



**Nyakirario & 2 others (As Officials of One Family Dandora
Phase II Association) v Nakeel (Civil Appeal E125 of 2022)
[2025] KEHC 295 (KLR) (Commercial and Tax) (23 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 295 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL APPEAL E125 OF 2022**

**H NAMISI, J
JANUARY 23, 2025**

BETWEEN

**LUCY NYAKIRARIO 1ST APPELLANT
SUSAN WANJIKU 2ND APPELLANT
JOSEPH SHIVACHI 3RD APPELLANT
AS OFFICIALS OF ONE FAMILY DANDORA PHASE II ASSOCIATION**

AND

JOSEPH OLOIJE MUESHA NAKEEL RESPONDENT

(Being an Appeal from the Judgement of Hon. Caroline Cheptoo Kemei, Principal Magistrate delivered on 6 September 2022 in Milimani Civil Suit No. 6005 of 2015)

JUDGMENT

1. The dispute between the Appellants and Respondent relates to the sale and purchase of land. By Plaint dated 1 October 2015, the Appellants instituted proceedings against the Respondent seeking:
 - i. The sum of Kshs 843,500 together with interest thereon at 24% per annum from due date of 15 November 2013 until payment in full;
 - ii. Costs of the suit together with interest thereon at court rates;
 - iii. Such other or further relief as the Court may deem just and expedient.
2. The Appellants' claim was that vide Agreement dated 15 November 2013, the Respondent agreed to sell to the Appellants a parcel of land known as Plot 1304 Imororo/Mashuru Group Ranching.



According to the witness statement by the Appellants, the property was registered in the name of King'alolo ole Matura and was to be transferred to the Defendant. The agreed price was Kshs 1,600,000/=. The Appellants paid a deposit of Kshs 720,000/= upon execution of the Agreement. A further Kshs 480,000/- was to be paid within 90 days, and the balance to be paid in exchange for the title deed.

3. It was the Appellants' case that upon payment of the Deposit and the lapse of 90 days, the Respondent indicated that he was unable to transfer the land to himself, thus unable to obtain the Land Control Board Consent to transfer the land to the Appellants. The Appellants demanded a refund of Kshs 720,000/= with interest thereon at 24% per annum, but the Respondent did not refund the monies.
4. Additionally, the Appellants incurred expenses of Kshs 123,500/- relating to the transaction, for which they sought a refund. These expenses included transport costs to Imaroro Mashure, trips to the District Commissioner's office in Kajiado on six occasions, signing of the Agreement as well as legal fees.
5. In denying the claim, the Respondent averred that it was the Appellants who breached the terms of the Agreement.
6. At the hearing, PW1, Joseph Muhanji Shivachi, adopted his witness statement dated 1 October 2015. The Witness produced the Agreement dated 15 November 2013, which indicated the payment terms as follows:

The purchase price in the sum of Kshs 1,600,000/= shall be paid to the Vendor as follows:

- a. The sum of Kshs 720,000/= shall be paid at the execution of this Agreement, receipt whereof is acknowledged by the Vendor signing this Agreement;
 - b. A further sum of Kshs 480,000/= shall be paid within 90 days of signing this Agreement;
 - c. The balance in the sum of Kshs 400,000/= shall be paid in exchange for the title deed and completion documents for the 20 acres.
7. It was PW1's testimony that the deposit of Kshs 720,000/- was paid as agreed. The Appellants were to pay Kshs 480,000/= but insisted on transfer of the land to the Respondent before making the payment. PW1 also produced copies of invoices, receipts and vouchers as proof of the expenses incurred in pursuing the land transaction. These amounts relate to meals, taxi services, allowances for meeting the Advocate, allowances for site visits. Importantly, I note that the visit to the Lands Office Kajiado to confirm the real owner of the land was done on 27 November 2013.
 8. On cross examination, PW1 admitted that they did not conduct a search prior to signing the Agreement. He admitted that there is no provision in the Agreement that provided for the payment of Kshs 480,000/- after transfer. Further, there was no agreement between parties on refund of monies incurred.
 9. The Respondent adopted his witness statement dated 11 December 2015. He confirmed receipt of Kshs 720,000/- only and stated that the Appellants informed him that they would pay the second instalment after seeking the title deed. On cross examination, he stated that he had offered to refund the Appellants their money but they refused.
 10. In its judgement, the trial court identified two issues for determination; (i) whether the Defendant breached the agreement dated 15 November 2013; and (ii) whether the Plaintiff is entitled to the prayers sought in the Plaint.



11. With respect to the first issue, the trial court relied on the long-standing principle of law that parties to a contract are bound by the terms and conditions thereof and that it is not the business of courts to rewrite such contracts. The trial court cited the Court of Appeal decision in *National Bank of Kenya Ltd -vs- Pipe Plastic Samkolit (K) Ltd (2002) 2 E.A. 503 (2011) eKLR* and *Pius Kimaiyo Langat -vs- Cooperative bank of Kenya Ltd [2017] eKLR*. The trial court found that the Appellants failed to pay the Kshs 480,000/= within the agreed period. Therefore, the Appellants were in breach of the Agreement.
12. Having found that the Appellants were the ones in breach, the trial court held that the Appellants were only entitled to a refund of Kshs 720,000/=, with interest thereon at court rates from the date of judgement until payment in full. Each party was ordered to pay their own costs of the suit.
13. Aggrieved by the judgement, the Appellants lodged an appeal on the following grounds:
 - i. That the learned Magistrate erred in law and in fact by failing to find that there was a breach of contract on the part of the Respondent;
 - ii. That the learned Magistrate erred in law and fact by failing to award special damages that were pleaded and strictly proved;
 - iii. That the learned Magistrate erred in law by showing open bias and failing to properly evaluate the evidence placed before her;
 - iv. That the learned Magistrate erred in law and fact by giving weight and attention to the Respondent's submissions while completely ignoring the Appellants' submissions;
 - v. That the learned Magistrate erred in law and fact by conferring herself a non-existent discretion while making a decision on interest that is expressly legislated upon;
 - vi. That the learned Magistrate erred in law and fact by failing to award the Appellant the costs of the suit
14. Parties canvassed the Appeal by way of written submissions. In their submissions, the Appellants rehashed the proceedings in the trial court and barely submitted on their grounds of appeal, save on the issue of interest. They argued that no reasonable person in his right senses would make further payments to a person who had demonstrated that they were unable to meet their part of the contractual obligations.
15. On interest, they relied on the cases of *Jane Wanjiku Wambu -vs- Antony Kigamba Hato & 3 Others, HCCA 32 of 2016* as well *Silas Mutua Mberia vs Muthoni Njue Veronica, HCCA E 005 of 2021*.
16. On his part, the Respondent relied on the numerous cases, including those cited by the trial court, in arguing that courts cannot re-write contracts for parties.

Analysis and Determination

17. I have read the Record of Appeal, Memorandum of Appeal and respective submissions. It is the duty of a first appellate court to re- appraise and re-analyse the evidence on record and arrive at its own conclusion and give reasons either way – see *Sumaria & Another vs Allied Industries Limited (2007) 2 KLR*. The Court has also to appreciate that in the discharge of its aforesaid mandate the Court should be slow in moving to interfere with a finding of fact by a trial court unless it was based on no evidence, it was based on a misapprehension of the evidence or the Magistrate had been shown demonstrably to have acted on wrong principle in reaching the finding he did –see *Musera vs Mwechelesi & another (2007) 2KLR 159*.



18. 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.”

19. In its recitals, the Agreement dated 15 November 2013 provides as follows, inter alia:

- (a) the Vendor is the beneficial owner of the property known as 30 acres of the property known as Plot 1304 Imaroro/Mashuru Group Ranch having purchased the same from Philip Ndicho Kagotho t/a Acacia Honey and Honey Products;
- (b) the said Philip Ndicho Kagotho t/a Acacia Honey and Honey Products on the other hand purchased the same from Moses Ole Nkirimpai King'alolo whereas the registered owner of the property is King'alolo ole Matura Pololo whose consent has been sought and obtained for the transaction herein;

20. It is clear from the onset that the Appellants were aware that the person they entered into contract with was not the registered owner of the property. However, the issue for determination herein is whether the Respondent breached the contract, and subsequently, if the Appellants are entitled to the reliefs they sought in the trial court.

21. I have gone through the evidence produced before the trial court as well as the testimonies of the witnesses. It is not in dispute that after payment of the deposit of Kshs 720,000/=, the Appellants were required to make a further payment of Kshs 480,000/- within 90 days of execution of the Agreement. The Appellants' argument is that they could not make further payment without evidence that the title has since been transferred to the Respondent. That requirement was not part of the Agreement. When the Appellants signed the Agreement, they were fully aware that the property was not registered in the name of the Respondent. In fact, from the recitals, it is clear that the property had been the subject of several prior sale transactions. Yet, the Appellants agreed to the terms and conditions.

22. In *Centurion Engineers & Builders Limited v Kenya Bureau of Standards (Civil Appeal E398 of 2021)* [2023] KECA 1289 (KLR) (27 October 2023) (Judgment), the Court of Appeal stated:

As this Court has severally stated, and now a longstanding principle of law, that parties to contract are bound by the terms and conditions thereof, and that it is not the business of courts to rewrite such contracts. In *National Bank of Kenya Limited v Pipe Plastic Samkolit (K) Ltd* [2002] 2 EA 503 [2011] eKLR at 507, this Court stated: “A court of law cannot rewrite a contract between parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded or proved.” See also *Pius Kimaiyo Langat v Co-operative Bank of Kenya Limited* [2017] eKLR.

In the House of Lord's decision in *Brogden v Metropolitan Rly Co* [1876-77] LR 2 APP CAS 66, Lord Blackburn held as follows: “I have always believed the law to be this, that when an offer is made to another party and in that offer, there is a request express or implied



that he must signify his acceptance by doing some particular thing, then as soon as he does that thing, he is bound.”

23. Needless to say, I find that the trial court did not err in its finding and find no reason to interfere with its decision. In view of the fact that the Appellants were the ones in breach of the agreement, then the remedy available to them was refund of the monies paid, being Kshs 720,000/=.

24. In the premise, 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 OF THE HIGH COURT

Delivered on virtual platform in the presence of:

..... for the Appellants

..... for the Respondent

Libertine Achieng.....Court Assistant

