Galaxy Merchant's Limited & another v Kwagara & another (Environment and Land Appeal E013 of 2024) [2025] KEELC 5024 (KLR) (16 June 2025) (Judgment)

Neutral citation: [2025] KEELC 5024 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ENVIRONMENT AND LAND APPEAL E013 OF 2024

JO MBOYA, J

JUNE 16, 2025

BETWEEN

GALAXY MERCHANT'S LIMITED ..... 1ST APPELLANT

VINIT ARVIND SAVLA ..... 2ND APPELLANT

AND

PATRICK MWIRIGI KWAGARA ..... 1ST RESPONDENT

TIMOTHY NJAGI NKONGE ..... 2ND RESPONDENT

JUDGMENT

1. The Respondents herein [who were the Plaintiffs in the original suit] approached the court vide Plaint dated 11th September 2019 and wherein the Respondents impleaded various defendants including the Appellants before the court.

2. Vide the Plaint under reference, the respondents sought the following relief:

    i. A Permanent injunction restraining the 1st Defendant from selling, disposing off, further charging and in anyway from wasting the suit premises known as Nyaki/Mulathankari/3346 and Nyaki/Mulathankari/3347 in Meru County.

    ii. A Mandatory injunction compelling the defendants to forthwith transfer to the plaintiff jointly the suit premises known as Nyaki/Mulathankari/3346 and Nyaki/Mulathankari/3347 in Meru County.

    iii. An order compelling the District Land Registrar, Meru, the 6th Defendant to forthwith transfer to the Plaintifs' their shares to be excised from the suit premises known as Nyaki/Mulathankari/3346 and Nyaki/Mulathankari/3347 in Meru County.

iv. In the alternative, an order for refund to the Plaintiffs the said amount altogether with interest at commercial rates from the date of breach until payment in full. [we submit that this is the most practical relief hereof plus damages].

v. Any other relief as this Honourable Court may deem fit.

vi. Costs of this suit.

3. The 1st and 2nd Defendants duly entered appearance and thereafter filed a statement of defence dated 25th January 2020 and wherein the 1st and 2nd Defendants [who are the appellants herein] denied the claims by the Respondents. Furthermore, the 1st and 2nd Defendants[appellants] indicated that same were to subject the respondents to strict proof.

4. The 3rd 4th and 5th Defendants duly entered appearance and filed a Joint statement of defence dated 3rd October 2022. On the other hand, the Interested Party entered appearance on the 1st November 2019.

5. The suit mounted by the current Respondents was heard and disposed of vide Judgment delivered on the 3rd January 2024 wherein the Learned Chief Magistrate found and held that the Respondents had duly proved their case. To this end, the Learned Chief Magistrate proceeded to and entered Judgment against all the Defendants save for the 6th Defendant [the District Land Registrar].

6. Aggrieved by and dissatisfied with the Judgment and decree of the learned Chief Magistrate, the Appellants herein approached the court vide Memorandum of Appeal dated the 27th February 2024; and wherein the appellants have raised the grounds following:-

i. The trial learned magistrate erred in law and fact by enforcing against the appellants the agreements dated 18.6.2015 and 19.10.2015 yet the appellants were not privy to the same.

ii. The learned trail magistrate erred in law and facts by entering judgment against the 1st respondent who is a total stranger to the contract, pleading and all proceeding in the lower court.

iii. The learned magistrate erred in fact and law by failing to hold that the agreement/ contracts which she relied upon to enter judgment against the appellant were tainted with illegality, coercion and fraud.

iv. The learned magistrate erred in fact and law by entering judgment against the appellant whereas there was no evidence in support of the same.

v. The learned magistrate erred in fact and law by failing to deduce and hold that the appellants were not beneficiaries'/recipients of the consideration monies that were the substratum of the respondents claim/suit.

vi. The trial magistrate erred in fact and law by granting a multiplicity of relief to the respondents and which amounts to unjust enrichment and is a Double Jeopardy to the appellant.

vii. The learned magistrate erred in fact and law by failing to make a fining against the interested party.

viii. The trial magistrate erred in fact and law by proceeding to enter Judgment against the appellants despite the fact that 3rd, 4th and 5th Defendants had conceded wholly owing the respondents the claimed amounts.

ix. The trial magistrate erred in fact and law by entering judgment against the appellants whereas there was clear evidence that they were not in any way liable/ culpable.

7. The instant appeal came up for directions on the 24th March 2025 whereupon the advocates for the parties confirmed that the record of appeal had been duly filed and served. Furthermore, it was posited that the record of appeal and the supplementary record of appeal contained all the requisite documents and thus the appeal was ready for hearing.

8. Arising from the forgoing, the court proceeded to and issued directions concerning the hearing and disposal of the appeal. In particular, the court directed that the appeal shall be disposed of by way of written submissions to be filed and exchanged within set timelines.

9. The appellants filed written submissions dated 8th April 2025 and wherein the appellant highlighted five [5] issues for determination. The issues raised by the appellants are namely; whether the appellants were privy to any legal transactions involving the respondents; whether the appellants received any monies from the respondents; whether the respondents can enforce two parallel agreement involving the same subject matter/ payments; whether the subsequent agreement between the respondents and the 2nd appellant was induced by coercion or duress; and whether the respondents' pleadings and evidence entitled them to the relief[s] sought or otherwise.

10. Regarding the first issue, namely; whether the appellants were privy to any legal transactions involving the respondents, learned counsel for the appellants has submitted that the subject suit touches on and concerns various agreements that were entered into between the respondents and Sargai development limited; Benard Mungai; and Sarah Njeri Mungai respectively. Furthermore, it was submitted that insofar as the agreements in question were entered into and executed between the respondents [who were the plaintiffs] and the named persons [who were the 3rd 4th and 5th defendants in the lower court], then the contract could not be enforced against the appellants.

11. It was the further submissions by the learned counsel for the appellants that the appellants herein were not bound by the doctrine of privity of contract and thus the impugned agreements could not be deployed and or utilized to lay a claim against the appellants or at all.

12. As pertains the second issue, learned counsel for the appellants has submitted that the appellants herein did not receive any monies and or payments from the respondents. To this end, it was posited that having not received any monies, the appellants could neither be ordered nor directed to make any refund in favour of the respondents or at all. If anything, it was submitted that the refund and compensation can only be pursued as against Sargai Development Limited.

13. In respect of the third issue, learned counsel for the appellants has submitted that the suit by and on behalf of the respondents sought to enforce two separate agreements. To this end, learned counsel contended that the respondents were enforcing both the agreement dated the 18th June 2015 and the latter agreement dated the 30th March 2019, whereas the two agreements touched on and concerned the same subject matter/dispute. In this regard, it has been posited that the two [2] agreements are parallel and thus same cannot be enforced contemporaneously or at all.

14. Moreover, it was submitted that the enforcement of the two[2] sets of the agreements in the manner spoken to by the trial court would be tantamount to unjust enrichment as against the appellants.

15. Furthermore, it was submitted that the 3rd 4th and 5th defendants [who are not parties to the appeal] had duly entered appearance and filed statement of defence wherein same [named defendants] had conceded the respondents claim.

16. On the other hand, it was submitted that it was also erroneous for the Learned Chief Magistrate to proceed and enforce the terms of the two [2] sets of the agreements, yet the respondents' evidence only adverted to and concerned a claim for refund/compensation paid to 3rd defendant [not a party to the appeal].

17. To this end, learned counsel for the appellants has therefore submitted that the pleadings which were filed by the respondents seeking to enforce the two [2] parallel agreements and the Judgment of the court that enforced both agreements contemporaneously constitute an unjust enrichment and has occasioned grave injustice.

18. Regarding the fourth issue, learned counsel for the appellants has submitted that the agreement dated 30th March 2019 and which was entered into between the 2nd appellant herein and the 4th defendant [not a party to the suit] on one hand; and the respondents on the other hand, was procured and obtained by coercion and duress. Furthermore, learned counsel submitted that at the time when the said agreement was entered into the 2nd appellant herein had been charged with a criminal offence and thus the entry into and execution of the impugned agreement.

19. Moreover, it has been submitted that the said agreement was entered into and executed with a view to having the criminal case/ charges against the 2nd appellant withdrawn. In this regard, and based on the existence of the criminal case, learned counsel has submitted that the 2nd appellant did not therefore enter into the impugned agreement freely and or voluntarily.

20. To buttress the submissions touching on and concerning duress and cohesion, learned counsel for the appellants has cited and referenced Chitty on contract 26th edition volume 1 paragraph 504 thereof where the learned authors have supplied the definition of duress and the ingredients attendant thereto. In addition, learned counsel has also referenced the Court of Appeal decision in the case of Kazungu Fondo Shutu versus Japhet Noti Chalo and Another 2021 Eklr.

21. In respect of the last issue, learned counsel for the appellants has submitted that the respondents herein had laid a claim concerning breach of the two [2] sets of agreements. In particular, it was submitted that at paragraph 14 of the Plaint, the respondents herein predicated their claim on the basis of the agreements dated the 18th June 2015. Whereas at paragraph 18 of the Plaint, the respondents propagated a claim on the basis of the agreement dated 30th March 2019.

22. Nevertheless, Learned counsel for the appellants has submitted that during the hearing, the respondents herein only tendered evidence touching on the claim for refund of Kenya shillings two million seven hundred thousands [Kes 2,700,000 Only] and one million seven hundred thousand only [Kes 1,700,000 Only] respectively. For good measure, it was posited that the respondent did not tender any evidence as pertains to reliefs flowing from the agreement dated 30th March 2019.

23. Premised on the evidence that was tendered by and on behalf of the respondents, it has been submitted that the Judgment of the Learned Chief Magistrate is therefore at variance with the evidence tendered. To this end, it was submitted that the impugned Judgment is therefore replete with serious error[s] of commission and omission[s].

24. Based on the forgoing, Learned counsel for the appellants has therefore implored the court to find and hold that the appeal beforehand is meritorious. To this end, the appellants have invited the court to allow the appeal and set aside the impugned Judgement in its entirety.

25. The respondents filed written submissions dated 19th May 2025; and wherein same has raised and canvassed five [5] salient issues for consideration by the court. The issues highlighted by the

respondents are namely; whether there was any breach of the agreement; whether there was fraud; whether there was sanctity of title; whether the Plaintiffs [read, the Respondents] proved their case; and whether the plaintiffs met the threshold for issuance of injunctions or otherwise.

26. Regarding the first issue, learned counsel for the respondents has submitted that the 2nd to 5th defendants [3rd to 5th defendants not parties to the appeal] breached the agreements that were entered into with the respondents. To this end, learned counsel for the respondents has submitted that wherever a person fails to perform his/her part of the contract, such conduct constitute[s] breach.

27. In support of the forgoing submissions, learned counsel for the respondents has cited and referenced Blacks Law Dictionary 9th Edition; page 213 and the decision in the case of Jackline Njeri Kariuki versus Moses Njunge Njau [2021] ekr.

28. In respect of the second issue, learned counsel for the respondents has submitted that the 3rd to 5th defendants [not parties to the appeal] fraudulently transferred the title of the suit property to the appellants herein. Furthermore, it was submitted that by the time the title of the suit property was being transferred to the appellants, the 3rd to 5th defendants had entered into and executed agreements with the respondents herein, pertaining to the constructions of two maisonette on the suit property.

29. Moreover, it was submitted that by the time the suit property was being transferred to the 1st Appellant, the respondent herein had already paid the deposits [stakeholders sums] as stipulated in the agreements dated 18th June 2015.

30. In the premises, learned counsel contended that the transfer and registration of the suit property in the name of the 1st appellant was therefore laced with fraud and illegality. In this regard, it was posited that the 1st appellant's title was therefore fraudulent.

31. In respect of the third issue, learned counsel for the respondents submitted that in so far as the 1st appellant's title was coloured with fraud and illegality, the said title cannot therefore vest and confer upon the 1st appellant lawful right[s] thereto. Moreover, it was posited that the doctrine of indefeasibility of title cannot be deployed where the title in question was procured by fraud.

32. To support the forgoing submissions, Learned counsel for the respondents has referenced the provisions of Article 40(6) of *the Constitution* 2010; the holding of the Supreme Court of Kenya in Attorney general versus Zinj Limited 2021 KESC 23 [klr] and Dr. Ben Mutungu Muthiora Versus Marion Muthamia Kiara Nyeri civil appeal No. 43 of 2017, respectively.

33. Next is the issue of whether the respondents proved their claim as against the appellants and the rest of the defendants who are not parties to the appeal. In this regard, it was submitted that the respondents tendered and adduced before the court credible evidence to demonstrate inter alia breach of the terms of the two [2] sets of the agreements that were entered into with the respondents. Furthermore, it was posited that the appellants herein failed to comply with and or adhere to the terms of the agreement dated 30th March 2019

34. Additionally, it was submitted that the appellants herein and the other defendants [not parties to the appeal] did not tender or adduce any evidence before the trial court. In this regard, it was therefore submitted that the respondents' case was uncontroverted.

35. Premised on the foregoing, learned counsel for the respondents submitted that insofar as the appellants did not tender any evidence then same [appellants] did not disprove the evidence pertaining to breach of the contract in question.

36. Further and in any event, it was submitted that even though the appellants had filed a statement of defence, the statement of defence was stated to be a mere pleading and same does not constitute evidence. To this end, learned counsel invoked and relied upon the decision in CMC Aviation Limited Versus crusair limited 1987 Klr 103.

37. Concerning the fifth issue, learned counsel for the respondents has submitted that the respondents placed before the court plausible, cogent and credible evidence to demonstrate that the appellant had breached the contract and thus a basis had been established to warrant the ground[s] for injunction. In this regard, counsel for the respondents has thereafter cited inter alia the provisions of Order 40 of the Civil Procedure rule 2010 ; Giella versus Casman brown 1973 EA 358; and Murao Limited versus First American Bank limited 2003 eklr respectively.

38. Regarding the last issue, namely; whether damages are payable, learned counsel for the respondents has submitted that the respondents placed before the court clear evidence showing breach of the contract. To this end, it has been submitted that having proved breach of contract, the respondents were therefore entitled to damages.

39. To vindicate the submissions that the respondents were entitled to damages, Learned Counsel for the respondents has cited and referenced various decisions inter alia Total Kenya limited versus Joseph Okeim Nairobi HCC 1243 OF 1999; Minister of safety and security versus Duiven Boden 2002(6) SA 431(SCA)449; Robinson versus Harman 1848 1 Exch 850; and Photo production limited versus Securicor Transport limited 1980 AC 827 respectively.

40. In a nutshell, learned counsel submitted that the respondents proved before the trial court that the contract/ agreement indeed existed and that same was breached by the appellants. Furthermore, it was submitted that arising from the breach under reference, the respondents suffered damage[s] and hence same are entitled to compensation.

41. Having reviewed the entire record of appeal; having considered the evidence that was tendered before the trial court [both oral and documentary]; having taken into account the written submissions filed by and on behalf of the parties and upon consideration of the applicable law, I come to the conclusion that the determination of the subject appeal stands on four [4] salient issues, namely; whether the order of permanent injunction that was issued in respect of the suit properties[Nyaki/Mulathankari/3346 and Nyaki/Mulathankari/3347] was lawful and legally tenable; whether there was privity of contract between the 1st appellant and the respondents or otherwise; whether the reliefs granted by the trial court are at variance with the evidence on record or otherwise; and what reliefs[if at all] ought to issue.

42. Before venturing forward to appraise and analyse the various thematic issues highlighted in the preceding paragraph, it is instructive to recall that what is before this court is a first appeal. The jurisdiction of this court while entertaining and adjudicating upon a first appeal is well settled.

43. The scope of the jurisdiction is to the effect that this court is obligated to undertake and or subject the evidence before the trial court to exhaustive scrutiny , appraisal evaluation and review in an endeavour to arrive at an independent conclusion based on the facts and the law. For good measure, this court is at liberty to depart from the factual findings and conclusions of the trial court.

44. Nevertheless, it is imperative to underscore that even though this court is at liberty to depart from the factual findings and conclusions of the trial court [where necessary], it is important to reiterate that this court can only do so where it is demonstrated that the factual conclusions arrived at by the trial court were based on no evidence; based on misapprehension of the evidence tendered; perverse to the evidence on record or where it is demonstratably shown that there is an error of principle committed by the trial court.[See section 78 of the *Civil Procedure Act* Chapter 21 Laws of Kenya]

45. The jurisdictional remit of the first appellate court while engaging with and or adjudicating upon an appeal was recently expounded by the Court of Appeal in the case of Kenya Urban Roads Authority & another v Belgo Holdings Limited (Civil Appeal E011 of 2021) [2025] KECA 764 (KLR) (9 May 2025) (Judgment) where the Court stated thus:

> 37. We have considered the appeal and this being a first appeal, we are under a duty to subject the entire evidence and the judgment to a fresh and exhaustive examination with a view to reaching our own conclusions in the matter. In carrying out this duty, we have to remember that we had no opportunity of seeing and hearing the witnesses who testified during the trial and to make an allowance for the same. We have also to remember that it is a big thing to overturn the findings of a trial court which has had the singular opportunity of reaching its conclusions based on a combination of the evidence adduced and observation by the court of the demeanour of witnesses. In a nutshell, a first appellate court must of necessity proceed with caution in deciding whether or not to interfere with the findings of a trial court, but of course where such findings are not supported by the evidence on record or where they are founded on a misapprehension of the law, the axe must fall on the impugned judgement. This position is anchored in section 78 of the *Civil Procedure Act*, which requires a first appellate court to re-evaluate, reassess and reanalyse the extracts of the record and draw its own conclusions. These provisions have been underscored in numerous decisions of the Superior Courts among them Peters v Sunday Post Limited [1958] EA 424, where the predecessor to this Court expressed itself as follows:

"Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law an appellate court has jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this really is a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight. This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstances that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to the courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given...Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's conclusion.

> " The appellate court may take the view that, without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the

> printed evidence. The appellate court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question...It not infrequently happens that a decision either way may seem equally open and when this is so, then the decision of the trial Judge who has enjoyed the advantages not available to the appellate court, becomes of paramount importance and ought not be disturbed. This is not an abrogation of the powers of a Court of Appeal on questions of fact. The judgement of the trial Judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong."

46. Bearing in mind the principles highlighted in the decisions [supra], I am now better placed to revert to the subject matter and to address the various issues that had been highlighted elsewhere hereinbefore.

47. Regarding the first issue, namely; whether the order of permanent injunction that was issued in respect of the suit properties[Nyaki/Mulathankari/3346 and Nyaki/Mulathankari/3347] was lawful and legally tenable, it is worthy to recall and reiterate that the respondents herein entered into and executed agreements with the 3rd defendant [not a party the appeal] wherein the respondents paid various sums of monies[stakeholders sums] towards purchase and acquisition of maisonettes which were to be contructed by the 3rd defendant on LR no. Nyaki/Mulathankari/ 895 .[See paragraph 11, 12 and 13 of the Plaint dated 11th September 2019].

48. Pursuant to the sale agreement which was entered into and executed with the 3rd Defendant, the respondents herein proceeded to and made various payments. In particular, the 1st respondent paid a total sum of Kenya shillings Two million seven hundred only [Kes 2,700,000 Only]; while the 2nd respondent paid Kenya Shillings One million seven hundred[Kes 1,700,000] only. Suffice it to underscore that the said payment[s] constituted deposits towards the purchase of the maisonettes to be constructed by the 3rd defendant.

49. Be that as it may, the 3rd defendant who at the material point in time was the registered owner of Nyaki/ Mulathankari/ 895 proceeded to and subsequently sold and transferred Nyaki/Mulathankari/ 895 to the 1st Appellant.

50. Arising from the transfer of the original parcel of land, the 1st Appellant herein became the lawful and legitimate proprietor thereof. Moreover, the 1st Appellant herein thereafter sub-divided the original subject of land into two [2] portions culminating into the creation of LR. No. Nyaki/Mulathankari/ 3346 and . Nyaki/Mulathankari/ 3347, respectively [hereinafter referred to as the suit properties].

51. It is instructive to note that the original parcel of land was sub-divided by and or on behalf of the 1st appellant around December 2017. For good measure, the Certificate[s] of official search which were tendered demonstrate that the suit properties were registered in the names of the 1st Appellant on 11th December 2017.

52. Furthermore, evidence abound that upon the registration of the suit properties in the name of the 1st Appellant, the 1st Appellant procured banking facilities from Credit Bank Limited; and thereafter

charged the suit properties. Notably, the suit properties were still charged to and on in favour of Credit bank PLC as at the time of delivery of the Judgment.

53. Be that as it may, the learned Chief Magistrate proceeded to and issued an order of permanent injunction restraining the Appellants from transacting on and or otherwise dealing with the suit properties until the decretal sum is paid. It is the issuance of the said order of permanent injunction that forms the basis of the issue beforehand.

54. The critical question that the court must engage/ grapple with relates to whether or not the respondents had any proprietary rights or interest over the suit properties to underpin the grant of an order of permanent injunctions. Suffice it to state that an order of permanent injunction can only issue to protect and preserve proprietary rights[if any] that had been acquired by the respondents and not otherwise.[See Moya Drift Farm Limited Versus Theuri 1973 EA173; Mohanson kenya limited versus the land registrar Kajiado 2017 EKLR and Kenya Power And Lightning Company Limited versus Sheriff Molana Habib 2018 eklr respectively.]

55. Did the respondents place before the trial court evidence to warrant the grant of an order of permanent injunction? There is no gainsaying that even though the respondents entered into and executed a sale agreement with the 3rd defendant [not a party to the appeal] the said sale agreement was neither registered in the register of the original property. Furthermore, the respondents herein did not register any caution and or restriction on the original property.

56. In the absence of any caution and or restriction and coupled with the fact that the sale agreement that had been entered into between the respondents and the 3rd defendant was not registered, there was no encumbrance to bar/ prohibit the transfer of the original parcel of land to the 1st appellant.

57. To this end, it is my finding and holding that the 3rd defendant was at liberty to and indeed transferred the original parcel of land to the 1st appellant. Upon the transfer of the original parcel of land to the 1st appellant same [the 1st appellant] became the lawful proprietor thereof.

58. In so far as the respondents right to and in respect of the original parcels of land had not accrued, the respondents herein could therefore only lay a claim for breach of contract as against the vendor, namely; the 3rd defendant. Suffice it to state that the respondents had not accrued and or acquired any legal rights to the original property or the suit properties of at all. Absent Legal rights to or Interest[s] over the Suit Properties, no Order of Permanent Injunction could issue; or be granted.

59. To buttress the foregoing exposition of the law, it is imperative to take cognisance of the holding of the Court of Appeal in the case of Kenya Forest Service v Rutongo't Farm Limited [2015] KECA 160 (KLR) where the court considered a similar situation.

60. For coherence the court stated and held thus.

> From the facts, it is undisputed that, the suit land was private land that belonged to Olsen. Once the agreement was executed with Olsen, a contract to purchase the suit land came into existence. It is this contract that became the basis of the respondent's contractual relationship with Olsen. When Olsen subsequently transferred the suit land to the appellant, and not to the respondent, a claim for breach of the respondent's contact with Olsen arose. Such a claim would be contractual in nature, and not constitutional. As such, ought to have been pursued as an ordinary contract claim by way of a plaint under the *Civil Procedure Act* and Rules that are specifically enacted to address contractual or civil disputes and to provide the appropriate remedies.

61. Secondly, it is not lost on this court that the respondents herein did not enter into and or execute any contract with the appellants herein as pertains to acquisition of rights or interest over the suit properties. For good measure, the respondents herein could only lay a claim to the suit properties during the trial if and only if, there was some semblance of contract with the appellants [subject to the Provisions of Section 3[3] of the *Law of Contract Act*, Chapter 23, Laws of Kenya].

62. However, it is important to underscore that PW1 [1st Respondent] conceded during his testimony before the court that same only entered into an agreement with the 3rd defendant but which agreement was never registered.

63. While under cross examination by learned counsel for the Appellants, PW1 stated as hereunder;

> " The agreement to purchase a maisonette was within ourself and Sargai developers limited. It was a written agreement. Benard Muigai 4th defendant signed on behalf of Sargai developers. When we entered into the agreement. I did not know the 1st and 2nd Defendants. The 1st and 2nd defendants did not appear as proprietors at the time we bought the properties."

64. Furthermore, and while still under cross examination, PW1 stated thus;

> " We had not placed a construction or any form of caveat on the suit premises. a such could not have indicated our interest in the suit land. The 1 first agreement for purchase of the maisonette was not registered at lands office. I am not aware that it is a mandatory provision to do so."

65. From the extract reproduced above, it becomes apparent that the respondents herein only entered into a sale agreement with Sargai Developers Limited. Same thereafter paid deposits. However, the original property was sold to and transferred in favour of the 1st Appellant long before the respondents completed payments of the purchase price.

66. In the circumstances, there is no gainsaying that the respondents had no dealing and or contractual relationship with the 1st appellant. In this regard, there is no way that an order of permanent injunction could have been issued to bar and or prohibit the 1st Appellant from dealing with and or transacting upon the suit properties.

67. The Court of Appeal in the case of Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] KECA 606 (KLR) underscored the rights of a registered proprietor of land in the following manner;

> It must also be remembered that it is a serious thing to restrain a registered proprietor of a property over what is undeniably his unless there are justifiable grounds to do so.

68. The third perspective that merits consideration in determining whether the order of permanent injunction was merited relates to the evidence that was tendered by PW1. In particular, PW1 posited that what the respondents were seeking from the court was refund/ compensation for the amount that were paid and interest at court rates. For good measure, the respondents did not advert to and or seek to procure an order of permanent injunction.

69. While giving evidence in chief, PW1 stated as hereunder:-

> " We seek compensation for amounts we paid and interest at court rates. That is all"

70. Additionally, it is also imperative to revisit the evidence of PW1 while under cross examination by learned counsel for the Appellants.

71. PW1 stated as hereunder:

> " I am seeking a refund of the money we paid together with interest at court rates."

72. It is also imperative to take cognisance of cross by 3rd 4th and 5th defendants the witness[PW1] stated thus:

> " We all claim Ksh. 2.5 Million for myself and Kshs. 1.7 Million for the 2nd plaintiff and interest at court rates."

73. As if the foregoing is not enough, PW1 re-visited the nature of their claim while under re-examination.

74. Same stated thus,

> " I seek a refund of the money we paid to Sargai, interest and costs. That is all"

75. I am afraid that granting of the order of permanent injunction was inspired by extraneous factors and or considerations. Nevertheless, there is no gainsaying that had the learned Chief Magistrate considered the evidence on record, same [Chief Magistrate] would have arrived at a contrary position.

76. Regarding the Second issue, namely; whether there was privity of contract between the 1st appellant and the respondents, it is important to underscore that the respondents herein did not enter into any dealings and or transactions with the 1st appellant. In particular, PW1 reiterated that the dealing that same entered into was between Sagai Developers [who was the 3rd defendant in the lower court] and themselves. Further and in any event, PW1 admitted and acknowledged that the 1st appellant was not part of the sale agreement relating to the maisonette.

77. That being the position, the question that does arise; is on what basis would orders be made as against the 1st appellant? Suffice it to state that the learned Chief Magistrate decreed permanent injunction in respect of the suit properties which are registered in the name of the 1st appellant; and similarly decreed that the refund of the monies in question was to be borne by the 1st to 5th defendants. For good measure, the 1st defendant is the current 1st appellant.

78. Surely, how can the 1st appellant be condemned to pay the decretal sum yet PW1 conceded and acknowledged that same[respondents] did not enter into any dealing[s], transaction[s] and or agreement[s] with the 1st appellant. Furthermore, PW1 conceded that no monies were paid to the 1st Appellant.

79. Other than the forgoing, its worthy to remember that PW1 stated that the compromise agreement dated 30th March 2019 was signed by the 2nd Appellant in his personal capacity. For good measure, there is no scintilla [iota] of evidence to show that the 2nd appellant was binding the 1st appellant or at all.

80. For ease of appreciation, it is appropriate to revert to the evidence of PW1. while under cross examination by Learned counsel for the Appellant[s]. Same [PW1] stated thus:

> " The 2nd defendant brought himself into the negotiating table and signed the agreement in his personal capacity. He committed to pay on behalf of sargai developers and Benard Mwigai. He has not presented proof that he is a director of the 1st Defendant."

81. To my mind, there is completely no evidence to connect the 1st Appellant to the respondents herein. In the absence of any dealing[s], transactions and or contractual relationship with the respondents, the orders of the trial court that impact upon the 1st appellant were therefore made in vacuum.

82. Before concluding on this issue, it is important to recall and reiterate that the doctrine of privity of contract stipulates and provides that a contract can only affect parties thereto. For coherence, it is only parties to the contract who acquire rights thereto and accrue labilities therefrom.

83. Instructively, the doctrine of privity of contract was elucidated by the Court of Appeal in the case of Savings & Loan (K) Limited v Kanyenje Karangaita Gakombe & another [2015] KECA 784 (KLR) where the court stated as hereunder:

> In this jurisdiction that proposition has been affirmed in a line of decisions of this Court, among them Agricultural Finance Corporation V Lengetia Ltd (supra), Kenya National Capital Corporation Ltd V Albert Mario Cordeiro & Another (supra) And William Muthee Muthami V Bank Of Baroda, (supra). Thus In Agricultural Finance Corporation V Lengetia Ltd (supra), quoting with approval from Halsbury's Laws of England, 3rd Edition, Volume 8, paragraph 110, Hancox, JA, as he then was, reiterated:
>
> > " As a general rule a contract affects only the parties to it, it cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. The fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract."

84. My answer to issue number two is two -fold. Firstly, there was no privity of contract between the respondents and the 1st appellant. Absent privity of contract, no orders could accrue and or be made against the 1st appellant at all.

85. Secondly, there is no gainsaying that the orders that were made as against the 1st appellant were made in vacuum taking into account that the respondents themselves conceded that same had no claim as against the 1st Appellant.

86. Regarding the third issue, namely; whether the reliefs granted by the trial court are at variance with the evidence on record or otherwise. It is important to posit that even though the respondents herein had filed the Plaint dated the 11th September 2019; and claimed various reliefs, there is no gainsaying that a court of law can only grant such reliefs which have been pleaded and thereafter proved.

87. Moreover, it is apposite to underscore that proof of the claims sought in the pleadings can only be achieved on the basis of evidence tendered and adduced. In the case of General & another v Hussein & 3 others (Civil Appeal 100 of 2018) [2025] KECA 1022 (KLR) (5 June 2025) (Judgment); the Court of Appeal addressed the manner of proving facts before a court of law.

88. The Court ventured forward and stated thus:

> 39. The Law of Evidence, in all its complex glory, naturally revolves around two cardinal things: facts and proof. It is these two that combine to form evidence, which the court may or may not accept as showing the merit or otherwise of a party's case. Some facts are however more important than others and it is not

> just expected but demanded that these facts be proved by the party seeking to rely on them. Section 3 (2) & (3) of the *Evidence Act* provides as follows: 2. A fact is proved when, after considering the matters before it, the court either believes it to exist, or considers its existence so probable that a prudent man ought, in the circumstances of the particular case, to act upon the supposition that it exists. 3. A fact is disproved when, after considering the matters before it, the court either believes that it does not exist, or considers its nonexistence so probable that a prudent man ought, in the circumstances of the particular case, to act upon the supposition that it does not exist.

89. It is instructive to note that the Learned Chief Magistrate could only grant relief[s] which had been proven on the basis of the evidence. In this regard, three questions do arise, and merit interrogation.

90. Firstly, the Learned Chief Magistrate granted an order of permanent injunction to restrain the 1st the 5th defendants from dealing with and or transacting over the suit properties yet the prayer for injunction had not been proven by evidence. Moreover, there is no gainsaying that the order was made yet the evidence on record did not advert to claims in respect of the suit properties.

91. Pertinently, the respondents clarion call was that same were seeking refund/ compensation of the monies that were paid to the 3rd Defendant. Period.

92. Secondly, the Learned Chief Magistrate awarded refund of kshs 2,700,000 Only; and 1,700,000 Only; to the respondents herein. However, the learned Chief Magistrate decreed that the said monies be paid by the 1st to 5th respondents. Nevertheless, it is not lost on this court that the awards in question related to payments that were made to Sargai developers limited.

93. Consequently, and in this regard, it is evident that the only persons chargeable with the refund [if any] is Sargai developers limited and its directors [subject to the dictum in Salmond versus Salmond[1897]AC 22]

94. Moreover, there is no gainsaying that the awards that have been made relate to the sums that were paid on the basis of the sale agreements entered into and executed on the 18th June 2015. To this end, the awards in question can only be borne by the recipient[s] and/ or beneficiaries thereof.

95. Lastly, it is also important to underscore that the Learned trial magistrate awarded interest at commercial rate from [sic] date of breach, namely; 30th March 2019. However, the evidence on record demonstrate[s] that the respondents only sought interests at court rates.

96. Insofar as the respondents testified and spoke to interest at court rates, the award of interest at commercial rates constitute[s] a serious error and or misdirection on the part of the Learned Chief Magistrate.

97. Notwithstanding the forgoing, it is also important to observe that an award of interest at commercial rates can only issue in circumscribed situations. Furthermore, before such an award can be made, the claimant [in this case, the Respondents] must satisfy the court that such an award is provided for under the contract or by custom.

98. In the case Highway Furniture Mart Limited v Permanent Secretary Office of The President & another [2006] KECA 190 (KLR) the Court of Appeal stated as hereunder;

> The authors further show that according to the substantive law, interest antecedent to the suit is only claimable where under an agreement there is stipulation for the rate of interest (contractual rate of interest) or where there is no stipulation, but interest is allowed by

mercantile usage (which must be pleaded and proved) or where there is statutory right to interest or where an agreement to pay interest can be implied from the course of dealing between parties (see pages 511 – 514) of Mulla (supra).

99. Before concluding on this issue, it is also important to highlight that the only basis upon which the 2nd appellant has been condemned to bear the decretal sum was because of the agreement dated 30th March 2019. However, while under cross examination by learned counsel for the appellants, PW1 is on record stating as hereunder;

> " The money I paid was paid to sargai. I do not know if it was transmitted to your client. The 4th clause- reads money was to be re-imburse" by Sargai Developers. The agreement says so. We agreed and signed the agreement."

100. My understanding of the evidence that was tendered by PW1 and in particular, the excerpt highlighted above demonstrate[s] that the refund/ re-imbursement was to be borne by Sargai developers limited [the 3rd defendant in the main suit]

101. I am afraid that there is a clear variance between the orders made by the Learned Chief Magistrate and the evidence on record. Quite clearly, the evidence on record points to the refund being made by persons other than the appellants herein.

102. Next is the issue of what reliefs, [if any] ought to be granted. In the course of addressing issues number one; two; and three elsewhere as herein before, the court has engaged with the legality of the orders that were issued against the appellant herein.

103. Regarding the order of permanent injunction, the court found and held that no credible basis was established to underpin same. It then means that the order of permanent injunction was misconceived and ought not to have been granted.

104. As pertains to the order for refund, evidence abound that such refund was to be made by Sargai developers limited [the 3rd defendant to the main suit]. In any event, the moment the Chief Magistrate proceeded to and computed the refund on the basis of the agreement dated 18th June 2015, no further claim could arise and or be anchored on the agreement dated 30th March 2019. Simply put, the refund as decreed at the foot of the Judgment can only be borne by the persons privy to the Sale agreement dated 18th June 2015.

105. Turning to the question of interest, it is common ground that the award of interest at commercial rate was a grave misconception. Firstly, no evidence was placed before the court to demonstrate the basis for such an award. Moreover, it is not lost on the court that the totality of the evidence that was spoken to and tendered by PW1 related to court rates.

Final Disposition:

106. From the analysis which has been captured and highlighted in the body of the Judgment, it must have become crystal clear that the appeal beforehand is meritorious. Quite clearly, the proclamation by the learned Chief Magistrate as against the appellants was legally untenable.

107. Consequently, and in the premises, the final orders of the court are as hereunder:

    i. The Appeal be and is hereby allowed.

    ii. The Judgment and decree of the Learned Chief Magistrate dated 30th January 2024 be and is hereby set aside in its entirety as against the Appellants.

iii. For the avoidance of doubt, the Judgment under reference remains valid as against the rest of the Defendants [save for the appellants herein] in the manner captured at the foot thereof.

iv. Costs of the Appeal be and are hereby awarded to the Appellants.

v. The Appellants shall also have costs in the subordinate court.

vi. Costs in terms of clause (iv) and (v) herein shall be agreed upon and in default to be taxed or assessed [where appropriate].

108. It is so ordered.

DATED, SIGNED AND DELIVERED AT MERU this.....16TH .....day of ..JUNE ...2025

OGUTTU MBOYA, FCIArb; CPM [MTI].

JUDGE

In the presence of:

Mr Mutuma- Court Assistant.

Mr. Ken Muriuki for the Appellants.

Mr. Kurauka for the Respondents.