Noordin v Royal Comfort Apartment Limited; Royal Comfort Apartment Limited (Plaintiff); Naziri Tayabali Noordin (Defendant) (Environment and Land Appeal E044 of 2020) [2022] KEELC 3718 (KLR) (20 July 2022) (Judgment)

Neutral citation: [2022] KEELC 3718 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND APPEAL E044 OF 2020

MD MWANGI, J

JULY 20, 2022

BETWEEN

NAZIR TAYABALI NOORDIN ..... APPELLANT

AND

ROYAL COMFORT APARTMENT LIMITED ..... RESPONDENT

AND

ROYAL COMFORT APARTMENT LIMITED ..... PLAINTIFF

AND

NAZIRI TAYABALI NOORDIN ..... DEFENDANT

(Being an appeal from the Judgment and Decision of Hon D W Mburu delivered on October 16, 2020 in the Chief Magistrate's Court at Nairobi in CM ELC No 5 of 2020)

JUDGMENT

Background

1. Before me is an appeal from the Judgment and decision of Hon D W Mburu delivered on October 16, 2020 in the Chief Magistrate's Court at Milimani Commercial Court (CM ELC 5/2020). The Appellant through the memorandum of appeal dated October 21, 020 prays that the said Judgment be set aside on 3 grounds namely;

    a. That the Learned Magistrate erred in law and in fact by failing to evaluate the evidence tendered judiciously.

    b. That the Learned Magistrate erred in law and in fact in considering elements of frustration of contracts which were not pleaded in the plaint, took irrelevant factors into account in awarding

the judgment to the Respondent. A claim of termination of contract by reason of frustration ought to be pleaded and proved.

c. That the Learned Magistrate erred in law and in fact having held that the professional undertaking provided by the Respondent was not anticipated under the sale agreement ought to have determined that the Respondent was in breach of the terms of the sale agreement.

2. The Appellant was the Defendant in the case before the Chief Magistrate's Court. The Respondent had instituted the suit seeking judgment against the Appellant for the sum of Kshs 7,300,000/= being the deposit paid towards the purchase of the suit property - L R No 1870/III/381 (Original 1870/III/236/1) I R 63488/2. The Chief Magistrate's Court allowed the Respondent's claim against the Appellant for the sum of Kshs 7,300,000/= with interest at court rates from the date of filing suit.

Court's directions

3. The court's directions in this matter were that the appeal be canvassed by way of written submissions. Thereafter parties would get an opportunity to briefly highlight the submissions. Both parties complied and filed their respective submissions. They too had the opportunity to highlight the submissions.

Submissions by the Parties.

A. Submissions by the Appellant.

4. The Appellant's submissions are dated December 3, 2021.

5. After analyzing the sequence of events, the Appellant proceeded to submit on the issue of whether the professional undertaking(s) issued by the Respondent (Plaintiff) for the balance of the purchase price complied with the terms of the sale agreement. The Appellant makes reference to clause 3.3 of the sale agreement which explicitly provided that,

> " the balance of the purchase price shall be paid by the purchaser's financier to the vendor or in such other manner as may be directed by the vendor within seven (7) days of the simultaneous successful registration of the transfer in favour of the purchaser or its nominee and the charge over the property in favour of the purchaser's financier."

6. Clause 3.4 of the agreement on the other hand further provided that;

> " the purchaser shall procure that on or before the completion date, its financier's issue an undertaking the vendor to pay to the vendor the balance of the purchase price within seven (7) days of the simultaneous successful registration of the transfer in favour of the purchaser or its nominee and the charge over the property in favour of the purchaser's financier."

7. The Appellant submits that the principal obligation of the Respondent under the agreement was to make payments for the purchase price in the manner agreed upon and approved by the vendor as above. The agreed and approved manner of payment according to the Appellant was:-10% deposit – Kshs.. 7,300,000/- as per clause 3.1 & 3.2 of the agreement.The balance of the purchase price in terms of clause 3.3 & 3.4 of the agreement – whereby the Respondent was obliged to procure an undertaking from their financier to guarantee payment of the balance of the purchase price.

8. According to the Appellant, the undertaking given by the Respondent's Advocates was to the effect that they were guaranteeing payment on behalf of an unknown mysterious, perhaps non-existent

financier for payment of Kshs 30,700,000/-. That was the reason why the Appellant rejected the same and rescinded the agreement.

9. It was the Appellant's submissions that the sale agreement was additionally subject to the Law Society Conditions of Sale, that obligate a purchaser to give an irrevocable professional undertaking securing payment by the purchaser financier's Advocates in a form and substance satisfactory to the vendor's Advocates. The Appellant's case is that the purchaser in this case did not give an undertaking as per the agreement that expressly required the undertaking to come from the financier.

10. The Appellant faults the Learned Magistrate on the basis that having found that the undertaking provided by the Respondent did not conform with the terms of the sale agreement, he ought then to have proceeded to make a finding that the purchaser (Respondent) was in breach of the agreement; and dismissed the suit on that basis.

11. The 2nd issue that the Appellant dealt with was whether the Respondent had pleaded frustration of the contract to merit such a finding by the Learned Magistrate. The Appellant submits that the Respondent's claim against the Appellant before the Magistrate's court was premised on breach of the terms of sale agreement. In fact the Appellant replicates the contents of paragraph 16 of the plaint where the Respondent had enumerated the particulars of breach against the Appellant as follows:-

    i. Failing to furnish the Plaintiff with completion documents despite receiving undertakings from the Plaintiff on the balance of the purchase price.

    ii. Failing to complete the transaction despite receiving undertakings from the Plaintiff on the balance of the purchase price.

    iii. Failing to refund the deposit despite refusal to complete the sale transaction.

12. The Appellant submits that parties are bound by their pleadings and the Plaintiff cannot at one point allege frustration and at another aver that it was ready to complete the transaction. The Learned Magistrate was bound to decide only on the issues before him.

13. The Appellant submits further that in any event, the law is that a frustrating event is one that the party relying on could not have foreseen i.e. an unforeseeable event. In this case the Appellant states that there was no unforeseeable event. He quotes a number of authorities to buttress his arguments. The Appellant's conclusion was that alleged failure by the Respondent to procure a suitable undertaking amounted to a breach of the Respondents obligations under the agreement.

14. The Respondent having breached the agreement left the Appellant with no other option than to exercise his rights and remedies under clause 12 of the sale agreement. The Appellant was therefore entitled to retain the 10% deposit as liquidated damages on account of the Respondent's breach of the agreement.

B. Submissions by the Respondent

15. On its part, the Respondent's submissions are dated March 31, 2022.

16. The judgment appealed from was in favour of the Respondent. The Learned Magistrate ordered the Appellant to refund the deposit paid to him by the Respondent of Kshs 7,300,000/- with interest at court rates from the date of filing suit until payment in full.

17. The Respondent identified 4 issues which it submitted on, namely: -

    a. Whether the Respondent pleaded and proved the doctrine of frustration;

b. Whether there was a common mistake/false and fundamental assumption that vitiated the sale agreement;

c. Whether the Appellant breached the sale agreement; and

d. Whether the reliefs granted by the trial court were appropriate in the circumstances of the case.

18. On the 1st issue, the Respondent affirms that the Learned Magistrate found that the sale agreement dated July 24, 2019 was frustrated by unforeseen circumstances hence neither party was in breach.

19. The Respondent submits that at paragraph 9 of its plaint amended on April 27, 2020, it had pleaded frustration. The Respondent replicates paragraph 9 of the amended plaint hereunder; -

> 9 "The fact that the property did not qualify for financing due to the short length of the unexpired leasehold term amounted to an unforeseen event that rendered the sale agreement frustrated. The Plaintiff therefore vide a letter dated October 31, 2019 sought to terminate the same and requested for a refund of the Deposit."

20. The Respondent submits that vide a letter dated October 7, 2019, its proposed financier confirmed that the Respondent could not get financing on account of the short (period) residue of the leasehold term of the suit property. The financier confirmed that the least period they could consider was a minimum of 35 years to expiry.

21. The Respondent avers that the financier's decision not to fund the purchase of the property was purely discretionary. It was not informed by any codified industry rule or practice that the Respondent would have been aware of prior to the execution of the agreement.

22. The Respondent cites various authorities in support of its argument to the effect that frustration occurs whenever the law recognizes that, without default of either party, a contractual obligation has become incapable of being performed.

23. The Respondent submits that at the time of execution of the sale agreement, there was a meeting of the minds (between the Appellant and the Respondent) – a mutual understanding that the purchase of the property would be financed by the 'bank' on the strength of the title thereto. The Respondent argues that neither party had foreseen a rejection by the bank to finance the purchase. The Respondent further avers that the agreement for sale was actually drafted by the Vendor/Appellant.

24. On the 2nd issue, the Respondent submits that there was a common assumption and mistake by the parties that the purchase of the property would be financed on the strength of the title to the property. The Respondent avers that the sale agreement was executed on the basis of the common mistake/ assumption by both parties that the title to the property would be sufficient to obtain financing to facilitate payment of the balance of the purchase price – Kshs 65,700,000/=. The Respondent submits that the common mistake had the effect of vitiating the contract.

25. Thirdly, the Respondent submits that despite the agreement having been frustrated, and in the interest of proceeding with the transaction, it went out of its way and made alternative financing arrangements. That is how comes that it caused to be issued to the Appellant two professional undertakings for the balance of the purchase price within the completion timeline. The Respondent submits that the two undertakings satisfied the main purpose of the agreement.

26. The Respondent further submits that the professional undertaking issued by its Advocates was a reasonable alternative as it was binding and could be enforced against the said Advocates. The Respondent avers that the Appellant did not on his part, demonstrate his readiness, ability and

willingness to complete the sale transaction, hence did not have the capacity to rescind the agreement. The Respondent therefore submits that notwithstanding the frustration of the transaction, the Appellant breached the agreement by failing to complete it as per clause 4.2 by failing to accept the two undertakings subject to the transaction, and failing to refund the deposit.

27. On the final issue, the Respondent submits that the trial Magistrate found that the agreement was frustrated by an unforeseen event and in the circumstances ordered a full refund of the deposit paid by the Respondent to the Appellant with interest at court rates from the date of filing suit. The Respondent affirms that it was the right remedy for a contract which had become impossible of performance or that had been otherwise frustrated.

28. The Respondent prays for the dismissal of the appeal.

Analysis and Determination

29. This being a first appeal; the court reminds itself of its primary duty as a first appellate court, to re-evaluate, re-analyse and re-assess the evidence and the law applicable before determining whether the conclusions reached by the Learned Magistrate are to stand or not and give reasons either way. (See *Selle & Another vs Associated Motor Boat Co Ltd & others* (1968) E A 123, *Gitobu Imanyara & 2 others vs Attorney General* (2016) eKLR, A*bok James Odera t/a A J Odera & Associates vs John Patrick Machira t/a Machira & Co. Advocates* (2013) eKLR)

30. I will therefore proceed to re-evaluate the case as presented before the Chief Magistrate's Court, re-analyse and re-assess the evidence and make my own determination.

The Plaintiff's case.

31. The facts giving rise to the case are as pleaded in the plaint amended on April 27, 2020 before the Chief Magistrate's Court. They were that, on or about July 24, 2019, the parties herein entered into a sale agreement wherein the Defendant (now Appellant) agreed to sell to the Plaintiff (now Respondent) all that piece of land known as L R 1870/III/381 (Original number 1870/III/236/1) I R 63488/2. The terms of the sale were that a deposit was to be paid on or before execution of the agreement, while the balance of the purchase price was to be paid through a financier.

32. The Respondent pleaded that there was an explicit default clause to the effect that, 'if the vendor shall be in breach of its obligations under the agreement, the purchaser shall give the vendor a 21 days' notice in writing confirming the purchaser's readiness to complete the sale in all respect and requiring the vendor to comply with their obligations under the agreement' before expiration of such notice and 'if the vendor shall fail to comply with such notice the purchaser shall at the purchaser's sole option be entitled to rescind the agreement whereupon the vendor's advocate shall refund the deposit (together with interest accrued) thereon to the purchaser'.

33. Fast forward; the deposit was paid upon execution of the sale agreement as contemplated. The purchaser alleges that it approached various banks seeking financing to fund the payment of the balance of the purchase price but was turned down on the grounds that the unexpired leasehold term of the suit property was only 25 years.

34. The Plaintiff/Respondent pleaded that the fact that the suit property did not qualify for financing due to the short length of the unexpired leasehold term amounted to an unforeseen event that rendered the sale agreement frustrated. The Plaintiff therefore vide a letter dated October 31, 2019 sought to terminate the agreement and requested for a refund of the Deposit paid from the vendor.

35. The Respondent pleaded further that on his part, the vendor on November 4, 2019 also proceeded to issue the purchaser with a 21 days notice to comply with clause 3.4 of the sale agreement failure to which he indicated that he would rescind the sale agreement.

36. The Respondent in its plaint alleged that it went ahead, despite the agreement allegedly having been frustrated, to secure alternative financing and on November 29, 2019, being within the 21 days notice and or timelines issued by the vendor, caused to be issued two separate professional undertakings from Messrs. Muthaura Mugambi Ayugi & Njonjo for Kshs 35,000,000/- and from Messrs O & M Law LLP for Kshs 30,700,000/- totaling Kshs 65,700,000/-, being the balance of the purchase price.

37. The Respondent averred that despite going through the 'painstaking process' of obtaining the alternative financing, the Appellant went ahead and unprocedurally rescinded the sale agreement.

38. The Respondent pleaded that it issued the Appellant with a 21 day completion notice, which notice the Appellant did not comply with. The Respondent's case was that the Appellant was therefore in breach of the terms of the sale agreement by failing to furnish the Respondent with the completion documents despite receiving undertakings on the balance of the purchase price, failing to compete the transaction and failing to refund the deposit despite refusal to complete the sale transaction. The Respondent therefore in its amended plaint prayed for the refund of the deposit of Kshs 7,300,000/- being the deposit paid to the Appellant with interest at court rates until payment in full.

The Defendant's case

39. In his Statement of Defence, the Appellant averred that the Respondent was aware of the actual state and conditions of title of the suit property including the residue of the leasehold period.

40. The Appellant further averred that the sale agreement was executed on July 24, 2019, and the completion date was 90 days from that date; meaning October 25, 2019. On October 22, 2019, three (3) days to the completion date, the Respondent sought an extension of the completion date by 60 days, but the Appellant conceded to an extension for 30 days only.

41. The Appellant further stated that on October 31, 2019, before the expiry of the 30 days extension period sought by the Respondent, the Respondent served him with a notice purporting to terminate the sale agreement and demanding a refund of the deposit. The grounds of the purported termination were that the Respondent was unable to procure an undertaking for payment of the balance of the purchase price in the amount of Kshs. 65,700,000/- from its financiers as required under the agreement.

42. The Appellant's position was that he had disclosed all the pertinent issues concerning the suit property including the residue of the lease period. The Appellant had no role to play in securing financing for the balance of the purchase price. The alleged failure by the Respondent to secure financing did not therefore qualify as an unforeseen event.

43. The Appellant acknowledging receiving a letter of undertaking from Messrs Muthaura Mugambi Ayugi & Njonjo Advocates acting on behalf of Barclays Bank of Kenya Ltd on November 29, 2019 for the sum of Kshs 35,000,000/- towards the balance of the purchase price. The said undertaking was not in respect of the entire balance of the purchase price.

44. On the same date, the Appellant received another letter from the Respondent's Advocates Messrs O & M Law LLP stating that they had received a sum of Kshs 30,700,000/- being the reminder of the purchase price which they had been instructed to hold in an escrow account and only release upon successful registration of the transfer in favour of the Respondent. The Respondent's Advocates

purported to issue an undertaking advising the Respondent that they would release the said funds upon successful registration of the transfer.

45. The Appellant conveyed his position to the Respondent on December 2, 2019, to the effect that clause 3.4 of their agreement was explicit that the Respondent was to procure an undertaking from its financiers and not from their Advocates. The Appellant therefore rejected the undertaking from the Respondent's Advocates as it was not in the form and substance satisfactory to him.

46. The Appellant affirmed that the Respondent was in breach of the terms of their agreement. The Appellant through his Advocates issued an appropriate and sufficient notice to the Respondent communicating his decision to rescind the agreement owing to the breach by the Respondent. The Respondent failed to remedy the breach despite notice from the Appellant.

47. The Appellant reiterated that it was an express term of their agreement with the Respondent that the deposit paid by the Respondent would be forfeited in the event that the Respondent failed to comply with its obligations under the sale agreemen and upon the Appellant electing to rescind the agreement in such circumstances.

Judgment by the Magistrate's Court

48. The Learned Magistrate in his judgment identified 3 issues for determination namely;

    a. Whether either of the parties breached the sale agreement.

    b. Whether the Plaintiff is entitled to the orders sought in the plaint.

    c. What is the appropriate order as to costs?

49. On the 1st issue, the Learned Magistrate found that neither of the parties could be held liable for breach of the sale agreement dated July 24, 2019, rather that the said agreement was frustrated by unforeseen events.

50. On the second issue, the Learned Magistrate found that the Respondent was entitled to a full refund of the deposit paid by the Appellant, with interest from the date of filing suit. On costs, the court ordered that each party bears its own costs.

Analysis and Determination

51. As I had pointed out earlier, the Appellant identified 3 grounds of appeal in his memorandum of appeal which I will collapse into two, and consider as hereunder;

    a. Whether the Respondent had pleaded frustration in the case before the Magistrate's court and proved the same.

    b. Whether the undertakings provided by the Respondent were compliant to the terms of the sale agreement between the parties and consequently whether the Respondent was in breach of the agreement.

52. It is not in dispute that there was a sale agreement dated July 24, 2019 between the parties herein. It is also not disputed that the Respondent paid to the Appellant a sum of Kshs 7,300,000/-, being the agreed deposit; under clause 3.2 of the agreement.

53. Parties are also in agreement that the balance of the purchase price was under clause 3.4 of the agreement to be secured through financing. The parties however did not identify who the financier was to be. That was left upon the purchaser to obtain.

54. The purchaser (Respondent) was further to procure, on or before the completion date an undertaking by its financier to pay to the vendor the balance of the purchase price (Kshs 65,700,000/-) within 7 days of the simultaneous successful registration of the transfer in favour of the purchaser or its nominee and the charge over the property in favour of the purchaser's financier.

55. The said clause 3.4 of the agreement provided that:-

> " The Purchaser shall procure that on or before the Completion Date, its financiers issue an undertaking to the Vendor to pay to the Vendor the Balance of the purchase price within seven (7) days of the simultaneous successful registration of the transfer in favour of the Purchaser or its nominee and the charge over the property in favour of the Purchaser's financier."

56. This now leads me to the first issue.

A. Whether the Respondent who was the Plaintiff in the case before the Magistrate's Court had pleaded frustration and if so, whether it proved the same.

57. The 1st part of the issue is rather straightforward. At paragraph 9 of the amended plaint amended on April 27, 2020, the Plaintiff expressly pleaded frustration. In the said paragraph, the Plaintiff stated that; -

> " The fact that the property did not qualify for financing due to the short length of the unexpired leasehold term amounted to an unforeseen event that rendered the sale agreement frustrated. The Plaintiff therefore vide a letter dated October 31, 2019 sought to terminate the same and requested for a refund of the deposit."

58. What more was the Appellant looking for? It is right there, in black and white!

59. I am aware of the opinion expressed by Owuor J A (as she then was) in the case of *Kenya Commercial Finance Company Ltd vs Ngeny and Another* (2002) 1 KLR 106, where she stated that, "a party who wished to rely on a frustrating event cannot as in this case simply mention it in passing ,.....particular facts which they seek to rely on resulting in the (alleged) frustration of the contract must be clearly set out in the pleading to enable the other side to prepare and defend the same."(emphasis mine)

60. In this case, the Respondent in paragraph 9 sufficiently disclosed the particular fact which resulted in the alleged frustration i.e. the fact that the suit property did not qualify for financing due to the short length of the unexpired leasehold term. That in my opinion was specific enough to enable the other side prepare and defend the same.

61. My finding therefore is that the Respondent had indeed sufficiently pleaded frustration in its plaint.

62. Besides pleading frustration, the Respondent had an obligation to prove it. Parties in this case surprisingly cited the same authorities to a large extent, in their submissions on what constitutes frustration.

63. Both parties made reference to the case of *Davis Contractors Ltd vs Fareham* (1956) A.C. where the court held that;

> " Frustration occurs whenever the law recognizes that without the default of either party a contractual obligation has become incapable of being performed because the circumstances

in which the performance is called for would render it a thing radically different from that which was undertaken by the contract – 'Non haec in foedera veni."

64. In the case of *Kenya Airways vs- Satwant Singh Flora* (2013) eKLR, the Court of Appeal made the following pronouncement: -

> " ...the doctrine of frustration operates to excuse further performance where;
>
> i. It appears from the nature of the contract and the surrounding circumstances that the parties have contracted on the basis that some fundamental thing or state of things will continue to exist or that some particular person will continue to be available, or that some future event which forms the foundation of the contract will take place, and
>
> ii. before breach, performance becomes impossible or only possible in a very different way to that contemplated without default of either party, and owing to a fundamental change of circumstances beyond the control and original contemplation of the parties. The mere fact that a contract has been rendered more onerous does not of itself give rise to frustration."

65. The Respondent in this case submits that their supposed financier through a letter dated October 7, 2019 communicated its decision conveying the regret that the Respondent could not get financing on account of the short term of the unexpired lease period of the suit property. The Respondent produced the said letter as an exhibit in the case. Though the Respondent had alleged that it had approached several banks, the evidence produced was only in respect of this one supposed financier.

66. The question then before me is whether the refusal by the Respondent's supposed financier to advance money to it due to the short period of the unexpired leasehold term amounted to an unforeseeable event.

67. It is not in doubt that the parties herein contemplated that the purchaser was to seek financing for the purposes of the payment of the balance of the purchase price amounting to Kshs 65,700,000/=.

68. It was definitely the responsibility of the Respondent as a reasonable purchaser, after conducting due diligence of the property and the title documents to also confirm and ascertain that it had the means to honour its obligation to pay the purchase price before committing itself and entering into a legally binding agreement.

69. Isn't it common wisdom and prudence that a person who intends to build a house must first sit down and estimate the cost to see if he has enough money to complete it before laying the foundation, lest, after he has laid the foundation, and is not able to finish it he becomes the laughing stock of the whole town?

70. Likewise, for a reasonable purchaser; he must sit down and consider the price to see if he has the money, enough to pay the purchase price or at least the means to secure the money before entering into a legally binding agreement.

71. The clear intention of the parties entering into the agreement was that it was to be legally binding between them. That is why they went into the great details of spelling out the obligation(s) due to each of them.

72. It is not allowable for the purchaser, as in this matter, to enter into a legally binding agreement then midstream turn around and say, 'I have been frustrated. I am unable to secure the money.' This is not

frustration as defined in the case of Davis Contractors Ltd –vs- Fareham (1957) A.C. This amounts to default on the part of the purchaser, having already committed and entered into a legally binding contract willingly, without coercion or undue influence.

73. Had the Respondent's case been that it had already secured a commitment from a financier before entering into the agreement with the Appellant, the outcome would have been different.

74. My finding in this case is that there was no frustration in this case. The Respondent did not prove it.

75. The conduct of the purchaser (Respondent) after purportedly issuing the termination Notice vide its letter of October 31, 2019, further demonstrates that the Purchaser understood that the agreement was still in force despite the purported rescission on the basis of frustration.

76. In the case of *Kenya Airways vs Satwant Singh Flora* (2013) eKLR, the Court of Appeal was categorical that the doctrine of frustration operates to excuse further performance of the contract. The same position was expressed in the case of *Hirji Mulji vs Cheong Yue Steamship Co Ltd* (1926) AC 497, where the court affirmed that the effect of frustration is that it brings the contract to an immediate end, whether or not the parties wished this to be the result.

77. If the contract was frustrated as the Respondent alleges, what business then did it have securing the professional undertakings after issuing the termination notice? A frustrated contract cannot be breached at the same time. Once a contract has been frustrated, it ceases to be. Pleading that the contract was frustrated and then alleging breach is incongruous.

78. This affirms my holding that the contract was not frustrated as alleged by the Respondent.

79. My finding therefore is that the Respondent did not prove frustration. I disagree with the Learned Magistrate's finding in that respect.

B. Whether the undertakings provided by the Respondent were compliant to the terms of the sale agreement.

80. Though the Respondent pleaded frustration, its claim against the Appellant was based on alleged breach of contract. One of the particulars of breach of contract alleged by the Respondent was that the Appellant, 'failed to complete the transaction despite receiving the undertaking from the Plaintiff on the balance of the purchase price.'

81. The Agreement between the parties was specific on the form and substance of the undertaking that the purchaser was expected to give. The sale agreement was also subject to the law society conditions of sale which oblige a purchaser in a transaction of the nature as the one in this case to give an irrevocable professional undertaking securing payment by the financier's advocates in a form and substance satisfactory to the vendor's advocate.

82. The purchaser/Respondent in this case did not comply with the said term and conditions. The undertaking(s) that the purchaser/Respondent gave did not comply in form and substance as explicitly agreed by the parties in the agreement. The Respondent agrees but expresses the position that what it gave to the Appellant was sufficient for the purposes of the agreement.

83. It is a longstanding principle of law that parties to a contract are bound by the terms and conditions thereof and that it is not the business of the Courts to rewrite such contracts. The Court of Appeal

in the case of *National Bank of Kenya Ltd vs Pipe Plastic Samkolit (K) Ltd* (2001) 2 E.A. 503, (2011) eKLR stated as follows: -

> " ..... A court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge."

84. In *Pius Kimaiyo Langat vs Co-operative Bank of Kenya Ltd* (2017) eKLR, the Court of Appeal further stated that: -

> " We are alive to the hallowed legal maxim that it is not the business of Courts to rewrite contracts between parties, They are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved."

85. In the case of *Danson Muriuki Kihara vs Johnson Kabungo* [2017] eKLR the court cited the case of *Margaret Njeri Muiruri -vs- Bank of Baroda (Kenya) Limited* (2014) eKLR where it was stated:-

> " It is not for the court to rewrite a contract for the parties. As this court held in National Bank of Kenya Ltd vs Pipeplastic Sankolit (K) Ltd. Civil Appeal No. 95 of 1999 " a court of law cannot rewrite a contract with regard to interest as the parties are bound by the terms of their contract."

86. The parties herein had expressly and explicitly agreed on the form and substance of the undertaking that the Respondent was expected to give. Parties had also agreed that the undertaking was to come from the Purchaser's financier in respect of the entire balance of the purchase price. The agreement between the parties did not provide for an undertaking from the Purchaser's Advocates. There was a reason why the parties were explicit in spelling out the obligations of each one of them. If the Purchaser's Advocates had the balance of the purchase price, the easier thing to do would have been to deposit the same with the financier to enable the financier give the undertaking for the entire balance of the purchase price as contemplated in the agreement between the parties.

87. The Learned Magistrate rightly found that the undertaking given by the purchaser did not conform with the terms of the agreement. I agree. The vendor was right and justified to reject the undertakings given by the purchaser. Accordingly, I find that the Purchaser/Respondent herein was in breach of the terms of the agreement. The vendor had a right to retain the deposit paid upon default by the purchaser as agreed in the sale agreement.

Conclusion

88. I therefore allow this Appeal with costs to the Appellant; set aside the Judgment and decision of Hon D W Mburu delivered on October 16, 2020 in the Chief Magistrate's Court at Milimani Commercial Court (CM ELC 5/2020) and substitute it with an order dismissing the Plaintiff (Respondent's) suit.

89. I however, agree with the Learned Magistrate's decision on the issue of costs of the suit before him. I will not disturb the same. It will remain as decided by the Learned Magistrate that each party bears its own costs in respect of the suit before the trial court (CM ELC 5/2020).

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF JULY 2022.

M D MWANGI

JUDGE

In the virtual presence of: -

Mr Maloba for the Appellant.

Mr Wachira for the Respondent.

Court Assistant- Hilda

M D MWANGI

JUDGE