REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC APPEAL E014 OF 2025

GEOFFREY MURIUKI MANENE……. APPELLANT

VS

GIDION GITONGA……. RESPONDENT

JUDGMENT

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1. The facts and the circumstances underpinning the subject dispute and by extension the instant appeal fall within the ambit of the *ratio decidendi* in the case of ***Kenyan Urban Roads Authority vs Elizabeth Wambui Githinji& 29 others [2019] eKLR*** where the Court of Appeal [per Justice Otieno Odek JA- has he then was] stated thus;

> *127.Comparative jurisprudence from Australia, the home of the Torrens system, is illuminating. In* ***Lukacs vs. Wood*** ***(1978) 19 SASR 520****, the intent of the vendor was to transfer three vacant parcels of land to the defendant. There was a mis-description in the contract that saw the defendant receive title to two vacant blocks of land, plus a third title, on which was built an apartment dwelling. It was some two years post settlement that the mistake was realized.* ***The vendors sought to correct the mistake and the defendant responded that indefeasibility of title allowed him to retain title to the land on which the apartments stood. The Supreme Court of South Australia held in favour of the vendors.***

There was a mistake in the conveyancing process, a total failure of consideration and this rendered the contract void.

128.In ***Tutt vs. Doyle*** ***(1997) 42 NSWLR 10,*** *because of a mistake in the transfer process, Tutt received a block of land larger than what was intended. He was aware that a mistake had been made. The New South Wales Court of Appeal saw the question quite simply —* ***was it unconscionable for one party to take advantage of another's mistake? The answer was yes. The transfer was held to be null and void on account of mistake.***

2. The respondent herein was taken ill and diagnosed to have contracted COVID-19 in the year 2021. As a result of the diagnosis, the respondent needed financial resources to settle the attendant medical expenses. However, the respondent was not in funds. Because of this, the respondent approached the appellant herein for financial accommodation and, in return, offered to sell/ transfer the title of the suit property, *namely*; LR Igoji/Mweru II/1920, to the appellant to hold as a precondition pending the execution of a formal sale agreement. For good measure, the title was indeed transferred and registered in favor of the appellant.

3. The appellant on his part, paid to and in favor of the respondent the sum of Kshs.600,000/= only, which constituted the stakeholder sum/ deposit in anticipation of the formal entry into and execution of the sale agreement.

4. By the grace of God, the respondent recovered from the COVID-19 sickness. Thereafter, the respondent and the appellant formalized the previous arrangement surrounding the transfer of the suit property. In

particular, the parties executed a sale agreement dated 30.9.2022 and wherein the consideration was fixed to be Ksh 2,600,000/= only. Moreover, the sale agreement also stipulated that the stakeholder sum of Ksh.600,000/= only had been previously paid to and acknowledged by the respondent. In addition, the agreement highlighted that the balance of the purchase price, namely; Kes 2,000,000/= Only, was to be paid within a stipulated timeline.

5. It is common ground that the balance of the purchase price was not paid within the set timeline. To this end, the appellant approached the respondent for extension of the period for payment of the balance of the purchase prices. Suffice it to state that the respondent obliged and the parties thereafter entered into a further agreement [addendum] extending the timeline to the end of March 2023.

6. Despite the extension of time, the appellant failed, neglected or refused to pay the balance of the purchase price. To this end, the respondent was constrained to and indeed instituted Civil proceedings vide Nkubu ELC No E011 of 2024 and wherein the respondent sought various reliefs inter alia cancellation of the certificate of title in favor of the appellant and rectification of the register of the suit property.

7. The suit before the subordinate court was heard and disposed of *vide* judgement rendered on 13.2.2024 [but which essentially should be 13.2.2025] and wherein the learned trial magistrate [Hon R. Ongira-SRM] found and held that the respondent had proved his claim to the requisite standard. In this regard, the trial court entered judgment in favor of the respondent. Essentially, the trial court decreed cancellation of the

title in favor of the appellant and thereafter awarded costs to the respondent.

8. It is the said judgment and the consequential decree which has aggrieved the appellant and thus provoked the subject appeal. The appellant has filed the appeal *vide* Memorandum of appeal dated 6.3.2025 and wherein the appellant has highlighted the following grounds of appeal.

    a) *The learned trial magistrate erred in fact and in law in finding that the respondent was entitled to cancellation of title deed issued to the appellant*
    b) *The learned trial magistrate erred in fact and in law in failing to consider the appellant's pleadings and willingness to pay the balance of the purchase price.*
    c) *The learned trial magistrate erred in fact and in law in not addressing the fate of the appellant's money paid to the respondent.*
    d) *The learned trial magistrate erred in fact and in law in not taking into account the fact that the respondent had requested the appellant not to pay until such a time that he would ask him to pay.*
    e) *The learned trial magistrate erred in fact and in law in in failing to appreciate the facts as at the time of hearing of the suit and make an appropriate order of specific performance of the contract.*

9. The subject appeal came up for direction on 9.10. 2025, whereupon learned counsel for the appellant intimated to the court that same had filed and served the record of appeal. Additionally, the learned counsel posited that the record of appeal was complete and thus the appeal was

ready for hearing. To this end, learned counsel sought directions as pertains to the hearing and disposal of the appeal.

10. With the concurrence of learned counsel for the respondent, the court proceeded to and issued directions pertaining to the hearing and disposal of the appeal. The court directed that the appeal shall be canvassed and disposed of by way of written submissions. Furthermore, the court circumscribed the timelines for filing and exchange of submissions.

11. The appellant filed a written submission dated 21.10.2025 and wherein the appellant has reiterated the grounds of appeal. Additionally, the appellant has highlighted four key issues for consideration and determination by the court.

12. Learned counsel for the appellant has submitted that the learned magistrate erred in law in finding and holding that the appellant had breached or violated the terms of the agreement dated 30.9.2022 and the addendum thereto. In particular, it was contended that the learned trial magistrate erred in cancelling the certificate of title in the name of the appellant, yet the terms/conditions of the sale agreement neither provided for nor envisaged cancellation of the certificate of title.

13. Secondly, learned counsel for the appellant has submitted that the learned trial magistrate erred in fact and in law in failing to consider the appellant's position and, in particular, the readiness of the appellant to pay/settle the balance of the purchase price. To this end, it was contended that the appellant had expressed his readiness and his willingness to pay the balance of the purchase price and hence the learned trial magistrate

ought to have given a conditional judgment to allow the appellant time to comply, by paying the balance of the purchase price.

14. Thirdly, learned counsel for the appellant has submitted that the learned magistrate failed to show mercy and sympathy by failing to extend an opportunity/ chance to the appellant to redeem the land by paying the balance of the purchase price. In this regard, learned counsel for the appellant has contended that the impugned judgment is devoid of mercy.

15. The last issue that has been canvassed by learned counsel for the appellant relates to the failure of the learned trial magistrate to speak to and give directions pertaining to the fate of the money that the appellant had paid to the respondent. In particular, it has been contended that the learned trial magistrate failed to address the issue of the monies that had been paid and by failing to do so allowed the respondent to retain the monies in question. In this regard, it has been submitted that the judgment under reference has enabled the respondent to accrue and retain an unjust enrichment.

16. Moreover, it has been submitted that the learned trial magistrate also failed to consider the evidence tendered by the appellant, which shows it is the respondent who had requested the appellant not to pay the balance of the purchase price because his [Respondents] children had threatened to kill him. In this regard, learned counsel for the appellant has submitted that the learned trial magistrate ought to have found that it is the respondent who precipitated the delay or non-payment of the balance of the purchase price and thus occasioned the breach of the sale agreement.

17. *In a nutshell* learned counsel for the appellant has invited the court to find and hold that the appeal before hand is meritorious and ought to be allowed. Moreover, learned counsel has implored the court to set aside the impugned judgment and decree specific performance of the contract, albeit with the timely condition and penalty.

18. The respondent filed written submissions dated 17.11.2025 and wherein the respondent supported the judgment of the learned trial magistrate. Furthermore, the respondent raised and canvassed four [4] key issues for consideration. The issues raised by the respondent are namely, whether the memorandum of appeal is fatally defective; whether the honorable court was entitled to cancellation of the title deed; whether the honorable court was obligated to take into account the purchase price paid to the respondent; and whether the appeal is merited.

19. Regarding the first issue, learned counsel for the respondent has submitted that the memorandum of appeal dated 6.3.2025 does not contain or highlight the reliefs sought by the appellant. In particular, it has been submitted that the Memorandum of appeal only contains the grounds of appeal and no more.

20. In the absence of reliefs sought by the appellant, it has been contended that the memorandum of appeal is deficient and fatally defective. In this regard, learned counsel has contended that the court is therefore stripped of the requisite jurisdiction to grant any orders in respect of the subject appeal.

21. Secondly, learned counsel for the respondent had submitted that the respondent executed the transfer instrument and thereafter facilitated the

transfer and registration of the suit property in favor of the appellant on the basis of goodwill. Moreover, it was contended that the transfer was effected, yet the consideration had neither been fully paid nor otherwise. In this regard, it has been submitted that by failing to pay the balance of Kshs.2,000,000/= [which is contended to constitute more than 2/3 of the consideration], the impugned transfer ought to have been cancelled/ nullified.

22. To this end, learned counsel for the respondent has submitted that the learned trial magistrate was correct in finding and holding that the respondent had proved his case. Additionally, it has been submitted that the cancellation of the certificate of title was lawful and just.

23. The third issue that has been canvassed by learned counsel for the respondent touches on and concerns the claim in respect of the refund of the deposit/stakeholder sum which was paid by the appellant. It has been submitted that the appellant herein failed to file a counterclaim in the subordinate court and thus forfeited his right to pursue and procure the refund of the deposit which had been paid to the respondent.

24. To the extent that the appellant did not file a counterclaim, it has been submitted that the learned trial magistrate was not obligated to address or decree a refund.

25. The last issue that has been canvassed by learned counsel for the respondent touches on the question of specific performance of the contract. It has been contended that the appellant has neither established nor satisfied the requisite ingredient[s] to warrant the invocation and application of the equitable remedy of specific performance. In any event,

it has been submitted that an order of specific performance cannot be issued where the conduct of the claimant is inequitable.

26. Consequently, and in the premises, learned counsel for the respondent has submitted that the subject appeal is *devoid* of merit[s] and same ought to be dismissed with costs to the respondent. Furthermore, learned counsel for the respondent has invited the court to affirm the judgment of the trial court.

27. I have reviewed the record of appeal, the evidence tendered and the written submissions filed on behalf of the respective parties. I come to the conclusion that two key issues crystallize for consideration and determination. The two issues are, namely; whether the learned trial magistrate correctly appraised the evidence on record and arrived at the correct decision or otherwise; and whether the appellant was entitled to a refund of the stakeholder sum which was paid or otherwise.

28. Before addressing the thematic issues, which have been highlighted in the preceding paragraph, it is imperative to highlight that what is before me is a 1st appeal. Being a first appeal, this court is enjoined to undertake exhaustive scrutiny, review, evaluation and analysis of the entirety of the evidence that was tendered before the court of 1st instance [Lower court] and thereafter to discern whether the conclusion/finding arrived at by the lower court accords with the evidence or otherwise.

29. Furthermore, it is important to underscore that in the course of evaluating the evidence on record, this court is called upon to arrive at and form an independent conclusion. Besides, the court is seized of the discretion to depart from the factual finding[s] arrived at by the lower court.

Nevertheless, it must be recalled that even though the court is obligated to arrive at an independent conclusion or depart from the factual conclusion[s], such departure can only be taken If and only of it is demonstrated that the findings of the lower court were based on no evidence; misapprehension of the evidence on record; perverse to the evidence tendered; or better still where it is demonstrated that the judgment was arrived at in contravention of established principle[s] of the law.

30. The scope and jurisdictional remit of the first appellate court while handling an appeal has been expounded in a plethora of decisions**. In** ***Selle & another v Associated Motor Boat Co Ltd of Kenya & others [1968] EA 123***, the Court of Appeal for Eastern Africa, which is the predecessor of our Court of Appeal stated thus:

> ***"An appeal to this court from a trial by the High Court is by way of a re-trial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.*** **[see** ***also Kenya Urban Roads Authority & another Vs Belgo Holdings Limited [2025]KECA]***

31. Back to the issue[s] for consideration. Regarding the first issue, it is imperative to recall that the appellant herein entered into an arrangement with the respondent pertaining to and concerning the sale of the suit property. The arrangement in question was precipitated by the fact that the respondent had been taken ill and diagnosed with COVID-19. In this regard, the respondent was in need of money to facilitate treatment and incidental medication.

32. Arising from the arrangement, the respondent agreed to execute the transfer instrument and thereafter transfer the suit property to and in favor of the appellant. For good measure, the transfer and registration of the suit property in favor of the appellant was undertaken prior to and before execution of a formal sale agreement in accordance with the provisions of **section 3 (3) of Law of Contract Act, Chapter 23 Laws of Kenya.**

33. Additionally, it is not lost on me that by the time the transfer and registration was being effected, the appellant had only paid the sum of Ksh 600,000/= being the deposit /stakeholder sum. Instructively, the balance of Ksh 2,000,000/= only remained due owing and payable.

34. It is also common ground that the previous arrangement between the appellant and respondent was formalized *vide* a sale agreement duly executed on 30.9.2022 and wherein the terms of engagement were synchronized and documented. In particular, the sale agreement stipulated the purchase price; the stakeholder sum to be paid; the acknowledgement of the stakeholder sum that had been paid; and the timeline for the payment of the balance of the purchase price.

35. Despite the stipulation contained in the body of the sale agreement. The appellant failed to comply with or abide by the terms thereof. Moreover, evidence abound that the appellant thereafter approached the respondent and procured an extension of time to pay the balance of the purchase price. Notably, the concession underpinning the extension of time culminated in an addendum.

36. It is important to state that the appellant did not comply with the terms contained in the addendum and hence the respondent was constrained to and indeed issued a demand notice. For good measure, the demand notice sought to have the appellant pay the balance of the purchase price within a stipulated timeline. Nevertheless, the appellant failed to comply with the terms of the demand notice and the failure precipitated the filing of the suit in the subordinate court.

37. The learned trial magistrate heard the case, reviewed the evidence and came to the conclusion that the appellant had not paid the balance of the purchase price, yet the title in respect of the suit property had been registered in his [appellant's] name. The magistrate found and held that the registration of the suit property in the name of the appellant, albeit without payment of the balance of the purchase price, negated the validity of the transfer and constituted unjust enrichment in favor of the appellant.

38. Moreover, the learned trial magistrate found and held that the appellant had been afforded sufficient opportunity to pay the balance of the purchase price but same had failed to do so. To this end, the learned trial magistrate found and held that a basis had been laid to warrant cancellation of the certificate of title in favor of the appellant and reversion of the suit property to the respondent.

39. The appellant now contends that the cancellation of the certificate of title and the reversion of the suit property to the respondent were erroneous and were premised on a misapprehension of the evidence. In this regard, the appellant now invites this court to interfere with the decision of the trial court.

40. I have appraised and appreciated the reasoning of the learned trial magistrate. I must say that the learned trial magistrate correctly evaluated and analyzed the evidence which was tendered before her. In particular, the learned magistrate correctly found and held that the appellant had procured and obtained the transfer and registration of the suit in his name under the guise that same would pay the balance of the purchase price, albeit to no avail. In this regard, the learned magistrate correctly found that the failure to pay the balance of the purchase price vitiated the contract and thus the registration was amenable to cancellation.

41. To my mind, the appellant herein cannot be allowed to retain and hold the title in respect of the suit property yet same has failed to pay the requisite consideration. The failure to pay the agreed consideration goes to the root of the contract and thus negates the transfer and registration of the suit property in favor of the appellant. Notably a valid contract envisages the existence of three critical ingredients namely; offer, acceptance and consideration.

42. Moreover, where a person, the appellant not excepted, procures a benefit without corresponding performance of his part of the bargain[Like in the instant case], such a person must not be allowed to retain the benefit procured on the basis of misrepresentation; mistake; or undue

inducement. To allow the appellant to retain the suit property in his name would not only be inequitable and unjust but would be tantamount to unjust enrichment.

43. In the case of ***Chase International Investment Corporation and Another v Laxman Keshra and 3 others [1978] KECA 7 (KLR*****,** the Court of Appeal considered the question of unjust enrichment and legal implication[s] attendant thereto.

44. For coherence, the court stated as hereunder:

> ***Most mature systems of law have found it necessary to provide, outside the fields of contract and civil wrongs, for the restoration of benefits on grounds of unjust enrichment. There are many circumstances in which a defendant may find himself in possession of a benefit which, in justice, he should restore to the plaintiff.***
>
> ***Obvious examples are where the plaintiff has himself conferred the benefit on the defendant through mistake or compulsion. To allow the defendant to retain such a benefit would result in his being unjustly enriched at the plaintiff's expense, and this, subject to certain defined limits, the law will not allow ... The principle of unjust enrichment presupposes three things: first, that the defendant has been enriched by the receipt of a benefit; secondly, that he has been so enriched at the plaintiff's expense; and thirdly, that it would be unjust to allow him to retain the benefit***

45. Flowing from the foregoing, and taking into account the circumstances attendant to the transfer and registration of the suit property in the name

of the appellant, I come to the conclusion that the learned trial magistrate correctly decreed cancellation of the title. Moreover, I find and hold that it would have been unjust, unfair, inequitable and illegal to allow the appellant to hold onto the title of the suit property.

46. Turning to the second issue, I beg to state that the appellant herein was at liberty to file a counterclaim or a cross claim, where appropriate, to seek a refund, [if at all], of the stakeholders' sum which had been paid. The appellant failed to file a counterclaim. By failing to file a counterclaim claim, the appellant deprived himself of the opportunity to propagate a claim for refund.

47. Furthermore, there is no gainsaying that the appellant was bound by his pleading. In this regard, the appellant could only propagate the claim [if any] pleaded and partake of the reliefs [if any] sought. Having not impleaded a cause of action for a refund, the appellant cannot now be heard to accuse the learned trial magistrate of the failure to decree refund.

48. Simply put, the appellant herein cannot and could not benefit from an Any Other Business [AOB]. [See the provision of order 2 rule 6 of the Civil Procedure Rules 2010], which prohibits departure.

49. In the case of ***Presbyterian Foundation v Kibera Siranga Self Help Group Nursery School [2023] KECA 371 (KLR)*** the Court of Appeal revisited the doctrine of departure and highlighted the salient features of our adversarial legal system.

50. The Court of Appeal stated thus

35. A case not specifically pleaded can be considered by the court only where the pleadings in substance, though not in specific terms, contains the necessary averments to make out a particular case and the issues framed also generally cover the question involved and the parties proceed on the basis that such case was at issue and had led evidence thereon. However, this should be only in exceptional cases where the court is fully satisfied that the pleadings and issues generally cover the case subsequently put forward and that the parties being conscious of the issue had led evidence on such issue. But where the court is not satisfied that such case was at issue, the question of resorting to the exception to the general rule does not arise. (See this court's decision in ***Dakianga Distributors (K) Ltd v Kenya Seed Company Limited*** *(2015) eKLR).*

37. Therefore, the general rule is that courts should determine a case on the issues that flow from the pleadings and the court may only pronounce judgment on the issues arising from the pleadings or such issue as the parties have framed for the court's determination. It is also a principle of law that parties are generally confined to their pleadings unless pleadings are amended during the hearing of a case. (See Galaxy Paints Co. Ltd v Falcon Guards Ltd (2000) 2 EA 385 and Standard Chartered Bank Kenya Limited v Intercom Services Limited & 4 others Civil Appeal No. 37 of 2003 (2004) 2 KLR 183).

51. The appellant, not having impleaded the claim for refund, cannot now be heard to contend that the question for refund was neither addressed nor adjudicated upon. Suffice it to posit that the learned trial magistrate could

only address and deal with issues properly pleaded and placed before her. The appellant cannot now be heard to blame the learned trial magistrate. On the contrary, the blame being directed to the learned trial magistrate is tantamount to the appellant seeing the log in the eye of the learned trial magistrate without acknowledging the speck in his own eye.

52. In the book of Mathew 7:3 the bible records thus:

"Why do you look at the speck of sawdust in your brother's eye, but pay no attention to the plank in your own eye.

53. I do not wish to say anymore. It suffices to state that the appeal beforehand is meritless.

54. On the question of cost; I find and hold that cost follow the event, unless for good cause the court finds otherwise. In respect of the instant matter, there is no intervening cause to warrant the departure from the general rule. [See section 27 of the Civil Procedure Act, Chapter 21, Laws of Kenya]. [***See also the decision of the Supreme Court in the case of Rai & 3 others v Rai & 4 others [2013] KESC 20].***

55. *In a nutshell,* I find and hold that the respondent is entitled to costs.

FINAL DISPOSITION.

56. For the reasons that I have highlighted in the body of the Judgment, it is apparent that the appeal before hand is meritless. Same courts dismissal.

57. In the end, the final orders that commend themselves to the court are as hereunder:

I. **The Appeal be and is hereby <u>dismissed.</u>**
II. **The Judgment of the trial court dated 13.2.2025 [but erroneously indicated 13.2.2024] and the consequential decree be and are hereby affirmed.**
III. **Cost of the Appeal be and are hereby awarded to the Respondent.**
IV. **The Cost in terms of clause[iii] shall be agreed upon and in default be taxed in the conventional manner.**

58. It is so ordered.

DATED, SIGNED AND DELIVERED AT MERU THIS 27TH DAY OF NOVEMBER 2025.

OGUTTU MBOYA, FCIArb, CPM [MTI].
<u>JUDGE.</u>

<u>In the presence of:</u>

Hussein – Court Assistant

Mr. Kaburu Miriti for the Appellant

Mr. Mwirigi Batista for the Respondent