

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ELCA NUMBER E013 OF 2025

SABERA KAJUJU MUTEA1ST APPELLANT

LUCY KANORIO.....2ND APPELLANT

VERSUS

JOSEPH KARAGANIA M'NKOROI RESPONDENT

*[Being an appeal against the Judgment of the Senior Principal
Magistrae's Court at Nkubu (Hon. Ngetich – SPM) in Nkubu MCELC
No. E008 of 2021 delivered on 5th February, 2025]*

JUDGEMENT

1. The Respondent herein [*who was the Plaintiff in the Subordinate Court*] filed the Complaint dated **22nd February 2021**; and wherein same sought various reliefs.
2. The reliefs sought *vide* the Complaint under reference were:
 - i. An order for the Defendants to transfer one acre of land to be excised from LR. Abuthuguci/U-Kaungu/1525 and in default, the Executive Officer of this court be empowered to execute the necessary instruments of conveyance.*
 - ii. Refund of Kenya Shillings 221,000 Only; agreed damages for breach of contract plus interest at commercial rates of 14% from the date of the contract.*
 - iii. Costs of the suit and interests.*
3. The Appellants duly entered appearance and thereafter filed a statement of defense dated **21st April 2021**; and wherein the Appellants disputed/denied the claims by the current Respondent. In particular, the Appellants contended that the 1st Appellant herein had no capacity [Locus Standi] to sell a portion of the suit property in so far as the suit property

was registered in the name of the husband of the 1st Appellant, who was deceased. Moreover, it was contended that in the absence of grant of letters of administration, the sale transaction was a nullity. In addition, it was averred that the 1st Appellant did not receive any monies or payments from the Respondent.

4. Additionally, it was contended that the suit against the 2nd Appellant was misconceived in so far as same was not a party to the sale agreement between the 1st Appellant and the Respondent. Furthermore, it was posited that the suit property was thereafter subjected to succession proceedings culminating into the issuance of grant of letters of administration in favor of the 2nd Appellant.
5. Further and in any event, it was posited that there was no collusion between the 1st Appellant and the 2nd Appellant to defraud the Respondent of his interest in respect of the suit property.
6. The suit in the subordinate court was heard and disposed of *vide* Judgement dated **5th February 2025** and wherein the learned trial magistrate [Hon. S.K Ngetich-SPM] found inter alia: the Respondent had proved that same paid the sum of Kshs. 200,000 only to the 1st Appellant; the 1st Appellant received the sum of Kshs. 200,000 Only; the 1st Appellant breached the contract between herself and the Respondent; and the Respondent is entitled to Kshs. 600,000 Only, on account of damages for breach of contract.
7. Furthermore, the learned trial magistrate found and held that the Respondent's claim against the 2nd Appellant was not proven and thereafter proceeded to dismiss the claim against the 2nd Appellant. However, the learned trial magistrate denied the 2nd Appellant costs of the suit and held that the 2nd Appellant had colluded with the 1st Appellant to defeat the Respondent's claim to the suit property.

8. It is the said Judgement and the consequential decree which has aggrieved the appellant and thus provoking the subject appeal. The Appellants have approached this court *vide* Memorandum of Appeal dated 3rd March 2025 and wherein the Appellants have highlighted the following grounds;

- i. The learned trial magistrate erred in Law and fact in holding that the 1st Appellant herein received Kshs. 200,000/= from the Respondent without evidence to support that position, and thereby erroneously ordered the 1st Appellant to refund money she never received.*
- ii. The learned trial magistrate erred in law and fact in failing to appreciate that the sale agreement was null and void since it relates to the sale of the of a deceased estate before confirmation of grant which in intermeddling with the deceased's estate.*
- iii. The learned trial magistrate erred in law and fact in holding that the appellants deliberately failed to transfer the suitland to the respondent and yet the same was not available for such a transfer pursuant to a certificate of confirmation of grant issued in Meru HSUCC/386/2015.*
- iv. The learned trial magistrate erred in law and fact in failing to appreciate that the 2nd Appellant as the Administrator of the deceased estate acted lawfully in distributing the suit land pursuant to the certificate of confirmation of grant.*
- v. The learned magistrate erred in the law and fact in his judgment by aiding an illegality and enforcing and unlawful contract when he ordered the 1st appellant to pay the respondent Kshs. 6,000/= as damaged under clause 7 of the impugned sale agreement.*

- vi. *The learned trial magistrate erred in denying the 2nd appellant costs and continuously held that she colluded with the 1st appellant to defeat the Plaintiff's claim on the suitland and yet she acted with all prudence required of an Administrator of a deceased estate to preserve the estate, and furthermore she was never privy to the impugned sale agreement.*
- vii. *The learned trial magistrate deliberately or otherwise failed to address himself on the question of his jurisdiction to handle the suit at the trial court, the suit property in question forming part of the estate of a deceased in Meru HCSUCC/386/2015.*

9. The Subject Appeal came up for directions on **25th November 2025** and whereupon the appellants confirmed having filed and served the record of appeal. Moreover, the appellants intimated to the court that the record of appeal was complete. To this end, the appellants sought directions as pertains to the hearing and disposal of the appeal.

10. With the concurrence of learned counsel for the Respondent, the court issued directions to the effect: the appeal be heard before one judge sitting at Meru for one day; the appeal be canvassed by way of written submissions; the parties to file and exchange submissions within circumscribed timelines.

11. The Appellants' filed submissions dated the **18th December 2025**; and wherein the appellant has raised and canvassed four [4] key issues. Firstly, learned counsel for the appellants has submitted that the learned trial magistrate erred in law in entertaining and adjudicating the dispute before the court yet the court was divested of jurisdiction to hear the suit. It has been contended that at the time when the trial court heard the suit, there was a succession cause which was pending before the high court,

namely; Meru HCC Succession Cause No. 386 of 2015. To this end, it has been contended that the trial magistrate erred in handling the suit and yet the jurisdiction over the suit land lay with the probate court.

12. Additionally, learned counsel for the appellants has submitted that the learned trial magistrate erred in law in finding and holding that there existed a valid sale agreement between the 1st Appellant and the Respondent over the suit property, yet the suit property belonged to and was registered in the name of the deceased. In this regard, it has been submitted that the learned trial magistrate failed to appreciate that the transaction between the 1st Appellant and the respondent constituted intermeddling with the estate of the deceased.
13. Secondly, learned counsel for the Appellants has submitted that the learned trial magistrate erred in law in finding and holding that the 1st Appellant had breached the sale agreement entered between herself and the respondent, yet the purported sale agreement had not been signed by the respondent. It was contended that the sale agreement which was tendered and produced before the court was incomplete.
14. Moreover, it was submitted that the sale agreement did not contain the signature of the respondent and thus same violated the provisions of **Section 3(3) of the Law of Contract act Chapter 23 laws of Kenya.**
15. Flowing from the contention that the sale agreement was not signed by the respondent, learned counsel for the appellants has submitted that there was no contract [Sale Agreement] which was capable of being breached or at all.

16. In the absence of a valid sale agreement, learned counsel for the appellants has submitted that the finding and holding of the trial court pertaining to breach of contract were arrived at in vacuum. Moreover, it has been submitted that the learned trial magistrate misapprehended the law as pertains to validity of contracts.
17. The third issue that has been canvassed by learned counsel for the appellants relates to the fact that the Respondent did not prove or establish payments of[sic] the sum of Kenya Shillings 200,000 Only; or at all. It was submitted that the evidence which was tendered by the Respondent was not only contradictory but misleading and suspect.
18. On the basis that the Respondent did not prove payment [s]of the sum of Kshs. 200,000 only, learned counsel for the appellants has submitted that it was erroneous on the part of the learned trial magistrate to find and hold that the 1st Appellant indeed received the sum of Kshs. 200,000 Only.
19. Additionally, it has been submitted that the finding and holding that the 1st Appellant should refund the sum of Kshs. 200,000 Only was not based on the evidence on record. On the contrary, it was contended that the said finding[s] was premised on misapprehension of the totality of the evidence on record and in particular, the learned trial magistrate failed to appreciate the contradictions and inconsistencies in the evidence of the Respondent and his witnesses.

20. The fourth point which has been canvassed by the learned counsel for the appellants is to the effect that the learned trial magistrate misapprehended the law as pertains to the award of costs. Moreover, it has been submitted that the learned trial magistrate improperly; and injudiciously exercised his discretion in depriving and denying the 2nd Appellant cost of the suit.
21. It was submitted that it was erroneous on the part of the learned trial magistrate to find and hold that the 2nd Appellant had colluded with the 1st Appellant to defeat the Respondents claim to the suit land yet the 2nd Respondent was merely exercising the statutory powers conferred upon her *vide* the grant of letters of administration.
22. As a result of the foregoing, learned counsel for the appellants has contended that the impugned Judgment and the consequential decree is wrought with errors and thus same ought to be impeached. To this end, the court has been implored to find and hold that the appeal is meritorious.
23. The Respondent filed written submissions dated **10th January 2026**; and wherein learned counsel for the appellant has raised and canvassed five [5] key issues. Firstly, it has been submitted that the 1st Appellant and the Respondent entered and executed two [2] sets of agreements, namely; the agreement dated **23rd August 2012** and the one dated **4th February 2013**. Furthermore, learned counsel for the Respondent has submitted that even though the appellants have challenged the agreements for being void and invalid, the appellants did not prove and or establish that the sale agreements were void.

24. Moreover, it has been submitted that the issue of the existence of the sale agreements was not [sic] contested since the 1st Appellant and her witnesses admitted the sale of one acre of the suit land to the Respondent.
25. Furthermore, learned counsel for the Respondents has submitted that the 1st Appellant indeed signed sale agreement dated **23rd August 2012** before an advocate.
26. Secondly, it has been submitted that the appellant signed the final sale agreement dated **4th February 2013** and wherein same acknowledged and confirmed receipt of Ksh. 200,000 Only. Moreover, it has been posited that the 1st Appellant affixed her fingerprint[s] on the sale agreement and thus confirming receipt of the money.
27. To this end, it has been submitted that the 1st Respondent cannot now be heard to resile from the sale agreement. Additionally, it has been posited that the 1st Appellant is bound by the terms of the contract.
28. The third point which has been raised by the learned counsel for the Respondent is to the effect that the 1st Appellant had undertaken to facilitate the transfer of the sold portion of the land to the Respondent. However, it has been contended that despite the terms of the sale agreement and the undertaking by the 1st Appellant, same failed to take necessary steps to perform her part of the bargain. To this end, it has been submitted that the failure by the 1st Appellant constitutes or amounts to breach of contract.
29. The fourth point that has been raised by learned counsel for the Respondent is to the effect that the 1st Appellant and the 2nd Appellant

colluded and thereafter the 2nd Appellant proceeded to and took out grant of letters of administration yet the 1st Appellant ranked in priority and ought to have been the one applying for the grant of letters of administration. In this regard, counsel has posited that the taking out of grant of letters of administration by the 2nd and not the 1st Appellant constituted a strategy orchestrated to defraud the respondent.

30. Finally, learned counsel for the Respondent has submitted that the learned trial magistrate correctly appraised the evidence on record and concluded that: the 1st Appellant had indeed received the sum of Kshs. 200,000 Only; the 1st Appellant failed to perform her part of the contract; the 1st Appellant breached the contract; the 1st Appellant cannot retain both the money and her land; the conduct of the 1st Appellant would amount to unjust enrichment; and the Respondent was entitled to damages for breach of the contract.
31. Additionally, learned counsel for the Respondent has submitted that the learned trial magistrate was correct in denying the 2nd Appellant costs of the suit in so far as the 2nd Appellant and the 1st Appellant had colluded in a bid to defeat the Respondent's claim to the land. In this regard, learned counsel for the Respondent has posited that the reason for denying the 2nd Appellant costs was lawful and valid.
32. In the premises, learned counsel for the Respondent has submitted that the Judgement of the learned trial magistrate is sound and well grounded. In this regard, learned counsel has posited that the instant appeal is meritless and thus ought to be dismissed with costs.

33. Having reviewed the record of appeal; the evidence tendered [both oral and documentary] and upon considering of the written submissions filed by the parties, I conclude that the determination of the instant appeal turns on four key issues, namely; whether the finding by the learned trial magistrate that the 1st Appellant received Kshs. 200,000 only is founded on the evidence on record or otherwise; whether the sale agreement/contract [if at all] between the 1st Appellant and the Respondent was valid and lawful or otherwise; whether the 1st Appellant breached the contract and whether the award of damages for breach of contract in the sum of Kshs. 600,000 only is lawful; and whether the learned trial magistrate improperly and injudiciously exercised his discretion in denying the 2nd Appellant costs of the suit.
34. Before venturing to address the thematic issues, which have been identified and highlighted in the preceding paragraph, it is imperative to underscore that what is before me is a first appeal. In this regard, it suffices to highlight that this court is vested with the jurisdiction to undertake exhaustive scrutiny, appraisal, review, and evaluation of the entire evidence that was tendered before the trial court and thereafter to determine whether the factual findings and conclusions by the trial court accord with the evidence or otherwise.
35. In addition, it is instructive to observe that this court is at liberty to form and arrive at an independent conclusion. Moreover, the court is also at liberty to depart from the findings and conclusions of the trial court. Nevertheless, it is paramount to highlight that even though this court is at liberty to arrive at an independent conclusion, the liberty is however, circumscribed by certain factors. Simply put, the liberty is not at large and can only be deployed where it is shown that the trial court acted on no evidence; the findings are perverse to the evidence on record; the findings are premised on misapprehension of the evidence on record; or

where it is demonstrably shown that there is an error of principle which vitiates the conclusions arrived at by the court.

36. The Jurisdictional remit of the first appellate court has been considered in various decisions. Most recently, the parameters underpinning the scope of the first appellate court's jurisdiction were expounded in the case of ***Kenya Urban Roads Authority & another v Belgo Holdings Limited (Civil Appeal E011 of 2021) [2025] KECA 764 (KLR) (9 May 2025) (Judgment)*** where the court held as hereunder;

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

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

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

37. With the foregoing in mind, I am now well disposed to revert to the issues and to interrogate same. I shall commence with the first issue, namely; whether the finding by the learned trial magistrate that the 1st Appellant received Kshs. 200,000 only is founded on the evidence on record or otherwise.
38. It is the respondent who approached the subordinate court contending that same had entered into a sale agreement with the 1st Appellant on 4th February 2013 and that pursuant to the said agreement, the Respondent paid to and in favor of the 1st Appellant the sum of Kshs. 221,000 Only. Furthermore, the Respondent contended that the payment[s] of the said sum, namely; Kshs. 221,000 only was duly acknowledged by the 1st Appellant.

39. To vindicate the contention that the 1st Appellant had been paid and indeed acknowledged the sum of Kshs. 221,000 only, the Respondent called two other witnesses alongside himself. Besides, the Respondent also tendered and produced before the court [sic] a copy of the sale agreement dated **4th February 2013**.
40. The learned trial magistrate evaluated the evidence tendered by the Respondent and his witnesses and considered [sic] the contents of the sale agreement dated **4th February 2013** and thereafter concluded that the Respondent had proved that same paid to the 1st Appellant Kshs. 200,000 only.
41. Put differently, the learned trial magistrate concluded that the evidence tendered by the Respondent established that the 1st Appellant had received the sum of Kshs. 200,000 only. On the contrary, the learned trial magistrate held that the payment of the further sum of Kshs. 21,000 Only was not proven.
42. Even though the learned trial magistrate found and held that the 1st Appellant had received and acknowledged the sum of Kshs. 200,000 only, it is worthy to note that the evidence that was tendered by the Respondent and his witnesses were not only contradictory but inconsistent and suspicious. I say inconsistent and suspicious because there exist fundamental gaps in the evidence, which gaps were neither accounted for nor explained.
43. Additionally, I state that the evidence by the Respondent and his witnesses is wrought with suspicion because the contents of the sale agreement dated **4th February 2013** is at variance with the statements of the Respondent, which were adopted as the evidence in chief. Moreover,

it is not lost on me that where parties enter into agreement the terms of the agreement can only be determined/discerned from the body of the agreement.

44. In particular, the rules [cannons] of interpretation exclude the introduction of oral evidence either to explain or to supersede the agreement/contract. **[See the Provisions of Section 97 of the Evidence Act Chapter 80 Laws of Kenya]**.
45. Additionally, it is apposite to take cognizance of the holding of the Court of Appeal in the case of Speaker of the **County Assembly Kisii County 2 others v James Omariba Nyaoga 2015KECA52 (KLR)**, where the court stated as hereunder;

“The 1st appellant's attempt to vary the terms of the letters of appointment, in our view, offends the provisions of Sections 97 and 98 of the Evidence Act, Chapter 80 Laws of Kenya, which attempt we must reject. This is not the first time we are doing so. In the case of John Onyantha Zurwe v Oreti Atinda alias Olethi Atinda [Kisumu Civil Appeal No. 217 of 2003] (UR), we cited, with approval, Halsbury's Laws of England 4th Edition vol. 12, on interpretation of deeds and non-Testamentary Instruments paragraph 1478 as follows:

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" Extrinsic evidence generally excluded:

Where the intention of parties has been reduced to writing it is in general not permissible to adduce extrinsic evidence whether oral or contained in writing such as instructions, drafts, articles, conditions of sale or preliminary agreements either to show that intention or to contradict, vary or add to the trms of the document. *Extrinsic evidence cannot be received in order to prove the object with which a document was executed or that the intention of the parties was other than that appearing on the face of the document."*

46. Back to the evidence on record. The Respondent herein filed two sets of witness statements dated **22nd February 2021** and **22nd July 2021**. The two sets of witness statements were adopted and constituted as evidence in chief of the Respondent.
47. It was the testimony of the Respondent *vide* the witness statement dated **22nd February 2021** that same entered into a sale agreement with the 1st Appellant on the **6th February 2013**. Furthermore, the witness posited that the sale agreement was in respect of a portion measuring one acre out of L.R. Abuthuguci/U-Kaongu/1525. In addition, the witness testified that same paid the sum of Kshs. 200,000 at the time of the agreement and which sum was acknowledged.
48. Suffice it to observe that the Respondent did not tender and produce before the court this purported sale agreement dated **6th February 2013** and wherein same [sic] contends that the sum of Kshs. 200,000 was paid and acknowledged. The question that begs the answer is why [if at all] the said agreement was withheld from the court.
49. Other than the said witness statement, whose details have been referenced in the preceding paragraph, the Respondent also relied on the witness statement dated **22nd July 2021**. The contents of these witness statements are not only curious but at variance with the previous witness statements. It is pertinent to reproduce a segment of this witness statement.
50. It states thus;
- “Indeed, I recall on 23rd August 2012 I entered into a sale of land agreement with the 1st Defendant who [sic] deceived Kshs. 100,000 and signed in acknowledgement in the presence of witnesses who*

include the 1st Defendant's Relatives. Subsequently, since I was working in Mombasa, I sent Kshs. 100,000 through one M'Impwii M'Muthuri who is a relative of the 1st Defendant who proceeded to pay the 1st Defendant on 1st February 2013 and all these payments were done before the advocate and were acknowledged by the 1st Defendant"

51. It is not lost on me that the purported sale agreement of **23rd August 2021** [if at all] was never tendered and produced before the court. Notably, it was contended that the said agreement underpins the acknowledgement in respect of receipt of Kshs. 100,000 Only.
52. Other than the foregoing, there is a curious aspect of this statement, namely; that when the sale agreement of **4th February 2013** was purportedly being entered into, the respondent was not present at the offices of [sic] of the advocate who allegedly crafted the impugned sale agreement.
53. There does arise a question as to whether a sale agreement could be crafted yet one of the parties who are purported to have contracted is absent. However, the determination of the question under reference shall await the opportune time.
54. Be that as it may, it is important to highlight that the contents of the two statements, which were adopted as the evidence in chief of the respondent contradicts the contents of the sale agreement dated **4th February 2013** [Exhibit P1].
55. I beg to underscore that the contradictions between the statements under reference and contents of the sale agreement brings to the fore the issue of the bona fide of the contents of the sale agreement. In particular, it raises a question of manipulation, misrepresentation, and lack of honesty

on the part of the respondent and more particularly, the payments of the sum of Kshs. 200,000 Only.

56. Additionally, there is a question as to why the advocate namely; Mr. John Muthomi, who crafted the sale agreement would purport that the entire sum of Kshs. 200, 000 Only was to be paid upon the signing of the agreement dated **4th February 2013**, if [and I say if] the previous sum of Kshs. 100,000 had been paid beforehand. Why was it not expressly stated in the manner provided for in the ordinary cause of events?
57. Worse still, there is the contention that the sum of Kshs. 100,000 only which was said to have been paid to the 1st Appellant on the **4th February 2013**; was actually not paid to the appellant but to one Marko. [See the evidence of the 1st Appellant].
58. In my understanding, the payments of Kshs. 100,000 Only; if at all ought to have flowed from the advocate who was the attesting witness to the 1st Appellant. It is only then that the advocate would attest payment and receipt of the money by the recipients.
59. In my humble view, the contradictions and inconsistencies that bedevilled the evidence tendered by the Respondent negates a finding that the 1st Appellant was paid and indeed acknowledged the sum of Kshs. 200,000 Only.
60. Moreover, it is worthy to recall that the sale agreement dated 4th February 2013, which was relied upon by the learned trial magistrate in arriving at the conclusion that the 1st Appellant received the sum of Kshs. 200,000 was itself, incomplete, deficient; and thus inadmissible.

61. Before departing from this issue, there is an aspect of the judgement of the learned trial magistrate that deserves a comment. The learned trial magistrate is on record stating thus;

“Apparently, there was an earlier agreement made in 2012 where a sum of Kshs. 100,000 was paid which the 1st Defendant seemed to have been talking about.”

62. It is quite interesting that the learned trial magistrate is basing his/her finding on the basis of supposition and innuendos, which were not proven. Moreover, the said excerpt by the learned trial magistrate constitutes a complete misrepresentation of the evidence by the 1st Appellant [DW1]. For good measure, the 1st Appellant did not reference any sale agreement that was ever entered into in the year 2012 or at all. The question is, why would the learned trial magistrate put words into the mouth of a witness? [1st Appellant]

63. Flowing from the foregoing analysis, I am afraid that the finding and holding by the learned trial magistrate that the 1st Appellant received Kshs. 200,000 Only from the respondent is not only based on misapprehension of the evidence on record, but same is perverse [contrary] to the evidence on record.

64. Turning to the second issue, namely; whether the sale agreement/contract [if at all] between the 1st Appellant and the Respondent was valid and lawful or otherwise, it is imperative to recall that the respondent contended that same entered into a valid sale agreement with the 1st Appellant. In addition, the respondent also posited that the said sale agreement was thereafter breached by the 1st Appellant. The aspect touching on breach [if at all] shall be addressed, shortly.

65. Regarding whether the sale agreement was valid, it is important to highlight that the suit property which was the subject of the contract was at the material point in time registered in the name of M’Mutea Chokeraa,

who was deceased at the point in time. Furthermore, it is conceded by the Respondent that at the time of the sale agreement the estate of the deceased had not been succeeded. [See paragraph 4 of the plaint].

66. The fact that the estate had not been succeeded, was also adverted to at the foot of preamble number two of [sic] the sale agreement dated 4th February 2013. Simply put, the respondent was knowledgeable and aware of the fact that suit property was registered in the name of the deceased.

67. It is common ground that the estate of a deceased cannot be dealt with, transacted upon, and or alienated prior to and before the confirmation of grant of letters of administration. In this regard, the provisions of **section 82 of the Law of Succession Act Chapter 160 Laws of Kenya** are instructive.

68. Moreover, it is worthy to underscore that any dealing and or transactions affecting the estate of a deceased person before grant of letters of administration amounts to intermeddling. Suffice it to state that intermeddling with the estate of a deceased is illegal and constitutes a criminal offence [See **Section 45 of the Law of Succession Act, Chapter 160, Laws of Kenya**].

69. To my mind, the provisions of section 45 and 82 of the Law of Succession Act negate the impugned sale agreement and render same not only illegal but void. In this regard, I find and hold that the impugned sale agreement was invalid.

70. The other aspect that merits consideration is whether the said sale agreement was complete. I have looked at the sale agreement at page 25 of the Record of Appeal and I beg to state that what is deemed to be a

sale agreement is a single page document with terms stated thereon and which only bears the segment for signature/thumbprinting by the vendor only. Notably, there is no portion for the signature of the purchaser and neither did he sign the purported sale agreement.

71. The question that comes to mind is whether the impugned document which corresponds with what was produced before the trial court can be termed as a sale agreement.

72. In my humble view, a sale agreement or better still a contract, would embody the terms agreed upon by the parties; and thereafter be duly executed or signed by the parties chargeable therewith. Moreover, where the sale agreement relates to immovable property, then it must be attested by witnesses present at the time of execution [see **section 3(3) of the Law of Contract Act Chapter 23 Laws of Kenya**].

73. I do not wish to belabor the point, but one thing is clear, namely; that the finding of the learned trial magistrate that the 1st Appellant and the Respondent entered into a valid sale of land agreement was made *per incuriam*.

74. The next issue for consideration is whether the 1st Appellant breached the contract and whether the award of damages for breach of contract in the sum of Kshs. 600,000 only is lawful. While dealing with issue number two, I have found and held that the purported sale agreement, which was being relied upon by the respondent was not only incomplete but invalid in the eyes of the law. Same was also found to be illegal.

75. Firstly, the respondent himself did not sign the purported sale agreement. Having not signed the said sale agreement, it means that the Respondent did not wish to be bound by the impugned agreement. In this regard, there is no way the respondent can now be heard to say that an agreement [which he did not sign] has been breached.

76. Other than the foregoing, the elephant in the room is whether, an agreement that is rendered legally infirm in the eyes of the law can be the subject of breach or otherwise. In my humble view, what is illegal and invalid is *void ab initio*.
77. Put differently, the document in question is dead in the water and cannot thus be the subject of deliberation of whether it was breached or not.
78. I am reminded of and Do share the dictum of Lord Denning Master of Rolls [MR] in the case of **Macfoy v. United Africa Ltd [1961] 3 ALL E.R. 1169** where the Privy Council observed that:
- “If an act is void then it is in law a nullity and not a mere irregularity. It is not only bad but incurably bad. “There is no need for an order of the court to set aside. It is automatically null and void with more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”*
79. The next aspect of this issue relates to whether the Respondent can benefit from an illegality and by extension whether the award of damages for breach of contract by the learned trial magistrate amounts to perpetuating an illegality.
80. In the case of **Mapis Investment (K) Limited v Kenya Railways Corporation [2006] KECA 344 (KLR)** the Court of Appeal considered a scenario whether a claimant who was party and privy to an illegality can benefit from the illegality. Moreover, the court also underscored the fact that the machinery of the court cannot be deployed in furtherance of an illegality.
81. For coherence, the court stated thus;

“In the case of Mistry Amar Singh v. Serwano Wofunira Kulubya 1963 EA 408 the Privy Council, on appeal from a judgment and order of the East African Court of Appeal at page 414 of the report, of Lord Morris of Borth-y-Guest in his speech quoted with approval the following quotation from the judgment in Scott v. Brown, Doering, McNab & Co (3), [1892] 2 QB 724 Lindley LJ at p.728:-

“Ex turpi causa non oritur actio. This old and well-known legal maxim is founded in good sense, and expresses a clear and well recognized legal principle, which is not confined to indictable offences. No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality the court ought not to assist him.”

82. To my mind and bearing the dicta cited in the preceding paragraph, the award of Kshs. 600,000 only on account of breach [sic] the sale agreement is contra the doctrine of *ex turpi causa non oritur actio*. In simple parlance, the award of damages arising out of the illegal contract is an illegality.

83. It cannot be allowed to stand.

84. The last issue for consideration concerns the exercise of discretion by the learned trial magistrate in denying or depriving the 2nd Appellant of costs upon the dismissal of the suit against her.

85. The learned trial magistrate found and held that the 2nd Appellant was neither party nor privy to the sale agreement that was [sic] entered into between the 1st Appellant and the Respondent. Having found as much, the learned trial magistrate dismissed the respondent's case against the 2nd Appellant. However, in a strange and curious twist of turn, the learned magistrate denied the 2nd Appellant costs.
86. According to the learned trial magistrate, the 2nd Appellant was denied costs because same [2nd Appellant] had allegedly colluded with the 1st Appellant to defeat the Respondent's claim in respect of the suit land.
87. I must state that though the learned trial magistrate referenced collusion, no evidence was tendered by the Respondent and no evidence is obtainable on record, to anchor [sic] collusion.
88. On the contrary, evidence abound that the said Appellant took out succession proceedings in respect of the estate of her father [deceased] and was thereafter issued with the grant of letters of administration. Pure and simple.
89. Having been issued with the grant of letters of administration, the 2nd Appellant, was no doubt bestowed with the statutory mandate to administer the estate of the deceased. No evidence was tendered to show that the issuance of the grant of letters of administration in her favor was informed by collusion. I am afraid that the learned trial magistrate exceeded his/her mandate in concluding that the 2nd Appellant had colluded with the 1st Appellant [her mother] to defeat the Respondent's claim.
90. At any rate, it is not lost on me that the Respondent had no claim to the suit land in so far as the impugned transaction amounted to intermeddling with the estate of the deceased.

91. In my humble view, the reason and or ground that was espoused by the learned trial magistrate to deprive the 2nd Appellant of her entitlement to costs was unreasonable and legally untenable. The reasoning is contrary to the dictates of **section 27 of the Civil Procedure Act Chapter 27 Laws of Kenya.**

92. I am alive to the fact that an award of costs is at the discretion of the court. However, it is not lost on me that in exercising discretion whether to award costs or otherwise, the courts must comply with well known and established legal principles. Moreover, it is established that the discretion cannot be exercised capriciously, whimsically, and or arbitrarily.

93. It is my finding and holding that the reasoning deployed by the learned magistrate in denying the 2nd Appellant costs in the subordinate courts amounts to improper and injudicious exercise of discretion [see ***Mbogo and another v Shah [1968] 1 EA 93***] [see also ***Farah Awad Gullet v CMC Motors Group Limited [2018] KECA 158 (KLR)***].

94. Flowing from the foregoing and considering the established principles espoused in the case of ***Mwanasokoni vs Kenya Bus Service (1985) eKLR; Jabane vs Olenja (1986) eKLR; and Mwangi vs Wambugu 1986 eKLR***, respectively, I conclude that a basis does exist to warrant departure from the findings and conclusions of the trial court.

FINAL DISPOSITION.

95. Having addressed the thematic issues that were enumerated in the body of the Judgement, it is now apposite to bring the matter to closure; and to

make the final/dispositive orders. Nevertheless, it is apparent that appeal beforehand is meritorious.

96. In the upshot, and for the reason[s] alluded to; the final orders that commend themselves to the court are as hereunder;

- i. The Appeal be and is hereby allowed.**
- ii. The Judgement of the learned trial magistrate dated and delivered on 5th February 2025 and the consequential decree be and are hereby set aside.**
- iii. *In lieu thereof*, the Respondent's suit *vide* Nkubu MCELC E008 of 2021 be and is hereby dismissed.**
- iv. Costs of the Appeal be and are hereby awarded to the Appellants.**
- v. Costs of the Proceedings in subordinate court be and are hereby awarded to the Appellants [Defendants in the lower court].**

97. It is so ordered.

DATED, SIGNED AND DELIVERED AT MERU this 29th day of January 2026

**OGUTTU MBOYA, FCI Arb; CPM [MTI-EA].
JUDGE**

In the presence of:

Hussein – Court Assistant.

Mr. Maheli for the Appellants.

Mr. Gikunda Anampiu for the Respondent