**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MERU**

**ELCL APPEAL CASE NO. E030 OF 2025**

**JOSHUA KABURU KIMATHI....................................APPELLANT**

**=VERSUS=**

**SIMON GITONGA M'IKIOME.................................RESPONDENT**

***(An Appeal against the Judgment of the Principal Magistrate Court at Githongo [Hon L Sarapai - PM] dated 19/3/2025 in Githongo SPMC E & L Case No. E006 of 2023)***

## JUDGMENT

**Introduction**

**1.** This appeal challenges the Judgment of the Principal Magistrate Court at Githongo [**Hon L. Sarapai – PM**], rendered on 19/3/2025 in **Githongo SPMC E & L Case No. E006 of 2023.** Some of the key issues that arose for determination in the suit were: (i) Whether the respondent, **Simon Gitonga M'Ikiome**, was in breach of the two land

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sale agreements dated 14/1/2013 and 18/5/2013 between him and **Joshua Kaburu Kimathi**, [*the appellant*]; (ii) Whether the appellant paid to the respondent the agreed purchase price under the said two land sale agreements; (iii) Whether the respondent was liable to refund to the appellant the purchase price paid to him under the two land sale agreements; (iv) Whether the respondent was liable to pay the appellant a total of Kshs 2,800,000 being liquidated damages under clauses 5 and 8 of the two land sale agreements; and (v) Whether the appellant was entitled to Kshs 90,000 being sums he allegedly paid as costs in Meru ELC Appeal No. E018 of 2020. Invariably, these are some of the key issues that fall for determination in this first appeal.

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**2.** Before I analyse and dispose the issues that fall for determination, I will briefly outline the background to the appeal; the grounds of appeal; and a summary of the parties' respective submissions in the appeal. Secondly, the two land parcels featuring in the appeal are **Abothuguchi/Kariene/3709** and **Abothuguchi/Kariene/3707.** In this judgment, the two parcels of land will be identified simply as **"parcel number 3709"** and **"parcel number 3707"** respectively. Also featuring in this dispute is the respondent's wife, **Evangeline Kagwene Gitonga**. She will be identified simply as "**Evangeline**".

**Background**

**3.** There was common ground that on **14/1/2013**, the two parties to this appeal entered into a land sale agreement pursuant to which the respondent sold to the appellant a parcel of land measuring 0.03 hectares "which was to be

excised from land **parcel number 3709"**. The agreed purchase price was Kshs 700,000. There was also common ground that subsequent to that, the two parties entered into a second land sale agreement dated **18/5/2013**, pursuant to which the respondent sold to the appellant land **parcel number 3707**, measuring 40 x 80 feet, at a consideration of Kshs 700,000.

**4.** Prior to the execution of the sale agreement dated 14/1/2013, the respondent caused land parcel number 3709 to be transferred to the appellant on 3/1/2013. The appellant was issued with a title deed on the same day. However, on 3/10/2013, the respondent's wife, Evangeline, caused a caution to be lodged against the title, claiming an interest in the land.

**5.** It does emerge from the exhibited copy of the parcel register relating to parcel number 3707 that on 3/1/2013, the respondent's wife [Evangeline] registered a caution against the said title, which at that time was still registered in the respondent's name. Notwithstanding the caution lodged by Evangeline, the two parties to this appeal went ahead and entered into a sale agreement on 18/5/2013. Due to the existence of the caution, the respondent did not manage to transfer this particular parcel to the appellant.

**6.** Aggrieved by the two cautions, vide a plaint dated 26/7/2013, the appellant and the respondent jointly instituted **Meru ELC Case No 209 of 2013** against Evangeline. They sought an order lifting the two cautions that Evangeline had registered against the two parcels. In response to the suit, Evangeline filed a defence and a counterclaim in which she contested the

claim and sought, *inter alia*, an order that the two parcels were family land and that the registration entered in favour of the appellant be cancelled on the ground of lack of spousal consent, fraud and illegality.

**7.** The said suit was subsequently transferred from **Meru Environment and Land Court** to **Githongo Principal Magistrate Court** and was registered as **Githongo SPMC ELC Case No 9 of 2017**. The suit was heard and disposed by the Principal Magistrate Court at Githongo [Hon S. Ndegwa] vide a judgment dated 4/5/2020. The Principal Magistrate Court dismissed the joint primary claim by the two parties to this appeal for lack of merit and allowed Evangeline's counterclaim. The court made a finding to the effect that the respondent could neither sell nor dispose the suit parcels without the consent of Evangeline.

**8.** Aggrieved by the judgment of the lower court in **Githongo SPMC E & L Case No. 9 of 2017**, the two parties to this appeal jointly lodged an appeal in the Environment and Land Court at Meru, to wit, **Meru ELC Appeal Case No E018 of 2020.** The appeal was heard by this court [Nzili J] and was disposed through a judgment dated 8/12/2021. This court made a finding to the effect that the lower court had reached a correct decision. It dismissed the appeal for lack of merit.

**9.** Subsequent to that, vide a plaint dated 28/2/2023, the appellant filed **Githongo SPMC E & L Case No E006 of 2023** against the respondent, praying for: (i) an order decreeing the respondent to refund to him a sum of Kshs. 1,400,000 being purchase price paid to him under the two aborted sale agreements; (ii) an order decreeing the

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respondent to pay him liquidated damages totaling Kshs 2,800,000 under Clauses 5 and 8 of the two aborted sale agreements dated 14/1/2013 and 18/5/2013 respectively; (iii) an order decreeing him to pay to the appellant Kshs 90,000 being costs paid by him in Meru ELC Appeal No E018 of 2020; and (iv) an order awarding him costs of the suit.

**10.** In answer to the suit, the respondent filed an undated defence in which he averred that the two land sale agreements were vitiated by the doctrine of frustration, and contended that the frustration was occasioned by the orders and decrees issued in **Githongo PMC E & L Case No 9 of 2017** and **Meru ELC Appeal No E018 of 2020.** It was the case of the respondent that, for the above reason, the two land sale agreements were null and void for all purposes. He denied committing fraud in the transactions nor conspiring with his wife, Evangeline, to defraud the appellant. He further averred that he did not receive the agreed purchase price of Kshs 1,400,000. He added that the appellant's suit was statute-barred under **Section 4** of the **Limitation of Actions Act**. Lastly, he averred that by dint of the decrees in **Githongo SPMC E & L Case No 9 of 2017** and **Meru ELC Appeal No E018 of 2020**, the appellant was estopped from suing the respondent.

**11.** Upon conducting trial and upon receiving submissions, the Principal Magistrate Court at Githongo [Hon L Sarapai] rendered the judgment that is the subject of this appeal on 19/3/2025. The trial court held that the two sale agreements were defective and for that reason, the first and second issues which it had identified in the suit were moot and could not be analysed and determined. The two identified issues were: (i) Whether the appellant had established by evidence that he

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was entitled to a refund of Kshs 1,400,000; and (ii) Whether the appellant had established by evidence that the liquidated damages of Kshs 2,800,000 accrued as per clauses 5 and 8 of the agreements dated 14/1/2013 and 18/5/2013. The trial court further found that the appellant had failed to prove fraud. The trial court also found that the appellant had failed to prove that he had paid Kshs 90,000 as costs in Meru ELC Appeal No E018 of 2020. The trial court dismissed the appellant's suit for lack of merit. Lastly, the trial court decreed that parties were to bear their respective costs of the suit.

**Appeal**

**12.** Aggrieved by the findings and decree of the trial court, the appellant brought this appeal, advancing the following six (6) grounds of appeal:

1) ***That the Learned Magistrate erred in law and facts by finding that the sale agreements dated 14/1/2013 and 18/5/2013 were defective.***

2) ***That the Learned Magistrate erred in law and in facts by finding that no consideration passed between the appellant and the respondent as per the land sale agreements dated 14/1/2013 and 18/5/2013.***

3) ***That the Learned Trial Magistrate erred in law and in facts by finding that the appellant had not discharged the burden of proof on payment of consideration price to the respondent.***

4) ***That the Learned Trial Magistrate erred in law by finding that the claim for breach of contract***

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***was moot on the basis that the land sale agreements were defective.***

5) ***That the Learned Trial Magistrate erred in law by finding that the appellant was not entitled to payment of liquidated damages as per the sale agreement dated 14/1/2013 and 18/5/2013.***

6) ***That the Judgement by the Learned Trial Magistrate was against the weight of the evidence and the law placed before trial court.***

**13.** The appellant prayed for an order setting aside the judgment of the trial court and allowing the appellant's suit in the lower court with costs. He also prayed for costs of the appeal.

**Appellant's Submissions**

**14.** The appeal was canvased through written submissions dated 27/10/2025, filed by ***M/s Mwirigi Kaburu & Co Advocates***. Counsel for the appellant identified the following as the two key issues that fell for determination in the appeal: (i) Whether the Learned Trial Magistrate erred in law and facts by finding that the sale agreements dated 14/1/2013 and 18/5/2013 were defective and that no consideration passed between the appellant and the respondent; and (ii) Whether the Learned Magistrate erred in law by finding that the claim for breach of contract was moot on the basis that the sale agreements were defective, hence the appellant was not entitled to liquidated damages.

**15.** Counsel pointed out that the trial court made a finding to the effect that the two sale agreements were defective because they had already been impugned by the courts in **Githongo**

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**SPMC E & L Case No 9 of 2017** and **Meru ELC Appeal Case No E018 of 2020**. Counsel further pointed out that the trial court made further findings to the effect that the two transactions were made in a suspicious manner and circumstances and that the appellant took advantage of the respondent. Counsel submitted that the trial court ignored crucial evidence which indicated that the two sale agreements were valid and bore all the essential elements of a valid contract. Counsel pointed out key clauses in the two land sale agreements and submitted that the respondent never disputed the process of making any of the two sale agreements. Counsel argued that, as a matter of fact, the respondent supported the respondent in proving to the trial court that the two sale agreements were valid and that a problem arose only when the wife of the respondent registered cautions against the titles.

**16.** Citing paragraph 11 of the judgment in Meru ELC Appeal No E018 of 2020, counsel submitted that this court noted in the said appeal that the respondent had confirmed in his written statement dated 27/7/2013 that he was aware of the two sale agreements; that monies had been paid to him; and that he had no problem transferring the parcels to the appellant. Counsel submitted that the respondent admitted in his evidence that the reason why his wife lodged cautions against the parcels was that she did not approve of the sales, adding that the respondent admitted receiving purchase price in instalments. Counsel argued that the two sale agreements were valid, adding that the trial court ought to have examined their contractual context. Citing the Court of Appeal pronouncement in ***Kenya Breweries Limited & another v Bia Tosha Distributors Limited & 5 others (2020) eKLR***,

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counsel submitted that it was not the business of the trial court to rewrite a contract made by parties. Counsel faulted the trial court for finding that the two contracts were defective.

**17.** Counsel further pointed out that upon making a finding to the effect that the two sale agreements were defective, the trial court declared that the issue of breach of contract was moot and that the respondent was not liable to pay the appellant liquidated damages. Counsel also pointed out that the trial court stated that no consideration passed between the appellant and the respondent and that liquidated damages could not be awarded in an illegal contract.

**18.** Faulting the trial court, counsel submitted that the respondent admitted receiving purchase price from the appellant, adding that as between the appellant and the respondent, the contract was valid. Counsel argued that the elements of an illegal contract, such as contra-public policy and criminal activity, did not exist, adding that the two contracts were vitiated by misrepresentation from the respondent's side, hence the appellant was entitled to be compensated for the breach.

**19.** Lastly, counsel submitted that the purpose of Clauses 5 and 8 was to pre-define the damages payable in the event of breach, adding that the damages were compensatory rather than punitive. Counsel urged this court to allow the appeal.

**Respondent's Submissions**

**20.** The respondent opposed the appeal through written submissions dated 7/11/2025, filed by ***Ms Kiogora Arithi & Co Advocates.*** Counsel identified the following as the four

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issues that fell for determination in the appeal: (i) Whether the trial court erred in finding that the sale agreements were defective and unenforceable; (ii) Whether there was proof of consideration or payment of Kshs 1,400,000; (iii) Whether there was fraud or collusion between the respondent and his wife; and (iv) Whether the appellant was entitled to a refund or liquidated damages.

**21.** On whether the trial court erred in finding that the two sale agreements were defective and unenforceable, counsel for the respondent submitted that the appellant's problems arose from his failure to conduct due diligence before entering into the transactions. Counsel added that a prudent purchaser would have investigated the title to confirm ownership and establish whether the land had any encumbrances. Counsel argued that the appellant's conduct was not that of a bona fide purchaser, contending that if the appellant had been diligent, he would have discovered that the parcels were trust land and could not be sold. Counsel cited the pronouncement in ***Gathuku v Nakuru Workers Housing Cooperative Ltd & another, Kariuki (Suing as the legal representative of the Estate of Joice Wangui Kathuku (deceased) ELC 100 OF 2016.***

**22.** Counsel further argued that the appellant's negligence precluded him from seeking any relief, adding that the suit parcels had been declared trust properties in **Githongo ELC No 9 of 2017** and **Meru ELCA E018 of 2020**. Counsel contended that the appellant could not re-open issues that had already been determined, adding that the appellant's claim was res judicata. Counsel cited the pronouncement in ***John Florence Maritime Services Ltd & Another v***

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***Cabinet Secretary for Transport & 3 Others (2015)eKLR.***

**23.** On whether there was proof that the appellant paid consideration of Kshs 1,400,000, counsel submitted that the appellant bore the burden of proof, particularly given the fact that the respondent denied receipt of purchase price.

**24.** On whether there was fraud or collusion between the respondent and his wife, counsel submitted that the appellant did not plead particulars of fraud in his plaint and did not tender any evidence of conspiracy between the respondent and his wife. Counsel further submitted that the respondent's wife was not a party to the impugned agreements and there was no proof she benefited from either of the transactions.

**25.** On whether the appellant was entitled to a refund, counsel argued that the appellant failed to prove that he had paid the purchase price. Counsel relied on the case of ***Margaret Njeri Muiruri v Bank of Baroda (Kenya) Limited (2014) KECA 319 (KLR) and Thrift Homes Limited v Kays Invest Limited (Civil Suit 1512 of 1998) (2015) KEHC 5591 (KLR).*** Counsel urged the court to dismiss the appeal.

**Analysis and Determination**

**26.** The court has read and considered the original record of the trial court; the record filed in this appeal; and the parties' respective submissions. The court has also considered the legal frameworks and the jurisprudence relevant to the issues that fall for determination in the appeal. The following are the key issues that fall for determination in the appeal: (i) Whether the trial court erred in finding that the two land sale

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agreements dated 14/1/2013 and 18/5/2013 between the appellant and the respondent were defective, and that owing to the defect, the issues relating to refund of purchase price and payment of liquidated damages were moot and could not be analysed in the trial court's judgment; (ii) Whether the respondent was in breach of the two aborted land sale agreements; (iii) Whether the appellant paid to the respondent the agreed purchase price under the two aborted land sale agreements; (iv) Whether the respondent was liable to refund to the appellant the purchase price allegedly paid to him under the two aborted land sale agreements; (v) Whether the respondent was liable to pay to the appellant a total of Kshs 2,800,000 being liquated damages under clauses 5 and 8 of the two aborted land sale agreements; and (vi) Whether the appellant proved remittance of Kshs 90,000 to Evangeline and his entitlement to a refund of the said amount by the respondent. I will analyse and dispose the above issues sequentially in the above order. Before I do that, I will outline the principle that guides this court when exercising appellate jurisdiction.

**27.** The task of a first appellate court was summarized by the Court of Appeal in the case of ***Susan Munyi v Keshar shinai (2013) eKLR*** as follows:

> ***"As a first appellate court our duty of course is to approach the whole evidence on record from a fresh perspective and with an open mind. We are to analyze, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive to our own independent conclusions."***

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**28.** The principle was similarly outlined in ***Abok James Odera t/a A J Odera & Associates v John Patrick Machira t/a Machira & Co Advocates [2013] eKLR*** as follows:

> ***"This being a first appeal, we are reminded of our primary role as a first appellate court, namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way."***

**29.** Did the trial court err in finding that the two land sale agreements were defective? Did the trial court err in finding that the two key questions relating to refund of purchase price and liability to pay liquidated damages were moot on account of the defect? The court has examined the parties' pleadings which gave rise to the issues that formed the basis of the trial hearing and the determination in the impugned judgment. Neither of the parties to the suit that was before the trial court pleaded the issue of defect in the two sale agreements. In paragraph 3 of his defence, the respondent admitted entering into the two sale agreements. He pleaded that the two sale agreements were, however, vitiated by the doctrine of frustration. He contended that the frustration was occasioned by the subsequent orders and the declarations issued in **Githongo SPMC E & L Case No 9 of 2017** and **Meru ELC Appeal No E018 of 2020.**

**30.** The issue of defect in the two sale agreements not having been pleaded by either of the parties, the trial court had no basis for invoking it and resting its entire judgment on it. Our courts have umpteen times stated that issues that fall for determination in a civil suit are to be framed out of the

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parties' pleadings. In ***Raila Amollo Odinga & another v IEBC & 2 others (2017) eKLR***, the Supreme Court of Kenya underscored the centrality of pleadings in the adjudication of civil disputes in the following words:

> ***" In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings."***

**31.** In ***David Sironga Ole Tukai v Francis Arap Muge & 2 others [2014] eKLR***, the Court of Appeal stated the following on the centrality of pleadings in the adjudication of civil disputes:

> ***"It is well established in our jurisdiction that the court will not grant a remedy which has not been applied for, and that it will not determine issues, which the parties have not pleaded. In an adversarial system such as ours, parties to litigation are the ones who set the agenda, and***

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***subject to rules of pleading, each party is left to formulate its own case in its own way."***

**32.** In ***Mithamo & another v Mithamo [2024] KECA 1864 (KLR)*** the Court of Appeal stated as follows:

> ***"We take the view that parties should specifically state their claim by properly pleading the facts relied upon and the relief sought, as the pleadings are the primary documents that guide the court and the parties concerning the claim and the contesting positions of the parties."***

**33.** For the above reasons, it was an err for the trial court to rest its decision on a defence that had not been pleaded by the either of the parties.

**34.** Secondly, as between the appellant and the respondent, there was never a dispute about the validity of the two land sale agreements they had entered into. Indeed, from the totality of the evidence on record, such as the proceedings in Githongo SPMC E & L Case No 9 of 2017; it does emerge that the two contracting parties read from the same script throughout the preceding litigations and were in agreement that they had valid and binding sale agreements as between the two of them. What frustrated their two binding sale agreements was the claim of a third party, Evangeline.

**35.** Thirdly, the trial court erred in failing to take into account the nature of relief which the appellant was seeking from the respondent through the suit. The appellant was not seeking orders of specific performance in terms of completion of the contracts. He was seeking alternative reliefs that would

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accrue in the event of abortion of the contracts or non-completion of the contracts. The appellant was alive to the fact that the two courts had rejected their joint claim for an order lifting the cautions and had ruled that, as a registered proprietor of the suit parcels, the respondent could only dispose the suit parcels with the consent of Evangeline who was her spouse. Effectively, the two contracts aborted due to frustration. Whereas the above finding frustrated the two sale agreements, it did not render the two agreements defective for the purpose of the reliefs that the appellant sought. Parties to the agreements were entitled to seek reliefs/remedies against each other within the confines of their two uncontested land sale agreements.

**36.** The totality of the foregoing is that the trial court erred in resting its decision on an unpleaded issue and in failing to analyse the appellant's claim within the confines of the two agreements which the contracting parties had entered into.

**37.** Did the appellant prove breach of contract on the part of the respondent? The appellant pleaded breach on the part of the respondent and itemized various particulars of breach, including: (i) an allegation that the respondent effected transfers that were tainted with illegality; (ii) that the respondent conspired to defraud the appellant; (iii) that the respondent refused to refund the purchase price; and Iiv) that the respondent failed to pay the agreed liquidated damages.

**38.** The court has examined the evidence that was before the trial court. The formal sale agreement relating to parcel number 3709 was entered into on 14/1/2013 while the transfer conveying the parcel into the name of the appellant was

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registered on 3/1/2013. This means that the transfer preceded the formal agreement for sale. The appellant having agreed to a transfer that preceded the agreement that he was relying on, his allegation that the said transfer breached the then non-existent agreement cannot hold.

**39.** Parcel number 3707 was sold to the appellant vide an agreement dated 18/5/2013. The exhibited land register relating to parcel number 3707 shows that at that time, there already existed a caution against the said title, registered on 3/1/2013 in favour of **Evangeline Kagwene Gitonga**. As a purchaser of a registered title, the appellant was deemed to have known the existence of the caution and to have elected to nonetheless proceed with the transaction. The allegations of fraud cannot hold in a transaction such this where the appellant entered into a sale agreement with the respondent while aware that the respondent's wife had already registered a caution against the title and the caution subsisted.

**40.** The court has also considered the allegation of conspiracy. There was no iota of evidence tendered to suggest that the respondent conspired with Evangeline to challenge the legitimacy of the concluded transfer or the legitimacy of the two sales. To the contrary, by the time the parties were entering into the second agreement, Evangeline had already registered a caution against parcel number 3707. Secondly, the litigation that ensued thereafter does not bear any evidence of conspiracy. Throughout the litigation, the respondent was on the side of the appellant and asserted his right to sell the suit parcels to the appellant.

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**41.** The evidence which the appellant placed before the trial court projected a registered proprietor who genuinely sold the suit parcels believing that he owned the suit parcels absolutely and he could sell them without the consent of his spouse. The evidence further reveals that the only reason why the sales aborted is that they were frustrated by the actions of a third party, Evangeline, who successfully mounted a claim of an unregistrable interest in the suit land. There was evidence of frustration of the contracts by a third party but there was no evidence of breach by the respondent. That is the finding of the court.

**42.** Did the appellant prove payment of purchase price under the two aborted sale agreements? This court has looked at the sale agreement dated 14/1/2013 relating to sale of parcel number 3709. It contained clear provisions on purchase price in clauses 1 and 2 in the following verbatim terms:

> ***"1. The vendor sells to the purchaser 0.03 Ha of land to be excised from ABOTHUGUCHI/KARIENE/3709 free from any encumbrances at a total consideration of Kshs 700,000/= (Seven Hundred Thousand only).***
>
> ***2. That the purchaser will pay the vendor a sum of Kshs 700,000/= (Seven Hundred Thousand only) being full and final payment at the execution of this agreement the receipt the vendor acknowledges.***
>
> ***SIGNED***
> ***VENDOR"***

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**43.** It does emerge that the respondent appended his signature at clause 2 acknowledging that he had received purchase price in full. His signature was witnessed by an advocate by the name **Anampiu.** It is not lost to this court that at the time the parties executed the sale agreement dated 14/1/2013, parcel number 3709 had already been transferred to the appellant by the respondent. The respondent having formally acknowledged receipt of purchase price relating to parcel number 3709 in full, and the said sale agreement having been tendered as evidence, this court is satisfied that the appellant properly proved payment of the purchase price of Kshs 700,000 to the respondent in relation to parcel number 3709.

**44.** The court has also looked at the agreement dated 18/5/2013 relating to parcel number 3707. The framework on purchase price is contained in Clause 1 which provided as follows:

> ***"1. The vendor sells and the purchaser buys free from all encumbrances whatsoever, the said plot at a total agreed consideration of Kshs 700,000/= (Kenya Shillings Seven Hundred Thousand) only, to be paid by the purchaser to the vendor in the following manner:***
>
> ***(i) Kshs 530,000/= (Five Hundred and Thirty Thousands Shillings) only, to be paid upon execution of this agreement receipt of which the vendor hereby acknowledges by signing hereunder.***
>
> ***SIGNED***
>
> ***Acknowledged by: Vendor***

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> ***(ii) The balance of Kshs 170,000/- (One Hundred and Seventy Thousands shillings) only:- The purchaser to construct a wooden residential house for the vendor on his (vendor's) land in Giaki at a value of Kshs 170,000/= aforesaid."***

**45.** It does similarly emerge from the uncontested formal sale agreement dated 18/5/2013 that the vendor formally acknowledged receipt of Kshs.530,000 out of the agreed purchase price of Kshs 700,000 for parcel number 3707. The respondent's acknowledgement was witnessed by an advocate called **Ndubi Josphat**. It is clear that the balance that remained to be paid after 18/5/2013 was Kshs 170,000. The parties agreed that the said balance was to be paid by way of the appellant constructing a wooden residential house for the respondent on the respondent's land in Giaki at a value of Kshs 170,000. Evidence of the said construction was not tendered.

**46.** The court has examined both the documentary and the oral evidence which the appellant tendered in the trial court. There was no conclusive proof of payment of the balance [Kshs170,000] relating to the agreed purchase price of Kshs 700,000 that related to parcel number 3707. The appellant proved payment of Kshs, 530,000. He did not, however, prove payment of the balance [Kshs 170,000].

**47.** Consequently, it is the finding of this court that the appellant proved that he paid to the respondent Kshs 700,0000 [*full purchase price*] relating to parcel number 3709. It is also the finding of this court that the appellant proved that he paid to the respondent Kshs 530,000 as part-payment of the agreed

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purchase price of Kshs 700,000 in relation to parcel number 3707. In total, the appellant paid to the respondent a sum of Kshs 1,230,000 towards the agreed purchase price for the two parcels. That is what the appellant proved and that is the finding of the court on the question as to whether the appellant proved payment of purchase price.

**48.** Was the respondent liable to refund to the appellant the above purchase price? The court has made a finding to the effect that there was no breach of contract by the respondent. The court has, in essence, agreed with the respondent's defence in the trial court to the effect that the two contracts were rendered unenforceable by the doctrine of frustration. Is purchase price refundable when a land sale contract is frustrated? Kenya's **Law of Contract Act** is silent on this. The fallback law is the English Law and the common law.

**49.** Prior to the enactment of the **Law Reform (Frustrated Contracts) Act 1943** in England, the prevailing law on this question was that when a contract became frustrated, the parties to the contract stood discharged from further performance and none of the parties was liable to make a refund of monies paid in furtherance of the contract prior to the frustrating event. The enactment of the **Law Reform [Frustrated Contracts] Act** in **1943** changed the above legal position. The Act provided that sums paid to any party in pursuance of the contract before the date of discharge became recoverable from the receiving party. That is the law that prevails in Kenya to date. Consequently, it is the finding of this court that the respondent was liable to refund to the appellant the sum of Kshs 1,230,000 which he received from

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the appellant as purchase price pursuant to the two frustrated land sale agreements.

**50.** Is the respondent liable to pay the appellant Kshs 2,800,000 as liquidated damages? The claim for liquidated damages in the sum of Kshs 2,800,000 was premised on Clause 5 of the sale agreement dated 14/1/2013 and Clause 8 of the sale agreement dated 18/5/2013. The two clauses contained the following provisions respectively:

> ***"5. That any party in breach of this agreement shall pay the non-defaulting party a sum of Kshs.1,400,000/=."***

> ***"8. Any party in breach of any term of this agreement shall pay the innocent party a sum of Kshs 1,400,000/= (One Million Four Hundred Thousand) only as liquidated damages for breach of this agreement."***

**51.** It is clear from the above provisions that liquidated damages would accrue only in the event either party breached the agreement. The court has made a finding to the effect that the appellant did not prove breach of either of the two agreements by the respondent. The court has also made a finding to the effect that the agreements were frustrated by a third party and the two parties to the sale agreements stood discharged from further performance due to the frustration. Consequently, it is the finding of the court that, in the absence of proof of breach by the respondent, the claim for liquidated damages in the sum of Kshs.2,800,000 was unmerited and the respondent was not liable to pay the sum.

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**52.** Did the appellant prove remittance of the sum of Kshs 90,000 that were awarded to Evangeline as costs in Meru ELCA Appeal No E018 of 2020? Did he prove his entitlement to a reimbursement of the said sum? The court has gone through the evidence that was placed before the trial court. In his list of trial documents, the appellant alluded to Mpesa messages which were itemized as No 10 in the List of Documents dated 28/2/2023. The actual Mpesa messages were, however, not in the trial bundle and were not tendered as evidence. All that was tendered in relation to the said costs was a consent dated 10/3/2022 which was executed by ***M/s Mwirigi Kaburu & Co Advocates*** [*acting for the two parties in this appeal, who were the two appellants in Meru ELC Appeal No E018 of 2020*] and ***Kiogora Arithi & Associates*** [*acting for Evangeline who were acting for the respondent in the said appeal*] . The gist of the consent was that the parties to the said appeal had by consent agreed to have Evangeline's bill of costs dated 22/12/2021 assessed at Kshs 90,000 and that the said costs were to be paid in two instalments. The appellant did not tender evidence demonstrating that he subsequently solely paid the said costs. He did not demonstrate why, in any event, he would be entitled to a re-imbursement of the sum of Kshs 90,000 yet the said sum was awarded against the two of them.

**53.** In light of the foregoing, the finding of the court on the last issue is that the appellant did not prove that he solely paid the costs that were awarded to Evangeline and that he was entitled to a re-imbursement of Kshs 90,000 by the respondent. If he indeed paid the sum, he failed to tender evidence relating to the payment.

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**54.** The respondent raised the issue of limitation of action in his submissions. He also raised the issue of res judicata. The court has considered the two issues. The two sale agreements aborted when this court rendered its judgment upholding the judgment of the trial court. That is when the cause of action for refund accrued. That was on 8/12/2021. The suit in the trial court was filed on 1/3/2023. That was well within the prescribed limitation period.

**55.** Secondly, during the preceding litigation in the preceding suit, the cause of action relating to refund of money paid had not accrued. It accrued when the event of frustration occurred. The issues that arose for determination in Githongo SPMC E & L Case No E006 of 2023 related to a new cause of action that sprung from the event of frustration. The cause of action did not accrue prior to the final determination of the question as to whether Evangeline had an unregistrable interest in the suit land. Consequently, the appellant's claim in Githongo SPMC E & L Case No. E006 of 2023 cannot be said to have been res judicata.

**56.** On costs, the errors culminating in this appeal were committed by the trial court. Consequently, parties will bear their respective costs of the appeal. The respondent will, however, bear costs of the suit in the lower court in tandem with the general principle in **Section 27** of the **Civil Procedure Act**.

**Disposal Orders**

**57.** In conclusion, for the reasons outlined in this Judgment, this appeal succeeds and is disposed in the following terms:

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***(a) The judgment of the trial court in Githongo SPMC E & L Case No E006 of 2023 (Githongo MCELC/E006/2023) dated 19/3/2025 is hereby set aside wholly and is replaced with the following award:***

> ***i. The defendant [Simon Gitonga M'Ikiome] is decreed to refund to the plaintiff [Joshua Kaburu Kimathi] Kshs 1,230,000 being the total acknowledged purchase price that the defendant received from the plaintiff pursuant to the two aborted/frustrated land sale agreements dated 14/1/2013 and 18/5/2013.***
>
> ***ii. The defendant shall bear the plaintiff's costs in the said suit.***

***(b) Parties shall bear their respective costs of this appeal.***

**DATED, SIGNED AND DELIVERED AT MERU THIS 30TH DAY OF APRIL, 2026.**

**B M EBOSO [MR]**

**ELC JUDGE**

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