



**Varizone Limited v Kanoga (Environment and Land Appeal 21 of 2022)
[2023] KEELC 21884 (KLR) (23 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21884 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT AND LAND APPEAL 21 OF 2022
EK MAKORI, J
NOVEMBER 23, 2023**

BETWEEN

VARIZONE LIMITED APPELLANT

AND

SIMON KANOGA RESPONDENT

(Being an Appeal from the Judgment of Hon. J.M Kituku Senior Magistrate dated 31st May 2022 in Kilifi ELC No. 347 of 2018 Varizone Limited v Simon Kanoga)

JUDGMENT

1. The Memorandum of Appeal dated 27th June 2022 cites 9 grounds of appeal as follows:
 - a. That as of 30th June 2018, the respondent had not paid Kshs. 1,713,500/= and the appellant was entitled to issue 14 days demand notice as it did on 30th July 2018 and a rescission notice dated 22nd August 2018 therefore the trial Court wrongly dismissed the appellant's case.
 - b. The appellant did not breach clause 7 of the sale agreement as alleged by the respondent.
 - c. That it is the respondent who breached the agreement by failing to pay the purchase money as scheduled on 11th November 2017.
 - d. By dint of clause 11.1, the appellant was entitled to issue a demand notice for 14 days and upon expiry of the said period, rescind the sale agreement in writing, and thereafter provisions of clause 11.2 and 11.3 took effect.
 - e. The cancellation notice issued on 22nd August 2018 was founded on the terms of the sale agreement.
 - f. That the Magistrate erred by finding that the respondent was not served with the rescission notice when the record shows there was such service.



- g. The trial Court wrongly applied the doctrine of estoppel to the appellant's circumstances of the suit hence arriving at an erroneous decision.
 - h. The trial Court erred by affirming the unilateral decision of the respondent of taking vacant possession without involving the appellant hence arriving at an erroneous decision.
 - i. The trial Court was biased against the appellant and that its decision cannot hold.
2. The appeal is opposed, in its entirety and the respondent identified 6 issues for determination of this Court:
- i. Did the appellant serve the Respondent with notices dated 30.7.2018 and 22.8.2018?
 - ii. If the answer to (i) above is in the affirmative, did the appellant waive those notices and revive the agreement?
 - iii. Did the Respondent pay the full purchase price for the suit premises and did the Appellant refund any part of the purchase price to the Respondent?
 - iv. Whether this appeal has any merit whether it is incompetent, frivolous, vexatious, and a gross abuse of the process of court?
 - v. Who should pay the costs of this appeal?
3. In *Mursal & another v Manese (suing as the legal administrator of Dalphine Kanini Manesa)* (Civil Appeal E20 of 2021) [2022] KEHC 282 (KLR) (6 April 2022) (Judgment) Mativo J. aptly summarized the role of the first Appellate Court as follows:

“A first appellate court is mandated to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses firsthand. This duty was stated in *Selle & another v Associated Motor Boat Co. Ltd. & others*¹ and in *Peters v Sunday Post Limited*.²¹{1968} EA 123.²{1958} EA. page 424.

- 3. A first appellate court has jurisdiction to reverse or affirm the findings of the trial court. A first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court, must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. While reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it.³³See *Santosh Hazari v Purushottam Tiwari* (Deceased) by L.Rs {2001} 3 SCC 179.
- 4. A first appellate court is the final court of fact ordinarily and therefore a litigant is entitled to a full, fair, and independent consideration of the evidence at the appellate stage. Anything less is unjust.⁴ The first appeal has to be decided on facts as well as on law. In the first appeal, parties have the right to be heard on



both questions of law as also on facts, and the first appellate court is required to address itself to all issues and decide the case by giving reasons. While considering the scope of Section 78 of *Civil Procedure Act*,⁵ a court of first appeal can appreciate the entire evidence and come to a different conclusion.

4. By an agreement dated 26th July 2017 the appellant agreed to sell, and the respondent agreed to purchase Plot No. V/508/3 in the County of Kilifi registered as CR. No. 37174 (the suit premises) at the agreed consideration of Kshs. 8,500,000.00. As shown by a copy of the title on pages 23 to 24 and the agreement contained on pages 25 to 32 of the Record of Appeal.
5. Both parties were represented by Dennis Kinaro & Co. Advocates up to 22nd November 2017 when the respondent appointed the firm of Kinyua Muyaa & Co., to represent him in that transaction.
6. There was some delay on the part of the respondent in payment of the purchase price, but the parties agreed that the respondent pay the balance of the purchase price and granted an extension to do so
7. The appellant and his advocate contended that they served the respondent with the demand notice dated 30th July and followed it with a cancellation notice dated 22nd August 2018, both written by Dennis Kinaro & Co. Advocates, addressed to the respondent at P.O Box 4500-01002, Thika and copied to the appellant and its Director, Christopher Wilson (PW1).
8. 8. The wrangling in this appeal then revolves around whether there was proper and legal rescission of the sale agreement and whether the trial Court properly directed its mind in finding that there was no service of notice of rescission and that the respondent paid all purchase monies and should have been given vacant possession of the suit property immediately.
9. The trial Court (Hon Kituku SPM) made a finding that delivery of vacant possession was a mere formality after the respondent had paid the full purchase price because under the terms of the agreement of sale vacant possession was automatic after full payment. This is what he said in the judgment contained on pages 539 to 559 of the record of appeal, particularly on page 553 of the record of appeal:

“This issue was contested by the defendant and the burden shifted to the plaintiff to prove service. No such evidence was proved, and I hold the defendant was not served with the termination notice.

The importance of service of both the demand and cancellation notice cannot be overemphasized.

The Court of Appeal in the case of *Nyangilo Ochieng & Anor. v Kenya Commercial Bank* [1996] held that:

“..... Once the chargor alleges non-receipt of the statutory notice, it is for the chargee to prove that such notice was in fact sent....”
10. The trial Court proceeded that once service of both demand notice and cancellation was never proved to have been done, and the appellant proceeded to accept the entire purchase monies from the respondent, the doctrine of estoppel crept into this matter.
11. The trial Court concluded that by paying the entire decretal sum, handing over vacant possession was a mere formality. The trial Court relied on a thread of emails from the appellant, which showed that



the appellant as of 19th September 2018, was still advising the respondent to pay up the balance to complete the transaction. The trial Court concluded that:

“That conduct shows the plaintiff was approbating and reprobating at the same time, and no Court of law can countenance that because the plaintiff made the defendant believe that despite the delay in finalizing the payment the contract was still on.”

12. Having reviewed the entire record and the materials presented to me in this appeal, I conclude that the appeal is lacking in merit. The trial Court correctly directed its mind to the evidence presented to it, as well as the relevant applicable law and precedents, and in giving effect to the parties' sale agreement, the trial Court was correct in dismissing the appellant's claim. I will conclude by saying that the appellant cannot have both the purchase money and the land under the circumstances of this case and in its four corners. Nothing has been shown to this Court what efforts were made to refund the purchase price following the appellant's unilateral revocation of the sale agreement in 2018.
13. The appeal is hereby dismissed with costs to the Respondent.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY IN OPEN COURT ON THIS 23RD DAY OF NOVEMBER 2023.

E. K. MAKORI

JUDGE

In the Presence of

Mr. Muthuri for the Respondent

Court Clerk: Happy

In the Absence of:

Mr. Kinaro for the Appellant.

