



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KABARNET**

**CIVIL APPEAL NO. E010 OF 2024**

RIFT ELECTRICAL HARDWARE AND SPARES LIMITED. APPELLANT

**VERSUS**

JOHN CHEBII KIPKALINY.....RESPONDENT

**JUDGMENT**

**(This appeal emanates from a judgment delivered by Hon. Caroline R.T Ateya Principal Magistrate on 31<sup>st</sup> July 2024)**

1. The Plaintiff instituted this suit against the Defendant vide a plaint dated 19<sup>th</sup> April, 2023 seeking for:-
  - a. A declaration that the Defendant is in breach of the sale agreement dated 5<sup>th</sup> June, 2021, entered into between himself and the Plaintiff.
  - b. Rescission of the sale agreement dated 5<sup>th</sup> June, 2021.
  - c. A mandatory order compelling the Defendant to pay to the Plaintiff the sum of Kshs.1,500,000/= being the amount paid as deposit towards the purchase of the subject property.

- d. Payment of penalty for breach of contract pursuant to the sale agreement dated 5<sup>th</sup> June,2021.
  - e. Interests on prayers c and d above at market rates accrued from the date of payment of the deposit.
  - f. Costs and interests of the suit.
  - g. Any other relief that this court may deem fit and just to grant.
2. The plaintiff avers that on or about the 5<sup>th</sup> June,2021, the Plaintiff company entered into a sale agreement for the purchase of a parcel of land measuring 200ft x200ft which was to be excised from all that parcel of land known as Baringo/Marigat/420 for due consideration of Kenya shillings Four Million Four Hundred Thousand (Kshs. 4,400,000/=).
  3. The plaintiff avers that he paid a deposit of Kenya shillings One Million, Five hundred Thousand (1,500,000/=) in accordance with the said sale agreement and the balance of Kenya shillings Two Million, nine Hundred Thousand (2,900,000/=) was to be paid in two installments of Kenya shillings One Million, Five Hundred Thousand (1,500,000/=) and Kenya Shillings One Million, Four Hundred Thousand (1,400,000/=) subject to the fulfillment of the conditions provided therein.
  4. The plaintiff further averred that it was expressly provided in the agreement that the plaintiff will pay the defendant the

first installment of the balance of the purchase price upon fixing of beacons and issuance of beacon certificate and the final instalment was to be paid upon transfer of ownership of the subject property in favour of the plaintiff.

5. The plaintiff avers that the exact positions of the suit property beacons delineating the purchase property had been pointed and agreed upon and it was a term of the sale agreement that the purchased parcel of land was to be square in shape.
6. That sometime in the month of May, 2022, the Defendant craftly purported to provide beacon certificate and a sketch depicting the shape of the property as trapezium and not square as agreed. The plaintiff further avers that it later established that there was an active court case touching on the suit property a latent defect which had not been disclosed.
7. The plaintiff averred that despite several of having the defendant rectify the situation and regularize the transaction, the defendant has adamantly failed, neglected and/or refused to heed its request thereby frustrating the completion of the sale agreement.
8. The Plaintiff particularized the particulars of breach of contract on the part of the defendant and averred that its

claim against the defendant is for rescission of the sale agreement dated 5<sup>th</sup> June,2021 and payment of the sum of Kenya Shillings One Million and Five Hundred Thousand (1,500,000/=) being the amount paid as deposit towards the purchase of the subject property. The plaintiff is also seeking to be paid damages of 14%of the purchase price, being penalty for breach owing to the fact that the Defendant defaulted in his obligations to the Plaintiff.

9. That the plaintiff's further plaint is also for interest accrued from the date of payment of deposit of market rates.

#### **DEFENCE CASE**

10. The Defendant entered appearance and filed a statement of defence and counterclaim. The Defendant denied the contents of the plaint and in particular that the property was to be square shaped. The Defendant avers that this is misleading and an afterthought as the sale agreement did not expressly state so. The defendant denied that he craftly interfered with the shape of the property and further that there is an active court case against the suit property.
11. The defendant denied the particulars of breach of contract for want of specific particulars and devoid of fact to collaborate the same. The defendant avers that he is not the cause of breach and shall demand for an order of specific performance against the plaintiff.

12. The Defendant prayed that the Plaintiff's suit be dismissed in its entirety. The plaintiff reiterates the averments in the statement of defence and further sets up the counterclaim that it is the plaintiff who has been in breach of the sale agreement dated 5<sup>th</sup> June, 2021, by mischievously introducing extraneous factors that were never captured in the sale agreement herein.
13. The Defendant averred that the plaintiff having breached the same be ordered to specifically perform his part of the bargain to completion. The defendant states that the plaintiff visited the suit land, verified the beaconing and it was sold to him as it is basis and he must be estopped from denying the condition and shape of the suit land.
14. The defendant reiterates that the beacons certificates were processed within the timelines as envisaged and the plaintiff cannot use the delay as a condition antecedent to rescind the sale agreement, nonetheless the same does not go to the root of the agreement to justify it as a breach of condition.
15. The defendant further states that the sale agreement contrary to the plaintiff's assertion did not expressly provide for completion period, was not express on the shape of the

property too. The Defendant sets out the particulars of breach on the side of plaintiff.

16. The Defendant prays that the plaintiffs suit be dismissed with costs and judgement be entered for the Defendant as prayed in the counterclaim being:-

- a. A declaration order holding that the plaintiff is solely in breach of the sale agreement dated 5<sup>th</sup> June,2021 from 28<sup>th</sup> August,2021 when he received a copy of the beacon certificate.
- b. An order of specific performance against the Plaintiff.
- c. Compensation to a sum of Kenya shillings 8,800,000/= owing to the breach.
- d. Mesne profits for breach.
- e. General and exemplary damages.
- f. Costs and interests from the date of filing of the suit herein.

### **PLAINTIFF'S REPLY TO DEFENCE**

17. The plaintiff filed a reply to defence and counterclaim where subsequently the suit proceeded for hearing and both parties prosecuted their respective cases. The trial court delivered judgement on 31<sup>st</sup> July 2024, dismissing the appellant case and making a determination that, the appellant was in breach of the sale agreement dated 5<sup>th</sup> June 2021.

18. The appellant herein was the plaintiff in the lower court and being aggrieved by the judgment of the trial court dated 31<sup>st</sup> July 2024, preferred this appeal, challenging the said judgement on the following grounds:-

- a) THAT the learned magistrate erred in fact and law by failing to consider the evidence on record which clearly demonstrated that respondent breached the agreement between parties.
- b) THAT the Learned Magistrate in her judgment dated 31<sup>st</sup> July 2024 erred in Law and fact by misinterpreting the mutual agreement between parties against the principles of law of contract.
- c) THAT the Learned Magistrate in her judgment dated 31<sup>st</sup> July 2024 erred in Law and fact by failing to consider the appellant submission and the applicable law, consequently arriving at a wrong conclusion.
- d) THAT the Learned Magistrate in her judgment erred in Law and fact by dismissing the appellant's case, yet the evidence on record demonstrated that, the appellant's case was proved on balance of probability.

e) THAT the trial court erred in law and in fact by elevating technicalities at the expense of substantive justice.

f) THAT the Learned Magistrate erred in law and in fact by delivering a self-defeating judgment which left both parties more aggrieved than they were at time of filing the suit.

19. The appellant prays for orders that:-

i. This Appeal be allowed and the Judgment of Honourable Caroline Rose Tabuche Ateya in Kabarnet Civil Case Number E032 of 2023 delivered on 31<sup>st</sup> July 2024 be set aside and this Honorable court be pleased to consider the evidence record and make appropriate orders.

b. That this Honorable court be pleased to make such orders as it deems fit in the interest of justice.

c. The cost be awarded to the appellant.

### **APPELLANT'S SUBMISSIONS**

20. The Appellant's submits that Mativo J (as he then was) in **Mursal & Another versus Manese (suing as the Legal administrator of Daphine Kanini Manesa (Civil Appeal E.20 of 2021) [20211 KEHC 282 (KLR)** stated that:-"A first appellate Court is empowered to subject the

whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses fast hand. This duty was stated in **Selle & Another versus Associated Motor Boat Co. Ltd & Others (1968) EA 123** and in **Peters versus Sunday Post limited (1958) EA 424.**"

21. They submit that this court has the power to subject the whole of the evidence to afresh and exhaustive scrutiny and make independent conclusions.
22. That the issues for determination can be summarized as follows:-
  - i. Whether the trial court erred in law and fact by dismissing the appellant case and in holding that the appellant breached the agreement dated 5<sup>th</sup> June 2021.
  - ii. Whether the Learned Magistrate erred in law and fact by delivering a self-defeating judgment which left both parties more aggrieved than they were at time of filing the suit.
  - iii. Whether the trial court erred in law and in fact by dismissing the appellant case and in holding that the appellant breached the agreement dated 5th June 2021.

23. They submit that from the pleadings filed and evidence on record, it's evident that the appellant herein proved their case on a balance of probability. That the suit was based on a formal sale agreement dated 5<sup>th</sup> June 2021. That the said agreement defined the rights and obligations of parties with certainty. They submit that the appellant filed the suit seeking inter alia refund of deposit paid, damages for breach of contract on the basis that the respondent breached the agreement by failing to honour the terms therein specifically the shape of the land purchased, existing dispute touching the subject matter of sale and delay in issuance of the beacon certificate. They submit that the court erred in law and fact by dismissing the appellant case on the reason that the sale agreement dated 5<sup>th</sup> June 2021, stipulated that payment of the 2<sup>nd</sup> installment was due after fixing and issuance of beacon certificate. That the agreement was silent on the timelines within which such beacons were to be fixed or issuance of the beacon certificate. They submit that the appellant after suffering unreasonable delay by the respondent issued a termination notice dated 11<sup>th</sup> January 2022(PEXBIT 3) specifying the breaches by the respondent and giving him 21 days to remedy the breaches failure to which the agreement stood terminated. That the respondent didn't remedy the breaches within 21 days and therefore the agreement stood terminated.

24. They submit that such notice by the appellant made time the essence of the agreement and the learned trial court erred in making a determination that there were no timelines for execution of the agreement. They rely on the case on **Omweri v Kiptugen (Civil Appeal 5 of 20[2022] KECA 413 (KLR) (4 March 2022)** where the court elaborately dealt with the issue of making time the essence of contract and similarly in the case of **Aida Nunes v John Mbiyo Njonjo and Charles K/gwe [1962] 1 EA 88** where this Court pronounced itself as follows:

"When time has not been made the essence of the contract and the circumstances are not such as to make it obvious that time is the essence, it is clear that, at least in contracts relating to the sale of land and the grant of leases, a party to the contract cannot avoid it on the ground of unreasonable delay by the other party until a notice has been served after the unreasonable delay making time the essence. That the same principle was also advanced in the case of **Simpson v. Connolly (4), [1953] 2 All E. R. 474, Finnemore, J., stated at p. 476** in relation to contracts for the sale of land: time if you do not complete this matter we shall treat the contract as at an end.

25. That the appellant herein issued a notice on 11<sup>th</sup> January 2022, which was produced as PEXBI 3 making time

the essence of the contract. They submit that the learned magistrate erred in law and fact in arriving at conclusion that there was no timelines for execution of the agreement dated 5<sup>th</sup> June 2021.

26. That secondly the subject of sale was described in the sale agreement as a portion measuring 200 x 200 ft or 8 plots measuring 0.05 hectares and or 0.4 hectares. That the shape was described with certainty as portion measuring, 200 x 200 Ft. That the learned trial court made a determination that the contract never stated that the land was to be a square. The court failed to take judicial notice that a portion of land measuring 200 x 200 Ft is a square in shape since the length and width are equal. That the appellant herein testified that he terminated the agreement since the shape of the land offered was different from the one contemplated in the sale agreement. That this position was confirmed by the respondent herein who confirmed he sold to the appellant a portion of land measuring 200 X 200 ft which is a square in shape.

27. They submit that such description of a property sold should inform any reasonable person that it's square in shape especially where both parties agree in evidence that the negotiated for land measuring 200 X 200 Ft touching the tarmac. They submit that, the appellant was within his rights to reject a portion of land which was not square in shape and

the respondent herein breached the contract by delivering a portion of land which was different in shape from what was captured in the agreement between parties. They rely on the case of **Sun Sand Dunes Limited v Raiya Construction Limited 120181 eKLR.**

28. They submit that the court erred by making a determination that, the claim that the portion of land sold was square is unfounded, yet the evidence of parties and the sale agreement confirmed that the land sold was 200 X 200 fit which is square.
29. That thirdly the appellant herein pleaded that the respondent herein breached the sale agreement by selling a land which had a dispute. That clause 6.2 of the sale agreement dated 5<sup>th</sup> June 2024, the respondent herein gave an express warranty that the land sold is not subject to any dispute. That however in a letter dated 7<sup>th</sup> May 2022 and which was produced as PEXBIT 4, the respondent admits that the process of issuing title deeds was delayed due an existing court case. That these relevant material facts were never disclosed to the appellant. That the court dismissed this disclosure of material facts as ground for termination of agreement by stating that, there was no proof of what case was, whether it was a dispute in court and whether the same was ongoing or concluded.

30. They submit that once the respondent herein admits that performance of his part was affected by a court case that material disclosure was sufficient and proof of the case number and progress of the same was not necessary. They submit that the appellant was within his rights to terminate the agreement on the basis on the said disclosure of the case which was delaying performance on the part of the respondent. That it was not the business of the trial court to interrogate the nature of the dispute or tract it progress. That the most relevant fact was presented by the respondent, that whatever nature of the dispute which existed between the respondent and his neighbours, it affected performance of his obligations as stipulated in the agreement.

31. It is their humble submissions that the appellant proved that the respondent breached the agreement dated 5<sup>th</sup> June 2021 and it was within his legal rights to issue a termination notice. That the court erred in law and fact in considering extraneous matters that were not relevant to the case at hand, thus coming to a wrong conclusion of dismissing the appellant's case. They submit that all relevant facts were ignored even where the respondent admitted in evidence that he has breached the terms of the sale agreement and even promised to refund the deposit of the purchase price.

32. On whether the Learned Magistrate erred in law and in fact by delivering a self-defeating judgement which left both parties more aggrieved than they were at time of filing the suit, they submit that it is not disputed that the parties herein entered into sale agreement dated 5<sup>th</sup> June 2021. That the appellant herein proceeded to terminate the agreement due to the breaches on the part of the respondent. That at the time of termination, the appellant had paid a deposit of Kshs.1, 500,000/= (Kenya Shilling One million and five hundred Thousand) to the respondent. They submit that the trial court made a determination that prayer for specific performance cannot issue for the reason that damages would be a more adequate remedy and the respondent can readily get equivalent of what was contracted from another source. That an order of specific performance in the circumstances would cause severe hardship to the appellant as it would be forcing them to take possession of land they are no longer interested in. They argue that the trial court did not award the respondent any damages sought in the counter claim except cost of the suit.

33. That the judgment is silent of what will happen to the deposit of the purchase price paid to the respondent which silence fundamentally means that the respondent herein remained with his land and retained deposit of the purchase price paid which is against the principles of natural justice.

That a party should not be allowed to maintain an advantageous position over the other gained by flouting the law. That retaining the deposit of the purchase was not among the remedies specified in the sale agreement dated 5<sup>th</sup> June 2021. That it evident the contractual relationship between parties came to an end and they cannot be compelled to proceed and perform their obligations as provided in the sale agreement and in such circumstances, order restoring both parties to their original status before entering to a contract would be adequate and to that extent the trial court ought to have issued directions on the refund of the deposit paid.

34. They submit that the respondent herein in his witness statement which he adopted as his evidence in chief, admits that he expressed intention to refund the deposit paid and he only needed sufficient time to make the payment. They pray that the court do proceed to order the respondent herein to refund to the appellant the deposit of Kshs.1, 500,000/= (Kenya Shilling One million and five hundred Thousand) with interest at court rate.

35. That the appellant has demonstrated that they proved their case on a balance of probability and the learned trial court erred in dismissing their case. They rely on their pleadings filed, evidence adduced and pray that the appeal herein be allowed with cost.

**RESPONDENT'S SUBMISSIONS**

36. The Respondents pointed out the following as issues for determination.
- i) Whether the Learned Magistrate Misrepresented the terms of the agreement dated 5<sup>th</sup> June,2021.
  - ii) Whether the Appeal has merit.
37. On whether learned magistrate misrepresented the terms of the agreement, they submit that it is not in dispute that the Appellant and the Respondent executed a land sale agreement on 5<sup>th</sup> June, 2021 voluntarily and satisfied all the ingredients of a valid contract, that the law applicable in this case is the Law of Contract Act chapter 23 of the laws of Kenya which provides in section 3 that:-
- " No suit shall be brought upon a contract for the disposition of an interest in land unless-
- (a)the contract on which the suit is founded-
- (i)is in writing.
  - (ii)is signed by all 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."

38. That the above provisions are also echoed in section 38 (1) of the Land Act 2012. That upon close scrutiny of the said agreement, it is clear from the provisions of clause (b) and 2

therein that the portion sold measures 200 by 200 or 8 plots each measuring approximately 0.05 Hectares and or 0.4 Hectares. That the agreement further stated the 2<sup>nd</sup> Instalment shall be paid upon fixing and issuance of the beacon certificate. That additional, Clause 8 clarified that the Vendor undertakes to point out the beacons thereof upon execution of this agreement, that still, clause 5 reiterates the condition that the portion sold touches the tarmac road along Marigat-Nakuru Road.

39. They submit that from the foregoing, they derive the following questions:

- a. Did the sale agreement expressly stated that the land in question should be strictly a square? The answer in No,
- b. Did the Appellant pay the instalment upon issuance of the beacon certificate as agreed? The answer is No,
- c. Did the Respondent process the Beacon Certificate as agreed? The answer is Yes.
- d. Did the Respondent point out the beacons upon execution? The answer is Yes,
- e. Lastly Did the land touched tarmac road? The answer is Yes.

40. That the gist of the Appellants claim is based on the fact that the land in question ought to have been square in

shape, however, this condition was not captured expressly in the sale agreement, this is an extraneous fact that did not form the basis of their mutual agreement, that in any event, if indeed it was the appellants intention to have a square parcel of land which the Respondent wouldn't have had an issue, then he ought to have raised the same upon execution thereof, a matter of fact, it is evident that the agreement was executed after the parties had visited the ground (page 89 of the record of appeal, the Appellant own admissions), that further, the Appellant admitted that he did not perform part of his bargain since he was not supplied with the original beacon certificate contrary to his earlier pleadings that he was not supplied with the beacon certificate, page 89 again of the record of appeal, that further still, when the Appellant was cross examined, he admitted that the parcel sold touched on the tarmac road, that is Marigat-Nakuru Road, objectively, that the Respondent could not guarantee a square parcel noting that the availability of an highway effectively distorts the shape of the property, and in essence this is a matter well beyond the control of the Respondent, nonetheless, the allegations of having a square land is just but a warranty which does not go to the root of the contract it was not a clear/express condition which fundamentally results to the contract being vitiated.

41. On whether the appeal has merit, they submit there was a valid sale agreement by the parties that was duly signed and from the evidence presented, it is clear that the Appellant is solely liable for breach. That further, the said agreement has not been vitiated by any factors nor has there been any allegations or form of illegality that was alluded to hold the Respondent liable for breach and in fact, the Respondent did all humanly possible to satisfy his part of the bargain as provided in the agreement.
42. That clearly the trial court properly directed itself in making the informed decision, a party held in breach cannot be allowed to enjoy from the fruits of its mistakes, it will amount to double speak, a party found in breach cannot benefit from a refund on account of its insolence, equity dictates that he who comes to it must do so with clean hands, that the Appellant purports to disregard this important remedy in equity.
43. They submit that in property transactions, the general principle is that a deposit paid by a purchaser serves as part payment and as security for the performance of the contract. That if the purchaser is in breach of the agreement, the deposit is usually forfeitable to the seller unless the contract provides otherwise or a court rule differently. They rely in the case of **Rajab Ali Virani v Ernest Wainaina & Another [1985] eKLR** and in **Peter Mburu Echaria v**

**Priscilla Njeri Echaria [2007] eKLR.** Further in the case of **Reliance Bank Ltd (In Liquidation) v Norlake Investments Ltd [2002] 1 EA 227 (CAK)**: The Court of Appeal emphasized the sanctity of contracts and upheld consequences of breach, including forfeiture of deposit if the contract so provides.

44. That it was established that a deposit is not merely part-payment but also a guarantee of performance. That if the buyer defaults, he forfeits the deposit.

45. They submit that in a nutshell, the above summary of Legal Principle on deposits dictates that it acts as a security for contract performance and is forfeited on breach by the paying party-unless expressly or judicially ordered otherwise.

46. That as guided above, it is clear that the deposit of Kshs. 1,500,000 should be retained as forfeiture by the Respondent; Consequently, they in the premise hereby submit that the Appeal herein is devoid of merit and ought to be dismissed with costs.

### **ANALYSIS AND DETERMINATION**

47. I have considered the memorandum of appeal, the record of appeal, the judgment of the trial court, the submissions by both parties, and the applicable law. As a

first appellate court, my duty is to subject the entire evidence on record to a fresh and exhaustive re-evaluation and draw my own independent conclusions, while bearing in mind that I neither saw nor heard the witnesses testify. See *Selle v Associated Motor Boat Co. Ltd* [1968] EA 123 and *Peters v Sunday Post Ltd* [1958] EA 424.

48. In view of the above, I have considered pleadings and proceedings before the trial court together with submissions by both parties herein and find the following as issues for determination: -

- i. Whether the trial court erred in holding that the appellant was in breach of the sale agreement dated 5th June 2021.
- ii. Whether the appellant had established a basis for rescission of sale agreement and refund of the deposit paid.
- iii. Whether the respondent was entitled to retain the deposit or specific performance as prayed in the counterclaim.
- iv. what reliefs this court should issue

**(i) Whether the trial court erred in holding the appellant in breach**

49. The appellant's case in the lower court was that the respondent failed to honour material terms of the

agreement: (a) that the property sold was to be 200ft x 200ft (square) but instead a trapezium portion was offered; (b) that the respondent failed to disclose a subsisting dispute on the property which frustrated performance; and (c) that the respondent delayed in processing the beacon certificate, thereby frustrating the agreement.

50. The trial court found that the agreement did not expressly stipulate the shape of the land, and therefore the appellant could not rely on the “square shape” claim to repudiate the agreement. On the alleged dispute, the trial court was of the view that no evidence was produced to prove the existence and nature of any case.

51. Upon re-evaluation, I find that the description in the agreement expressly provided for a parcel measuring 200ft x 200ft. A plot with equal sides is ordinarily a square, and therefore, the parties’ intention appears reasonably clear. The evidence on record shows that what was offered did not conform to the agreed dimensions. This was a fundamental variation that went to the root of the bargain.

52. As regards the latent defect, the respondent admitted in correspondence that there existed a dispute affecting the processing of title. A warranty was given in the agreement that the property was free from encumbrances and disputes. Non-disclosure of such a fact constituted breach of warranty.

The trial court erred in dismissing the issue for want of proof of the specific case number.

53. On the beacon certificate, while the agreement did not stipulate strict timelines, the appellant duly issued a notice dated 11th January 2022 making time of the essence. The law is settled that where a contract is silent on time, a party may issue reasonable notice to make time essential: see *Aida Nunes v John Mbiyo Njonjo* [1962] EA 88 and *Omweri v Kiptugen* (Civil Appeal No. 5 of 2020) [2022] KECA 413. The respondent did not remedy the breach within the notice period. The appellant was therefore within his rights to treat the agreement as terminated.

**(ii) Whether the appellant was entitled to rescission and refund**

54. Having found that the respondent was in breach of material terms of the agreement, the appellant was entitled to rescind. The remedy of rescission seeks to restore the parties to their original position. Accordingly, the appellant was entitled to a refund of the deposit of Kshs. 1,500,000 paid towards the purchase price.

**(iii) Whether the respondent could retain the deposit or claim specific performance**

55. The respondent urged that the appellant was in breach and therefore the deposit ought to be forfeited. Generally, a deposit is a guarantee for performance and may be forfeited

where the purchaser defaults: see *Rajab Ali Virani v Ernest Wainaina* [1985] eKLR; *Reliance Bank Ltd v Norlake Investments Ltd* [2002] 1 EA 227. However, forfeiture presupposes breach by the purchaser. In the present case, I have found that the respondent was the party in breach. Equity does not permit him to retain both the land and the deposit.

56. On specific performance, the trial court correctly declined to order it. It would be unjust to compel parties to complete a transaction marred by breach and mistrust.

**(iv) What reliefs this court should issue**

57. The ends of justice require that the deposit of Kshs. 1,500,000 be refunded to the appellant together with interest at court rates from the date of filing suit until payment in full. The prayer for damages equivalent to 14% of the purchase price was not demonstrated by evidence of actual loss and was rightly declined.

**Disposition**

58. In the result, I find that the appeal is merited. The judgment of the trial court delivered on 31st July 2024 is hereby set aside and substituted with the following orders: -

- a) The sale agreement dated 5th June 2021 is hereby rescinded.
- b) The respondent shall refund to the appellant the sum of Kshs. 1,500,000 being the deposit paid, with interest at court rates from the date of filing suit until payment in full.
- c) The respondent's counterclaim is dismissed.
- d) Costs of the suit in the lower court and of this appeal are awarded to the appellant.

**Judgment** delivered, dated and signed Virtually at Kabarnet  
this **2<sup>nd</sup> Day of October**, 2025.

.....  
**RACHEL NGETICH**  
**JUDGE**

**In the presence of:**

- Mr. Mburu for Appellant.
- Mr. Kiptoo for Respondent.
- CA, Elvis.