



**Khalif v Mwachiude (Environment and Land Appeal 11 of 2021)
[2024] KEELC 5165 (KLR) (9 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5165 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND APPEAL 11 OF 2021**

LL NAIKUNI, J

JULY 9, 2024

BETWEEN

MADIHA ALWY KHALIF APPELLANT

AND

SALIM YUSUF MWACHIUDE RESPONDENT

JUDGMENT

I. Preliminaries

1. The Judgment herein pertains to an appeal lodged before this Honorable Court by Madiha Alwy Khalifa – the Appellant herein. The appeal was filed through a Memorandum of Appeal dated 4th November, 2019 and a Record of Appeal filed on the same day against Salim Yusuf Mwachiude, the Respondent herein. In a nutshell, the appeal revolves around the interpretation by the lower court of its own orders herein as seen here below.
2. The Appeal emanated from the Judgment of the Chief Magistrate’s Court at Mombasa [Hon. E.K. Makori] dated and delivered on 15th October, 2019 in Mombasa CMCC No. 710 of 2017. Based on the Affidavit of Service on record the Record of Appeal was properly served upon the Respondent.
3. On 15th May, 2024 the parties having fully complied with court’s direction pursuant to the provision of Section 79B of the *Civil Procedure Act*, Cap. 21 and Order 42 of Rules 11, 13 and 16 of the Civil Procedure Rules, 2010 it slated for highlighting the written submissions which the parties discharged effectively.

II. The Appellant’s case.

4. From the filed Memorandum of Appeal, the Appellant averred as follows:-
 - a. The trial court erred in law in that it delivered a judgment that was wholly against the weight of the law and evidence that was availed in the said trial.



- b. The trial court erred in law in that it failed to make a proper determination with regard to the party who caused the intended transfer of the suit property not to take place.
 - c. The trial court erred in law in that it allowed a claim for interest when the same had not been properly claimed and hence the court had no proper jurisdiction to award the said claim.
 - d. The trial court erred in law in that it arrived at its decision on the basis of some documents that were not either administer in evidence and/or which were not properly attested thereby making the same to have no probative value.
5. The Appellant prayed that the Honourable Court grant the following:
- a. The appeal herein be allowed with costs.
 - b. That Judgment be entered for the Respondent in the sum of Kes.6,000,000/- but free of any interest and costs with a further provision that the Appellant be given a period of one (1) year to refund the said sum of money.
 - c. Any other relief that the court may find fair and just to grant.
6. From the filed pleadings, the judgment emanated from a claim filed by the Respondent in CMCC No. 710 of 2017. On 1st February 2016 by written Agreement entered into between the Respondent and the Appellant herein, the Respondent purchased from the Appellant a piece of land known as plot No. 833/I/MN Mkomani Measuring approximately 0.1874 acres at the agreed consideration of a sum of Kenya Shillings Ten Million (Kshs.10,000,000.00/=).
7. On the same date (1st February 2016) the Respondent paid the sum of Kenya Shillings Two Million (Kshs.2,000,000/-), to be held by the Appellants Advocate as stakeholder pending completion of the sale. (copy of the Agreement for sale dated 1st February, 2016 attached). On 6th April 2016 the Respondent paid to the Appellant the sum of Kenya Shillings Two Million Two Hundred Thousand (Kshs. 2, 200,000.00 plus the sum of Kenya Shillings One Million Eight Hundred Thousand (Kshs. 1,800,000.00) for perfecting the Title and to get the property in vacant possession, making the total sum of Kenya Shillings Six Million (Kshs. 6,000,000.00) (copy of the acknowledgement dated 6th April 2016 attached).On 13th June, 2016 the Appellant signed cash acknowledgement in which she acknowledged receipt of the sum of Kenya Shillings Three Million One Eighty One Thousand Two Hundred (Kshs. 3,181,200.00/=) from the Respondent making a grant total of the sum of Kenya Shillings Nine Million One Eighty One Thousand Two Hundred (Kshs. 9,181,200.00) (copy of the cash acknowledgement attached).
8. The Appellant failed to secure the Title Deed and possession of the property known as plot number 833/I/MN Mkomani in favour of the Respondent as agreed in clause 2(ii) and 3 of the said agreement dated 1st February 2016. On 22nd March 2017, under the instructions of the Respondent to his former Advocates Messrs. Kiarie Kariuki and company, demand notice was issued and served upon the Appellant in which the Respondent demanded refund of the total sum of the sum of Kenya Shillings Nine Million One Eighty One Thousand Two Hundred (Kshs. 9,181,200.00/=) within (21) twenty - one days as provided for in the Law Society condition of sale which were incorporated in the said agreement. (copy of the letter dated 22nd March 2012 attached).
9. The Appellant never respond to the said letter of demand dated 22nd March 2017. On 24th April 2017 the Respondent instructed M/s. S.B. W Kenzie and company Advocates to file suit against the Appellant for the recovery of the sum of Kenya Shillings Nine Three Million One Eighty One Thousand Two Hundred (Kshs. 9,181,200.00/=) being refund of the purchase price in respect of the



parcel of land on plot number 833/I/MN. On 2nd May 2017, under the instructions of the Respondent to his former Advocates M/s. B.W Kenzie and company Advocates, a suit was filed in the Chief Magistrate's court Mombasa against the Appellant for the recovery of:.

- a. The sum of Kshs.9,181,200.00
 - b. costs of the suit plus interest at courts rates from 1st February 2016 until judgment and payment in full.
 - c. Any other relief which the Honourable court may, deem fit and fair to grant
10. The Learned Magistrate opined himself in the judgment delivered on 15th October, 2019as follows:-
- “ At the end, I am satisfied that the Plaintiff has in a balance of probabilities proved his case against the Defendant and I will enter judgment for him against the Defendant as follows:-
- a. Refund of Kshs 9,181,200/-
 - b. Costs of this suit with interest thereon from 1st February 2016 until payment in full.

III. The Submissions

11. On 15th May, 2024, as stated the Record of Appeal was admitted and directions given specifically in the presence of all the parties. The Honorable Court directed that the said appeal be disposed of by way of written submissions with given stringent time lines. Pursuant to that the parties herein fully complied, all the Counsels were granted ample opportunity file their written submissions, pursuant to that the Honourable Court reserved a Judgment on 4th June, 2024.

A. The Written Submission by the Appellant

12. The Learned Counsel for the Appellant the Law firm of Messrs. Mutisya Mwanzia & Ondeng Advocates filed their written submissions dated 8th March, 2024. M/s. Gatimu Advocate commenced the submission by stating that this was an appeal against the Judgment delivered in the civil case “Mombasa Chief Magistrate's Court Civil Suit No. 710 of 2017” by Hon. E.K Makori (as he then was) on 15th October, 2019. On behalf of the Appellant, the Learned Counsel averred that the Judgement failed to take into account all the circumstances and evidence tendered into consideration thereby arriving at a decision that was unsafe.
13. The Learned Counsel devolved on the brief facts of the case. She stated that the agreement for sale giving rise to this dispute was the one dated 1st February, 2016. (See pages 114 to 118 of the Record of Appeal). It was between the Appellant and the Respondent. The agreement was for the purchase of the property known as Plot No.833 /1/MN-Mkomani. The purchase price was a sum of Kenya Shillings Ten Million (Kshs. 10,000,000/=). The Respondent was to pay a deposit of a sum of Kenya Shillings Two Million (Kshs. 2,000,000/=) and the outstanding balance of a sum of Kenya Shillings Eight Million (Kshs. 8,000,000/=) was to be paid after the transfer of the title and/or within 30 days. (See page 116 of the record).
14. The property was then transferred to the Respondent through the an Indenture dated 21st March, 2016. (See pages 123 to 126 of the record). The Respondent however did not understand that an Indenture is a document of the title he insisted on the title deed. The Respondent then decided to rescind the transaction. As to how much was paid by the Respondent to the Appellant for purpose of



the transaction, that was summarized in the Respondent's written statement (See page 4 of the record of appeal).

15. From the grounds of the appeal preferred, they summarized the following issues for determination: -

Firstly, whether the Respondent was entitled to a refund of a sum of Kenya Shillings Nine Million One Eight One Thousand Two Hundred (Kshs. 9,181,200/=). In the Respondent's written statement filed on 2nd May, 2017, the Respondent states as follows: "I SALIM YUSUF MWACHIUDE, do state as follows:-

- 1)) That on or about 1st February, 2016, I entered into a sales agreement with one MADIHA ALWY KHALID, for sale of her Family Land on Plot No. 833 /1/MN. The land was owned by way of an Indenture and we had to obtain a freehold title. They agreed on a sale price of a sum of Kenya Shillings Ten Million (Kshs. 10,000,000/=) together with the costs of perfecting the title.
- 2) He had to pay her a sum of Kenya Shillings Six Million (Kshs. 6,000,000/=) and the balance of a sum of Kenya Shillings Four Million (Kshs. 4,000,000/=) was to be used to perfect the title so that I get the property in vacant possession.
- 3) He never engage several people and the said Madiha was aware he spent a sum of Kenya Shillings Three Million One Eighty One Thousand Two Hundred (Kshs. 3,181,200/=). Their Advocate was aware of the fact. However as they went on Madiha frustrated the process by being un - co - operative. She failed to have the relevant documents signed by the relevant Family members.
- 4) That in the circumstance he had no alternative other then to seek refund of a sum of Kenya Shillings Six Million (Kshs. 6,000,000/=) which she received in cash and a sum of Kenya Shillings Three Million One Eighty One Thousand Two Hundred (Kshs.3,181,200./=) in form of expenses for perfecting the tittle. In total he was claiming the sum of a sum of Kenya Shillings Nine Million One Eight One Thousand Two Hundred (Kshs. 9,181,200/=).
- 5) That Law firm of Messrs. Kiarie Kariuki wanted a demand Letter claiming for the money but Madiha has refused and or ignored to pay the same... "

16. The contents of Paragraphs 3 and 4 of the said statement clearly confirmed that only the sum of Kenya Shillings Six Million (Kshs. 6,000,000/=) was paid directly to the Appellant which the Appellant acknowledged receipt. The further sum of a sum of Kenya Shillings Three Million One Eighty One Thousand Two Hundred (Kshs. 3,181,200/=) was being claimed by way of expenses.

17. The Learned Counsel's contention was that the claim for Kenya Shillings Three Million One Eighty One Thousand Two Hundred (Kshs. 3,181,200/=) by way of expenses fell under what was referred to as "Special damages". The Respondent was therefore required to specifically plead and strictly prove the same.

18. The Respondent pleaded the sum of Kenya Shillings Three Million One Eighty One Thousand Two Hundred (Kshs. 3,181,200/=) at paragraph 5 of the Plaint. However no single evidence was produced to support the said expenses, no invoices or receipt of payment was produced by the Respondent.



19. The Learned Counsel relied on the decision made in the case of:- “WMT & Another (Suing in their own Capacity and as Administrator of the Estate of the Late ETM – Versus - Sarova Hotels Limited t/a Sarova Whitesands Beach Resort & SPA [2021]CKLR where the court stated as follows:-
- “The Plaintiff ought to understand that in bringing the action for damages, it is for them to prove the same and that it is not enough to state that the amount spent was this or that without anything to back these assertions. In such a case the burden of proof lies with whoever would want the court to find in his favour in support of what he claims. It was upon the Plaintiff/Appellant to prove their case on a balance of probability and the fact that the Defendant did not adduce any evidence is immaterial”.
20. Following the above reasoning, the Counsel submitted that the trial Court erred in Law by allowing the claim for Kenya Shillings Three Million One Eighty One Thousand Two Hundred (Kshs. 3,181,200/=) being the necessary expenses for perfecting the title as the Respondent never tendered any evidence in support of the said expenses.
21. Therefore, the Learned Counsel urged that the Judgement for the sum of Kenya Shillings Nine Million One Eighty One Thousand Two Hundred (Kshs. 9,181,200/=) be set aside and substituted with an award of Kenya Shilling Six Million (Kshs. 6,000,000/=) only.
22. Secondly, whether the Respondent was entitled to an award of interest on the said sum of Kenya Shilling Six Million (Kshs. 6,000,000/=): It was their submissions that the Respondent had no good reason to rescind the sale hence a refund of the money paid should not bear any interest. They stated so for the following reasons:
- a) As per the Respondent’s testimony he spent a sum of Kenya Shillings Three Million One Eighty One Thousand Two Hundred (Kshs. 3,181,200/=) to perfect the title. Why would he then seek to have the sale canceled when the title had been perfected?
 - b) The Appellant completed her obligation in the transaction through an Indenture dated 21st March, 2016 (See pages 6 to 10 of the record).The Indenture was the title in Law.
23. The demand for a Certificate of Title was therefore misguided. She stated however that the legal framework for Indentures appears to be unfamiliar to most of the public since majority believe that for one to demonstrate ownership of land, you require a Title Deed. Anyway, ignorance of the Law is not a defence.
24. The Respondent was not entitled to an award of interest as there was no reason to rescind a Sale which was actually complete. The Respondent was only entitled to a refund of the sum of Kenya Shillings Six Million (Kshs, 6,000,000./=) paid to the Appellant.
25. In conclusion, the Learned Counsel held that they believed to have stated enough to demonstrate that the appeal was merited and urged that it be allowed with costs.

B. The Written Submission by the Respondent

26. The Respondent through the Law firm of Messrs. Asige Keverenge and Anyanzwa Advocates filed their written submissions dated 27th March, 2024 and filed the same day. Mr. Asige Advocate commenced his submissions by stating that on 1st February 2016 by written Agreement entered into between the Respondent and the Appellant herein, the Respondent purchased from the Appellant a piece of land known as plot No. 833/I/MN Mkomani Measuring approximately 0.1874 acres at the agreed consideration of (Kenya Shillings Ten Million (Kshs.10,000,000.00/=). On the same date (1st February



- 2016) the Respondent paid the sum of (Kenya Shillings Two Million (Kshs. 2,000,000/=) to be held by the Appellants Advocate as stakeholder pending completion of the sale. (copy of the Agreement for sale dated 1st February, 2016 attached).
27. On 6th April 2016 the Respondent paid to the Appellant the sum of Kenya Shillings Two Million Two Hundred Thousand (Ksh.2,200,000.00/=) plus the sum of Kenya Shillings One Million Eight Hundred Thousand (Kshs. 1,800,000.00/-) for perfecting the Title and to get the property in vacant possession, making the total sum of Kenya Shillings Six Million (Kshs. 6,000,000.00/=) (copy of the acknowledgement dated 6th April 2016 attached). On 13th June 2016 the Appellant signed cash acknowledgement in which she acknowledged receipt of the sum of Kenya Shillings Three Million One Eighty One Thousand Two Hundred (Kshs. 3,181,200.00/=) from the Respondent making a grant total of a sum of Kenya Shillings Three Million One Eighty One Thousand Two Hundred (Kshs. 9,181,200.00/=) (copy of the cash acknowledgement attached).
28. The Appellant failed to secure the Title Deed and possession of the property known as plot number 833/I/MN Mkomani in favour of the Respondent as agreed in clause 2(ii) and 3 of the said agreement dated 1st February 2016.
1. Clauses 2(ii) and 3 of the Agreement for sale dated 1st February 2016 stated: -
 2. Clauses 2(ii) The balance of Kenya Shillings Eight Million (Kshs.8,000,000.00) only shall be paid to the vendor by the purchaser on or after obtaining the Title Deed (if any) within thirty (30) day from the date hereof.
 3. The possession of the properties will be delivered to the purchaser by the vendor upon receipt of initial deposit.
29. The Learned Counsel submitted that on 22nd March 2017, under the instructions of the Respondent to his former Advocates M/S Kiarie Kariuki and company, demand notice was issued and served upon the Appellant in which the Respondent demanded refund of the total sum of Kshs. 9,181,200.00 within (21)twenty-one days as provided for in the law society condition of sale which were incorporated in the said agreement. (copy of the letter dated 22nd March 2012 attached).The Appellant did not respond to the said letter of demand dated 22nd March 2017.
30. On 24th April 2017 the Respondent instructed M/S.B. W Kenzie and company Advocates to file suit against the Appellant for the recovery of the sum of Kenya Shillings Three Million One Eighty One Thousand Two Hundred (Kshs.9,181,200.00/=) being refund of the purchase price in respect of the parcel of land on plot number 833/I/MN.On 2nd May 2017, under the instructions of the Respondent to his former Advocates M/s. B.W Kenzi and company Advocates, a suit was filed in the Chief Magistrate's court Mombasa against the Appellant for the recovery of:
- a. The sum of Kshs.9,181,200.00
 - b. costs of the suit plus interest at courts rates from 1st February 2016 until judgment and payment in full.
 - c. Any other relief which the Honourable court may, deem fit and fair to grant
31. The Learned Counsel submitted that Summons to enter appearance was issued by the Honorable court on 3rd May 2017, and served upon the Appellant / Defendant. The Appellants /Defendant through her former Advocates M/s. Balala and Abed company, filed in court memorandum of appearance on 17th May 2017and statement of Defence on 8th June 2017. On 18th July 2017, the Defendant/ Appellant's former Advocates filed in court an application by way of chambers summons



in which they sought orders of the court to grant leave to Balala and Abed Advocates cease to be the Advocates acting for the Appellant/Defendant in MSA CMCC NO.710 OF 2012.

32. The said application came up for hearing on 31st July 2017 and for Ruling on 15th September 2017 and the court granted the orders as prayed in the application dated 15th July 2017. On 18th October 2017 the Defendant/Appellant through her former Advocates M/s. Gikandi and company Advocates filed in court an application by way of Notice of Motion in which they sought orders of the court to set aside the ex parte judgment entered against the Defendant/ Appellant on 15th September 2017. The said Application came up for hearing on 6th November 2017 and for Ruling on 6th February 2018 and the court set aside the said Judgment and the Defendant/Appellant was allowed to defend her case.
33. On the issues for determination, the Learned Counsel relied on the following:-
- a. Whether on 1st February 2016 by written Agreement entered into between the Appellant and the Respondent, the Respondent purchased from the Appellant a piece of land known as plot number 833/I/MN Mkomani, measuring approximately 0.1874 acres at a consideration of a sum Kenya Shillings Ten Million (Kshs. 10,000,000.00/=).
 - b. Whether on the same date (1st February 2016) the Plaintiff/ Respondent paid to the Defendant/Appellant the sum of Kenya Shillings Two Million (Kshs. 2,000,000.00/=) to be held by the Defendant's Advocates as stakeholder pending completion of sale.
 - c. Whether on 6th April 2016 the Plaintiff / Respondent paid to the Defendant /Appellant's Advocates the sum of Kenya Shillings Two Million Two Hundred Thousand (Kshs. 2,200,000.00/=) as part payment of the purchase price.
 - d. Whether on the same date i.e. 6th April 2016 the Plaintiff/ Respondent paid to the Defendant/ Appellants Advocate a further sum of Kenya Shillings One Million Eight Hundred Thousand (Kshs. 1,800,000.00/-) being payment for perfecting the Title Deed and to get the property in vacant possession making the total sum of Kenya Shillings Six Million (Kshs. 6,000,000.00/=).
 - e. Whether on 13th June 2016 the Plaintiff/Respondent paid to the Defendant/Appellant the sum of Kenya Shillings Three Million One Eighty One Thousand Two Hundred (Kshs. 3,181,200.00) as part payment of the purchase price and the same was duly acknowledged receipt by the Defendant / Appellant as per the cash acknowledgement dated 13th June 2016.
 - f. Whether the Defendant/Appellant failed to secure the Title Deed of the said plot No. 833/I/MN in favour of the Plaintiff/ Respondent as agreed in clauses 2(ii) and 3 of the said Agreement for sale dated 1st February 2016.
 - g. Whether the Defendant/Appellant was in breach of the Agreement for sale dated 1st February 2016.
 - h. Whether the Defendant/ Appellant is the registered owner of the parcel known as subdivision No.833 Section 1Mainland North measuring approximately 0.1874 hectares.
 - i. Whether the INDENTURE dated 21st March 2016 entered into between the Defendant/ Appellant and the Plaintiff/ Respondent in respect of the sale of parcel of land known as subdivision plot no. 833/I/MN Mkomani was illegal.
34. The Learned Counsel submitted that the matter was listed for hearing on 17th January 2017, the Plaintiff SALIM YUSUF MWACHIUNDE testified that he is a business person, he knows the Defendant who is a business person. She told him she wanted to sell him a plot he recorded a statement on 2nd May 2017, which he adopted as evidence in chief. PW - 1 testified that the Defendant was to sell



him a plot she told him that the plot belongs to her and her mother, the plot was No.838/1/MN he saw it was her plot, he was issued with a copy of INDENTURE, SALE AGREEMENT was done he paid the total sum of Kenya Shillings Nine Million (Kshs. 9,000,000.00/=) the total purchase price was Kenya Shillings Ten Million (Kshs.10,000,000.00/=) they signed the Agreement he produced it in court as Exhibit No. 1.

35. PW - 1 Further testified that after payment he was issued with acknowledgment which he produced in court as exhibit No.2. PW - 1 testified that he was issued with indenture. transfer was not done, he did a search, he found there was somebody called BREK BW AWADH ABDULLA ATHIMINI who was paying land rates.
36. On the Defendant's testimony in the Chief Magistrates Court, the Learned Counsel submitted that the Defendant (MADIHA ALWY KHALIFA) testified that she resides in Tudor, she knows SALIM YUSUF MWACHIUNDE, he filed a case against her in which he claimed 10 million. DW - 1 further testified that in the Defendant's list of Documents filed on 29th March 2018, she signed the sale Agreement and she received a sum of Kenya Shillings Two (Kshs.2,000,000.00/=). She further confirmed that she signed the indenture and transfer.
37. The Learned Counsel submitted that DW - 1 testified that the property had issues, she confirmed that she received a further sum of Kenya Shillings Four Million (Kshs. 4,000,000.00/=) making a grant total of a sum of Kenya Shillings Six Million (Kshs. 6,000,000/=) she stated that the sale was of a sum of Kenya Shillings Ten Million (Kshs. 10,000,000.00/=). DW - 1 Further testified that the Plaintiff wrote a letter and withdraw from the sale she stated that, later she received demand Notice from Messrs. Kiarie Kariuki Advocates in which they demanded refund of the sum of the Kenya Shillings Nine Million Nine Hundred (Kshs. 9,900,000/-).
38. On the proceedings and Judgment of the Chief Magistrate's Court, the Learned Counsel submitted that the matter came up for hearing on several occasions and finally for Judgment on 15th October 2019 and the court entered Judgment for the Plaintiff against the Defendant as follows: -
 - i. Refund of Kshs.9,181,200.00
 - ii. Costs of the suit with interest thereon from 1st February 2016 until payment in full
39. On the irregularities on the part of the Appellant, the Learned Counsel submitted that therecord of Appeal filed in court on 14th May 2019, by the Appellant does not contain a copy of the Judgment appealed against. The Record of Appeal does not contain description of documents (index).
40. On the authorities, the Learned Counsel relied on the authority of the case of:- "Marilyn Indombera Ayiero – Versus – Samarose Investments (2019) eKLR", in which the court held that: -
 - a. The Defendant to refund the Plaintiff the sum of Kshs. 350,000.00
 - b. The Defendant to pay interest on the sum at the rate of 12% from 22nd October 2014, until payment in full.
 - c. The Defendant to pay costs of the suit
41. In the case of:- "John Mungai Murango and Another – Versus – Jeremiah Mukoma" the Court of Appeal held that:-

“we find no merit in the Appeal which we hereby dismiss with costs to the Respondent.”



42. On Conclusion and prayers, the Learned Counsel submitted that the Respondent fully concurred with the Judgment of the Chief Magistrate’s Court Hon. E.K MAKORI delivered at Mombasa on 15th October 2019. The Respondent prayed that this Appeal be dismissed with costs to the Respondent.

IV. Analysis and Determination.

43. I have had a chance to critically assess all the pleadings filed in this Appeal being the Record of Appeal and its contents, the Memorandum of Appeal by the Appellant, the written submissions, the plethora of cited authorities by the parties, the relevant provisions of *the Constitution* of Kenya, 2010 and the statutes.
44. For the Honorable Court to be in a proper position to arrive at an informed, plausible, just, fair and reasonable decision from the filed Appeal by the Appellant herein, the Honorable Court has condensed the subject matter into the following two issues (2) salient issues for its determination. These are:-
- a. Whether the filed appeal by the Appellant being aggrieved by the Judgment of the Chief Magistrate’s Court at Mombasa [Hon. E.K. Makori] dated and delivered on 15th October, 2019 in Mombasa CMCC No. 710 of 2017 is merited.
 - b. Who will bear the costs of the Appeal?

ISSUE No. (a) Whether the filed appeal by the Appellant being aggrieved by the Judgment of the Chief Magistrate’s Court at Mombasa [Hon. E.K. Makori] dated and delivered on 15th October, 2019 in Mombasa CMCC No. 710 of 2017 is merited.

45. Before embarking on the issues for analysis under this sub-heading as indicated earlier in the Judgement the Honorable Court in a preamble form the court makes two assertions. First on the re-evaluation of the evidence from trial court and secondly the brief facts of this case. From the onset, I hold that this is a first appeal. Thus, I am guided by several legal authorities to wit in the case of: “Kenya Ports Authority – Versus - Kuston (Kenya Ltd, (2009) 2 EA 212” this Court stated as follows regarding the duty of first appellate court:-

“This being a first appeal to this Court, the duty of the court, is to reconsider the evidence, evaluate and draw its own conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect...”

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

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

47. The various powers of the Court on appeal, the provision Section 78 of the *Civil Procedure Act*, Cap. 21 are provided as follows:

“78. Powers of appellate court



- (1) Subject to such conditions and limitations as may be prescribed, an appellate court shall have power—
 - (a) To determine a case finally;
 - (b) To remand a case;
 - (c) To frame issues and refer them for trial;
 - (d) To take additional evidence or to require the evidence to be taken;
 - (e) To order a new trial.
- (2) Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.”

48. Black’s Law Dictionary defines the word “remand”, as relevant to this case, as “To send (a case or claim) back to the court or tribunal from which it came for some further action.”
49. The only issue for determination in the appeal is whether this Honourable Court can interfere with the Judgment of the lower court by find the claim by the Appellant to enter Judgment be entered for the Respondent in the sum of Kenya Shillings Six Million (Kshs. 6,000,000/-) but free of any interest and costs with a further provision that the Appellant be given a period of one (1) year to refund the said sum of money.
50. From the filed pleadings, the Judgment emanated from a claim filed by the Respondent in CMCC No. 710 of 2017. On 1st February 2016 by written Agreement entered into between the Respondent and the Appellant herein, the Respondent purchased from the Appellant a piece of land known as plot No. 833/I/MN Mkomani Measuring approximately 0.1874 acres at the agreed consideration of Kenya Shillings Ten Million (Kshs.10,000,000.00/=).
51. On the same date (1st February 2016) the Respondent paid the sum of Kenya Shillings Two Million (Kshs.2,000,000/-) to be held by the Appellants Advocate as stakeholder pending completion of the sale. (copy of the Agreement for sale dated 1st February, 2016 attached). On 6th April 2016 the Respondent paid to the Appellant the sum of (Kenya Shillings Two Million Two Hundred Thousand (Kshs. 2,200,000.00/=) plus the sum of Kenya Shillings One (Kshs. 1,800,000.00/=) for perfecting the Title and to get the property in vacant possession, making the total sum of Kenya Shillings Six Million (Kshs. 6,000,000.00/=) (copy of the acknowledgement dated 6th April 2016 attached).On 13th June, 2016 the Appellant signed cash acknowledgement in which she acknowledged receipt of the sum of Kshs. 3,181,200.00 from the Respondent making a grant total of Kenya Shillings Nine Million One Eighty One Thousand Two Hundred (Kshs. 9,181,200.00/=) (copy of the cash acknowledgement attached).
52. The Appellant failed to secure the Title Deed and possession of the property known as plot number 833/I/MN Mkomani in favour of the Respondent as agreed in clause 2(ii) and 3 of the said agreement dated 1st February 2016. On 22nd March 2017, under the instructions of the Respondent to his former Advocates M/S Kiarie Kariuki and company, demand notice was issued and served upon the Appellant in which the Respondent demanded refund of the total sum of Kenya Shillings Nine Million One Eighty One Thousand Two Hundred (Kshs. 9,181,200.00/=) within (21)twenty-one days as provided for in the law society condition of sale which were incorporated in the said agreement. (copy of the letter dated 22nd March 2012 attached).



53. The Appellant did not respond to the said letter of demand dated 22nd March 2017. On 24th April 2017 the Respondent instructed M/S.B. W Kenzie and company Advocates to file suit against the Appellant for the recovery of the sum of Kenya Shillings Nine Million One Eighty One Thousand Two Hundred (Kshs.9,181,200.00/=) being refund of the purchase price in respect of the parcel of land on plot number 833/I/MN.
54. I will not reiterate the facts as I have stated them before in this Judgment, but the Court notes that on 24th April 2017 the Respondent instructed M/s. B. W Kenzi and company Advocates to file suit against the Appellant for the recovery of the sum of Kshs.9,181,200.00 being refund of the purchase price in respect of the parcel of land on plot number 833/I/MN. On 2nd May 2017, under the instructions of the Respondent to his former Advocates M/s. B.W Kenzi and company Advocates, a suit was filed in the Chief Magistrate's court Mombasa against the Appellant for the recovery of:
- a. The sum of Kshs.9,181,200.00
 - b. costs of the suit plus interest at courts rates from 1st February 2016 until judgment and payment in full.
 - c. Any other relief which the Honourable court may, deem fit and fair to grant
55. The Plaintiff SALIM YUSUF MWACHIUNDE (PW 1) testified that he was a business person, he knew the Defendant who is a business person. She told him she wanted to sell him a plot he recorded a statement on 2nd May 2017, which he adopted as evidence in chief.PW - 1 testified that the Defendant was to sell him a plot she told him that the plot belongs to her and her mother, the plot was No.838/1/ MN he saw it was her plot, he was issued with a copy of INDENTURE, SALE AGREEMENT was done he paid the total sum of Kenya Shillings Nine Million (Kshs. 9,000,000.00/=) the total purchase price was a sum of Kenya Shillings Ten Million (Kshs.10,000,000.00/=) they signed the Agreement he produced it in court as Exhibit No-1.
56. PW - 1 further testified that after payment he was issued with acknowledgment which he produced in court as exhibit No.2. PW - 1 confirmed that he was issued with indenture. transfer was not done, he did a search, he found there was somebody called BREK BW AWADH ABDULLA ATHIMINI who was paying land rates.
57. On the Defendant's testimony in the Chief Magistrates Court (DW - 1), the Learned Counsel submitted that the Defendant (MADIHA ALWY KHALIFA) testified that she resides in Tudor, she knows SALIM YUSUF MWACHIUNDE, he filed a case against her in which he claimed Kenya Shillings Ten Million (Kshs. 10,000,000/-). DW - 1 further testified that in the Defendant's list of Documents filed on 29th March 2018, she signed the sale Agreement and she received Kenya Shillings Two Million (Kshs. 2,000,000.00/=). She further confirmed that she signed the indenture and transfer.
58. DW - 1 testified that the property had issues, she confirmed that she received a further sum of Kenya Shillings Four Million (Kshs. 4,000,000.00/=) making a grant total of a sum of Kenya Shillings Six Million (Kshs. 6,000,000) she stated that the sale was of Kenya Shillings Ten Million (Kshs. 10,000,000.00/=). DW - 1 Further testified that the plaintiff wrote a letter and withdraw from the sale she stated that, later she received demand Notice from the Law firm of Messrs. Kiarie Kariuki & Company Advocates in which they demanded refund of the sum of Kenya Shillings Nine Million Nine Hundred Thousand (Kshs. 9,900,000/-).



59. The Learned Magistrate opined himself in the Judgment delivered on 15th October, 2019 as follows:-

“At the end, I am satisfied that the Plaintiff has in a balance of probabilities proved his case against the Defendant and I will enter judgment for him against the Defendant as follows:-

- a. Refund of Kshs 9,181,200/-
- b. Costs of this suit with interest thereon from 1st February 2016 until payment in full.

60. By awarding the sum of Kenya Shillings Nine Million One Eighty One Thousand Two Hundred (Kshs 9,181,200/-) the trial court had examined the facts of the case and concluded that from the Kenya Shillings Six Million (Kshs 6,000,000/-) and Kenya Shillings Three Million One Eighty One Thousand Two Hundred (Kshs 3,181,200/-) was used in perfecting the title. I shall therefore not vary the decision of the Trial Court as it had properly evaluated the case as it was.

61. In this case, view of the finding of the appeal of the no percentage of interest, the matter shall be remanded to the trial court for reassessment of the percentage of interest on the principal sum and the costs which principal sum remains unchanged from the decree of the trial court.

62. On the issue of interests and costs, it is trite that the twin provisions on interest in the [Civil Procedure Act](#), Cap. 21 provide for interest on the principal sum awarded by the Court and interest on costs of the suit, respectively under Section 26 (2) and 27 (2) of the Act, as follows:

26. Interests

- (1) Where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit.
- (2) Where such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the court shall be deemed to have ordered interest at 6 per cent per annum.

27. Costs

- (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.
- (2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.



63. Over time the Chief Justice has by Practice Notes given guidance to court as to the reasonable rate of interest that the court may award under the provision of Section 26(1) of the Act being: “interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment”.
64. In the case law authority relied on by the Respondent, the applicable rate of interest as at 2006 [and so far as I know to date] is 14%. In the case the Court of Appeal, “Highway Furniture Mart Limited – Versus - Permanent Secretary Office of The President & another [2006] eKLR”, a claim for a higher rate of 36% claimed by the appellant and upheld the High Court judge in her application of 14% on the principal sum, and observed as follows:

“It is apparent from the three grounds of appeal that the appeal is not against the merits of the decision particularly the findings of fact by the superior court; that Appellant did plead but did not pray for the interest rate at 36%; that the Appellant did not state in the evidence of its managing director the basis of the rate of interest of 36%; that the court did not award interest rate at 36%; that there was no error on the judgment and that the error was on the decree which included an amount of Shs.30 million as claim for interest which was not prayed for or awarded in the Judgment. The appeal concerns the jurisdiction of the court to set aside the decree and order the correction of the decree so that it would agree with the Judgment. That notwithstanding, it is necessary to determine the rate of interest awarded in the Judgment because the Appellant’s Counsel maintained in the superior court and still maintains before us that the rate of interest at 36% was pleaded in paragraph 1 of the Plaintiff and that by the phrase: “Costs of this suit and interest as prayed in the Plaintiff” in the Judgment the Judge indeed awarded that interest rate.

It is also necessary to determine the validity of the rate of interest awarded because the jurisdiction of the superior court largely depend on the nature of error or errors that the Judge assumed jurisdiction to correct.

As a matter of pleadings and evidence it is true as found by the Learned Judge that while the Appellant pleaded in paragraph 1 of the plaintiff for interest at the rate of 36% the Appellant did not, however, pray for the rate of interest at 36% as a relief and did not give evidence at all concerning that rate of interest. By Order VII rule 6 of the Civil Procedure Rules (CP Rules) the plaintiff should state specifically the relief which the Plaintiff claims. The relief claimed by the Appellant was specifically pleaded in paragraph 3 (1) of the plaintiff “as the principal sum of Shs.11,257,118/= together with interest thereon at court rate from the date of the plaintiff until payment in full”. The Chief Justice from time to time fixes the ceiling of the court rate interest under section 26 of the *Civil Procedure Act*. The prevailing court rate is 14% p.a. which is the rate applied by Okwengu J.

The justification for an award of interest on the principal sum is, generally speaking, to compensate a plaintiff for the deprivation of any money, or specific goods through the wrong act of a Defendant. In Later – Versus - Mbiyu [1965] EA 592, the forerunner of this Court said at page 593 paragraph E:

“In both these cases the successful party was deprived of the use of goods or money by reason of the wrongful act on the part of the defendant, and in such a case it is clearly right that the party who has been deprived of the use of goods or money to which he is entitled should



be compensated for such deprivation by the award of interest”. (See also the Uganda case of *Lwanga v Centenary Rural Development Bank* [1999] 1 EA 175).

If the Plaintiff was indeed claiming interest on the principal sum at 36% it is surprising that Joseph Waitiki Ndegwa who gave evidence in support of the claim did not refer to that rate of interest or give evidence of circumstances which could have justified the award of interest above the court rates. There was no explanation why the appellant had to wait for more than 7 years to file the suit. It is evident that the claim was incontestably unproved.

The Judgment delivered by Juma J. did not specifically deal with the claim for interest at 36%. That claim as computed in the decree amounted to Shs.30,119,467/68 which exceeded the principal sum by more than three times. It was undoubtedly a very large claim. It is inconceivable that Juma J could have allowed such a large claim without specifically saying so and without assigning any reasons. The award of interest at 36% cannot be simply implied from the Judgment. We are satisfied that Okwengu J correctly construed the Judgment of Juma J that court did not award interest at the rate of 36%.”

65. It is clear that the Chief Justice’s directions in the Practice Notes can only affect or guide the court’s exercise of the power to order interest under the provision of Section 26 (1) of the Act and not the statutory provision of the rate of interest under the provision of Section 26(2) at 6 % per annum. The Practice Note clearly affected only the power of “the court to order interest to be paid at such rate as the court deems reasonable”. This power to order reasonable rate of interest is provided for under the provision of Section 26 (1) of the Act. Indeed, the provision of Section 26 (2) of the Act applies to situations where the decree of the Court is silent, that is where court does not order any rate of interest, and this provision has not been amended. The Judgment of the trial court of 15th October, 2019 the Learned Trial Magistrate (as he was then) opined as it follows:-

b. Costs of this suit with interest thereon from 1st February 2016 until payment in full.

66. Had the trial court made provision for rate of interest on the principal sum, it would have been required to be guided by the Chief Justice’s Practice Note on interest under section 26(1) of the Act then set at 14% as observed in the “Highway Furniture Mart decision, (supra)”. In the present circumstances, there being no order on rate of interest by the court, the provision of Section 26 (2) of the *Civil Procedure Act* clearly stipulates the applicable rate of interest at 6% per annum. Interest on costs is, of course, separately provided for under section 27(2) of the Act at 14% per annum.
67. On the payment of the decretal sum, the Appellant seeks to be given a period of one (1) year to refund the said sum of money. The Civil procedure Rules under Order 21 Rule 12 provide for the court’s power and discretion to order payment of decretal sums by posting the same or instalment as follows:
- 2.
- (1) Where and in so far as a decree is for the payment of money, the court may for any sufficient reason at the time of passing the decree order that payment of the amount decreed shall be postponed or shall be made by instalments, with or without interest, notwithstanding anything contained in the contract under which the money is payable.
 - (2) After passing of any such decree, the court may on the application of the judgment debtor and with the consent of the decree- holder or without the consent of the decree holder for sufficient cause shown, order that the payment of the amount decreed be postponed or be made by instalments on such terms as to the payment of interest, the



attachment of the property of the judgment-debtor or the taking of security from him, or otherwise, as it thinks fit.”

68. This court considers that this is an appropriate case for the payment of decretal sum together with interest and costs on instalment taking into consideration the public nature of the appellant school with exchequer funding requiring budget inclusion for any lawful payments. But the discretion to order payments in instalment lies with the trial as the court which passed the decree within the meaning of the provision of Order 21 Rule 12 of the Civil Procedure Rules, 2010. Indeed, in accordance with the principle in “Mbogo & Anor. – Versus - Shah (1968) EA 93”, the Appellate court may not lightly interfere with discretion of the trial court.
69. However, as the trial court will have to reassess the amounts payable on the basis of the rate of interest as 6%, in accordance with Section 26 (2) of the *Civil Procedure Act*, 2010 the court will also determine the mode of payment execution as appropriate.
70. The upshot of the same is that in such a case where the court does not specify the rate of interest, or, in the words of Section 26 (2) the Act, “inter alia”:-

“Where such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the court shall be deemed to have ordered interest at 6 per cent per annum.”

71. In this regard I find the appeal is partially allowable with each party bearing its own costs.

ISSUE No b). Who will bear the costs of the Appeal?

72. The issue of Costs is at the discretion of Courts. Costs mean the award that a party is granted at the conclusion of any process, legal action or proceeding in any litigation. The Proviso of the provision of Section 27 (1) of the *Civil procedure Act*, Cap. 21 provides that Costs follow the event whereby by events it means the result of the said process, legal action or proceedings.
73. In the instant case, I find that the Appeal being partially allowed each party should bear its own costs.

V. Conclusion and Disposition.

74. The upshot of the foregoing, and having conducted an in-depth analysis of the framed issues herein, the Honorable Court finds that the Appeal by the Appellant lacks merit and is hereby dismissed. Accordingly, and for avoidance of any doubts, the Honorable Court makes the following orders for disposal thereof:-
- a. That the appeal filed through a Memorandum of Appeal dated 4th November, 2019 and a Record of Appeal herein be and is hereby partially allowed with each party bearing its own costs.
 - b. That the Honourable Court shall not touch the verdict in terms of the amount awarded by the Trial Court being a refund of a sum of Kenya Shillings Nine Million One Eighty-One Thousand Two Hundred (Kshs. 9,181,200/-) but alters the part of the orders of the trial Court which did not indicate the interest rate payable on the refund which on costs on the basis of 6% on the sums awarded by the judgment as stipulated in Section 26 (2) of the *Civil Procedure Act* and 14% on the costs, as provided by Section 27(2) of the *Civil Procedure Act*, 2010.
 - c. That the Respondent is restrained from executing the decrees of the trial court until such computation of the decretal sum has been done, or until further orders of the trial court.



d. That each party shall bear its costs of the Appeal.

It is so ordered accordingly

**JUDGEMENT DELIVERED THROUGH MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND
DATED AT MOMBASA THIS.....9THDAY OFJULY.....2024.**

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**HON. MR. JUSTICE L.L. NAIKUNI
ENVIRONMENT AND LAND COURT AT
MOMBASA**

Judgement delivered in the presence of:-

- a. M/s. Firdaus Mbula, the Court Assistant.
- b. M/s. Gatimu holding brief for Mr. Mwanzia Advocate for the Appellant.
- c. Mr. Asige Advocate for the Respondent.

