



**Mwago v Kings Pride Properties Limited (Civil Appeal E148 of 2022)  
[2023] KEHC 21733 (KLR) (Commercial and Tax) (29 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 21733 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL APPEAL E148 OF 2022  
DAS MAJANJA, J  
AUGUST 29, 2023**

**BETWEEN**

**AMOS MAINA MWAGO ..... APPELLANT**

**AND**

**KINGS PRIDE PROPERTIES LIMITED ..... RESPONDENT**

*(Being an appeal from the Judgement of Hon. E. Kagoni, PM dated 16th September 2022 at the Magistrates Court at Nairobi, in Civil Case No. E672 of 2021)*

**JUDGMENT**

**Introduction and Background**

1. This is an appeal against the judgment of the Subordinate Court dated 16.09.2022 dismissing the Appellant's suit. The facts and background leading to the Appellant filing suit in the lower court are largely common cause and can be gleaned from the record of appeal as follows. The Respondent offered the Appellant a chance to buy a 3-bedroom apartment off plan at Windsor Gardens Apartments situated on Land Reference Number 76/460 ("the Apartment") for Kshs. 7,500,000.00. The Appellant signaled his acceptance by signing a Letter of Offer on 21.01.2016 ("the Letter of Offer") and pursuant to its terms, paid a deposit of Kshs. 2,250,000.00.
2. By a plaint dated 04.05.2021, the Appellant filed suit claiming that the Respondent failed to commence and complete the construction of the Apartment within 3 years as had been initially represented to him by the Respondent. In 2018, he discovered that the property on which the Apartment was to be constructed had been abandoned. When he instructed his advocates to demand a refund of his deposit, the Respondent replied by offering the Appellant another apartment unit at Runda Royal, a totally different project and a complete variation of the terms of the Letter of Offer. The Appellant cited the



- Respondent for breach of contract and claimed the Kshs. 2,250,000.00 deposit together with interest and costs of the suit.
3. The Respondent, in its defence, opposed the suit and prayed for the suit to be dismissed. It stated that the Appellant entered into an Agreement for Sale with the vendor of the Apartment, Windsor Gardens Limited and that it was only acting as an Agent of a disclosed Principal and that it did not receive the deposit from the Appellant.
  4. The Respondent stated that as an agent it did not have any interest in any property that it could have transferred to the Appellant. It also denied being in breach of any contract. It alleged that the Appellant was in breach of the payment terms of the purchase price as contained in the Letter of Offer. Further, that the Appellant, who was having trouble paying the purchase price in accordance with the Letter of Offer, opted to pull out of the transaction. The Respondent contended that Appellant's suit was premature, non-suited and misconceived and did not disclose any cause of action as against it.
  5. The Subordinate Court set down the matter for hearing. The Appellant (PW 1) testified on his own behalf while the Respondent presented its director, Major (Rtd.) Daid Karanja Karani (DW 1) as its witness. The parties filed written submissions whereupon the court rendered its judgment on 16.09.2022. The court identified two issues for determination; whether the Appellant was entitled to the remedies sought and who was to bear the costs of the suit.
  6. In summary, the Subordinate Court held that the phrase "subject to contract by way of formal sale agreement" in the Letter of Offer indicated that the final agreement was yet to be reached and would be reached, upon the execution of a formal contract by the Appellant and the vendor, Windsor Garden Limited. Based on the evidence, the trial court held that the Appellant did not pay any cash to the Respondent as it admitted that the vendor was Windsor Garden Limited and he paid the deposit of Kshs. 2,250,000.00 to Telagen Investment Ltd. The trial court concluded that the Appellant, having knowledge of all the facts, ought to have joined the parties implicated in the transaction. The court concluded that in the absence of a contract between the Appellant and Vendor and by failure to sue the proper parties, the suit could not succeed. The Subordinate Court declined to award the Respondent costs of the suit on account of its role as marketer of the Apartment who failed to assist the Appellant acquire what was promised.
  7. Following dismissal of its suit, the Appellant now appeals to this court. The appeal was disposed by way of written submissions which I have considered. I do not propose to rehash them but will refer to them where necessary on the determination.

### **Analysis and Determination**

8. In determining this appeal and as has been submitted by the Appellant, I am aware that this court is exercising the jurisdiction of a first appellate court and therefore has a duty to examine matters of both law and facts and subject the whole of the evidence to a fresh and exhaustive scrutiny, drawing a conclusion from that analysis and bearing in mind that the court did not have an opportunity to hear the witnesses first hand ( *Selle & another v Associated Motor Boat Co. Ltd. & others* [1968] EA 123)i.
9. Even though the Appellant raises 17 grounds of appeal in its Memorandum of Appeal, it has condensed the same into three issues which more or less mirror the those that were determined by the subordinate court; whether the learned magistrate erred in dismissing the Appellant's suit and if this is in the affirmative, what reliefs is the Appellant entitled to and who should bear the costs of this appeal and those in the trial court.



10. The Appellant's suit against the Respondent was for the refund of Kshs. 2,250,000.00 it paid for the Apartment. It is common ground that the deposit was paid upon signing of the Letter of Offer and that the vendor of the Apartment was Windsor Gardens Limited while the deposit was paid into the account of Telagen Investments Limited. The Respondent maintained that as marketing agent of Windsor Gardens Limited, it has no interest to pass onto the Appellant. Further, that it did not receive the deposit which was paid to Telagen Investments Limited, the vendor's beneficiary.
11. The tenor of the Letter of Offer between the parties and whether the same created contractual obligations between them was a contentious issue before the subordinate court. The Court of Appeal in *East African Fine Spinners Limited (in receivership) & 3 others v Bedi Investments Limited* [1994] eKLR deliberated on the issue of the import of a letter of offer which is subject to contract. Citing Bankes LJ., in *Keppel v Wheeler & Another* [1927] 1 KB 577, Kwach JA., rendered himself on this question in the following words: "The sale was by its express terms subject to contract and until that contract had been executed there was no contract between the parties which could be enforced by an order of specific performance or mandatory injunction."
12. In the same decision, Gicheru JA., cited the following decisions to buttress the legal effect of an offer which is subject to contract. *Chinnock v The Marchioness of Ely* 4 DE G J & S 638, *Bennet, Walden & Co v Wood* [1950] 2 All ER 134 and *Winn v Bull* [1877] 7 Ch D 29 where the court held as follows:
 

Where you have a proposal or agreement made in writing expressed to be subject to a formal contract being prepared, it means what it says; it is subject to and is dependent upon a formal contract being prepared. When it is not expressly stated to be subject to a formal contract it becomes a question of construction, whether the parties intended that the terms agreed on should merely be put into form, or whether they should be subject to a new agreement the terms of which are not expressed in detail.
13. From the authorities cited, it is now settled that a letter of offer disclaimed by the phrase "subject to contract..." as was the Letter of Offer is not binding upon the parties until the same is concretized by a subsequent formal contract. Therefore, in as much as the Appellant submits that the Respondent's advocates had admitted that the parties had entered into a contract, the same could not be the case as the Letter of Offer lacked all the essential ingredients of a contract, that is, an unconditional acceptance devoid of any further stipulation which in this case, was the contract between the Appellant and the vendor. I therefore find and hold that the trial magistrate correctly interpreted the Letter of Offer and found that in the absence of the anticipated contract between the Appellant and the vendor, there was no legally binding contract between the Appellant and the Respondent. In the absence of a contract, the Respondent could not be cited for breach of contract.
14. The Respondent further denied liability on the ground that it was an agent of the vendor in this transaction. The Appellant contested this assertion and submits that that the Respondent did not produce any document or evidence to support any agency relationship hence the trial magistrate erred in finding that the Respondent was an agent. Bowstead and Reynolds on Agency (17<sup>th</sup> Ed.) Sweets Maxwell Page 1-001, defines such an agency relationship to be, "... a relationship which exists between two persons, one whom expressly or impliedly consents that the other should act on his behalf so as to affect his relations with third parties, and the other of whom similarly consents so to act or so acts."
15. An agency relationship and the consent of such a relationship can be inferred from the conduct of the parties and that once the Respondent stated that it had the consent of the vendor to sell the Apartment on its behalf, then it was presumed that it had such valid consent from the vendor. The onus thus shifted to the Appellant to prove that the Respondent did not have the consent or was not an agent.



The Appellant did not lead any evidence to show that the Respondent was not an agent since it was clear that the Respondent was not the vendor of the Apartment but Windsor Gardens Limited on whose account it paid the deposit. Since the principal was known, the Appellant ought to have sued it. In *Anthony Francis Wareham t/a A. F. Wareham v Kenya Post Office Saving Bank and 2 Others* [2004] eKLR, the Court of Appeal stated as follows regarding the suit against the principal and agents:

It was also prima facie imperative that the Court should have dismissed the respondent's claim against the second and third appellants for they were impleaded as agents of a disclosed principal contrary to the clear principle of common law that where the principal is disclosed, the agent is not to be sued. Furthermore the Court having found on the evidence that the second and third appellants were principals in their own right and not agents of the first appellant in the transaction giving rise to the suit, it should have dismissed the suit against the first appellant who had been sued as the principal.

16. I therefore hold that the Subordinate court was correct to hold that the ought to filed suit against the principal, in this case the vendor, Windsor Gardens Limited for a refund of its deposit and that it did not have any cause of action against the Respondent.

### **Disposition**

17. It must now be clear that this appeal lacks merit. It is dismissed. The Appellant shall pay the Respondents costs assessed at Kshs. 50,000.00.

**DATED AND DELIVERED AT NAIROBI THIS 29TH DAY OF AUGUST 2023.**

**D. S. MAJANJA**

**JUDGE**

Court Assistant: Mr M. Onyango.

Mr Gachugi instructed by Hiram Christopher Advocates LLP for the Respondent.

Mr Njuguna instructed by Benson Njuguna and Company Advocates for the Appellant.

