



REPUBLIC OF KENYA



**Car Master (K) Twenty Eleven Limited v Shah & 2 others (Land Case E043 of 2023) [2024] KEELC 14025 (KLR) (20 December 2024) (Judgment)**

Neutral citation: [2024] KEELC 14025 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
LAND CASE E043 OF 2023  
EK WABWOTO, J  
DECEMBER 20, 2024**

**BETWEEN**

**CAR MASTER (K) TWENTY ELEVEN LIMITED ..... APPLICANT**

**AND**

**PARUL SARJU SHAH ..... 1<sup>ST</sup> RESPONDENT**

**SARJU LALCHAND SHAH ..... 2<sup>ND</sup> RESPONDENT**

**KASHA PROPERTIES LIMITED ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. By the Originating Summons dated 1<sup>st</sup> August 2023, brought under section 1A,1B, 3 and 3A of the [Civil Procedure Act](#) and Order 37 rule 3 of the Civil procedure rules 2010, the applicant seeks the following reliefs; -
  1. Spent...
  2. The Honourable court be and is hereby pleased to issue an order declaring that the 1<sup>st</sup> and 2<sup>nd</sup> respondents are in breach of the agreement for sale dated 28<sup>th</sup> February, 2017 for the sale and purchase of all that property known as Nairobi/block 35/662 (Original Land Reference Number 209/107/4)
  3. The Honourable court be and is hereby pleased to issue and order directed at the respondents jointly and severally, for the immediate repayment of the full deposit in the sum of Kshs 36,000,000.00 due to the Applicant.
  4. The Honourable court be and is hereby pleased to issue an order directed at the respondents jointly and severally, for the immediate payment of interest on the sum of Kshs 36,000,000.00 due to the applicant at court rates from the date of breach of the agreement, being January 2023 until payment in full.



5. The Honourable court be and is hereby pleased to issue an order directed at the respondents jointly and severally, for the immediate payment of general damages to the applicant for the distress occasioned by negligent and refusal by the respondents to perform their undertaking and breaching the legitimate expectations of the applicant.
  6. The Honourable court be and is hereby pleased to issue an order for the costs of this application in the Applicants favor.
  7. The Honourable court be and is hereby pleases to issue an order directed at the respondents jointly and severally, for the immediate payment interest on prayer (6) above, from the date of Judgement until payment in full.
2. This is premised on the grounds that there is an underlying undisputed agreement for sale in respect of disposition of an interest in a parcel of land described as NAIROBI/BLOCK 35/662 (Original Land Reference Number 209/107/4). The 1<sup>st</sup> and 2<sup>nd</sup> Respondents were the registered owners of the said parcel whereas the applicant was desiring of purchasing the same as per the agreed terms between the parties. Parties entered into an agreement for sale dated 28<sup>th</sup> February 2017 for the sale and purchase of the suit property as per the terms and conditions of the agreement which was properly executed by the parties and attested thereof, thereby forming a valid legal and lawful contract whose terms were fully binding upon them.
  3. In fulfilling its obligation under clause 3(i) of the agreement, the Applicant dully made payment of the requisite deposit to the 1<sup>st</sup> and 2<sup>nd</sup> respondents in the sum of Kshs 36,000,000.00 both in cash and direct bank transfer and the applicant was intent on paying the balance for the purpose of completing the purchase of the suit property as per the terms of the agreement. On or about January 2023, the Applicant was made aware that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in collusion with the 3<sup>rd</sup> Respondent proceeded to enter into a parallel agreement for sale and purchase of the suit property and caused the transfer of the said property to the 3<sup>rd</sup> Respondent without any lawful regard to the Applicant's proprietary interest acquired upon payment of the deposit. The 3<sup>rd</sup> Respondent has taken possession. The agreement between the Applicant and 1<sup>st</sup> and 2<sup>nd</sup> Respondent can only be terminated in accordance with the powers of special condition No. 1 of the agreement which mandatorily requires that the 1<sup>st</sup> and 2<sup>nd</sup> Respondent issue a completion notice and no completion notice has been issued.
  4. In response to the Originating Summons, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed a notice of preliminary objection dated 26<sup>th</sup> October 2023 and a replying affidavit sworn by Sarju Lalchand Shah on 26<sup>th</sup> October 2023.
  5. The 3<sup>rd</sup> Respondent filed a replying affidavit sworn by Mohamed Bishar on 3<sup>rd</sup> November 2023.

### **Directions of the Court**

6. Pursuant to the directions issued by this court on 8<sup>th</sup> November 2023 and 24<sup>th</sup> January 2024 it was directed that the originating summons be canvassed by way of written submissions. Parties were granted specific timelines to comply. The court also directed that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents preliminary objection would be considered alongside their response to the Originating Summons.

### **The Applicant's case and submissions**

7. The Applicant's case was stated in its supporting affidavit sworn on 1<sup>st</sup> August 2023 and Further Affidavit sworn on 22<sup>nd</sup> January 2024 by Mayur Shah a director of the Applicant's company. The Applicant also filled written submissions dated 22<sup>nd</sup> January 2024 in support of its case.



8. It was the Applicant's case that there is an underlying undisputed agreement for sale in respect of disposition of an interest in a parcel of land described as NAIROBI/BLOCK 35/662 (Original Land Reference Number 209/107/4). The 1<sup>st</sup> and 2<sup>nd</sup> Respondents were the registered owners of the said parcel whereas the applicant was desiring of purchasing the same as per the agreed terms between the parties. Parties entered into an agreement for sale dated 28<sup>th</sup> February 2017 for the sale and purchase of the suit property as per the terms and conditions of the agreement which was properly executed by the parties and attested thereof, thereby forming a valid legal and lawful contract whose terms were fully binding upon them.
9. It was also the Applicant's case that in fulfilling its obligation under clause 3(i) of the agreement, the Applicant dully made payment of the requisite deposit to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in the sum of Kshs 36,000,000.00 both in cash and direct bank transfer and the applicant was intent on paying the balance for the purpose of completing the purchase of the suit property as per the terms of the agreement. On or about January 2023, the Applicant was made aware that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in collusion with the 3<sup>rd</sup> Respondent proceeded to enter into a parallel agreement for sale and purchase of the suit property and caused the transfer of the said property to the 3<sup>rd</sup> Respondent without any lawful regard to the Applicant's proprietary interest acquired upon payment of the deposit.
10. It was averred that the 3<sup>rd</sup> Respondent has taken possession and commenced construction on the suit parcel.
11. According to the Applicant, it was contended that the agreement between the Applicant and 1<sup>st</sup> and 2<sup>nd</sup> Respondent can only be terminated in accordance with the powers of special condition No. 1 of the agreement which mandatorily requires that the 1<sup>st</sup> and 2<sup>nd</sup> Respondent issue a completion notice and no completion notice has been issued.
12. It was averred that the Applicant is a complete stranger to the purported completion notice dated 1<sup>st</sup> February 2018 allegedly issued by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents since the same has never been delivered nor received by the Applicant to date. It was contended that the said completion notice does not constitute a proper completion notice as envisaged under the special conditions of the agreement.
13. It was further contended that the purported completion notice is invalid and improper since it failed to indicate that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were ready and willing to complete the transaction.
14. In its submissions dated 22<sup>nd</sup> January 2024, the applicant submitted on the following issues; -
  - i. Whether the preliminary objection is merited
  - ii. Whether on a balance of probabilities, the applicant has proved that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are in breach of the agreement for sale dated 28<sup>th</sup> February 2017 and the applicant is thus entitled to the remedied sought in the suit herein.
15. Citing several cases including the cases of Aviation & Allied workers union Kenya -vs- Kenya Airways Limited & 3 others (2015) EKLK, Mukisa Biscuit Manufacturing Co. ltd -vs- West End Distributors ltd (1969) EA 699 among others it was argued that the preliminary objection filed herein is not on a pure point of law for the reasons that the date which the breach of agreement occurred is highly contested by the parties. It was argued that the cause of action occurred in January 2023 being the period when the Applicant was made aware of the unlawful transfer of the suit property to the 3<sup>rd</sup> Respondent.
16. It was also submitted that the Notice of Completion allegedly issued by the 1<sup>st</sup> and 2<sup>nd</sup> Respondent was issued sometimes on 1<sup>st</sup> February 2018 and if the court was to consider the same, then the suit herein



is not the time barred as the cause of action arose 21 days from the date of issue of the said completion notice.

17. On whether the Applicant on a balance of probabilities has proved that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are in breach and that the Applicant is entitled to the remedies sought it was argued that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are in material breach of the terms of the agreement. The Applicant made payment of Kshs 36,000,000.00 which payment was over and above the requisite deposit of Kshs 26,000,000.00. The 3<sup>rd</sup> Respondent took possession disregarding the Applicant's interest and no Completion Notice was issued in line with the provisions of special conditions No. 1 of the agreement.
18. It was also submitted that the Completion Notice issued by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents dated 1<sup>st</sup> February 2018 does not constitute a proper and or valid completion notice as envisaged under the special conditions of the agreement. It was argued that the completion notice must be a 21 day notice and must contain the following three key elements, that the vendor is ready able and willing to complete, specification of the default by the other party and notification to the other party that they are required to remedy the said default within the said notice period. Cases of Peter S. Muturi Karanja -vs- Wilson Maina Wanjiku (2019) ECLR, Lucy Muthoni Muthembi -vs- Samira Chepkemei Chelangat & 2 others (2020) eCLR were cited in support.
19. The Applicant concluded his submissions by urging the court to dismiss the preliminary objection and grant the reliefs sought in the Originating Summons dated 1<sup>st</sup> August 2023.

#### **The case of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and submissions**

20. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents opposed the originating summons by filing a replying affidavit sworn by Sarju Lalchand Shah on 26<sup>th</sup> October 2023 and written submissions dated 31<sup>st</sup> January 2024.
21. It was deposed that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were at the material time touching on the suit property, the registered owners of the parcel of land known as Nairobi/Block 35/662 (Original Land Reference Number 209/107/4), on 7<sup>th</sup> July 2015, the 1<sup>st</sup> Respondent together with the 2<sup>nd</sup> Respondent entered into an agreement for the sale of the suit property to RISER INVESTORS LIMITED which encountered difficulties and unable to complete the transaction. The initial intended purchaser opted to vary the initial agreement for sale due to the difficulties that ensued making it impossible for it to complete the transaction on the initial completion date. The varied agreement was executed on 18<sup>th</sup> November 2015.
22. It was stated that the intended purchaser introduced the Applicant herein to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents with the understanding that the Applicant would take over the transaction from RISER INVESTORS LIMITED and in addition pay the amount of interest accrued on the sale of the suit property.
23. According to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, the Applicant entered into a sale agreement with them dated 28<sup>th</sup> February 2017 for the sale of suit property at Kshs 13,000,000.00 upon which the Applicant was to pay a deposit of Kshs 26,000,000.00. It was contended that the said deposit was not paid and no proof of payment was provided. The completion date was 30<sup>th</sup> May 2017 which was not complied with by the Applicant.
24. It was averred that on 1<sup>st</sup> February 2018, a 21 days' notice was sent to the Applicant through registered post to the Applicant's address provided in the agreement for sale and upon expiry of the 21 days' Notice, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were at liberty to sell the property.
25. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents submitted on the following issues in their written submissions; -



- i. Whether the preliminary objection dated 26<sup>th</sup> October 2023 is merited.
  - ii. Whether the applicant has met the criteria for the grant of an order of temporary injunction.
  - iii. Whether the respondent breached the sale agreement dated 28<sup>th</sup> February 2017.
  - iv. Whether the Applicant should be refunded the deposit.
  - v. Whether the applicant is entitled to general damages for breach of contract.
26. It was submitted that the agreement was entered on 28<sup>th</sup> February 2017 and the application was filed on 1<sup>st</sup> August 2023 being after 6 years and 6 months later. The cases of Mehta -vs- Shah (1965) EA 321, Peter Kimani Njenga -vs- Mugo Kamaburi Mugo & 3 others (2018) eKLR among others were cited in support.
27. On whether the Applicant has met the criteria for the grant of the temporary injunction orders, it was argued that the suit property changed hands on 14<sup>th</sup> January 2022 and the said prayer has been overtaken by events.
28. In respect to the alleged breach of the sale agreement dated 28<sup>th</sup> February 2017 by the Respondents, it was argued that as per the said agreement, the Applicant was to pay a nonrefundable deposit of Kshs 26,000,000.00, the Applicant has not produced any evidence to support the said breach. There is no evidence of payment of the sum of Kshs 36,000,000.00. The Completion Notice dated 1<sup>st</sup> February 2018 was duly served upon the Applicant and hence it is quite bold of the Applicant to assume and or presume that there is still an existing sale agreement between the Applicant and the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.
29. On whether the deposit ought to be refunded, it was contended that the Applicant had not adduced any evidence of payment of the same and if at all it was paid then pursuant to the said agreement, the same was non-refundable.
30. As to whether general damages for breach of contract ought to be paid, it was argued that the same is a matter of trial and in any event general damages are not awarded in a case of breach of contract. The case of Dharamshi -vs- Karsan (1974) EA 41 was cited in support.
31. The court was urged to dismiss the application with costs.

### **The case of the 3<sup>rd</sup> Respondent and submissions**

32. The 3<sup>rd</sup> Respondent filed a Replying Affidavit sworn by Mohamed Bishar on 3<sup>rd</sup> November 2023 and written submissions dated 15<sup>th</sup> March 2024. It was contended that the 3<sup>rd</sup> Respondent is not privy to the alleged agreement for sale dated 28<sup>th</sup> February 2017 entered between the Applicant and the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.
33. It was deposed that the 3<sup>rd</sup> Respondent entered into a sale agreement with the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to purchase the suit property for a sum of Kshs 130,000,000.00 vide an agreement dated 14<sup>th</sup> January 2022 and later they prepared a variation agreement to amend the description of the suit property under the sale agreement which agreement was dated 23<sup>rd</sup> August 2022 owing to the gazettelement and eventual conversion and migration of the suit property which changed the title number to Nairobi/Block 35/662.



34. The 3<sup>rd</sup> Respondent deposed that a transfer was executed on 25<sup>th</sup> January 2023 and stamp duty was paid upon which a certificate of lease was issued and they obtained a post registration certificate of search confirming the registration of the 3<sup>rd</sup> Respondent as the proprietor of the suit property.
35. The 3<sup>rd</sup> Respondent also submitted on the following issues in their written submissions dated 15<sup>th</sup> March 2024; -
- i. Whether this court has jurisdiction to hear and determine the originating summons which is statutorily barred under section 4(1)(a) of the Limitation of Acts Act.
  - ii. Whether the agreement for sale of the suit property between the applicant and the 1<sup>st</sup> and 2<sup>nd</sup> respondent was discarded by the completion notice dated 1<sup>st</sup> February 2018 and who is the rightful owner of the suit property.
36. It was argued that pursuant to section 4(1)(a) of the *Limitation of Actions Act* an action of contract and tort may not be brought after the end of six years from the date of which the cause of action occurred. According to the 3<sup>rd</sup> Respondent, the completion date was to be 30<sup>th</sup> May 2017 and hence the suit having been filed in August 2023, the same was statutorily barred and as such the court lacks jurisdiction to hear and dispose the same.
37. As to whether the agreement dated 28<sup>th</sup> February 2017 was rescinded by the Completion Notice dated 1<sup>st</sup> February 2018, it was submitted that the Applicant was duly given the completion Notice as was required under special condition 1 of the agreement which notified the Applicant of its failure to comply with the conditions of the sale stipulated in the said agreement and hence the said agreement was deemed as rescinded. The cases of Housing Company of East Africa Limited -vs- Board of trustees National Social Security Fund and 2 others (2018) eKLR Sisto Wambugu -vs- Kamau Njuguna (1983) eKLR among others were cited in support.
38. As to who is the rightful owner of the suit property, it was submitted that the sale agreement and transfers to the 3<sup>rd</sup> Respondent are valid and enforceable and as such the 3<sup>rd</sup> Respondent is the rightful owner pursuant to section 24 and 26 of the *Land Registration Act*.
39. The court was equally urged to dismiss the application with costs.

### **Analysis and Determination**

40. The parties are in agreement on the issues for determination herein and have largely cited the same authorities articulating the same or similar points of law in support of their relative positions taken by the parties on the opposite side of the matter.
41. From the Originating Summons, the Affidavits and the written submissions filed it emerges that the issues for determination are as follows; -
- i. Whether the 1<sup>st</sup> and 2<sup>nd</sup> Respondent's preliminary objection dated 26<sup>th</sup> October 2023 is merited.
  - ii. Whether there was breach of the agreement dated 28<sup>th</sup> February 2017 by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.
  - iii. Whether the Applicant is entitled to the reliefs sought.
42. On the first issue for determination, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed a preliminary objection dated 26<sup>th</sup> October 2023. The preliminary objection was raised on the grounds that the applicants alleged cause of action being founded on contract is statutorily barred by didn't of section 4(1)(a) of the *Limitation of*



Actions Act and hence the court lacks jurisdiction to entertain the same. In buttressing the preliminary objection, the Respondents submitted that the agreement of sale between the Applicant and the 1<sup>st</sup> and 2<sup>nd</sup> Respondents was entered into on the 28<sup>th</sup> February 2017 wherein the completion date was 30<sup>th</sup> May 2017 yet the suit was filed on 1<sup>st</sup> August 2023 being 6 years and 6 months later and thus being time barred.

43. The Applicant on the other hand had submitted that it was only in January 2023 that the applicant became aware that the transfer of the suit property to the 3<sup>rd</sup> Respondent had been undertaken and as such the cause of action accrued in January 2023. It was also submitted that no completion notice was ever served and the alleged notice dated 1<sup>st</sup> February 2018 was never received by the Applicant. Basing its argument on this position, the Applicant submitted that the suit was filed in time and the same was properly before court.

44. In determining this issue, this court refers to the often-cited case of Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd [1969] EA 696 which has been the watershed as to what constitutes preliminary objections. The Court of Appeal in Nitin Properties Ltd v Singh Kalsi & another [1995] eKLR also pellucidly captured the legal principle when it stated as follows:

“...A Preliminary Objection raises a pure point of law, which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion...”

45. This statement of the law has been echoed time and again by the courts: see for example, Oraro –v- Mbaja [2007] KLR 141.

In Hassan Ali Joho & another -v- Suleiman Said Shabal & 2 Others SCK Petition No. 10 of 2013 [2014] eKLR the Supreme Court stated that:-

“... a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit”.

46. The Supreme Court again reconsidered the position of parties resorting to the use of preliminary objections and pronounced itself as follows in the case of Independent Electoral & Boundaries Commission –v- Jane Cheprenger & 2 Others [2015] eKLR.

“The occasion to hear this matter accords us an opportunity to make certain observations regarding the recourse by litigants to preliminary objections. The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection —against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.” [emphasis added]

As was stated in the Oraro vs Mbaja Case (supra), a preliminary objection must not be blurred with factual details liable to be contested. This court is also guided by the cases of Kenneth Shitsugane versus County Government of Kakamega & Another [2021] eKLR and George Kamau Kimani & 4 Others versus County Government of Trans-Nzoia & Another [2014] eKLR. In the instant case, it is clear that the issue as to whether the cause of action occurred in May 2017 or February 2018 or January 2023 is indeed a contested issue of fact which cannot be determined by way of preliminary objection.



47. In view of the foregoing, it is the finding of this court that the preliminary objection dated 26<sup>th</sup> October 2023 is not merited and the same is declined.
48. On the second issue, as to whether there was breach of the agreement dated 28<sup>th</sup> February 2017, it was argued by the applicant that the Applicant in fulfilling its obligation made payment of Kshs 36,000,000.00 being deposit of the purchase price as was stipulated under clause 3(i) of the said agreement. It was also argued that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents failed to issue a Completion Notice which was a mandatory requirement that was provided for under special condition No. 1 of the said agreement.
49. From the evidence that was produced before this court, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents proceeded to issue a Completion Notice dated 1<sup>st</sup> February 2018 which in essence disregarded the said agreement. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents also denied ever receiving any deposit from the Applicant.
50. A perusal of the Completion Notice dated 1<sup>st</sup> February 2018 which was annexed to the affidavit of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents as shows that it was issued pursuant to clause 5 and 3(ii) of the sale agreement dated 28<sup>th</sup> February 2017 and the same stipulated as follows; -
- “We have yet to receive any communication from you or your advocates as to your willingness to proceed with the sale.
- Consequently we hereby give you notice as provided for under special condition 1 of the agreement to comply with the conditions subject to which the sale was made including that relating to completion of sale within 21 days, failure to which the provisions of the said special condition will apply strictly”
51. According to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, the Completion Notice was sent out to the Applicant by way of registered post through their address “Car Master (K) Twenty Eleven Limited, P.O Box 63680 – 00619, Nairobi”.
52. Annexed to that Completion Notice was also a copy of a receipt dated 14<sup>th</sup> February 2018 showing payment of Kshs 105/= paid by Tariq Khan and Associates Advocates for the purposes of transmission of the said notice to the Applicant. From the evidence that was adduced, it was evident that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents only proceeded to engage the 3<sup>rd</sup> Respondent in respect to the sale of the suit property from November 2021 after they had considered the sale agreement dated 28<sup>th</sup> February 2017 as having been rescinded. Equally the 1<sup>st</sup> and 2<sup>nd</sup> Respondents denied ever receiving any deposit from the Applicant and in the absence of any evidence to the contrary, it is the finding of this court that the Applicant has been unable to demonstrate whether there was any breach of the agreement on the part of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.
53. The final issue for consideration is whether the Applicant is entitled to a refund of the deposit of Kshs 36,000,000.00 and other relief sought in its application.
54. The sale agreement dated 28<sup>th</sup> February 2017 stipulated that the purchase price of the suit property was Kshs 130,000,000.00 upon which the purchaser shall pay a sum of Kshs 26,000,000.00 on execution of the said agreement and the remaining balance of Kshs 104,000,000.00 shall be paid on the completion date which was set as 30<sup>th</sup> May 2017. It was also stipulated that while the Applicant averred that it paid a deposit of Kshs 36,000,000.00 in both cash and direct bank transfers, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents denied ever receiving the same.



55. The court has carefully perused the affidavits dated 1<sup>st</sup> August 2023 and 22<sup>nd</sup> January 2024 and notes that the Applicant has not provided any evidence either by way of the bank slip and or any acknowledgement of receipt of funds from the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in respect to the payment of the said amount.
56. It is worth noting that a sum of Kshs 36,000,000.00 is a substantial amount which must be well documented and evidence tendered if at all it was paid. In the circumstances, it is the finding of this court that the Applicant has been unable to discharge its burden that it indeed made payment of Kshs 36,000,000.00 to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. The bank details and the date when the said deposit was made was equally not provided.
57. In view of the foregoing, it is the finding of this court that the Applicant has not proved its case to the required standard and as such the reliefs sought are not for granting.
58. In respect to costs, it is the law that costs follow the event unless otherwise stated. Considering that the Respondents are the successful parties to this suit, this court directs that the Respondents are entitled to the cost of defending the Originating Summons.

### **Final Orders**

59. As I come to the end of this judgment, I wish to render my unreserved apologies to the parties in this matter for the delay in rendering this decision. The delay was occasioned by the fact that the Court file was among those that were misplaced during the Court's transfer to a different station which involved movement of so many files within quite a short time.
60. In conclusion, it is the finding of this court that the Originating Summons dated 1<sup>st</sup> August 2023 is unmerited and the same is dismissed with costs to the Respondents

**DATED, SIGNED, AND DELIVERED VIRTUALLY AT VOI THIS 20<sup>TH</sup> DAY OF DECEMBER 2024.**

**E. K. WABWOTO**

**JUDGE**

In the presence of: -

Mr. Gisemba for the Applicant.

Ms. Khadija Athman h/b for Mr. Khan for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

Ms. Jaleba h/b for Mr. Kuria for the 3<sup>rd</sup> Respondent.

Court Assistant; Mary Ngoira.

