Mugambi & another v Kanyuuru & 3 others (Civil Appeal E380 & E382 of 2020 (Consolidated)) [2023] KECA 1382 (KLR) (24 November 2023) (Judgment)

Neutral citation: [2023] KECA 1382 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL E380 & E382 OF 2020 (CONSOLIDATED)

K M'INOTI, F TUIYOTT & GWN MACHARIA, JJA

NOVEMBER 24, 2023

BETWEEN

CHARLES MWITI MUGAMBI ..... APPELLANT

AND

ERIC MWENDA KANYUURU ..... 1ST RESPONDENT

ZAKAYO KIMATHI MUNGANIA ..... 2ND RESPONDENT

CHIEF LAND REGISTRAR ..... 3RD RESPONDENT

ATTORNEY GENERAL ..... 4TH RESPONDENT

AS CONSOLIDATED WITH

CIVIL APPEAL E382 OF 2020

BETWEEN

ZAKAYO KIMATHI MUNGANIA ..... APPELLANT

AND

ERIC MWENDA KANYUURU ..... 1ST RESPONDENT

CHARLES MWITI MUGAMBI ..... 2ND RESPONDENT

CHIEF LAND REGISTRAR ..... 3RD RESPONDENT

ATTORNEY GENERAL ..... 4TH RESPONDENT

(An appeal from the judgment of the Environment and Land Court of Kenya at Nairobi (K. Bor, J.) delivered on 27th February 2020 in ELC Case No.143 of 2017)

JUDGMENT

1. At plenary hearing of these two appeals, they were consolidated, with Civil Appeal No E380 of 2020 as the running file. For ease of reference, we shall refer to the parties in the consolidated appeal by name. Charles Mwiti Mugambi(Mugambi) and Zakayo Kimathi Mungania(Mungania) are the appellants, while Eric Mwenda Kanyuuru (Kanyuuru), the Chief Land Registrar (the Land Registrar) and The Attorney General are the respondents.

2. When the question of which contract as between that of Mugambi and Mungania and that of Mugambi and Kanyuuru concerning the purchase of land described as LR No 12672/51 comprising approximately 0.2023 Ha or 0.5 acres in Runda (the suit land) was valid, the trial Court (Bor, J) upheld the latter contract and found in favour of Kanyuuru.

3. Mungania had commenced ELC No 137 of 2017 (Zakayo Kimathi Mungania v Eric Mwenda Kanyuuru) in which his case was that, following a sale agreement dated 19th July 2016 with Mugambi, he purchased the suit land and a transfer was effected in his favour on or about 31st August 2016. His complaint was that on several instances, which are set out in paragraph 4 of his plaint, Kanyuuru by himself and through agents trespassed on the property. He sought a permanent injunction against him and an order for general damages for trespass.

4. Kanyuuru's response, made in a statement of defence dated 22nd March, 2017, was that he is the rightful owner of the suit property by virtue of a sale agreement dated 29th August, 2012 made between him on the one hand, and Mugambi and one David Mwenda Maingi (Maingi) on the other hand. The terms of the agreement required that a sum of Kshs 16,000,000.00 be paid in installments to Mugambi for the land and Kshs 8,000,000.00 to Maingi for developments made on the land. It is common ground that Kanyuuru made full payment to Maingi and part payment of Kshs 7,800,000.00 to Mugambi. He took possession of the property with the full knowledge of Mugambi and Maingi and alleged that he had made developments on it at a cost in excess of Kshs 10,575,686.00.

5. Kanyuuru complains that in violation and breach of the said agreement, Mugambi caused a legal charge in favour of Kenya Commercial Bank (KCB) to secure an advance of Kshs 10,000,000.00 to be registered and a stalemate ensued. In further breach, Mugambi had the encumbrance discharged and the property transferred to a third party, Mungania. And whilst he did not expressly plead a counterclaim, Kanyuuru sought the following prayers in his statement of defence:

    a. The prayers sought by the Plaintiff be denied by this Honourable Court and this suit be dismissed and/or struck out with costs to the Defendant;

    b. A declaration by the Court that the Defendant is the beneficial owner of the parcel of land LR Number 12672/51 Nairobi;

    c. An order to the Chief Land Registrar to cancel the transfer to the Plaintiff registered on 31st August 2016;

    d. An award of general damages to the Defendant as against the seller and the Plaintiff;

    e. A permanent injunction restraining the Plaintiff and the seller by themselves or through their agents and/or servants from interfering with the Defendant's quiet possession and enjoyment of his property; and

f. In the alternative to the above, an order for payment to the Defendant by the seller and the Plaintiff jointly and severally of the sum of Ksh 26,000,000 being the total amounts so far expended by the Defendant pursuant to the Agreement and together with interest at the rate of 25% per month from 29th August 2012 until payment in full and together also with general damages.

6. Kanyuuru, on the basis of the same set of facts, commenced Civil Suit No 143 of 2017 (Eric Mwenda Kanyuuru v Charles Mwiti Mugambi, Zakayo Kimathi Mungania, Chief land Registrar and the Attorney General) seeking substantially similar orders as he had pleaded in civil suit 137 of 2017 save that in amended pleadings dated 27th April 2017 he prayed for an order of specific performance against Mugambi in respect to the contract dated 29th August, 2012. The filing of the second suit was wholly unnecessary because Kanyuuru would have simply set up a counterclaim against Mungania and joined the other parties as defendants in the existing suit.

7. The two suits were heard together under the lead file No 143 of 2017. The hearing comprised of three witnesses for Kanyuuru being Maingi (PW2), Michael Otieno Angego (PW3) and himself. Mugambi and Mungania testified on their own behalf. The highlight of the evidence is set out in detail as is relevant to resolving the issues for determination in this appeal.

8. In holding for Kanyuuru, the learned judge held that; although Mugambi issued a completion notice upon Kanyuuru on 8th March 2013 which expired on 29th March 2013, Mugambi did not refund the purchase price as envisaged in the agreement; in any event the notice was ineffectual in the light of Mugambi encumbering the title, Kanyuuru was ready, able and willing to perform his obligation and was therefore entitled to specific performance of the contract dated 29/8/2012 and having so found, the sale between Mugambi and Mungania could not stand.

9. Although ten grounds were raised in this appeal, they were collapsed into four headings namely that the learned judge erred in fact and law in holding that:

a. Kanyuuru was ready, able and willing to complete the sale so as to be entitled to an order for specific performance.

b. Mugambi was in breach of clause 10(c) of the agreement where one of the completion documents under clause 9(b) was a discharge of charge.

c. Kanyuuru was entitled to an order for specific performance when he had an unpaid balance of Kshs 8,500,000 and this amounted to re-writing the contract between Kanyuuru and Mugambi.

d. Mungania was not an innocent purchaser for value without notice.

10. Mr. Omuga learned counsel for Mugambi submitted that the remedy of specific performance can only be granted to a purchaser who is ready to pay the full purchase price on the date of completion. The decision in *Kukal Properties Development Limited v Maloo & 3 Other*s [1993] eKLR was cited for this proposition. We were also referred to the decision in *Wambugu v Njuguna* [1983] eKLR for a similar argument that an order for specific performance cannot be granted to a purchaser who has not performed his part of the bargain or has failed to show that he was at all time ready and willing to so do.

11. It was contended for Mugambi, that the security to Cooperative Bank of Kenya Limited was discharged on 27th September 2012, when a subsequent charge in favour of KCB was registered. This subsequent charge was discharged on 31st August 2016 and a transfer effected in favour of Mungania. This demonstrated that the transaction with Kanyuuru could not be frustrated by the mere fact that the

title was charged to a financial institution; that in any event there was no clause in the agreement that prohibited Mugambi from charging the title prior to the completion date.

12. The arguments made for Mungania substantially align with those of Mugambi and we need not repeat them. However, emphasized on his own behalf, was that he was a bona fide purchaser for value whose purchase was assured of protection notwithstanding that previous dealings might be shown to have been mired in fraud. The decisions in *Elizabeth Wambui Githinji & 29 Others v Kenya Urban Roads Authority & 4 Others* [2019] eKLR, and *Tarabana Company Limited v Sehmi & 7 Others* [2021] KECA 76 KLR, were cited in support of the position. It was submitted that Mungania purchased the suit property from Mugambi for Kshs 30,000,000.00 whose receipt was acknowledged in a detailed statement/schedule prepared by the advocate who acted for both parties. We were also urged to note that the purchase was entered four (4) years after Mugambi had served Kanyuuru with a notice of termination of sale and advised him to collect a refund of monies from their common advocates. In addition, that Mungania had no knowledge about the previous dealings between the two until Kanyuuru trespassed on the suit property; he was not aware of any fraud nor was he a party to any fraud when he acquired the suit property.

13. At the hearing of the appeal, Ms. Achieng learned counsel representing Kanyuuru submitted that the legal effect of registering a charge over the land, which ranks in priority over any other interests, was that the land will not be sold and successfully transferred until the charge was discharged. Relying on section 2 of the *Land Registration Act* and paragraph 5(c) of Schedule 8 of the *Income Tax Act*, it was contended that a chargee in his capacity as a nominee possesses powers of the chargor subject to the security, charge or encumbrances and when it executes a transfer (after exercising its statutory power of sale) a chargee does so in its capacity as a nominee.

14. On the rescission of the contract, counsel argued that the vendor may rescind the contract only if the purchaser's conduct is such as to amount to the repudiation of the contract and parties can be restored to their former position. Citing clause 3(c) of the agreement, it was argued that Mugambi could not purport to terminate the agreement without fulfilling the condition therein, being refund of the monies paid by Kanyuuru. In addition, it was submitted that Mugambi was in breach of clause 10(b) of the agreement by charging the property to KCB.

15. Training his guns at Mungania, he is assailed as not being a bona fide purchaser for value without notice, it being submitted that Mungania never made any payment to Mugambi. In that connection, it is contended that it was not possible for cheques of Kshs 1,000,000.00 or more to be made by way of cheque and that we should take judicial notice of that. Further, the schedule of payments produced was not proof of payment. In arguing that there was a conspiracy between Mugambi and Mungania, it is argued that it is for that reason that Mungania did not sue for indemnity as would be provided in clause 13 of their agreement.

16. This is a first appeal and our role is to re-evaluate the evidence afresh and to draw our own conclusion having regard to the fact that we did not see or hear the witnesses and giving due allowance for that handicap. This position was stated in the case of *Selle & Another v Associated Motor Boat Company Ltd. & Others* [1968] EA 123 as follows: -

> "I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An 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 allowance in this respect.

> In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (*Abdul Hameed Saif v Ali Mohamed Sholan* (1955) 22 EACA 210)."

17. We see the issues requiring our determination as coinciding with the grounds of appeal and are;

    a. Who between Kanyuuru and Mugambi was in breach of contract?

    b. If the answer to (a) above is in favour of Mugambi, did he lawfully terminate the contract? and;

    c. Was Mungania an innocent purchaser for value without notice?

18. At the heart of this dispute was the agreement entitled, "Cessation of Business, Dissolution of Partnership and Sale Agreement" made on 29th August 2012 between Mugambi and Maingi on the one part and Kanyuuru on the other. There were two subsets to the agreement. The first was the agreement between Kanyuuru and Maingi regarding the purchase of the developments on the land. This is not controversial and we say no more on it.

19. The second was the sale of the land itself by Mugambi to Kanyuuru at a price of Kshs 16,000,000.00. For its centrality to the matter at hand, clause 3 on the purchase price and payment is reproduced in its entirety:

> "3. The First Vendor agrees to sell and the purchaser agrees to buy Land Reference Number 12672/51 excluding any developments thereon at a purchase price of Kenya Shillings Sixteen Million only (Kshs 16,000,000/=) paid and or to be paid to the First Vendor as follows:
>
> a. Kenya Shillings Four Million Nine Hundred Thousand (Kshs 4,900,000/=) already paid and is hereby acknowledged as paid by the First Vendor.
>
> b. Kenya Shillings Two Million One Hundred Thousand (Kshs 2,100,000/=) immediately upon signing this agreement, and in any case within five (5) working days thereof.
>
> c. The balance thereof of Kenya Shillings Nine Million (Kshs 9,000,000/=) in three (3) equal quarterly instalments of Kshs 3,000,000/= each one on or before 30th November 2012, 28th February 2013 and 31st May 2013 and in default of the payment mentioned in (b) or if any monies forming more than one (1) instalment shall fall in arrears, this sale between the First Vendor and the purchaser shall stand terminated (upon a twenty one (21) days written notice to comply being issued to the purchaser and the purchaser shall forfeit a sum equivalent to 10% of the purchase price mention (sic) in this clause and the First Vendor shall refund the balance of the monies paid to the purchaser without interest within three (3) months expiry and of the said notice to comply."

20. It is undisputed that at the time when Kanyuuru gave evidence at trial on 22nd October 2019, there remained an unpaid balance of Kshs 8,500,000.00 of the purchase price. Indeed in his testimony, he

readily admitted breaching the timelines for payment of the balance of Kshs 9,000,000.00. Fielding questions in cross-examination he stated:

> " 9 million was to be paid in 3 installments on 30/11/2012. I did not pay 3 million. 2nd installment was to be paid on 28/02/2013. I did not pay it. 3rd instalment was payable on 31/05/2013. I did not pay it. As at 30/11/2012, I owed a balance of 9 million to 1st defendant. I paid 500,000 into his account in January 2013. Left balance of 8.5 million. I did not make any other payments after that."

21. In his defence to Mungania's suit, Kanyuuru seems to seek refuge for the non-payment in an alleged breach by Mugambi. This is what he pleads: -

> " Thereafter in total violation and in flagrant breach of the said Agreement, the seller illegally and fraudulently caused a legal charge to be registered against the property to Kenya Commercial Bank Limited on 27th September 2012 to secure advance of Kshs 10,000,000 and a stalemate immediately ensued between the seller and the defendant."

22. We leave the question as to whether Mugambi was in breach of the agreement when he charged the property to KCB to a later part of this judgment. For now, we examine whether the evidence bears out the theory by Kanyuuru that he did not pay the balance of Kshs 9,000,000.00 timeously because of the alleged breach on the part of Mugambi.

23. Mugambi's testimony was that by the time Kanyuuru made payment totaling Kshs 7,500,000.00, Kanyuuru was well aware about the registration of the charges. Further, that because of default in payment of the purchase price by Kanyuuru, Mugambi issued a notice of 21 days on 8th March 2013 demanding payment and in default, termination of the contract. As Kanyuuru did not remedy the default, he issued a termination notice on or about 29th March 2013.

24. There is a set of events that answers this first issue. Following non-compliance of the payment timetable, Kanyuuru's lawyer sent a draft agreement to Mugambi through an email dated 14th May 2013. Of significance is that this email came after Mugambi had issued the termination notice. The highlight of the draft agreement was that Kanyuuru was proposing a rescheduling of payment of the balance of the purchase price. There is no evidence that prior to making this proposal for rearrangement, Kanyuuru had complained about the KCB charge. In his written testimony of 28th February 2019, Kanyuuru explains why the draft agreement was necessary; he had arranged to obtain a loan from Cooperative Bank to enable him to pay off the balance of the purchase price in order to end the impasse between him and Mugambi; and as the bank required a written agreement between himself and Mugambi to support the application for a loan, the draft agreement was drawn. It was his further evidence that when his lawyer, Mr. Maingi, and Mugambi met, Mugambi refused to sign it and demanded an extra Kshs 5,000,000.00. Maingi who gave evidence in support of Kanyuuru corroborated the evidence in regard to the meeting.

25. Maingi told the court that he tried to reconcile the two as they were both his friends. In a written statement dated 28th February 2019 adopted as his evidence in-chief, he gave his version as to what caused the stalemate;

> " Sometime in early December 2012 as we had lunch together with the 1st defendant and the plaintiff the 1st defendant told the plaintiff that he wanted the balance of his payment of Kshs 9 million in full and that he was no longer willing to accept installment payments as

per the terms of the agreement. He asked the plaintiff to propose when he would be ready to give him the full amount even if it was after one year. This caused a stalemate."

26. Not once does Maingi suggest that Kanyuuru held back payment of the balance of the purchase price because he (Kanyuuru) was protesting an alleged breach of the contract by Mugambi. There was then further testimony by Kanyuuru that he discovered the existence of the KCB charge sometime in January 2013. If that is true, then he was already in default of the installment due on 30th November 2012.

27. There is overwhelming evidence that the reason why Kanyuuru did not make the payments as provided for by the contract was because of lack of funds on his side and not because he was protesting the registration of the KCB charge. Indeed, this was the very reason he was arranging for a loan from Cooperative Bank. He was seeking to mend his default way after he had received the termination notice.

28. Next, we deal with whether registration of the KCB charge was a breach of the contract by Mugambi. In this respect, two clauses of the agreement are crucial. Clause 9 sets out the completion documents that Mugambi would be required to avail upon full payment of the purchase price. Under clause 9(b), the completion documents included:

> "Duly executed transfer in triplicate in favour of the purchasers. And duly executed discharge of all charges (if applicable)."

Regarding the state of the properties, there was clause 10:

> " 10. The property is sold subject to:
>
> a. All subsisting easements, quasi easements and right of way (if any) on the property.
>
> b. The Acts, reservations, stipulations and conditions subject to which the property is currently held by the common vendor but otherwise free from all encumbrances or any adverse claim whatsoever."

29. The position taken by Mugambi in his pleadings in ELC No 143 of 2017 was that at the time of signing the agreement clause 9(b) contemplated that there would be a charge or charges. Further, that the impugned charge which was registered on 27th September 2012, merely amounted to a change of chargee from Cooperative Bank to KCB and that by dint of clause 9(b), he was required to give as one of the completion documents, a duly executed discharge. Mugambi argues that looked at from this perspective, the second charge did not alter any of the provisions of the agreement and in particular the obligation of either party. Further, his evidence was that by the time of making payments of the purchase price, Kanyuuru was aware of the existence of the impugned charge.

30. On his part Kanyuuru pleaded that, yes, he was aware of it in January 2013 after which he did not make further payments.

31. We observe that in view of the provisions of clause 10 only the encumbrances that were registered against the title as at the date of the agreement were contemplated by the agreement. Certainly, the KCB charge which came after would not be in contemplation. Second, the argument by Mugambi that the KCB charge merely replaced the Cooperative charge cannot be a correct one if only because the charge for Cooperative Bank was to secure Kshs 9,000,000.00 and that to KCB was for Kshs 10,000,000.00. In any event, whether or not the second charge was simply a replacement charge would not change the

position that it was registered after the agreement and was not therefore contemplated. If that was all to the matter, then Mugambi's defence would be tenuous.

32. A further contention put forward by Mugambi was that Kanyuuru became aware of the KCB charge at the time it was registered but never protested or complained about it. If it is true, as stated by Kanyuuru that he learnt of the KCB charge only in January 2013, there is evidence that he made further payments of at least Kshs 400,000.00 in February 2013, days after. And as earlier observed, the issue of the second charge was not part of the impasse that Maingi sought to break. The only time that Kanyuuru protested the charge was in a demand letter of 25th February 2017 way after the termination letter had been issued. It is therefore believable, as asserted by Mugambi, that Kanyuuru was well aware of the registration of the KCB charge at the time it was registered. There is stronger evidence that he acquiesced to it by making further payment even after becoming aware of its existence. It is from this vantage point that we are unable to reach the same result as the trial court that Mugambi was in breach of the agreement.

33. Having come to the conclusion that Kanyuuru was in default of payment of the consideration, Mugambi invoked the provisions of clause 3(c) which we have already set out in paragraph 19 of this Judgment.

34. On 8th March 2013, Mugambi wrote to Kanyuuru;

> " Dear Mr. Mwenda,
>
> Termination of Sale of LR No 12672/51
>
> As you are aware out of Kshs 3,000,000/= due by 30th November 2012 by virtue of clause 3(c) of the agreement you have only paid Kshs 500,000/=. Further note that you have not paid the Kshs 3,000,000.00 which fell due on 28th February 2013.
>
> Consequently take notice that the sale agreement shall stand terminated at the expiry of twenty one (21) days from today unless the said balance of Kshs 5,500,000/= is paid in full by then.
>
> Yours sincerely, Signed
>
> Charles Mwiti Mugambi.

35. No payment was forthcoming and on 30th January 2014, Mugambi informed Kanyuuru that the contract stood terminated and that he had deposited a refund of Kshs 5,900,000.00 with Mugambi Mungania & Co. Advocates. In a communication dated 28th February 2014, the advocate informed Kanyuuru of their intention to return the deposited money back to Mugambi as he (Kanyuuru) had not given directions as to where it was remitted. In the letter, Kanyuuru was given another 7 days to give those instructions. In his oral testimony, Kanyuuru confirmed receipt of the termination letter but also stated that he did not collect what was due to him as a refund.

36. The submission by counsel for Kanyuuru was that the rescission was ineffective because the contemplated refund was not available within three (3) months after the date of the termination, and we think this to be right. The letter of termination was that of 8th March 2013 and it cannot be disputed that no refund was forthcoming until months later, on 30th January 2014. While it is true that Kanyuuru persisted in default even up to 2014, Mugambi needed to issue a fresh and proper notice that conformed with clause 3(a); being a 21-day notice to pay and in the event of continued default to refund the purchase price paid less the forfeited amount within three (3) months of the date of expiry of the notice to comply. Having failed to do so, then there was no lawful termination of the contract and so Mugambi was in breach when he purported to sell the property to Mungania.

37. The downside for Kanyuuru was that he too was in default and was not ready, able and willing to keep his side of the bargain and was not deserving of the equitable remedy of specific performance which is only available to a purchaser who is not in breach. In this regard is the decision of the Court in *Kukal Properties Development Ltd v Tafazzal H. Maloo & 3 others* [1993] eKLR in which Muli, JA. observed:

> " The Maloos were in breach of the intended agreement. They accepted the refund of 10% deposit. The purchase price was not tendered during the contractual period or thereafter. The remedy of specific performance was not available to the Maloos. Specific performance is an equitable remedy and must flow from a legal right. The Maloos, having committed breach of their agreement, specific performance could not be legally decreed. The learned trial judge fell into error in decreeing specific performance (see *Sisto Wambugu v Kamau Njuguna* (1988) 1 KAR 219)."

38. Another reason why Kanyuuru would not be eligible for an order for specific performance was his attempt to blame his failure to pay the balance of the purchase price on Mugambi knowing too well that it was because of his own inability to raise funds. A party seeking an equitable remedy must be forthright and free of blemish.

39. Kanyuuru had sought an alternative relief, a prayer for the sum of Kshs 26,000,000.00 being part payment of the purchase price and the cost of construction together with interest at 28% per month compounded monthly from 29th August 2012. Regarding the amount spent on the construction, Kanyuuru produced an agreement dated 24th September 2012, between himself and Antico Classic Interiors who were to undertake interior and exterior finishes at Kshs 10,575,686.00. Clause 2 of the agreement sets out how that sum was to be paid. There is, however, no evidence that this sum or part of it was ever paid. This leaves a dearth of evidence on how much Kanyuuru spent on construction of the property and the claim being in the nature of special damages which requires specific proof, is not awardable. But he does not go empty handed. He is entitled to the refund of the entire sum of Kshs 7,500,000.00 he made in part payment of the purchase price. No sum shall be forfeited to Mugambi as the termination notice issued by him was ineffectual.

40. Our finding that Kanyuuru is not entitled to an order for specific performance is also dispositive of the appeal by Mungania. Our holding takes away the platform for Kanyuuru to question or challenge the contract between Mugambi and Mungania. Indubitably, Mungania's claim to the suit land must prevail. He was a bona fide purchaser for value without notice.

41. In the end, the judgment of the trial court delivered on 27th February 2020 is hereby set aside and in its place;

    a. Regarding ELC 143 of 2017, judgment is entered for Eric Mwenda Kanyuuru as against Charles Mwiti Mugambi for the sum of Kshs 7,500,000.00 with interest thereon at court rates from the date of the filing of the suit until payment in full.

    b. Regarding ELC 137 of 2017 an order of permanent injunction do issue restraining Eric Mwenda Kanyuuru, by himself, servants, employees or agents from trespassing or in any manner or interfering with the possession of Zakayo Kimathi Mungania over LR No 12672/51, Runda, Nairobi.

    c. So as to reflect the level of success of the parties in the suits and in this appeal, Eric Mwenda Kanyuuru and

Charles Mwiti Mugambi shall each bear their own costs in ELC 137 of 2017 and in this appeal. Costs of Zakayo Kimathi Mungania both here and at the Trial court shall be borne by Eric Mwenda Kanyuuru. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF NOVEMBER, 2023.

K. M'INOTI

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

F. W. NGENYE-MACHARIA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR