2nd Defendant was an innocent purchaser for value without notice and whether the plaintiff should be compelled to transfer the suit land to him, they submitted that vide the sale agreement dated August 11, 2014 which was produced as Defendant Exhibit 2, the 1st Defendant sold to the 2nd Defendant the suit land at a consideration of Kshs 650,000/= which amount he paid in full. Further that the trial magistrate found that the 2nd Defendant was an innocent purchaser for value without notice. They then argued that the trial court erred by stating that the plaintiff could not be forced to transfer one (1) care of the suit land the 2nd Defendant since she was not privy to the agreement between the 1st Defendant and the 2nd Defendant. They emphasized that it was proved that the Plaintiff was aware of the transaction between the 1st and 2nd Defendant and that this was evidence by the letters produced as D Exhibits 4 and 5 written by her Advocates, Ms Birech, Ruto and Company Advocates and Angu Kitigin and Company Advocates. Their further argument was that since the 2nd Defendant purchased the suit land when it was still registered in name of the plaintiff's husband the late Bernard Wafula Makokha he was an innocent purchaser. Regarding the absence of the land control Board consent, they submitted that it never arose at the trial. They then submitted that costs be awarded to them because the Plaintiff dragged them into unnecessary court proceedings. They prayed that the appeal be dismissed with costs and the cross appeal be allowed. This set the matter ready for determination.

Analysis, Issues and Determination

23. As stated above, when the Appellant filed her appeal, the 2nd Respondent cross-appealed. This Court is under the duty to determine both the Appeal and Cross-Appeal on their merits. I considered the grounds in the Memorandum of Appeal and those in the Cross-Appeal, the evidence of the parties at the trial, the submissions on their behalf, the case law relied on as well as the relevant statutes.

24. This being a first appeal, I am under duty to consider the evidence on record, evaluate it afresh and make my own finding about it. This is in line with the role of this Court as a first appellate forum as was outlined by the Court of Appeal in the case of *Gitobu Imanyara & 2 others v Attorney General [2016] e KLR*. In that Appeal it was held that: -

> ' 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 allowances in this respect.'

25. Similarly, in Peters v Sunday Post Ltd [1958] EA 424, as cited in *Jackson Kaio Kivuva v Penina Wanjiru Muchene (2019) eKLR*, it was held:

> ' Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide.'

26. Additionally, in *Abok James Odera t/a AJ Odera & Associates v John Patrick Machira t/a Machira & Co Advocates [2013] e KLR*, the court held 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 reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.'

27. It means that this Court being the first instance appellate one in this matter, it has to analyze both the evidence and the law and apply the facts to the law as a trial one would. In essence this is akin to a re-trial although I did not have the opportunity to hear the testimony of the witnesses in person. I will therefore consider the grounds of appeal and determine them based on both the law and evidence on record.

28. I am of the view that I will deal with each of the grounds of appeal sequentially and those of the Cross-Appeal. However, before then I have two issues to determine at the preliminary stage. First is the argument in submissions by the Respondents that the Appellant was incorrect when she submitted that the Preliminary Objection was dismissed on account of failure by the appellants to submit thereon. It is worth noting that the decision on the preliminary objection dated February 19, 2018 was rendered on May 21, 2018. None of the parties herein appealed therefrom. What is before me is not an appeal and cross-appeal from that decision but one against the judgment on the merits of the entire suit and counterclaim. That decision was delivered on March 1, 2021. Thus, it is neither here nor there as to why the trial Magistrate rendered herself as she did in the ruling on the Preliminary Objection. In any event, whether the parties filed submissions or not and whether the trial Court considered them or not is not of much value before a Court. Submissions are not pleadings and evidence. They constitute views which the parties give to the Court to try and convince the Court to make a finding in their favour. The Court may or may not agree with the arguments therein and it may as well ignore them. There are many decisions which are validly made by courts without necessarily considering the submissions of parties. It is not fatal to any proceedings for a party not to file submissions in a matter. A Court should not 'punish' a party by making an unfavorable decision against him for reason of not filing or making

submissions in support of his case. But submissions must be aligned to the cause of action, the law, the pleadings and facts of a case.

29. In the case of *Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another [2014] eKLR*, the Court of Appeal stated:

> ' Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' 'marketing language', each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented.'

30. Also, in *Patrick Simiyu Khaemba v Kenya Electricity Transmission & another [2021] eKLR* this Court stated,

> ' Moreover, submissions neither exist in nor are they made in a vacuum: they must be anchored on the filing of any or a combination of the above documents as relate to Applications in case they are filed. Where any such issues are raised orally, submissions must be based on the points or issues that are raised.
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> 13. Short of the above, a party cannot be heard to submit on a hollow or non-existent point. As such, since submissions are 'marketing tools' for parties, they must contain what is being marketed.'

31. The next preliminary issue is the competence of the Cross-Appeal herein. The appeal herein was filed on March 31, 2021. This was within the 30 days of the decision of the trial Court, as provided for under Section 79G of the *Civil Procedure Act*. By virtue of Order 41 Rule 11 of the *Civil Procedure Rules 2010*, the Appellant ought to have, within 30 days of filing of the appeal, caused the appeal to be listed for directions before the judge. The record does not show that the Appellant complied with that provision. She did so on August 25, 2021 when she listed it for Directions on October 5, 2021. On October 5, 2021 the Respondents sought 14 days to file their Cross-Appeal. They were granted the request and the Court fixed the Appeal for mention on October 27, 2021 to confirm the filing of the documents. They did not do so. After many mentions thereafter, they only reported back to Court on March 1, 2022 that they had complied.

32. The Cross-appeal herein was filed on March 1, 2022. Clearly the Cross-Appeal was filed outside of the time it should have been. That was by the October 19, 2021. By the act of the Respondents not seeking extension of time after the expiry of the fourteen (14) days they sought on October 5, 2021, the leave granted no longer existed for them. On that account alone the Cross-Appeal is not competent before this Court.

33. However, again, this Court is of the view that a Cross-Appeal is as good an appeal. Time to appeal against a decision of the trial Court as provided for in Section 79G of the *Civil Procedure Act* is 30 days. Since a Cross-Appeal is provided for in the Rules, specifically Order 52 Rule 32 of the Civil Procedure Rules 2010, and that it is an appeal premised on the existence of an appeal, it goes without saying that there ought to be a time limit for a party to file the Cross-Appeal. This procedure should be understood in light of the procedure for filing a Plaint, a Defence and a Counterclaim. Time limits for such steps in both procedures are important. It cannot be open for a Respondent to take his sweet time to bring to Court a Cross-Appeal. Granted that a Cross-Appeal is 'in response to' an appeal then this Court is of the view that the 30 days limitation for the Respondent to act must start from

somewhere. In my view they start to run from the time it is brought to the attention of the Respondent that there exists an appeal. That is done when the Appellant complied with Order 42 Rule 12 of the Civil Procedure Rules, that is to say, when the judge has given directions that he/she has not rejected the Appeal under Section 79B of the *Civil Procedure Act*. The compliance by the Appellant then is that he/she serves the Memorandum of Appeal on all the Respondents. The purpose of the service of the Memorandum of Appeal cannot be gainsaid. It is to bring to the attention of the other side that an appeal has been preferred and that the said appeal has not been rejected hence the Respondents can take steps to put their house in order, and that is, to file a Cross-Appeal if they so desire. A Cross-Appeal cannot be said to be one unless there is an appeal existing before Court, otherwise the appeal being filed independent of an existing one is another appeal as any can be. It cannot be a cross-one. If one were to treat an independent appeal as a cross-one it would be akin to treating pollination of crops as cross-pollination or animals of the same kind breeding as doing cross-breeding. That would be a misnomer. There can be two or more appeals filed against the same decision separately but then they would be consolidated. That does not imply that they are cross-appeals. In sum, my view is that time for Cross-Appeals starts to run when the Memorandum of Appeal is duly served in accordance with the law. Any pleading purporting to be a cross-appeal that is filed outside of the thirty (30) days from the service of the Memorandum of Appeal without leave of the Court would be incompetent and should be a candidate for striking out. As I state this, I am alive of the decisions by my brother and sister judges on this issue. For instance, I am aware of the decision in *Kenya Bus-Rapid T/A Kenya Bus Services Management Co Limited v Patrick Irungu Gichure [2018] eKLR*, and *Diamond Trust Bank (K) Limited v Galaxy Ventures (K) Limited [2020] eKLR* both of which I agree with, and *Christine Aloo v Mary Atieno Ouma [2021] eKLR* with which I respectively disagree on the holding that a 'cross appeal ought to be filed at least before directions under Order 42 Rule 11 of the Civil Procedure Rules have been given in the main appeal.'

34. I now turn to the evidence of the parties before I analyze it with the grounds of appeal and the law. The Plaintiff testified as PW1 and called one other witness, one Stanley Mosben, who testified as PW2. PW1 adopted her witness statement which was dated February 8, 2018. She testified that her husband died and left her with a parcel of land which was the suit land. Further, she stated in evidence that before his demise she and her husband sold land to Moses Chirchir, the 1st Defendant in the suit. That was on April 1, 2010. The sale price was Kshs 400,0000/= of which Kshs 280,000/= was paid on execution of the agreement and the balance of Kshs 120,000/=. She relied on a copy of an agreement dated April 1, 2010 whose originals she stated had been taken by the Defendant and her late husband. It was produced in evidence as P Exhibit 4. The original of the agreement was produced by the 1st Defendant as D. Exhibit 1. She also relied on other documents in evidence, namely, the Copy of Certificate of Official Search, Copy of title deed to the suit land, Certificate of Confirmation of Grant dated August 3, 2018 and a letter from the Chief which was dated July 25, 2017, all of which she produced P Exhibit 1, 2, 3 and 5 respectively. Her witness statement was to the effect that she was the legal registered owner of land parcel No. Moi's Bridge/Moi's Bridge Block 12/(Ex-Cullen)59; that on February 19, 2010 the 1st Defendant and her late husband, one Makokha Bernard Wafula entered into an agreement of sale of one (1) acre to be excised from the parcel of land she now was registered as owner. The agreed sum was Kshs 400,000/= of which Kshs 280,000/= was paid leaving a balance of 120,000/= which was to be paid by end of August, 2010; the 1st Defendant failed to pay the balance; he entered onto the land in 2010 and had been tilling it since and later sold it to the 2nd Defendant who intended to plough it; she became the legal owner of the land after the death of her husband; and the 2nd Defendant had been threatening her to give him title to the one (1) acre of land yet he was a stranger.

35. In cross examination she stated that her husband died in 2012; the agreement was made on April 1, 2010. She stated that the balance of the purchase price was not paid as was confirmed by one Stanley

Mosiben who would testify as PW2. She denied that the signature at the back of P Exhibit 1 and D Exhibit 1 was her husband's. She then testified that she later came to learn of the transaction between the 1st Defendant and the 2nd but she stated that she was not involved in it. She stated that both agreements, namely that between her and her husband with the 1st Defendant and the one between the 1st Defendant and the 2nd should be canceled. Her evidence was that the transaction was not made with the consent of the land control board as required by law since her husband was not paid the balance of the purchase price. She stated that her husband died without receiving the balance yet he always called for it. She denied ever reaching out to the 2nd Defendant for financial help. She testified further that the 2nd Defendant was not right in buying land in respect of which the owner had already died. Her testimony was that the 2nd Defendant bought her land by mistake She disputed the 2nd Agreement, stating that it was not genuine.

36. In re-examination she repeated that until his death her late husband had not been paid the balance as he was still demanding for it. She only learnt of the sale between the Defendants long after they had transacted between themselves.

37. PW2, Stanley Mosben testified that he was a witness to the execution of the agreement between the Plaintiff and the 1st Defendant on April 1, 2010, as testified by PW1. It was done in the deceased vendor's house. A balance of Kshs 120.000/= remained unpaid and by 2012 when he retired he could not confirm that it was paid. He stated that there was even a time the Plaintiff's late husband wanted to refund the money already paid on the agreement.

38. On cross-examination, upon being shown the Agreement which was then marked as DMFI-1, he stated that the back thereof bore a rubber stamp similar to the one he used to use but he did not understand the document. He denied ever witnessing the payment of the balance on September 5, 2010. He also denied witnessing the payment of October 11, 2010. He denied clearly that the signature purporting to be his appended against the two purported payments of the balance was his. He, however, stated that the signatures against them appeared to be that of the Plaintiff's late husband and the 1st Defendant. The Defence Counsel applied for and was granted an order by the Court to subject the documents P Exhibit 4 and D Exhibit 1 to examination by the document examiner through the office of the Director of Criminal Investigation (DCI). At that juncture, the Plaintiff closed her case.

39. The 1st Defendant testified as DW1. He stated that he knew both the Plaintiff and her deceased husband, one Bernard Wafula. He testified how he entered into an agreement with the deceased before he died, over the purchase of one (1) acre of land from him. The agreement was entered into on April 1, 2010 over part of the land known as Moi's Bridge/Moi's Bridge Block 12/(Ex-Cullen)59. He repeated the terms of the agreement as were given by the Plaintiff. He produced the original agreement of sale as D Exhibit 1. It had writings on two pages, the front and back thereof. He acknowledged that there were three witnesses to the initial agreement, namely, the Plaintiff, one William Ichabei and Stanely Mosben who testified as PW2. He said he was put into possession of the land and cultivated it for four consecutive years until August 11, 2014 when he sold it to the 2nd Defendant vide and agreement of even date. He produced the agreement between he and the 2nd Defendant as D Exhibit 2.

40. In the transaction, he was paid the sum of Kshs 650,000/=. He stated that before selling the land he approached one Emmanuel, the son to the Plaintiff, to buy the land but he refused. He referred him to the Plaintiff who he met at a wedding but she too refused. Thus, even PW1's son refused. It was then that he sold it to the 2nd Defendant. PW1 then stated that whoever was selling the land was 'selling air' and it disturbed him. It was then that he got two witnesses with whom he went to inquire from the Plaintiff if the 1st Defendant owed money on the land and she said he did not.

41. His further evidence was that the Plaintiff informed him that only processing fees of Kshs 4,870/= for the title was outstanding. He agreed to pay it on her behalf and retained the receipt, number 25813, issued by Kiarie and Company Advocates, which he produced as D Exhibit 3. He stated that he sold the land to the 2nd Defendant who used it for three years, up to 2017. He owed no money on the latter agreement.

42. On cross-examination he stated that at page 2 of D. Exhibit 1, the Plaintiff, Esther Chesoli, was not a witness. He testified that even the village elder was not involved in the transactions for the payment of the balance. He adduced evidence that the title processing money was received from Bernard Wafula but admitted that a deceased person cannot pay for anything.

43. On re-examination, the witness stated that the balance of 120,000/= was paid at the deceased husband's welding shop at Moi's Bridge about 4.00 pm of the material date. He stated that upon reaching there with Kshs 120,000/= he found the deceased and Stanley Mosben, PW2. That DW1 asked the deceased where Esther (the Plaintiff) was and he stated that she did not have a problem. He paid the money and PW1 demanded 2,000/= to prepare the agreement. His evidence was that it was not necessary to involve the Plaintiff and 2nd Defendant in the agreement. He stated that the law firm of Kiarie & Co Advocates was issuing clearance certificates at the time hence the payment of the title processing fees to the said law firm.

44. DW2, one Jared Tadayo Ambayi, the 2nd Defendant also testified. He stated that he knew the Plaintiff and the 1st Defendant. Both were his neighbours. He stated that he entered into an agreement with the 1st Defendant on August 11, 2014. It was over the purchase of the one (1) acre of the suit land at a price of Kshs 650,000/=. He referred to the agreement which had been produced as D Exhibit 2. He took immediate possession and build a house and planted trees on it. He produced in evidence as D Exhibit 5(a) and (b) photographs of the house and trees.

45. He stated that he was aware of the agreement between the Plaintiff's late husband and the 1st Defendant but was not aware of any debt owing from the 1st Defendant to the deceased vendor. The only sum owing was the clearance fees of Kshs 4,879 which he paid on September 13, 2014 to Ms Kiarie & Co Advocates who were issuing clearance certificate. He paid in the name of Bernard Wafula, the deceased. He then stated that the Plaintiff (Esther Chesoli) was aware of the transaction between himself and the 1st Defendant. He surveyed the land as a confirmation. His evidence was that the Plaintiff did not involve him in processing the title to the suit land. But he was told to pay the fees for processing the title so that he would receive his. He stated he was not party to the dispute between the Plaintiff and 1st Defendant but wanted his counter-claim to be allowed with costs.

46. In cross-examination he admitted that he did not involve the Plaintiff in his transaction with the 1st Defendant. He admitted there was no contract between himself and the Plaintiff who was the administrator of the estate of the deceased husband. He carried out a survey to confirm the acreage thereof. He did not know if the land had a dispute between the Plaintiff and the 1st Defendant. He only learnt that the land was in the Plaintiff's name after he received a demand from the Plaintiff. But the Plaintiff did not have any claim against him from 2014 to 2018. He stated that he was under no obligation to involve the Plaintiff. It was this juncture that the Defendants closed their case.

47. The first ground of appeal was that the learned trial magistrate erred in fact and law in holding that the appellant's claim was time-barred (sic) whereas the completion date of the agreement the subject matter of the suit was August, 2010, and the suit was in February 2018 before the expiry of 12 years as stipulated by Section 7 of the *Limitation of Actions Act*. In essence that appellant complained to this Court that the trial magistrate found wrongly or in error that the Plaintiff's suit was statutory-barred.

This was after analyzing the evidence of the parties - the Plaintiff and the 1st Defendant - in regard to when the cause of action arose therein arose. The brief facts giving rise to this finding are that the Plaintiff's late husband and the 1st Defendant did enter into an agreement for the sale of one (1) acre of land being part of the parcel of all that parcel of land known as Moi's Bridge/Moi's Bridge Block 12/ (Ex-Cullen)59 on April 1, 2018. The Plaintiff brought the suit to cancel the agreement made on that date, a declaration that the 1st Defendant was in breach of contract, and evict both the Defendants from her land. Further facts before the trial Court were that the 1st Defendant entered the suit land on April 1, 2010 while the 2nd Defendant entered thereon on October 1, 2014. While the Defendant argues that he was put into possession on April 1, 2010, the Plaintiff argues that the 1st Defendant forcefully entered on the land and continued with cultivation. The agreement produced as P Exhibit 4 and also as D Exhibit 1 provides that 'The vendor undertakes to hand-over possession of the said land Number 59 in respect of agreement.' The agreement was vague on the aspect of handing over possession because it referred to 'agreement'. This was not clear as to whether it would be at the time of completion of the purchase price or at the execution of the agreement. Be that as it may, it is not disputed that the 1st Defendant did take possession of the land soon after the execution of the agreement. Whether it was forceful or upon peaceful entry and permission is neither here nor there as of now since he no longer is in possession.

48. At this juncture it is worth repeating the finding of the learned trial magistrate in the judgment impugned. After analyzing the pleadings, the evidence and the law, the Court found that the suit was statutory barred. It dismissed it and ordered each party to bear own costs.

49. Worth of note is that the suit before the trial Court was against two Defendants. One was in possession of the land, not at the behest of the Plaintiff or her late husband and the other was not, after having held possession thereof for four years and yielded it to the other Defendant in possession. In my view, the causes of action against each of the Defendants arose differently and on diverse dates. The complaint by the Plaintiff against the 1st Defendant was that he ought to have completed the purchase price by 'end of August, 2010'. This meant that he should have paid the balance of Kshs 120,000/= on or before August 31, 2010. Without any further written agreement showing a variation of those terms, it means that if payment of the balance was paid by that date, then the 1st Defendant was in breach of the agreement by the said date. I find that in order to make a further finding that the cause of action against the 1st Defendant arose at the end of the August 31, 2010 date. Any suit on breach or otherwise on that agreement ought to have been brought before the end of the six (6) years from then. This was in line with Section 4 (1)(a) of the *Limitation of Actions Act* which provides that 'The following actions may not be brought after the end of six (6) years from the date on which the cause of action accrued- (a) actions founded on contract;' Hence in so far as the suit in the lower Court had part of the cause of action as a declaration that the Plaintiff was in breach of contract, that aspect of the action was statute-barred. She could not sue the 1st Defendant on that account since the issue was statute-barred. But the Court erred in finding that the entire suit was statute-barred, only an aspect thereof and as against the 1st Defendant was statute-barred, and I would set aside that finding based on my further analysis of the entire suit as below.

50. The case before the trial Court presented a unique set of facts. Looking at the Plaint, there was more than one cause of action pleaded. Again, the causes of action were not against the 1st Defendant alone. They touched the 2nd Defendant whose ownership and occupation of the suit land was in question. And at this point it would be important to define a cause of action. The Legal Information Institute of Cornell University defines a cause of action as, 'a set of predefined factual elements that allow for a legal remedy. The factual elements needed for a specific cause of action can come from a constitution,

statute, judicial precedent, or administrative regulation.' It is a fact or combination of facts entitle one the right to seek judicial redress or relief against another.

51. In the case before the trial Court, the Plaintiff complained that the 1st Defendant relied on an agreement to enter her land and actually sold it to another person and invited that other person, the 2nd Defendant, to reside on her land. She then applied for the cancellation of the agreement as one of the reliefs. The 2nd Defendant contended both in pleadings and evidence that the agreement dated April 1, 2010 that formed the basis of the second agreement, that is to say, the agreement between him and the 1st Defendant, was valid and the terms thereof fulfilled hence legal ownership of the parcel rightfully passed from the initial owner (the Plaintiff's late husband) to the 1st Defendant hence the 1st Defendant had good title to pass to the 2nd Defendant. Faced with such a situation, the Court has to determine, and rightly so, whether or not the terms of the said agreement were fulfilled. Again, that Court had to determine whether the said agreement, if it was not complied with by the 1st Defendant in the first place, would be canceled or not.

52. In my view, the 2nd Defendant position in terms of ownership and possession of the one (1) acre he claims from the suit land cannot stand in isolation of all other facts including whether or not the agreement dated April 1, 2010 was or was not valid or completed. To the extent that the 2nd Defendant laid credence of his ownership and possession of the one acre based on an agreement the terms of whose fulfilment was in question, the Court had no option but to determine whether or not in the first instance the said document was valid and its terms fulfilled. In that respect I find that the trial Magistrate was right in considering whether or not the agreement dated April 1, 2010 ought to be canceled for breach thereof.

53. However, even leaving the above point aside, one pertinent issue is whether or not the agreement was valid in the first place. There is no dispute that the suit land in issue was agricultural land. Sale transactions which relate to agricultural land are controlled transactions and therefore subject to Section 6 of the *Land Control Act*, Chapter 302 of the Laws of Kenya. Even subdivision of agricultural land ought to be done after the consent of the land control board had been obtained. Section 6 of the Act provides that a sale or subdivision transaction in relation to controlled transactions void for all purposes unless the land control board of the area or division where the land is situate has given consent. In the instant case, no control board consent too sub-divide or sell the one acre of the suit land was sought and obtained. Thus, the agreement dated April 1, 2010 was void for the purposes it was meant for and could therefore not form the basis of ownership, possession or transfer to any other person as it was.

54. The other attendant issue to this was that the 2nd Defendant entered the parcel of land on August 11, 2014. An action for recovery of the land from him could be brought within 12 years of that entry onto the parcel of land. It means that the cause of action against the 2nd Defendant as a trespasser began on that date. In terms of Section 7 of the *Limitation of Actions Act*, and given the fact that the 2nd Defendant had no contractual relationship with either the deceased husband of the Plaintiff or the Plaintiff herself, a suit against him could legally be sustained as long as it was filed any time before August 10, 2026. Thus, the trial Magistrate erred in finding that the suit against the 2nd Defendant was statute-barred.

55. In my view the finding of the trial Magistrate on the statutory bar had two further problems hence it is my view that the trial magistrate erred both in law and fact in that respect. First, the trial magistrate had been presented a Preliminary Objection dated February 19, 2018. The Court determined the merits or otherwise of the Preliminary Objection. That it did on May 21, 2018 by making a finding that it was premature. While finding that may be plausible, it dismissed the Preliminary Objection. Then in the

judgment it made another finding on it. In the judgment the Court found that the suit was statutory-barred. With due respect, the latter finding amounted to the same Court sitting on its determination twice, or so to say, sitting on its decision on appeal. This was an error in law.

56. In regard to the finding by the trial Magistrate that the suit was statute barred, this Court is of the view that in contracts of land, there are instances when Section 4 (1)(a) of the *Limitation of Actions Act* cannot be read in isolation of Section 7 thereof. They must be read conjunctively when a proprietor of land wishes to recover his land from a person who is on it unlawfully, that is to say, one who was lawfully on it, for instance, by permission but the same is withdrawn. In my view, Section 4(1)(a) applies to where parties enter into contracts and one breaches it or one tries to enforce the same, or attempts to recover money on it or to declare as against the other the validity of the contract. The contract is essentially between the two and not as against third parties. The statutory bar is as against enforcement of one or other terms of the contract. But in cases where one of the parties permitted the other to be on his land pursuant to the contract and that other breaches the terms, the party not at fault cannot sue after the expiry of the period of six years, unless the exceptions to limitation are met. However, under Section 7 of the *Limitation of Actions Act*, he can sue for recovery of his land whose passion he parted with under that contract, as long as it is done within 12 years of the cause of action. Thus, to the extent that the Plaintiff sued for recovery of his land before 12 years land the suit was not statute barred. Therefore, the trial Magistrate was in error on that finding.

57. One aspect which the 2nd Defendant in error in his counter-claim was that there was no privity of contract between him and either the Plaintiff or the late husband to the Plaintiff. That the trial Magistrate was right in her finding about the lack of the relationship. Since the contract over the suit land was between the Defendants inter se, the 2nd Defendant should have raised a cross-suit or a claim against the Co-Defendant for a refund of his money. He chose not to do so for reasons better known to himself. The matter rests there.

58. On the 2nd ground of appeal, as to whether there was or was not a valid agreement to cancel, I have addressed it paragraph 53 above, where I have found that the transaction herein having been a controlled one was subject to the land control board consent being given. Since it was not, then the agreement was void for all wants and purposes. Thus, the trial Magistrate erred on that aspect.

59. I now analyze the third, fourth and fifth grounds of appeal together since they are related. The appellant argues that the trial Magistrate erred in law in not granting the reliefs sought despite making a proper finding that the agreement was not honoured as required by end of August, 2010. She also stated that the trial Court erred in law in failing to hold that the Plaintiff had proved her case on a balance of probabilities and that her decision was against the weight of evidence. I have considered the evidence, pleadings and finding of the trial Court. First, since the trial Court concentrated on determining whether or not the suit was statutory-barred, and since that finding would have determined the whole suit, it was not necessary for it to determine on the issue of weight of evidence or proof on a balance of probabilities. Be that as it may, looking at the totality of the evidence, it is my view that the Plaintiff proved her case on a balance of probabilities against the Defendants. First, there was an agreement made on April 1, 2010 which, while the issue before Court was not its enforcement, the Court was right in finding that it was not honoured in its terms since it was central to the finding on whether or not the 2nd Defendant was a purchaser for value without notice.

60. An argument was posed by the 1st Defendant that the Court erred in not making use of Section 67 of the *Evidence Act* on the best evidence Rule. That argument was erroneous in the sense that the original of the copy of the agreement which was initially marked as P Exhibit 4 was produced by the Defence and it was the one that the Court considered as to whether or not the payment of the balance was honoured. P Exhibit 4 did not contain the 2nd page of the agreement but D. Exhibit 1 did. It

was D Exhibit 1 that the trial Court considered and found to have not been honoured, whether in time or at all. First, the trial Court found, and rightly so, that the sum of Kshs 120,000/= was not paid by end of August, 2010 as was agreed. Second, and of importance, was the finding that the said balance was not paid at all, even though the back of the agreement purported to show that it was paid in two instalments of Kshs 115,000/= and Kshs 5,000/= on September 5, 2010 and October 11, 2010 respectively. This finding was correct in the sense that the witness, PW2 who witnessed the first execution of the agreement was alleged to have witnessed the 2nd and 3rd payments but he denied the same. He refuted the signature thereon as his and cast doubt as to the rubber stamp that was affixed thereto, which purported to be is, as to its authenticity or availability. Moreover, the Plaintiff discounted the signatures on the reverse of the document as being her husband's. And the Court carefully compared the signature appearing at the front page as that of the deceased Mr Bernard Wafula and those at the back and did not find them closely similar. It required independent proof that they all were of the deceased husband of the Plaintiff. Since it was the 1st Defendant who alleged that payment of the Kshs 120,000/= was paid, it was incumbent on him, pursuant to Section 107 of the *Evidence Act*, to proof that fact. He failed to do so, even when he was given opportunity for long to subject the document to a document examiner. Since the 2nd Defendant also relied on that assertion, he too had the burden on proof that it was the fact. He too failed. Thus, the trial Magistrate observed the best evidence rule and arrived at the correct finding.

61. With regard to the Cross-Appeal, I have stated before that it was incompetent before me and is to be dismissed. But even if I were to entertain it on its merits, I would still dismiss it for the following reasons.

62. Regarding the first and second grounds of the Cross-Appeal which I deal with jointly, the 2nd Defendant/ Respondent argued that the trial Magistrate erred in law and fact in not finding that he proved his counterclaim on a balance of probabilities. The Counterclaim was basically that the 2nd Defendant bought the one acre from the 1st Defendant for value and as an innocent purchaser and with the knowledge of the Plaintiff. It is this Court's view that the 2nd Defendant did not proof the issue to the required standard in law of a balance of probabilities for the reasons that, first, he did not adduce any evidence that he involved the Plaintiff. All that he stated and argued was that the Plaintiff having been a resident of part of the parcel of land in issue and she saw him settle on it she knew of the transaction. Also, that the 1st Defendant had earlier approached the Plaintiff's son and herself to buy the land but they declined it. In my view that was not knowledge that would amount to the Plaintiff being aware that there was a land transaction between the 1st and 2nd Defendant. Also, the 2nd Defendant cannot claim to be an innocent purchaser for value for a number of reasons. First, he did not have express information that the original transaction had been completed or the obligations therein fulfilled. If the evidence of the 1st Defendant is anything to go by when he testified that he heard of the Plaintiff stating that he was 'selling air (and) I was disturbed,' it was clear that the 1st Defendant knew that there was an issue of him not owning the land and therefore not able to transfer the same to anyone. Moreover, since the 2nd Defendant knew that the land was registered in the name of the deceased husband of the Plaintiff and that succession was not yet done, he knew clearly that the 1st Defendant could not be in a position to sell a deceased person's land. In law, the 1st defendant did not have any title to pass to the 2nd defendant and therefore the 2nd defendant cannot claim that in illegal possession or settlement on the plaintiff's land vested proprietary right on him unless he had been there for over 12 years. Actually, what the 2nd Defendant did in purporting to buy the land was to meddle with the estate of the deceased person and that was an offence. Section 45 of the *Law of Succession Act* is clear on such actions and it prohibits them. I need not rehash the law on innocent purchaser without notice at this point but it is clear that the 2nd Defendant is not one.

63. Regarding the 3rd ground, that would have only been possible to succeed if the first and second grounds could have succeeded. The ordering of the transfer of the land to the 2nd Appellant could only be possible if he succeeded in proving the case on a balance of probabilities.

64. On the 4th ground, about the best evidence rule, I have sufficiently addressed it. Regarding the 5th ground, it was not the duty of the Court to ensure that parties go home with something just because they came to Court. Courts must and will always give parties reliefs they proof and deserve and they must be effective remedies. I see no proper ground of appeal in this argument. Lastly, regarding an award of costs having not been given, it is trite law that under Section 27 of the *Civil Procedure Act*, while costs follow the event, an award of costs falls at the discretion of the Court to order otherwise depending on the circumstances and the Court weighs them before awarding otherwise. The Court did weigh that an exercised its discretion properly.

65. In the end I find that the Appeal succeeds and the Cross-Appeal fails. I therefore set aside the lower Court judgment dated and delivered on March 1, 2021 and substitute it with judgment on the following terms

    a. A declaration that the agreement dated April 1, 2010 is void for all wants and purposes.

    (b) An order of eviction of the Defendants from all that parcel of land known as Moi's Bridge/ Moi's Bridge Block12/(Ex-Cullen)59 to be effected within 30 days of this order if they do not voluntarily remove themselves and or their items therefrom.

    (c) Costs of the Appeal to be to the appellant and those of the Cross-Appeal to be borne by the 2nd Respondent. The Costs of the lower Court shall be to the Plaintiff therein.

66. Orders accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 20TH DAY OF DECEMBER, 2022.

Hon. DR. IUR FRED NYAGAKA

JUDGE, ELC