Collins v Ogango (Civil Appeal 427 of 2018)
[2024] KECA 19 (KLR) (25 January 2024) (Judgment)

Neutral citation: [2024] KECA 19 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 427 OF 2018

MSA MAKHANDIA, K M'INOTI & M NGUGI, JJA

JANUARY 25, 2024

BETWEEN

DOLORES N COLLINS ..... APPELLANT

AND

JOHN OKUNA OGANGO ..... RESPONDENT

(An appeal from the Judgment and the Decree of Environment and Land Court (Bor, J.) dated 18th September 2017 in Nairobi ELC Case No. 606 of 2016)

JUDGMENT

1. This is an appeal by Dolores N. Collins, ("the appellant") against the judgment and decree of Kossy Bor, J. of the Environment and Land Court ("ELC") in ELCC No. 606 of 2016 (OS) delivered in Nairobi on 18th September 2017. By the said judgment and decree, the learned Judge awarded liquidated damages of 10% of the purchase price to the respondent, ordered specific performance against the 2nd defendant in the suit, Collins Park Villas Limited, which was not made a party to this appeal, directing it to transfer the suit property by way of a long lease to the respondent and to furnish him with the completion documents within 30 days of the date of judgment, whereupon the respondent would pay the balance of the purchase price to the appellant within 3 days of receiving the lease and all completion documents from the 2nd defendant, and finally, the appellant was to bear the costs of the suit.

2. The facts of this case as we can discern from the record are straightforward and clear. On 16th July 2015, the appellant entered into an agreement with the respondent for the purchase of a 5- bedroomed townhouse along Owashika Road Lavington, ("the suit property"), at an agreed purchase price of KShs 52 Million. The letter of offer provided that the respondent would pay 20% of the purchase price as deposit, being KShs 10,400,000.00 on the execution of the letter of offer and the balance within 90 days of receipt of transfer documents. The respondent and the appellant subsequently, executed

a sale agreement in which the appellant is described as the beneficial owner of the suit property. The agreement stipulated that the appellant sold the suit property to Tofina Rom Builders who were referred to as the "developer" in the agreement dated 2nd August 2011 and that the developer in turn transferred the suit property to Collins Park Villas Limited who was the 2nd defendant in the primary suit. The 2nd defendant undertook the construction of the townhouses and was owed KShs 15,320,000.00 by the appellant.

3. Further, the parties agreed that the respondent would pay the aforesaid amount as part of the deposit directly to the 2nd defendant to settle the sum the appellant owed it. Clause 3 stipulated that the balance of the purchase price would be paid to the vendor's advocates subject to the provisions on completion. Clause 6 set the date of completion as 45 days from the date the Nairobi City County Government would issue a Certificate of Occupation for the suit property. Moreover, the sale agreement had a document referred to as "consent" which provided that the developer, as the registered proprietor of the suit property, had given its consent for the transaction and added that "it is understood that the registered proprietor was not a party to the sale agreement". The 2nd defendant also gave its consent to the agreement in similar terms.

4. There was also a document titled "Irrevocable Undertaking" in which the 2nd defendant stated that as the registered proprietor of the suit property, it had given its consent to the transaction and added that "it is understood that the registered proprietor is not a party to this agreement." It also gave its irrevocable undertaking to the respondent's advocates to directly transfer the suit property to the respondent by way of a long-term lease and to furnish the respondent's advocates with the completion documents within 45 days of completing the construction of the suit property. There was also an irrevocable undertaking to the respondent's advocates from the developer in which it undertook to finish construction of the suit property within 90 days of receipt of KShs 15,320,000.00 being the sum the appellant owed it on account of the construction of the suit.

5. The respondent paid the deposit of KShs 15,320,000.00 to the 2nd defendant on 8th June 2015 and 16th July 2015. He paid a further sum of KShs 500,000.00 on 30th September 2015 and 5th October 2015 at the request of the appellant who indicated that this sum would be credited to him as part of the purchase price on completion of the transaction. The appellant's advocates, Messrs Ochieng Ogutu & Company Advocates drew the sale agreement. The 2nd defendant and developer were represented by the firm of Messrs Were Oonge & Company Advocates while Messrs Oduk & Company Advocates represented the respondent in the transaction. On 6th January 2016, the appellant's advocates forwarded the Certificate of Practical Completion to the respondent's advocates indicating that she had completed her part of the agreement and demanded payment of the balance of the purchase price. The Certificate of Practical Completion, which was dated 1st December 2015, confirmed that the construction of the suit property was completed on 30th November 2015. The appellant's advocates also wrote to the 2nd defendant's advocates on 6th January 2016 notifying them that they were required to release the completion documents to the respondent's advocates within 45 days of practical completion of construction.

6. From the record, after the above exchanges, there was a sudden turn of events as on 19th January 2016, the appellant's advocates gave the respondent's advocates 21 days' notice to complete the transaction by paying the balance of the purchase price of KShs 36,680,000.00. They threatened to rescind the agreement if payment was not made within that period and that the respondent would forfeit 10% of the purchase price and the appellant would be at liberty to sell the suit property to another buyer. Indeed, the appellant followed through with the threats as on 29th February 2016, she rescinded the sale. This unilateral action attracted protests from the respondent through several letters but the appellant was unmoved.

7. The respondent then instituted a suit in the ELC by way of Originating Summons (OS) dated 3rd July, 2016, in which he sought the court's determination on 9 issues which were whether: the appellant was entitled to rescind the sale agreement without complying with the provisions of the sale agreement; the respondent was entitled to receive the Certificate of Occupation from Nairobi City County so as to complete payment of the purchase price; the appellant was entitled to forfeit 10% of the purchase price; the appellant waived her right to rescind the contract when she failed to refund the deposit of KShs 15,320,000/= within 7 days of the forfeiture; the 2nd defendant was in breach of its irrevocable undertaking issued under the sale agreement; the court could issue an order to compel the 2nd defendant to honour the terms of the irrevocable undertaking; the appellant was entitled to payment of the balance of the purchase price and following which event under the sale agreement; damages were payable to the respondent and if yes, the quantum thereof and by whom and, lastly, who was to pay the costs of the suit?

8. The trial court after evaluating and considering the evidence presented made findings already reproduced elsewhere in this judgment.

9. The appellant, being aggrieved by the said judgment and decree, filed an appeal in this Court on the grounds: that the trial court erred in law and in fact in finding: that the respondent was entitled to liquidated damages of 10% of the purchase price; in granting damages and specific performance to the respondent at the same time and, in granting costs of the suit to the respondent.

10. The appeal proceeded by way of written submissions with limited oral highlights on a virtual platform. The appellant, through Mr. Ochieng Oguttu, learned counsel, submitted on the first ground, that the agreement entered into by the parties provided that if completion fails to take place due to default not attributable to the purchaser, or the vendor is, for any reason, unable to complete the transaction, the purchaser shall give to the vendor twenty-one (21) days' notice in writing to comply with her obligations, and such notice shall specify the default and require the vendor to make it good within the twenty-one (21) days' notice period. If the vendor fails to comply with the said notice, the purchaser may, at his discretion, rescind the agreement and the vendor shall within seven (7) days thereafter return all the monies paid by the purchaser pursuant to the agreement together with ten (10%) percent of the purchase price as the agreed liquidated damages. The appellant submitted that for the clause to be available to the respondent, he is the one who should have triggered rescission by giving completion notice of twenty-one (21) days to the appellant. Put differently, for the respondent to claim liquidated damages of l0% of the purchase price under that clause, the was supposed to be the one who triggers the rescission of the agreement. It was further submitted that it was erroneous for the court to award the respondent damages whereas it was not the respondent who had rescinded the agreement. Reliance was placed on the case of *Caltex Oil (Kenva) Limited v Rono Limited* - Civil Appeal No. 97 of 2008 for the proposition that the award of damages was not automatic even in the event the court found that there was breach of the agreement. That any damages payable for breach had to be proved by the way of evidence which the respondent failed to do in the circumstances of this case.

11. It was the view of the appellant that the trial court erred in law in granting damages and specific performance to the respondent at the same time. The appellant submitted that it was trite law that the relief of damages and specific performance are untenable at the same time. It was further submitted that the respondent was not entitled to both damages and specific performance for breach of agreement, since he had already been granted the suit property through specific performance and to award him damages again would amount to unjust enrichment.

12. On costs of the suit, it was the appellant's submission that the respondent was required, under the sale agreement, to pay the balance of the purchase price on or before the completion date provided

the appellant had secured a suitable irrevocable undertaking from the 2nd defendant, before signing the agreement. There was no other condition attached to the payment of the balance of the purchase price other than securing of the said undertaking by the appellant. Relying on the case of *Housing Company of East Africa Limited v Board of Trustees National Social Security Fund & 2 Others* [2018] eKLR, it was submitted that she was not in breach of the Sale Agreement but rather it was the 2nd defendant. Therefore, the court should have ordered the 2nd defendant to meet the costs of the suit. She submitted in the alternative that the court having found both the appellant and the 2nd defendant in breach of the sale agreement, the court should have ordered both to share the costs of the suit.

13. The appeal was opposed by the respondent through Mr. Oduk, learned counsel. In his written submissions, the respondent merely reiterated and expounded on what the appellant had submitted, and in particular, the historical antecedents of the dispute, of which there is no need to rehash. Suffice it to add that on 6th January 2016, the appellant's advocates wrote to the 2nd defendant's Advocates indicating that they had completed their part of the agreement and they were requesting for the balance of the purchase price. The appellant's advocates wrote to the developer's advocates on the same date notifying them that they were required to release the completion documents to the respondent's Advocates within 45 days of practical completion of construction. This was the first time the appellant indicated that the construction was complete. Then, on 19th January 2016, the appellant quickly rescinded the agreement and allegedly forfeited 10% of the purchase price and never refunded advance payment received. The appellant then instigated the 2nd defendant to breach the contract by not completing and forwarding the registration and completion documents to the respondent's counsel as provided for in the agreement. The 2nd defendant heeded and became complicit in the breach of the agreement by the appellant. That the trial court, in the premises, rightly ordered the 2nd defendant to effect the transfer of the suit property to the respondent and payment of liquidated damages of KShs 5,200,000.00 by the appellant.

14. The respondent submitted that the appellant breached the contract by failing to keep her part of the bargain and repudiating it and interfering with the 2nd defendant's performance of the agreement. It was further submitted that the appellant breached the agreement by not effecting the transfer. Referring to the persuasive authorities of *Joseph Kangethe Irungu v Peter Neansa Muchoki* ELC No. 484 of 2017 (Muranga) (UR) and *Gharib Suleman Gharib v Abdulrahman Mohammed Agil* LLR No. 75O CAK Civil Appeal No. 112 of 1998 the respondent submitted that he sought an order of specific performance against the 2nd defendant, the registered proprietor who failed to honour the obligation to him after receiving KShs 15,320,000.00 of the purchase price on account of the appellant. That he also sought damages at large against the appellant for breaches she committed. It was contended that the breach was admitted and not denied nor was it a ground of appeal in this appeal. The respondent relied on the case of Ritho v Kariithu & Another 1988 KLR 237, for the proposition that in cases which the court has jurisdiction to entertain an application for an injunction against a breach of any covenant, contract, or agreement, or against the commission or continuance of any wrongful act, or for specific performance of any covenant, contract or agreement, it shall be lawful for the same court, if it thinks fit, to award damages to the party injured either in addition to or in substitution for an injunction or specific performance and such damages maybe assessed in such manner as the court shall direct. That being the case it was submitted that the court was right in granting the prayers sought and costs against the appellant. It was his further submission that the costs were confined to the appellant who was a partner in the breach.

15. We have considered the appeal, the submissions by counsel for the parties and the authorities cited. This being a first appeal, it is by way of retrial and this Court, as the first appellate court, has a duty to re-evaluate, re-analyze, and re-consider the evidence and draw its own conclusions, of course, bearing

in mind that it did not see witnesses testifying and therefore give due allowance for that. This was this Court's decision in *Gitobu Imanyara & 2 Others v Attorney General* [2016] e KLR, where it stated that:

> "[A]n appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect."

See also *Seascape Ltd v Development Finance Company of Kenya Ltd*, [2009] KLR 384.

16. Having considered the record of appeal in light of our mandate as set out above, in our view the issues that fall for our determination are whether: there was breach of the agreement and by whom; the respondent was entitled to liquidated damages of 10% of the purchase price; the respondent was entitled to liquidated damages and an order of specific performance at the same time; and finally, who was to bear the costs of the suit.

17. There is no doubt that there was an agreement for sale. Indeed, all the parties concede to this fact. We wish, however, to address the issue of breach of agreement. *Black's Law Dictionary*, 9th Edition, at Page 213, defines a breach of Contract as:

> "a violation of a contractual obligation by failing to perform one's own promise, by repudiating it, or by interfering with another party's performance. A breach may be one by non-performance or by repudiation or by both. Every breach gives rise to a claim for damages and may give rise to other remedies. Even if the injured party sustains no pecuniary loss, or is unable to show such loss, with sufficient certainty, he has at least a claim for nominal damages."

18. It is trite law that courts cannot re-write contracts for parties, neither can they imply terms that were not part of the contract. In the case of *Rufale v Umon Manufacturing Co. (Ramsboltom)* (1918) L.R 1KB 592, Scrutton L.J. held as follows:

> "The first thing is to see what the parties have expressed in the contract and then an implied term is not to be added because the court thinks it would have been reasonable to have inserted it in the contract.

Equally, in the case of *Attorney General of Belize et al v Belize Telecom Ltd & Another* (2009), 1WLR 1980 at page 1993, citing Lord Person in *Trollope Colls Ltd v Northwest Metropolitan Regional Hospital Board* (1973) I WLR 601 at 609, the court held as follows:

> "The court does not make a contract for the parties. The court will not even improve the contract which the parties have made for themselves. If the express terms are perfectly clear and [free] from ambiguity, there is no choice to be made between different meanings. The clear terms must be applied even if the court thinks some other terms could have been more suitable."

19. Based on the above decisions and the summarized facts of the case, we are in no doubt that there was breach of the agreement. The question is who was in breach? On the basis of the record, we are satisfied, just like the trial court, that it was the appellant who breached the contractual terms and purported to amend the terms therein to suit herself. The appellant failed to do what the contract had demanded of her, especially, the acquisition of certificate of completion and proper communication of the same to

the respondent. The appellant was not even keen on the terms to the extent that even after causing the termination of the agreement in an improper manner, she did not follow up to refund the respondent the amounts that he had paid over and above the 10%. Her actions betrayed her intention not to sell the suit property even after the respondent assisted her by paying more than 10% of the purchase price to ensure the construction was completed. We are fortified in this view, by this Court's decision in the case of *Delilah Kerubo Otiso v Ramesh Chander Ndingra* [2018] eKLR, where it was held that:

> "In our view, the appellant's conduct was oppressive, highhanded, outrageous, callous and underhanded, to say the least. We could go further and suggest that what he was engaged in, bordered on a fraud. The appellant from the word go never had the slightest intention of honouring the agreement... He engaged in a disappearing act whenever it suited him only to re-appear and invoke section 7 of the Act and proclaim that the transaction was void... In the circumstances, general damages would be tenable in our view. Given the foregoing, how can the judge be faulted for invoking the general principles of contract law as opposed to the provisions of sections 6 and 7 of the Act so as to annul the sale agreement? Had the judge taken that route the result would have been unjust and oppressive to the appellant. The court would have sanctioned the unacceptable conduct of the appellant and allowed him to benefit from his own mischief."

20. As to damages, the trial court ordered that the respondent be paid liquidated damages of 10% of the purchase price. It relied on the provisions of part 11 of the agreement between the parties. It is clear from the facts of the case that as per the agreement, the respondent paid a total of KShs 15,320,000.00 to the 2nd defendant on account of the appellant. This was over and above the required 10% deposit of the purchase price, the reason being that this was monies due to the developer from the appellant that were to be paid by the appellant. Clause 11 of the agreement provided as follows:

> If the Purchaser is in default or fails to comply with any of the conditions hereof or of the Condition subject to which this sale is made including the obligations to pay the Purchase Price (or any part thereof) together with accrued interest pursuant to clause 10 above, the Vendor shall give to the Purchaser Twenty One (21) days' notice (time being of the essence) in writing confirming the Vendor's readiness to complete the sale in all respects and specifying the default and requiring the Purchaser to complete and or remedy the default before the expiration of such notice AND if the Purchaser shall fail to comply with such notice the Vendor shall be entitled to:
>
> "Rescind this Agreement whereupon the Purchaser shall forfeit ten (10%) percent of the purchase price and the Vendor shall retain the forfeited amount as the agreed liquidated damages and return any monies paid over and above the 10% forfeited pursuant to this Agreement within Seven days from the date of expiry of the termination notice and thereafter be at liberty to resell the property."

21. If completion fails to take place due to default not attributable to the purchaser, or the vendor is for any reason unable to complete the transaction, the purchaser shall give to the vendor twenty-one (21) days' notice in writing to comply with her obligations, and such notice shall specify the default and require the vendor to make it good within the twenty-one (21) days' notice period. If the vendor fails to comply with the said notice, the purchaser may at his discretion rescind this agreement and the vendor shall within seven (7) days thereafter return all the monies paid by the purchaser pursuant to this agreement together with 10% percent of the purchase price as the agreed liquidated damage.

22. We adopt the following definition of a liquidated demand from The Supreme Court Practice (1985) Volume 1, at page 33:

> A liquidated demand is in the nature of a debt, i.e a specific sum of money due and payable under or by virtue of a contract. Its amount must either be already ascertained or capable of being ascertained as a mere matter of arithmetic. If the ascertainment of a sum of money, even though it be specified or named as a definite figure, requires investigation beyond mere calculation, then the sum is not a 'debt or liquidated demand' but constitutes 'damages'...

23. From the agreement, it is clear that the respondent paid a percentage of the required amount and what remained was for the appellant and his group to fulfill their obligations. Of essence was the fact that the appellant would secure an undertaking from the registered proprietor or its advocates to transfer the suit property directly to the respondent by way of a long-term lease and to provide the respondent with the completion documents, which had been detailed in clause 9 of the agreement. Further, the appellant would procure an undertaking from the 2nd defendant to complete the construction within 90 days from the date of receipt of the deposit, and lastly, the completion date would be 45 days from the date the Nairobi City County issued a certificate of occupation of the suit property. The record, however, discloses a different turn of events. The appellant never complied with any of the above terms. We note that the Certificate of Practical Completion was forwarded to the appellant on 6th January yet it had been issued on 30th November 2015, a delay of over a month which the appellant has not deigned to explain. Further, in a replying affidavit sworn by the 2nd defendant, the deponent confirms that the respondent paid KShs 15,320,000.00 in terms of the agreement and was therefore entitled to the suit property. Obviously, the 2nd defendant is blaming the appellant for the mess leading to the breach of the agreement. The record also shows that the 2nd defendant's advocates could not prepare the long-term lease to the respondent for the reason that the issue of their fees had not been settled. This fact had never been communicated to the respondent's advocates. That notwithstanding, it is clear that the appellant was to meet the costs of obtaining all completion documents. Finally, we note that the respondent was to meet his last part of the bargain 45 days after Nairobi City County issued a certificate of occupation. Neither the appellant nor the 2nd defendant have disclosed whether this was ever done yet it was the responsibility of the appellant and the 2nd defendant to do so. With all these breaches of the agreement of sale by both the appellant and or the 2nd defendant, how was the respondent to fulfill his part of the bargain? The respondent bears no blame for the turn of events. It is common ground that the respondent met his part of the bargain in terms of payments to the appellant on 8th June 2015 and 16th July 2015 respectively.

24. From the record, it is apparent that all the parties were represented by counsel in the transaction. As already noted, on 6th January 2016, by their letter of the same date, the appellant's advocates forwarded the Certificate of Practical Completion to the respondent's advocates, which letter indicated that the appellant had completed her part of the agreement and demanded payment of the balance of the purchase price while referring to the undertaking in the agreement. The Certificate of Practical Completion confirmed that the construction of the suit property was completed on 30th November 2015. The appellant's advocates also wrote to the 2nd defendant's advocates on 6th January 2016, notifying them that they were required to release the completion documents to the respondent's Advocates within 45 days of the practical completion of construction. On 19th January 2016, the appellant's advocates gave the respondent's advocates 21 days' notice to complete the sale transaction by paying the balance of the purchase price of KShs 36,680,000.00. They threatened to rescind the agreement if payment was not made within that period while stating that the respondent would forfeit 10% of the purchase price whereupon the appellant would be at liberty to sell the Suit Property to

another buyer. Indeed, the appellant, on 29th February 2016, rescinded the agreement. Even after rescinding the agreement, the appellant did not refund the monies paid by the respondent in excess of the 10%. We conclude on this aspect by stating that the rescission was unjustified and flagrant. The appellant and 2nd defendant were not interested in heeding the provisions of the agreement between the parties.

25. We are, of course, aware that the award of damages is in the discretion of the trial court and that, as was stated in *Mbogo & Another v Shah* [1968] EA 93:

> A Court of Appeal should not interfere with the exercise of the discretion of a single judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice ...

26. We are satisfied that the award was properly founded and sound. The appellant was under an obligation to refund the monies paid by the respondent over and above 10% but which she has not done to date, yet the appellant is accusing the respondent of unjust enrichment. To our mind, the order for her to pay the liquidated damages was an appropriate sanction for her unbridled mischief in the circumstances.

27. On the issue of whether the respondent was entitled to the award of both damages and specific performance, as a general rule, "a purchaser is entitled to recover damages at large where a seller refuses to implement an agreement for any reason other than a defective title and compensation contemplated by the contract or which could reasonably have been in the contemplation of the parties as likely to be wasted if the contract is broken." See *Openda v Ahn* [1984] KLR 208.

28. In *Ritho v Kariithi & Another* [1988] KLR 237, this Court held that it has the power to award damages in lieu of specific performance in the following terms:

> In all cases in which the Court has jurisdiction to entertain an application for an injunction against a breach of any covenant, contract or agreement, or against the commission or continuance of any wrongful act, or for the specific performance of any covenant, contract or agreement, it shall be lawful for the same court, if it thinks fit, to award damages to the party injured, either in addition to or in substitution for an injunction or specific performance and such damages may be assessed in such manner as the court shall direct.

See also *Gharib Suleman Gharib v Abdulrahman Mohamed Agil* LLR No. 750 (CAK) Civil Appeal No. 112 of 1998 where this Court held that:

> "The jurisdiction to order specific performance is based on the existence of a valid and enforceable contract and being an equitable relief, such relief is more often than not granted where the party seeking it cannot obtain sufficient remedy by an award of damages the focus being whether or not specific performance will do more perfect and complete justice than an award of damages."

29. Having found that the suit property had not been sold to a third party, the only option the trial court had of bringing a complete resolution and closure of the dispute was to order the completion of the sale by payment of the balance of the purchase price and the appellant and the 2nd defendant to cause the transfer of the suit property to the 2nd defendant. The trial court did not err in ordering specific performance of the contract as well as awarding damages.

The court went ahead and gave the timelines in which the appellant was supposed to comply with the terms of the decree, which were sound. As the order of specific performance was directed at the 2nd defendant and not the appellant, and damages were directed at the appellant and not the 2nd respondent, the question of unjust enrichment on the part of the respondent does not arise.

30. In holding so, we are fortified in our view by the findings in the case of *Hadley v Baxendale* (154) 9. Exch 214 where Anderson P. stated as follows:

> " Where two parties have made a contract which one of them has broken, the damages which the other ought to receive should be such as may fairly and reasonably be considered either as arising naturally. i.e. according to the usual course of things, from such breach itself, or such as may reasonably be supposed to have been in contemplation of both parties at the time they made a contract as the probable result of a breach of it."

In this case, the liquidated damages awarded were specifically provided for in the agreement for sale.

31. The appellant has submitted that she should not have been penalized to meet the costs of the suit, for the reason that the breach was by the 2nd defendant, who was to cause the suit property to be transferred to the respondent. The said 2nd defendant, in carrying out its obligations in the transaction, was under the directions of the appellant, hence her liability in costs. Further, the issue of costs is normally at the discretion of the trial court and in any event follow the event. The appellant was equally liable for the breach. We are unable to see any ground upon which we can interfere with the trial court's exercise of discretion to impose costs on the appellant.

32. Finally, we note that the 2nd defendant in the trial court was not made a party to this appeal and as such we cannot determine the issue regarding its liability for costs without having given it a chance to explain its case. We cannot condemn a party in costs that is not party to the appeal.

33. Having said as much, the appeal is dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF JANUARY, 2024.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL MUMBI NGUGI

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR