IN THE COURT OF

APPEAL AT MOMBASA

(CORAM: TUIYOTT, ACHODE & MUCHELULE,

JJ.A) CIVIL APPEAL NO. E034 of 2023

BETWEEN

STEPHEN ODDIAGA …… 1ST

APPELLANT TSAVO ACADEMY COMPANY LIMITED ……

2ND APPELLANT

AND

VOI DEVELOPMENT COMPANY LIMITED.....RESPONDENT

(*Being an appeal from the judgment of the Environment and Land Court at Mombasa (Kibunja J) delivered on 18th January 2023*

in

ELC Case No. 116 of 2016)

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JUDGEMENT OF THE COURT

1. This appeal originates from a plaint dated **20th May 2016** and amended on **14th December 2017**, filed by **Stephen Oddiaga** and **Tsavo Academy Company Limited**, the 1st and 2nd appellants respectively, against **Voi Development Company Limited** the respondent, in **Mombasa ELC Case No. 116 of 2016**. In it, they sought orders compelling Eliud Mwamunga, (deceased) and the respondent to release title deeds and completion documents in respect of Plot **Nos. 83** and **84.** They also prayed for costs of the suit.

2. The respondent filed a statement of defence dated 8th September 2016, contending that the sale agreement in

question was between himself and Tsavo Academy, owned by

one Lucas Obiero, and not the 1st appellant, who therefore had no legal claim to the parcels of land.

3. On 5th May 2021, the court marked the claim against the 1st Defendant Hon. Eliud Mwamunga, (deceased) as abated, following his death, more than two years prior. Thereafter, the appellants filed a Further Amended Plaint dated 23rd June 2021, seeking:

    i. *An order compelling the respondent to release deed plans, transfers, and title deeds for LR Nos. 15030/77 and 15030/78 at Voi;*

    ii. *A declaration that the said plots belong to the 1st appellant;*

    iii. *An order directing the Land Registrar Mombasa, to execute the necessary documents should the respondent fail to do so;*

    iv. *Costs and interest*.

4. The appellants averred that the respondent, through its managing director (the late Hon. Eliud Mwamunga), entered into a handwritten sale agreement with the 1st appellant for the sale of the two parcels of land at a total consideration of Kshs. 300,000. The 1st appellant allegedly paid a deposit of Kshs. 180,000, leaving a balance of Kshs. 120,000 to be paid upon execution of the sale agreement and transfer. That the appellants took possession of the parcels and carried out developments valued at Kshs. 85 million.

5. It was also averred that despite payment of survey fees amounting to Kshs. 16,000 and an additional Kshs.

50,000

upon the respondent's request, the formal sale agreement was never executed, and completion documents were not delivered as agreed, prompting the filing of the present suit.

6. The respondent did not file a further defence in response to the appellants' further amended plaint.

7. During the hearing, the 1st appellant testified as PW1, adopting his witness statement dated 23rd June 2021 and reiterating that he acted as a director of the 2nd appellant. He testified that he paid the agreed deposit and later the survey fees at the request of the respondents but never received the title documents. Subsequently, a letter of offer dated 4th July 2005 from the respondent confirmed the allocation of the plots in question to the 2nd appellant.

8. The respondent did not tender any evidence, and its case was marked as closed.

9. Upon considering the matter before him, Kibunja J found that the suit had no merit and dismissed it. He ordered the 1st appellant to pay costs to the respondent.

10. The judgment displeased the appellants and they filed this appeal. A summary of the grounds in the undated Memorandum of Appeal are that the learned Judge:

    i. *Failed to carefully consider, evaluate and analysis the pleadings and evidence of the appellants.*

    ii. *Misconceived the circumstances obtaining at the time the sale took place, subsequent interactions*

between the parties and therefore, failed to address the issues in dispute.

iii. *Misdirected himself by concluding that there was no sale agreement contrary to the clear pleadings by the appellants.*

iv. *Erred by concluding that lack of a formal agreement was fatal, which conclusion went against the law of contract.*

11. The appellants filed written submissions dated 19th December 2023, through the firm of M/s Stephen Oddiaga & Company Advocates and urged that the handwritten agreement on the back of the cheque dated 27th April 2005 amounts to a valid land sale agreement pursuant to the provision of **section 3 (3)** of the **Law of Contract Act**. It was posited that the late Hon. Eliud Mwamunga acknowledged the existence of the sale agreement between the respondent and the 2nd appellant in his statement in the superior court. Additionally, that the deceased referred to the handwritten sale agreement, and pointed out that the correct parcel numbers are 15030/77 and 15030/78 and not 83 and 84, prompting the 1st appellant to amend the plaint to capture the correct suit property.

12. The appellants urged the court to allow the prayers sought in the plaint and give directions on the payment of the balance of purchase price being Kshs. 70,000.

13. The respondent did not file submissions.

14. When the appeal came before us for plenary hearing on

18th March 2025, Ms. Mwanzia learned counsel appeared for

the appellants and opted to rely entirely on the submissions as filed without highlighting. M/S Omolo Onyango advocates for the respondent were not present, although they had been duly served with the hearing notice on 11th March 2025.

15. This being a first appeal, our mandate is stated in this Court's decision in **Neepu Auto Spares Limited v Narendra Chaganlal Solanki & 3 others [2014] KECA 383 (KLR)** thus:

> ***"Being a first appeal we must re-evaluate the evidence and come to our own conclusions, but always bearing in mind that we did not hear the witnesses nor observe their demeanour. We may only interfere with the findings of the trial judge if the judge failed to take into account particular circumstances or based his impression on demeanour of witnesses which was inconsistent with the evidence – see the judgment of this court in Maimuna s/o Patrick Mutoo v Wilson Njau Nyaki Civil Appeal No. 131 of 1994. In Peters v Sunday Post Limited [1958] EA 424 it was held that:***
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> > ***'while an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of the circumstances admitted or proved, or has plainly gone wrong, the appellate court***

will not hesitate to so decide.’”

16. We have considered the record of appeal together with the submissions before us and the core issue that arises for our consideration is whether there was a valid contract for the sale of land between the appellants and the respondent.

17. The appellants came to court seeking an order to compel the respondent to release Deed Plans, transfers, and Title Deeds for the parcels of land known as LR Nos. 15030/77 and 15030/78 at Voi, a declaration that the said plots belong to the appellants and an order directing the Land Registrar Mombasa, to execute the necessary documents should the respondent fail to do so. In short, the appellants were seeking to be put in possession of titles to LR Nos. 15030/77 and 15030/78 at Voi.

18. Title to land is an end product of a process. If the process that was followed prior to the acquisition of the title does not comply with the law, the resultant title will not be held to be indefeasible. The validity of a contract in the sale of land is provided for under the provisions of **section 3(3)** of the **Law of Contract Act** which replicate each other word for word. They provide for the requirements in a contract for the disposition of an interest in land as follows:

> ***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:

19. It follows that for an agreement for the disposition of land to be valid and enforceable, the agreement must not only be in writing, it must be signed by the parties thereto and attested by a witness, who must be present when the contract is signed. The import of the foregoing is that a contract for the sale of land requires a formal, comprehensive written agreement to be legally enforceable.

20. The written agreement or contract for sale must incorporate the essential elements stated **Section 3(3)** of the **Law of Contract Act**. These include and are not limited to the identification of the parties, description of the property under sale, consideration, completion date, signatures of the vendor and purchaser and the attestation by witnesses.

21. This is what this Court held in **Jacob Wekesa Bokoko Balongo v Kincho Olokio Adeya & another [2020] KECA 928 (KLR)** that:

> ***"Under the applicable section 3(3) of the Law of Contract Act, no suit can be maintained for disposition of an interest in land unless the contract is in writing and executed by both parties. Oral agreements for the sale of real estate and or land are generally not worth anything and are unenforceable by dint of the applicable section 3(3) of the Law of Contract Act."***

22. In the present case, the appellants relied on handwritten notations at the back of a cheque dated 27th April 2005, which the 1st appellant described as an initial sale agreement. The writing referenced a portion of **LR No. 9665 CR No. 15030/83** and **84**, and provided that a formal agreement would be prepared later. The 1st appellant also relied on the letter of offer dated 4th July 2005 signed by the late Hon. Mwamunga, who was the Executive Director of the respondent. The letter was addressed to *"M/s Tsavo Academy (Mr. Lucas Obiero) Proprietor*" and not to the 1st appellant.

23. We quote in extensor what the learned Judge had to say in finding that **Section 3 (3) of the Law of Contract** was not complied with:

> *"When the 1st plaintiff testified in court, he disclosed the initial sale agreement to be the one he wrote at the back of the deposit cheque on the 27th April 2005 and which he produced as exhibit. It reads as follows; "Cheque issued in part payment of purchase price of portion of plot LR 9665 CRNO15030/83, 84 amounting to 5 acres situated at Voi town. A sale agreement to be prepared later. Balance of Ksh.100,000/- to be paid on transfer. Purchaser to be at liberty to start development." PW1 confirmed during cross examination that what he called the sale agreement does not specify who was the vendor and the purchaser. To the right edge of the above writings is what PW1 said was a signature by E.T.Mwamunga (vendor), himself (purchaser) and Joseph Obiero as witness.*

That though no evidence was called by the defendants, PW1 in his testimony referred to the letter of offer filed

by 1st defendant, dated the 4th July 2005, and signed by the 1st defendant as executive director of the 2nd defendant. The letter is addressed to "Ms Tsavo Academy (Mr. Lucas Obiero) Proprietor."

The copy of the receipt No NM 093 dated the 4th July 2005 that PW1 produced as exhibit, indicates it is a deposit of ksh.180,000/- for 5 Acres, being LR Numbers 15030/77 and 15030/78 and was issued to M/S Tsavo Academy by Voi Development Co. Ltd. This is the receipt referred to as a note at the foot of the letter of offer. The letter of offer and receipt both dated 4th July 2005 do not appear to have any relationship with the writings at the back of the cheque dated 27th April 2005 that has been referred to in (a) above, and which PW1 called the initial or informal sale agreement between him and the 2nd defendant. Had they have been related, then the letter of offer would have preceded the issuance of the deposit cheque. The letter of offer would also have been addressed to the 1st plaintiff [PW1] and the receipt would have been issued to him and not the 2nd plaintiff.

24. The trial Judge articulated the issue well and we see no need to belabor it. In the circumstances of this case, we have no difficulty finding, as did the trial Judge, that the appellants did not prove the existence of a valid and enforceable contract between the 2nd appellant and the respondent as required by law.

25. After a careful analysis and re-evaluation of the evidence, we find that the appellant has failed to demonstrate that the learned Judge erred in law and in fact in arriving at the conclusion that he did in the impugned judgment.

Accordingly, we find that this appeal has no merit and is dismissed in its entirety.

26. The respondent having not filed written submissions or been represented during the hearing in Court, we make no orders as to costs.

It is so ordered

Dated and delivered at Mombasa this 19th day of December, 2025.

F. TUIYOTT

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JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

A. O. MUCHELULE

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JUDGE OF APPEAL

I certify that this is a true copy of the original ***Signed***
DEPUTY REGISTRAR