



REPUBLIC OF KENYA



**Maina v Odhiambo (Civil Appeal E312 of 2023) [2025] KEHC 294 (KLR)
(Commercial and Tax) (23 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 294 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL APPEAL E312 OF 2023
H NAMISI, J
JANUARY 23, 2025**

BETWEEN

BENJAMIN LAWINO MAINA APPELLANT

AND

CLEOPA OULO ODHIAMBO RESPONDENT

*(Being an Appeal from the Judgement of Hon. S. K. Onjoro, Chief Magistrate
delivered on 30 May 2023 in Milimani Civil Suit No. E3713 of 2022)*

JUDGMENT

1. The dispute between the Appellant and Respondent arose from the sale of a GTO 52 Four color printer of serial number 688869 which the Respondent sold to the Appellant. By Agreement dated 11 April 2017, the Respondent agreed to sell to the Appellant the said printer for the sum of Kshs 3,600,000/=. Payment was to be made in three instalments. The Appellant made a payment of Kshs 1,500,000/- as the initial payment. Thereafter, the Respondent made demands for the outstanding balance, which the Appellant did not pay.
2. In the lower court, the Respondent sought the following orders:
 - i. The sum of Kshs 2,100,000/=;
 - ii. Interest on (i) above at court rates;
 - iii. Costs of the suit
3. In response to the Plaintiff, the Appellant filed a Statement of Defence and Counterclaim seeking the following reliefs:
 - i. Special damages amounting to Kshs. 10,600,000/-.



- ii. General damages.
 - iii. A refund of Kshs. 1,650,000/-, being the amount paid to the Plaintiff for the purchase of the printer.
 - iv. Interest on a, b and c above at court rates from the date of filing this suit until payment in full.
 - v. Costs of this suit.
 - vi. Any other relief the court may wish to grant.
4. It was the Appellant's case that at the time of purchase, the printer had been kept in a storage facility. The Appellant could not access the printer because the Respondent had rent arrears for the said facility amounting to Kshs 625,000/=. The Appellant sent this sum of money to the Respondent to clear the rent arrears, and thus was able to access the printer. Minor repairs were done on the printer before the Appellant transported it to the Appellant's place of work. The Appellant worked on the printer but soon realised that it had some difficulties. The Appellant averred that subsequently parties renegotiated the price of the printer to Kshs 2,850,000/= and voided the earlier Agreement.
 5. It was the Appellant's contention that thereafter different engineers conducted major repairs on the printer but it was declared to be defective and not fit for purpose. By that time, the Appellant had paid the Respondent a total of Kshs 1,650,000/=. The printer was never used.
 6. In his Counterclaim, the Appellant averred that he incurred loss and damages as a result of the defective printer, from loss of business to the constant major repairs undertaken. He also incurred rental charges from the premises where the printer was stored.
 7. At the hearing, the Respondent adopted his witness statement. In support of his claim, the Respondent produced a copy of the Sale Agreement and the demand letter. On cross examination, the Respondent stated that he was not aware of any mechanical problems with the printer or that the same was not functional. According to him, the machine was functional at the time of sale. No repairs were done on the machine while it was at the Respondent's premises.
 8. The Appellant and his witness, DW2, Kennedy Otieno Adika, testified that the machine was not functional when it was removed from the Respondent's premises. It was the Appellant's testimony that he was not able to test the machine at the time of sale because there was no electricity within the premises. He stated that the machine had cost him Kshs 1,300,000/= as well as the Kshs 1,200,000/= that he had paid towards the Respondent's rent arrears. In support of his claim, the Appellant produced a copy of Lease dated 1 May 2021 between Mr. H. Shah and Wright Press Limited. On cross examination, the Appellant stated that he did not return the printer to the Respondent because the Respondent did not have an office, nor did he ask the Respondent to collect it. Instead, he kept the machine for 5 years.
 9. DW2, Kennedy Adika, adopted his witness statement. He was the one who introduced the Appellant to the Respondent and was present when the parties negotiated the terms of the sale. It was his testimony that the Appellant did not assess the machine before moving it out of the premises.
 10. In its judgement, the trial court observed that the Sale Agreement signed by both parties indicated that the printer was in good working condition, which fact the Appellant and his witness disagreed with. The trial court observed that the Appellant's attempt to contradict the purpose of the Agreement amounted to extrinsic evidence which offends the parole evidence rule. The trial court found no merit in the counterclaim and entered judgement in favor of the Respondent as prayed.



11. Aggrieved by the judgement, the Appellant lodged an appeal on 16 grounds as follows:
- i. That the learned Magistrate erred in law and fact by holding that the Printer of Serial Number 688869 was sold on an “is as it was” basis, contrary to the provisions of the Sale Agreement between the parties dated April 11, 2017.
 - ii. That the learned Magistrate erred in law and fact by holding that the Printer of Serial Number 688869 was sold in good working condition despite the evidence that the said Printer was defective and not fit for the purpose it was purchased for.
 - iii. That the learned Magistrate erred in law and fact by failing to consider the evidence that at the time of purchasing the Printer of Serial Number 688869, there was no electricity at the Respondent’s premises and as such the said Printer was not tested.
 - iv. That the learned Magistrate erred in law and fact by failing to find that the Printer of Serial Number 688869 was not functional when it was transported to the Appellant’s premises and that despite engaging various technicians the said Printer never worked.
 - v. That the learned Magistrate erred in law and fact by failing to find that the Respondent had an obligation to ensure that the Printer of Serial Number 688869 was of merchantable quality and fit for purpose before selling it to the Appellant.
 - vi. That the learned Magistrate erred in law and fact by disregarding the evidence of Kennedy Adika, the Appellant’s witness who confirmed that the Printer of Serial Number 688869 sold to the Appellant was not functional, various technicians were unable to set it up, and that he informed the Respondent of the defective nature of the Printer of Serial Number 688869.
 - vii. That the learned Magistrate erred in law and fact by failing to find that the Respondent was aware of the defective nature of the Printer of Serial Number 688869.
 - viii. That the learned Magistrate erred in law and fact by failing to find that the Appellant kept the Printer of Serial Number 688869 as lien for part of the purchase price already paid to the Respondent.
 - ix. That the learned Magistrate erred in law and fact by failing to find that the Printer of Serial Number 688869 was too big and could not fit at the Respondent’s home and therefore he could not take it back to his house.
 - x. That the learned Magistrate erred in law and in fact by failing to find that the formation of a contract must have consensus ad idem, or “meeting of the minds” and that the absence of a genuine intention to enter contract signifies the absence of a contractual relationship.
 - xi. That the learned Magistrate erred in law and in fact by failing to find that the executed Sale Agreement dated April 11, 2017 which is vitiated by deceit or 2 3 fraudulent misrepresentation is a mere appearance of the Appellant’s initial intention to purchase the Printer of Serial Number 688869, and not the genuine intention of the Appellant that would constitute meeting of the minds required to form an actual and enforceable contractual relationship.
 - xii. That the learned Magistrate erred in law and in fact by failing to find that the Appellant’s evidence that the Sale Agreement dated April 11, 2017 was entered into by way of the mischief of misrepresentation is admissible rather than excluded by the parol evidence rule.
 - xiii. That the learned Magistrate erred in law and in fact by failing to find that the Respondent having fraudulently misrepresented the facts as to the condition of the Printer of Serial



Number 688869 to the Respondent, the Sale Agreement dated April 11, 2017 signed between the Respondent and the Appellant became vitiated, unenforceable, and therefore cannot be salvaged by the parole evidence rule.

- xiv. That the learned Magistrate erred in law and fact by failing to find that the Appellant's counterclaim was merited.
 - xv. That the learned Magistrate erred in law and fact by failing to find that the Appellant had incurred damages as a result of the defective nature of the Printer of Serial Number 688869.
 - xvi. That the learned Magistrate erred in law and fact by failing to award the Appellant the reliefs sought in his Statement of Defence and Counterclaim dated September 23, 2022.
12. Parties canvassed the Appeal by way of written submissions. In his submissions, the Appellant summarised his grounds of appeal in 3 issues for determination, namely:
- i. Whether the Trial Court erred in law by failing to find that the Printer was not of merchantable quality and unfit for purpose;
 - ii. Whether there was misrepresentation; and
 - iii. Whether the Appellant was entitled to reliefs sought in the counterclaim.
13. On the first issue, the Appellant relied on the provisions of Section 16 of the *Sale of Goods Act*, Cap 31 and the cases of Wood Products Ltd -vs- Rufus Kithela Kobia [2019] eKLR and Ken Aluminium Products Ltd -vs- High Tech Air Conditioning & Refrigeration Ltd [2018] eKLR. The Appellant submitted that the printer was defective and never used by the Appellant. It is apparent, therefore, that the same was not of merchantable quality and not fit for the purpose for which it was bought.
14. In response to this, the Respondent submitted that merchantable goods need not be outstanding or superior in quality. They need only be fit for the ordinary purpose for which they are used. In this instance, the ordinary purpose was printing. The Respondent if upon delivery to the Appellant, the printer was unmerchantable then the Appellant was entitled to reject it rather than keep it for 5 years claiming to fix it. He relied on the cases of Rogers -vs- Parish (Scarborough) Ltd [1986] EWCA Ci J1105-6 and Vivid Printing Equipment Solutions Ltd -vs- Monicah Ng'ong'oo t/a Identity Partner [2019] eKLR.
15. On the second issue of misrepresentation, the Appellant submitted that Respondent having fraudulently misrepresented the facts as to the condition of the printer, the Sale Agreement dated 11 April 2017 became vitiated and thus, enforceable. The Appellant argued that common law stipulates that the vitiating factors of contract include misrepresentation. He relied on the case of Gideon Kitavi Mbuuko & Another -vs- Cosmas Mrombo Moka t/a Madaltex Enterprises [2019] eKLR
16. On his part, the Respondent submitted that it is ridiculous for the Appellant to claim misrepresentation 7 years into the contract. He contended that the Appellant, being a professional in the printing industry, is well versed with matters regarding printers as compared to the Respondent.

Analysis and Determination

17. I have read the Record of Appeal, Memorandum of Appeal and respective submissions. My duty as the first appellate court is to concentrate on whether the trial court made errors of judgement as claimed by the Appellant.
18. I have gone through the evidence produced before the trial court as well as the testimonies of the witnesses. The Respondent produced a copy of Sale Agreement signed by both parties and witnessed



by Kennedy Otieno Adika, DW2. The Sale Agreement indicates the agreed price of the printer to be Kshs 3,600,000/=. Further, the printer is indicated to be in good working condition.

19. In his testimony, the Respondent acknowledged having received Kshs 1,500,000/- from the Appellant.
20. Other than the testimony of the Appellant, no evidence was led on the issue of a renegotiated price for the Printer as claimed by the Appellant. There is no documentary evidence produced vitiating the initial executed Agreement. The only documentary evidence produced by the Appellant is a copy of Lease. Its relevance herein is not apparent.
21. From my own analysis of the matter, based on the evidence, the Respondent duly discharged his burden of proof. The Appellant, on the other hand, did not provide any evidence to substantiate the claims in his Counterclaim. There was no evidence that he had paid Kshs 1,650,000/= and not Kshs 1,500,000/=. No receipts or invoices were produced to prove the expenses incurred in repairing the printer, if at all.
22. To my mind, the Appellant's argument that the printer did not work and was not fit for purpose is not backed by any documents to prove that this was the case. Further, there is no evidence that the Appellant informed the Respondent that the machine was not working, or even tried to return it to the Respondent. Instead, he kept it for 5 years.
23. The question that arises is whether this court sitting on appeal has any reason to disturb the findings of the trial court. In *United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd [1985] E.A.*, the court had this to say on this issue:

“The Court of Appeal will not interfere with a discretionary decision of the Judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the Judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the Judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong.”

24. I find the trial court not guilty of any of the factors stated above. Consequently, I find no reason to interfere with the trial court's discretion. This appeal is hereby dismissed with costs to the Respondent.

DATED AND DELIVERED AT NAIROBI THIS 23 DAY OF JANUARY 2025.

HELENE R. NAMISI

JUDGE

Delivered on virtual platform in the presence of:

..... for the Appellant

..... for the Respondent

Libertine AchiengCourt Assistant

