Olegasalie New Properties Limited v Lematasho (Environment and Land Appeal E003 of 2022) [2025] KEELC 6465 (KLR) (24 September 2025) (Judgment)

Neutral citation: [2025] KEELC 6465 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ENVIRONMENT AND LAND APPEAL E003 OF 2022

MD MWANGI, J

SEPTEMBER 24, 2025

BETWEEN

OLEGASALIE NEW PROPERTIES LIMITED ..... APPELLANT

AND

JEREMIAH PARKIMIAN OLE LEMATASHO ..... RESPONDENT

(Being an appeal from the judgment of the Honourable Chief Magistrates Court at Kajiado, in Kajiado ELC CASE NO. 31 OF 2021)

JUDGMENT

Background

1. This appeal arises from the judgment of the Chief Magistrate's Court at Kajiado delivered on 28th December 2021 by Honourable B. Cheloti (Senior Resident Magistrate) in Kajiado CM ELC Case No. 31 of 2020. The dispute originated from a land sale transaction in respect of all that parcel of land known as Land Reference Number Kajiado/Loodariak/686.

2. The Plaintiff before the trial court, now the Appellant, commenced the suit by way of an Amended Plaint dated 18th August 2020. In that suit, the Appellant sought, inter alia, a refund of monies allegedly paid to the Defendant (now Respondent) as part of the consideration for the purchase of the suit property. The Appellant also prayed for a declaration that the sale agreement or agreements entered into between the parties were void ab initio, and sought the attendant reliefs of costs and any other orders the court might deem just.

3. The Appellant's case in the lower court was that by a sale agreement dated 30th July 2014, the parties agreed to a transaction for the purchase of the suit property at a consideration of Kenya Shillings Thirty Million (Kshs. 30,000,000/=). The Appellant pleaded that pursuant to the said agreement, it paid a deposit of Kenya Shillings Three Million (Kshs. 3,000,000/=) in cash, and in addition transferred to the Respondent a motor vehicle, a Toyota Harrier, which the parties valued at Kenya Shillings Two

Million Five Hundred Thousand (Kshs. 2,500,000/=). The logbook of the said motor vehicle was handed over to the Respondent. It was contended that the Respondent, despite having received the deposit and the motor vehicle, failed to honour his obligations under the agreement. The Appellant averred that instead of completing the transaction, the Respondent dealt with third parties in respect of the same property, thereby rendering performance of the agreement impossible.

4. The Appellant further pleaded that, notwithstanding demand, the Respondent only refunded part of the monies received, to wit, the sum of Kenya Shillings Nine Hundred and Fifty Thousand (Kshs. 950,000/=), leaving a substantial balance of Kenya Shillings Four Million Five Hundred and Fifty Thousand (Kshs. 4,550,000/=) outstanding. The Appellant therefore prayed for judgment against the Respondent for refund of the said balance, a declaration that the sale agreement or agreements between the parties were void ab initio, costs of the suit, and such further or other relief as the court may deem fit.

5. The Respondent entered appearance and filed an Amended Statement of Defence and Counterclaim dated 1st September 2021. The Respondent denied the Appellant's claim and put the Appellant to strict proof. He pleaded that the operative agreement between the parties was not for Kenya Shillings Thirty Million (Kshs. 30,000,000/=) as alleged, but for Kenya Shillings Twenty-Four Million (Kshs. 24,000,000/=). He contended that the Appellant failed to complete the purchase within the stipulated time and that he had properly issued a completion notice requiring the Appellant to perform its obligations. The Respondent further relied on a supplementary agreement dated 17th September 2014, which, according to him, provided for the return of completion documents pending full payment of the purchase price. He invoked Clause 16 of the agreement which entitled him to retain a percentage of the purchase price as liquidated damages in the event of default by the purchaser.

6. By way of Counterclaim, the Respondent sought various reliefs including liquidated damages equivalent to twelve percent (12%) of the purchase price, which he calculated at Kenya Shillings Three Million Six Hundred Thousand (Kshs. 3,600,000/=). He also claimed interest allegedly accruing on the unpaid balance of the purchase price, which he particularized as Kenya Shillings Nine Hundred and Fifty Thousand (Kshs. 950,000/=) as at 30th August 2015. He prayed for judgment in his favour for those sums, interest thereon, costs of the suit, and any other or further relief deemed fit.

7. The suit proceeded to full hearing before the subordinate court. The Appellant called one witness, namely, Stephen Njoroge Karanja (PW1), who adopted his witness statement as evidence-in-chief and produced the Appellant's bundles of documents filed on 22nd July 2020, 18th August 2020, and 24th September 2020. On the other hand, the Respondent testified as DW1 and similarly adopted his witness statement, and called an additional witness, Stephen Malit (DW2). The Respondent's bundle of documents filed on 8th August 2021 was produced in evidence. The parties traversed their respective pleadings, with the Appellant insisting that the purchase price was Kshs. 30,000,000/= and that the Respondent was in breach, while the Respondent maintained that the true agreement was for Kshs. 24,000,000/= and that it was the Appellant who had defaulted.

8. Upon hearing the parties, the learned trial magistrate delivered judgment on 28th December 2021. From the record, it is evident that the court held that the operative agreement between the parties was the one pegging the purchase price at Kshs. 24,000,000/=, and not Kshs. 30,000,000/= as claimed by the Appellant. The court further found that it was the Appellant who was in breach of the contract for failing to complete the purchase within the time stipulated. Consequently, the court dismissed the Appellant's claim for refund of Kshs. 4,550,000/= and declined to make a declaration that the agreements were void ab initio. The Respondent's counterclaim was considered and partially allowed, but the trial court nonetheless made orders condemning the Appellant to pay the costs of the suit.

9. Aggrieved by the said judgment, the Appellant filed a Memorandum of Appeal dated 10th January 2022. In the said Memorandum of Appeal, the Appellant raised the following grounds challenging the findings and decision of the trial court:- That the learned trial magistrate erred in law and fact by:

    a. Disregarding the binding law as established by the Court of Appeal In Margaret Njeri Muiruri v Bank of Baroda (Kenya) Limited (2014) eKLR to the effect that "Courts shall not be the fora were parties indulging in varying terms of their agreements with others will get sanction to enforce the varied contracts. Contracts belong to parties and they are at liberty to negotiate or even vary the terms as and when they choose. This they must do together with the meeting of the minds. If it appears to a court that one party varied the terms of a contract with another, without the knowledge, consent or otherwise of the other, and that other demonstrates that the contract did not permit such variation, this court will say no to the enforcement of such a contract."

    b. Enforcing the agreement beating the purchase price of Kshs. 24,000,000/- while finding in the same judgement that there were two contradictory agreements over the same transaction; the other being for a purchase price of Kshs. 30,000,000/-.

    c. Failing to find that there was no meeting of minds in the transaction, and therefore the two Agreements entered into by the parties were void ab initio.

    d. Finding that the Appellant herein was in breach of an agreement for a purchase price of Kshs. 24,000,000/- whereas in law there was no agreement capable of either enforcement or breach.

    e. Failing to give reasons for the judgement entered in the matter and delivered on 28th December 2021.

    f. Failing to consider the submissions dated 17th November 2021 and filed by the Appellant herein.

    g. Condemning the Appellant herein to bear the costs of the suit while in the impugned judgement both the Appellant and the Respondent had succeeded in their claims before the Honourable Chief Magistrate Court.

    h. Recording that the Appellant's witness before the Chief Magistrates' Court at Kajiado averred that the purchase price was Kshs. 24,000,000/-

10. On the basis of those grounds, the Appellant prays that this Court allows the appeal, set aside the judgment of the Chief Magistrate's Court, and grant the reliefs sought. Specifically, the Appellant prays for the following orders:

    a. That the appeal be allowed with costs.

    b. That the judgment of the learned trial magistrate delivered on 28th December 2021 in Kajiado CM ELC Case No. 31 of 2020 be set aside in its entirety.

    c. That the costs of this appeal be awarded to the Appellant, together with interest at Court rates from the date of the award.

    d. That the Court be pleased to grant such other or further orders as may be just and expedient in the circumstances of this case.

11. The record further shows that when the appeal came up for directions, the Court directed that it be canvassed by way of written submissions. The Appellant duly filed and served written submissions

dated 25th April 2025. The Respondent, despite service of the record of appeal and the directions of this Court, did not file any submissions and did not otherwise participate in the appellate proceedings. An affidavit of service filed on record confirms that the Respondent was duly served with all requisite documents and notices of hearing but failed to attend or to respond. This Court therefore proceeds to consider and determine the appeal on the basis of the Appellant's pleadings, the record of the trial court, the Memorandum of Appeal, and the submissions on record.

Appellant's Submission

12. The appellant identified several issues for determination. On the first issue, namely the validity and enforceability of the two Agreements dated 30th July 2014 and 17th September 2014, the Appellant submitted that both instruments fell short of the mandatory requirements of Section 3(3) of the *Law of Contract Act*, which obliges contracts for the disposition of an interest in land to be in writing, signed by the parties, and attested by witnesses. Counsel emphasized that this provision is designed to safeguard certainty and prevent fraudulent or speculative claims in land transactions. It was argued that in the absence of strict compliance, the agreements cannot be clothed with legal enforceability.

13. In support of that proposition, the Appellant relied on the decision in Silverbird Kenya Ltd v Junction Ltd [2013] eKLR, where the Court held that where parties fail to meet the statutory requirements under Section 3(3), their agreement cannot be enforced in a court of law regardless of any equitable considerations. The Appellant also placed reliance on Daudi Ledama Morintat v Mary Christine Karie [2017] eKLR, where the court reiterated that a contract for the sale of land that does not meet the requirements of Section 3(3) remains void and cannot form the basis for relief.

14. The Appellant further contended that the existence of two contradictory Agreements – one reflecting a purchase price of Kshs. 30,000,000/- and another stipulating Kshs. 24,000,000/- – created irreconcilable inconsistencies. Counsel submitted that the trial court fell into error by electing to enforce the 17th September 2014 Agreement while disregarding the earlier one. According to the Appellant, both Agreements, viewed against the law, could not confer enforceable rights.

15. On the second issue, whether there was consensus ad idem, the Appellant argued that the presence of two agreements with divergent terms was evidence of lack of a meeting of minds between the parties. It was submitted that consensus ad idem is the cornerstone of any valid contract, and absent such concurrence, no contract can be said to exist. To fortify this position, counsel cited Margaret Njeri Muiruri v Bank of Baroda (Kenya) Ltd [2014] eKLR, where the Court of Appeal affirmed that a contract is founded on the principle of mutuality and concurrence of the parties, and where that concurrence is absent or vitiated, the contract becomes unenforceable. Applying that reasoning to the present case, it was contended that the contradictory purchase prices demonstrated that the parties never reached a common understanding, and therefore no enforceable contract could be deemed to exist.

16. On the third issue, whether the Appellant was in breach, it was submitted that unenforceable or contradictory agreements cannot be breached in law. Counsel maintained that the trial court erred in finding that the Appellant was in breach of the Agreement of 17th September 2014, yet the very enforceability of that Agreement was in issue. The Appellant's position was that a void contract is incapable of being breached, and consequently the Respondent's claim for breach lacked any legal foundation.

17. On the fourth issue, whether the learned magistrate gave reasons for her judgment, the Appellant argued that the trial court failed to discharge its judicial duty to provide clear and sufficient reasons for its findings. The Appellant invoked Article 50 of *the Constitution*, which guarantees parties the right to

a fair hearing, including the right to know why they have succeeded or failed in a case. It was contended that the judgment of the trial court fell short of this constitutional standard, as it did not adequately explain the rationale for preferring one Agreement over the other or the basis for awarding relief.

18. On the fifth issue, whether the reliefs were properly awarded, the Appellant submitted that the trial court misdirected itself in granting the remedies it did. Counsel broke down the reliefs into three distinct aspects. First, as to refund, it was urged that no refund could be ordered on the basis of void or contradictory Agreements, since such Agreements cannot confer enforceable rights. Second, regarding damages, it was submitted that damages flow from breach of a valid contract, and in the absence of such a contract, there was no legal basis upon which the Respondent could be awarded damages. Third, concerning costs, the Appellant argued that the trial court wrongly exercised its discretion by condemning the Appellant to bear costs notwithstanding the absence of proof of breach. According to the Appellant, costs are awarded to a successful litigant at the discretion of the court, but such discretion must be exercised judiciously and not capriciously.

19. Accordingly, the Appellant urged this Court to allow the appeal, set aside the judgment of the subordinate court delivered on 28th December 2021, and substitute it with orders dismissing the Respondent's claim with costs.

Issues for Determination

20. Upon a careful consideration of the pleadings filed, the evidence adduced before the trial court, the judgment delivered therein, the grounds set out in the Memorandum of Appeal, and the submissions advanced by the Appellant, this Court is of the view that the following issues arise for determination in this appeal:

    i. Whether the Agreements dated 30th July 2014 and 17th September 2014 satisfied the legal requirements of Section 3(3) of the *Law of Contract Act*, and whether they were valid and enforceable contracts capable of recognition in law.

    ii. Whether there was consensus ad idem between the parties in relation to the sale transaction, given the existence of two contradictory agreements stipulating different purchase prices.

    iii. Whether the Appellant could be found to have been in breach of the agreements, and if so, whether such breach was established in law.

    iv. Whether the trial court discharged its constitutional and judicial duty to give adequate reasons for its findings and determination in compliance with Article 50 of *the Constitution*.

    v. Whether the reliefs granted by the trial court, namely refund, damages, and costs, were proper and legally sustainable in the circumstances of the case.

    vi. What orders ought to be made as to costs of this appeal and of the proceedings in the lower court.

Analysis and Determination

Whether the Agreements dated 30th July 2014 and 17th September 2014 satisfied the legal requirements of Section 3(3) of the *Law of Contract Act*, and whether they were valid and enforceable contracts capable of recognition in law.

21. The starting point must be the provisions of Section 3(3) of the *Law of Contract Act*, Cap 23 Laws of Kenya, which provides in mandatory terms that:

> " No suit shall be brought upon a contract for the disposition of an interest in land unless— (a) the contract upon which the suit is founded— (i) is in writing; (ii) is signed by all the parties thereto; and (b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party: Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the *Auctioneers Act* (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust."

The above statutory requirement leaves no room for doubt. For a contract relating to disposition of an interest in land to be valid and enforceable, it must not only be in writing but also signed by the parties, with the signatures duly attested by a witness. Both agreements produced before the trial court were reduced into writing and bore signatures of the parties. On the face of it, therefore, they conformed to the formal requirements stipulated in Section 3(3). The difficulty, however, is not whether they were reduced into writing or signed, but whether they represented a genuine meeting of minds between the parties and whether, given their contradictory nature, they could both stand as enforceable contracts in law.

22. This Court notes that the agreement dated 30th July 2014 reflected a purchase price of Kshs. 30,000,000/-, while the subsequent agreement dated 17th September 2014 reflected a purchase price of Kshs. 24,000,000/-. Both documents referred to the same parcel of land and to the same transaction, yet the purchase consideration was at variance. The trial magistrate, in her judgment, chose to enforce the latter agreement of 17th September 2014, apparently on the reasoning that it was the operative contract. The difficulty with that approach is that it left unexplained the legal effect of the earlier agreement, and more critically, it did not resolve the fundamental inconsistency in the consideration payable.

23. As was aptly stated by the Court of Appeal in National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd and another [2001] eKLR:

> " A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. It is not the business of courts to rewrite contracts for parties."

The same position was echoed in Pius Kimaiyo Langat v Co-operative Bank of Kenya Ltd [2017] eKLR where the Court of Appeal emphasized that:

> " Courts cannot re-write contracts for the parties. They are bound by the terms thereof, unless coercion, fraud or undue influence are pleaded and proved."

24. What emerges from the record is that the parties signed two different agreements in respect of the same parcel of land, with materially different consideration. The question then becomes whether such contradictory agreements demonstrate consensus ad idem. The law is settled that for a valid contract

to exist, there must be a meeting of the minds on the essential terms, particularly the subject matter and the consideration. Where parties are not in agreement on the price, which is the very foundation of a sale transaction, the contract is rendered uncertain and incapable of enforcement.

25. In Charles Mwirigi Miriti v Thananga Tea Growers Sacco Ltd & another [2014] eKLR, the Court of Appeal stated that:

> " For a contract to be valid, there must be consensus ad idem. If there is no agreement on essential terms of the contract, the contract is incomplete and cannot be enforced."

The two agreements placed before the trial court could not both be said to represent a consensus ad idem, since the purchase price was materially different. By recognizing and enforcing the latter agreement of 17th September 2014 without addressing the inconsistency with the earlier one, the learned trial magistrate fell into error. She overlooked the fact that the presence of two contradictory agreements in respect of the same subject matter was not merely a procedural anomaly but went to the root of the validity of the contract itself.

26. This Court therefore finds that although both agreements satisfied the formal requirements of Section 3(3) of the *Law of Contract Act*, the existence of two contradictory agreements on the same transaction, each with different consideration, demonstrated that there was no genuine meeting of minds between the parties. In the absence of consensus ad idem, the contracts could not be said to be valid and enforceable as the law requires.

Whether there was consensus ad idem between the parties in relation to the sale transaction, given the existence of two contradictory agreements stipulating different purchase prices.

27. In considering whether there was consensus ad idem between the parties, it is necessary to return to first principles of contract law. A valid contract is founded upon the meeting of the minds of the parties on the essential terms of the transaction. The Court of Appeal in Nelson Kivuvani v Yuda Komora & Another [1996] eKLR emphasized that for an agreement to be binding there must be a clear and mutual assent to the same thing in the same sense. Where parties are at variance on such fundamental terms as the purchase price, the contract is rendered infirm for want of consensus.

28. In the matter before me, there were two separate agreements for the sale of the same parcel of land executed within a relatively short span of time: one dated 30th July 2014 indicating a purchase price of Kshs. 30,000,000/=, and another dated 17th September 2014 reflecting a purchase price of Kshs. 24,000,000/=. The very fact of such contradiction strikes at the heart of whether there was any true agreement between the parties. The learned magistrate, while recognizing the existence of both agreements, nonetheless proceeded to enforce the latter without addressing the apparent inconsistency.

29. The principle that contracts belong to parties, and that variation of their terms requires mutual assent, has been settled by the Court of Appeal in Margaret Njeri Muiruri v Bank of Baroda (Kenya) Limited [2014] eKLR where the Court stated as follows:

> " Contracts belong to the parties and it is not the business of the courts to rewrite them. Courts shall not be the fora where parties who voluntarily execute contracts come to shed crocodile tears and plead to be rescued from their bad bargains. They must freely and voluntarily be bound by the terms of their contracts. Contracts can only be varied by parties thereto and it must be shown that there was consensus ad idem. If it appears to a court that one party varied the terms of a contract without the knowledge, consent, or participation

of the other, and that other demonstrates that the contract did not permit such variation, the court will say no to the enforcement of such a contract."

30. Applying that principle, it is plain that where there are two agreements at variance on the price, it cannot be said that the parties were at ad idem. The purchase price is not an ancillary matter but goes to the root of the contract. Without a clear and unequivocal consensus on that term, the agreements cannot be enforced.

31. Further, in National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & Another [2001] eKLR, the Court underscored that a court of law cannot rewrite a contract between parties and that it is to give effect to the intentions of the parties as expressed therein. Where, however, the intentions cannot be discerned due to contradiction on a material term, the court is deprived of any foundation upon which to anchor enforcement.

32. I therefore find that the existence of two contradictory agreements in respect of the same transaction demonstrates a lack of consensus ad idem. The learned magistrate erred in law in failing to appreciate that the inconsistency in purchase price rendered the transaction void for want of agreement on an essential term. In such circumstances, there was no enforceable contract in law capable of being breached or enforced.

Whether the Appellant could be found to have been in breach of the agreements, and if so, whether such breach was established in law.

33. Turning now to the question whether the Appellant was in breach of the agreements, it is necessary first to observe that breach presupposes the existence of a valid and enforceable contract. The principle was made clear in Galaxy Paints Co. Ltd v Falcon Guards Ltd [2000] eKLR where the Court of Appeal stated that:

> " It is trite law that a court will not enforce an agreement that is illegal or otherwise void."

Having already found that the agreements dated 30th July 2014 and 17th September 2014 failed for want of consensus ad idem, it follows inexorably that there was no enforceable contract binding the parties.

34. A party cannot be held to have breached an agreement that does not exist in law. Breach is predicated upon enforceability. Here, where there is no single clear agreement, the Court has nothing to enforce and correspondingly no breach to adjudicate upon. Thus, the finding of the trial magistrate that the Appellant was in breach of the 17th September 2014 agreement was legally unsustainable. I therefore find that the Appellant could not in law be held to have breached unenforceable and contradictory agreements. The conclusion reached by the trial court on breach was erroneous in law and fact.

Whether the trial court discharged its constitutional and judicial duty to give adequate reasons for its findings and determination in compliance with Article 50 of *the Constitution*.

35. The next issue is whether the trial court gave reasons for its judgment in accordance with the constitutional duty to provide a reasoned determination. Article 50(1) of *the Constitution* of Kenya provides in mandatory terms that:

> " Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body."

It is well settled that the right to a fair hearing encompasses the right to receive a reasoned judgment. The Supreme Court of Kenya in Petition No. 5 of 2015 – Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others [2017] eKLR emphasized that a judgment must demonstrate how a court arrived at its conclusion and must disclose the reasoning process.

36. In the case before me, the trial court acknowledged the existence of two agreements but, without analysis of their contradictions or the statutory requirements under Section 3(3) of the *Law of Contract Act*, proceeded to enforce the latter agreement. The judgment was bare of a considered reasoning process on the validity of the contracts, the question of consensus ad idem, or the alleged breach. The Court of Appeal in Flora N. Wasike v Destimo Wamboko KECA 149 KLR underscored the necessity for trial courts to set out issues for determination, analyze the evidence, and apply the law before arriving at conclusions.

37. I find that the learned magistrate fell short of this duty. The failure to articulate cogent reasons amounted to a violation of the duty to render a reasoned decision as demanded by Article 50(1) of *the Constitution*. The appellate court, in such a case, is entitled to intervene.

Whether the reliefs granted by the trial court, namely refund, damages, and costs, were proper and legally sustainable in the circumstances of the case.

38. The final issue concerns whether the reliefs granted by the trial court were properly awarded. The trial court granted, inter alia, a refund of monies allegedly paid, damages, and costs. It is incumbent upon this Court to evaluate whether those reliefs were legally tenable given the findings on the validity of the contracts.

39. As regards refund of the purchase price, it is to be observed that restitution may only arise where it is demonstrated that one party has unjustly enriched itself at the expense of the other under an enforceable or at least partially performed contract. In the instant case, the record does not demonstrate with clarity the sums, if any, paid by the Respondent to the Appellant under either of the agreements. Moreover, the contradictory nature of the agreements casts doubt upon the basis of any restitutionary order. The Court of Appeal in Kenya Commercial Bank Ltd v Osebe [1982] KLR 296 held that a court must be satisfied of the factual and legal foundation of an order before granting it. In the absence of such foundation, the order for refund could not stand.

40. As regards general damages for breach of contract, the law is well settled that damages do not ordinarily lie for breach of contract beyond what is necessary to place the innocent party in the position he would have been in had the contract been performed. The Court of Appeal in Kenya Breweries Ltd v Natex Distributors Ltd [2004] eKLR held that:

> " There can be no general damages for breach of contract. The damages recoverable are those proved to have been suffered as a result of the breach." Given that there was no valid contract, there was no breach, and therefore no basis for the award of damages. The award of damages by the trial court was in error."

41. As to costs, Section 27 of the *Civil Procedure Act* provides:

> " 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 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."

Costs follow the event. Having found that the Respondent's claim was predicated on unenforceable agreements, it follows that the award of costs in its favour was equally unjustified.

42. In conclusion, therefore, the reliefs granted by the trial court were not grounded on law or evidence. The orders of refund, damages, and costs were made without legal foundation and must be set aside.

43. Having carefully re-evaluated the entire record, the pleadings, the evidence adduced at the trial, the impugned judgment, the Memorandum of Appeal, and the submissions of counsel, this Court has reached the conclusion that the transaction between the parties did not give rise to an enforceable contract in law. The contradictory agreements, executed at different purchase prices, were void ab initio and incapable of enforcement. Consequently, the Appellant's claim as founded in the plaint could not stand in the form it was decreed by the trial court.

44. Nonetheless, it is evident from the uncontroverted record that part of the consideration passing between the parties was not only monetary but also included a motor vehicle. The trial court recognized this, and it remains a matter that cannot be ignored in the interests of justice and to prevent unjust enrichment. While the sale agreements are unenforceable, the law of restitution obliges parties to restore benefits received under a void transaction so that neither retains a windfall at the expense of the other.

45. Accordingly, and in exercise of this Court's appellate jurisdiction, the justice of the case requires that while the substantive claims fail for want of a valid contract, there shall issue appropriate refund and restitution orders confined strictly to what was proved to have been transferred in fact between the parties.

46. Accordingly this court enters judgement for the following terms:

    a. The appeal is hereby allowed to the extent set out herein.

    b. The judgment and decree of the trial court delivered on 28th December 2021 in Kajiado CMC ELC No. 31 of 2020. are hereby set aside, save to the limited extent provided below.

    c. In the interests of justice and in order to prevent unjust enrichment, the Court hereby orders that the Appellant shall be refunded, within 90 days, the sum of Kenya Shillings Four Million Five Hundred and Fifty Thousand (Kshs. 4,550,000/=) being the deposit paid towards the aborted transaction, less the sum of Kenya Shillings Nine Hundred and Fifty Thousand (Kshs. 950,000/=) already refunded.

    d. The refund under order (c) above shall be satisfied by way of:

        i. Payment of Kenya Shillings Two Million and Fifty Thousand (Kshs. 2,050,000/=) in monetary form; and

        ii. Payment of the equivalent of the motor vehicle the subject of the transaction assessed at Kenya Shillings Two Million Five Hundred Thousand (Kshs. 2,500,000/=).

    e. Save as provided in order (c) and (d) above, the other reliefs granted by the trial court, including general damages and costs, are vacated.

    f. The Appellant shall have the costs of this appeal.

It is so ordered.

DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 24TH DAY OF SEPTEMBER 2025.

M.D. MWANGI

JUDGE

In the virtual presence of: