



REPUBLIC OF KENYA



**Uba Kenya Bank Limited v Top Image Africa Limited (Civil Appeal E162 of 2022)
[2025] KEHC 254 (KLR) (Commercial and Tax) (23 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 254 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL APPEAL E162 OF 2022
H NAMISI, J
JANUARY 23, 2025**

BETWEEN

UBA KENYA BANK LIMITED APPELLANT

AND

TOP IMAGE AFRICA LIMITED RESPONDENT

(Being an Appeal from the Judgement and Decree of Hon. H. M. Nyaberi, Chief Magistrate delivered on 6 October 2022 in Milimani Civil Suit No. 9380 of 2018)

Agreement via email correspondence formed a legally binding contract.

The case revolved around a forex exchange in which the exchange converted currency at 1% lower than the indicative rate set by the Central Bank. As a result, a loss of Kshs 12,300,000 was suffered. At the trial court it was held that the appellant's failure to issue the basis of their exchange rate while asked by the respondent and during the course of the hearing clearly proved the claim of withholding information. The appellant owed the respondent a duty of care that would have prevented the respondent from suffering such a colossal loss. On appeal the court found that the agreed upon exchange rate via email formed a contract that was legally binding. The High Court allowed the appeal.

Reported by John Ribia

Financial Law – forex exchange – indicative rate – purpose - whether the indicative rate of forex exchange that was set by the Central Bank was binding or was to be used as a reasonable estimate of a currency's market price - Central Bank of Kenya (Foreign Exchange Business) Regulations, 2007 (cap 491 Sub Leg).

Law of Contract – correspondence – email correspondence – agreement via email correspondence – whether such an agreement constituted a binding contract - whether email correspondence in which parties agreed on the price to trade forex constituted a binding contract.

Financial Law – forex exchange – agreement to trade currencies at a certain rate – allegation that the rate was fraudulent after the trade already took place - whether a party that had agreed to trade currencies at an agreed



forex exchange rate could sue the forex exchange for applying fraudulent exchange rates – Central Bank of Kenya (Foreign Exchange Business) Regulations, (cap 491 Sub Leg); Constitution of Kenya article 46(1); Consumer Protection Act, (cap 501) section 4.

Law of Evidence – *burden of proof – burden of proof in commercial disputes - who bore the burden of proof in commercial disputes - Evidence Act (cap 80) sections 107, 109, and 112.*

Brief facts

The respondent instituted proceedings against the appellant at the trial court for breach of contract. The respondent was a customer of the appellant, which provided banking and financial services. Between February 9, 2018 and March 26, 2018, the respondent sought to convert and/or secure the value of its funds held in Nigerian Naira to Kenya Shillings at the prevailing exchange rate applicable and as approved by the Central Bank of Kenya. The respondent alleged that the appellant misled the respondent into believing that the exchange rate at the material time was 0.18 instead of 1.18. Based on that information, the respondent authorised the conversion of Nigerian Naira 123,000,000, leading to a loss of Kshs 12,300,000. Instead of being credited with the sum of Kshs 34,300,000, the respondent's account was credited with Kshs 21,140,000. The respondent alleged fraud and malice on the part of the appellant.

The trial court found that the appellant's failure to issue the basis of their exchange rate while asked by the respondent and during the course of the hearing clearly proved the claim of withholding information. The appellant owed the respondent a duty of care that would have prevented the respondent from suffering such a colossal loss. The court found that the bargain was manufactured only to the detriment of the respondent. The trade was unconscionable and improper.

Aggrieved the appellant filed the instant appeal.

Issues

- i. Whether email correspondence in which parties agreed on the price to trade forex constituted a binding contract.
- ii. Whether the indicative rate of forex exchange that was set by the Central Bank was binding or was to be used as a reasonable estimate of a currency's market price.
- iii. Whether a party that had agreed to trade currencies at an agreed forex exchange rate could sue the forex exchange service provider for applying fraudulent exchange rates.
- iv. Who bore the burden of proof in commercial disputes?

Held

1. It was 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.
2. Section 107 (1) of the Evidence Act set the legal burden of proof upon the party who invoked the aid of the law and substantially asserted the affirmative of the issue. Sections 109 and 112 set the evidential burden that was cast upon any party who desired the court to believe in the existence of a particular fact. He who asserted must prove.
3. The burden of proving that the appellant applied erroneous or fraudulent exchange rates lay on the respondent. The respondent produced a printout from an unknown online source indicating exchange rates for various currencies on March 26, 2018. The respondent did not produce evidence of the Central Bank of Kenya exchange rates for the Nigerian Naira at that material time. The finding, therefore, by the trial court that the prevailing exchange rate at the time was 0.28% was misguided.
4. The Financial Markets department under the Central Bank of Kenya compiled indicative foreign exchange rates daily for use by the general public. Those rates reflected the average buying and selling rates of the major participants in the foreign exchange market at the open of trade every day, thus providing a good indicator for any interested party on the value of the shilling on any particular day.
5. An indicative rate was a reasonable estimate of a currency's current market price. It was provided by a market maker to an investor upon request. The indicative rates were provided by the Central Bank



- of Kenya. However, those rates were not fixed, and thus fluctuated according to free market forces of supply and demand. Parties negotiated and agreed on the rate of exchange.
6. Correspondence was exchanged confirming the rate at 0.18% on February 28, 2018 and March 2018. The email correspondence essentially constituted a contract between the appellant and respondent for the sale and purchase of Kenya Shillings. The agreed rate was 0.18%. Since none of the parties complained of any vitiating factors that they could each have relied on to have avoided the contract between them, they were accordingly bound by the terms of the agreement.
 7. Parties to a contract were bound by the terms and conditions thereof and that it was not the business of the courts to rewrite such contracts. The respondent's suit was not proved. There was no breach of contract by the appellant and no legal basis for the finding by the trial court.

Appeal allowed.

Orders

- i. *Judgement of the trial court rendered on October 6, 2022 set aside.*
- ii. *Judgement of the trial court rendered on October 6, 2022 was substituted with an order dismissing the suit with costs to the appellant.*
- iii. *The appellant was awarded costs of the appeal, assessed at Kshs 50,000/=.*

Citations

Cases

Kenya

1. *Euromec International Limited v Shandong Taikai Power Engineering Company Limited* Civil Case E527 of 2020; [2021] KEHC 93 (KLR) - (Mentioned)
2. *Gova, Ratilal Sumaria & another v Allied Industries Limited* Civil Appeal 203 of 2002; [2007] KECA 501 (KLR) - (Mentioned)
3. *Hakizimana, Abdoul Abdulkarim v Arrow Motors (EA) Ltd & another* Petition 367 of 2016; [2017] KEHC 9674 (KLR) - (Mentioned)
4. *Kimaiyo, Pius Langat v Co-operative Bank of Kenya Limited* Civil Appeal 48 of 2015; [2017] KECA 152 (KLR) - (Explained)
5. *Musera vs Mwechelesi & another* No 279 of 1999; [2007] KECA 84 (KLR) - (Mentioned)
6. *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another* Civil Appeal 95 of 1999; [2001] KECA 362 (KLR) - (Explained)
7. *Nyambura, Jennifer Kamau v Humphrey Mbaka Nandi* Civil Appeal 342 of 2010; [2013] KECA 423 (KLR) - (Explained)

Statutes

Kenya

1. Central Bank of Kenya (Foreign Exchange Business) Regulations, 2007 (cap 491 Sub Leg) In general - (Cited)
2. Constitution of Kenya article 46(1) - (Interpreted)
3. Consumer Protection Act (cap 501) section 4 - (Interpreted)
4. Evidence Act (cap 80) sections 107(1); 109; 112 - (Interpreted)

Advocates

Mr Mbabu for the appellant.

Mr Museve for the respondent.



JUDGMENT

1. By plaint dated September 6, 2018, the respondent instituted proceedings against one Kevin Ng'ang'a and the appellant for breach of contract. It was the respondent's case that the respondent was a customer of the appellant, which provided banking and financial services through account number 5501xxxxxxxxxx. Between February 9, 2018 and March 26, 2018, the respondent sought to convert and/or secure the value of its funds held in Nigerian Naira to Kenya Shillings at the prevailing exchange rate applicable and as approved by the Central Bank of Kenya. Kevin Ng'ang'a, an employee of the appellant, misled the respondent into believing that the exchange rate at the material time was 0.18 instead of 1.18. Based on this information, the respondent authorised the conversion of Nigerian Naira 123,000,000/=, leading to a loss of Kshs 12,300,000/=. Instead of being credited with the sum of Kshs 34,300,000/=:, the respondent's account was credited with Kshs 21,140,000/=:.
2. The respondent alleged fraud and malice on the part of the appellant, which was a breach of contract by the appellant and Kevin Ng'ang'a. In the plaint, the respondent sought the following reliefs:
 - i. A declaration that the defendant's conversion of Nigerian Naira to Kenya Shillings for the plaintiff was fraudulent and against the Central Bank of Kenya guidelines on applicable rate at the material time;
 - ii. Judgement in the sum of Kshs 12,300,000/= in respect of the outstanding amount;
 - iii. Damages in respect of the loss of opportunity to invest the sum of Kshs 12,300,000/=:;
 - iv. General damages for the fraud and breach of contract between the plaintiff and the defendant;
 - v. Costs of the suit with interest on the judgement sum at the rate of 24% per annum in (i) and (ii) above.
3. The appellant entered appearance and filed a statement of defence denying the claim. The appellant averred that sometime in January 2018, the respondent approached the appellant seeking assistance to convert funds that were held in local currency from different countries in West Africa, including Nigeria and Cameroon. The respondent intimated that the funds had been held in the respective countries for a long period of time due to forex scarcity. Upon review, the appellant suggested to the respondent that the respondent begins by converting the Nigerian Naira. The appellant could purchase the Naira and sell to the respondent Shillings as and when the need for the Naira arose. To assist the respondent, the respondent opened a Naira call account with the appellant, earning an interest of 5%. The respondent funded the account with NGN 123,000,000/=:.
4. The appellant averred that on February 28, 2018, the appellant had a demand for NGN 50,000,000 and approached the respondent with an offer to convert the NGN 50,000,000/= to Kenya Shillings at the rate of 0.18. The respondent agreed to the terms and authorised the conversion. Consequently, the sum of Kshs 9,000,000/= was credited to the respondent's account. The balance of NGN 73,000,000/= held in the call deposit account continued to earn the agreed interest.
5. On March 26, 2018, the appellant had a demand for Nigerian Naira and approached the respondent with an offer to convert the NGN 73,000,000/= to Kenya Shillings at the rate of 0.18, which would be an equivalent of Kshs 13,140,000/=: . The respondent agreed and authorised the conversion. The sum of Kshs 13,140,000/= was deposited in the respondent's account. The appellant denied claims of malice or fraud.



6. At the hearing, PW1, Jeniffer N Barasa, CEO of the plaintiff, testified. She adopted her witness statement dated September 6, 2018 and produced various documents including email correspondence between the parties, bank statements and copies of the applicable Central Bank of Kenya money conversion and exchange rates. On cross examination, PW1 confirmed that on February 28, 2018, she wrote to the Bank authorizing the conversion of NGN 50,000,000 into Kenya Shillings at the exchange rate of 0.18%. In March 2018, she authorised conversion of NGN 73,000,000/=. PW1 also confirmed that she did not have any official document from the Central Bank of Kenya confirming the exchange rates. Instead, she produced a document from a website.
7. Kevin Ng'ang'a testified on behalf of the appellant. He adopted his witness statement dated November 9, 2020 and produced various documents. It was his testimony that the foreign exchange market works on demand and supply basis. On cross examination, the witness stated that the bank only informs customers of indicative rates. As at February 28, 2018, the indicative exchange rate was 0.18%. It was his testimony that the Central Bank of Kenya does not publish the conversion rates for Nigerian Naira to Kenya Shillings. The bank offering the exchange is the one that controls the rates, subject to the guidelines by the Central Bank of Kenya.
8. In its judgement, the trial court considered the following issues: whether the plaintiff had proved its case in a balance of probabilities and whether the plaintiff was entitled to the prayers sought. On the first issue, the trial court relied on the provisions of article 46(1) of The *Constitution*, section 4 of the *Consumer Protection Act* and several cases including *Hakizamana Abdoul Abdul v Arrow Motors (EA) Ltd & another* [2017] eKLR and *Euromec Internation Ltd v Shandong Taikai Power Engineering Company Ltd* (Civil Case E527 of 2020) [2021] KEHC 93 (KLR).
9. The trial court found that the appellant's failure to issue the basis of their exchange rate while asked by the respondent and during the course of the hearing clearly proves the claim of withholding information. The appellant owed the respondent a duty of care that would have prevented the respondent from suffering such a colossal loss. The court found that the bargain was manufactured only to the detriment of the respondent. The trade was unconscionable and improper.
10. Judgement was entered in favor of the respondent against the appellant as follows:
 - i. A declaration that the defendants conversion of the Nigerian Naira to Kenya Shillings for the plaintiff was unconscionable and against the Central Bank of Kenya guidelines on applicable rate at the material time;
 - ii. Judgement for the plaintiff as against the 2nd defendant for the sum of Kshs 12,300,000 being the balance amount at the exchange rate of 0.28%
 - iii. Costs of the suit
 - iv. Interest at court rates on (ii) above from the date of filing the suit.
11. Aggrieved by the judgement, the appellant lodged an appeal on 12 grounds as follows:
 - i. The learned magistrate erred in law and in fact by finding that the agreement between both parties to convert Nigerian Naira into Kenya Shillings was unconscionable and against the Central Bank of Kenya guidelines;
 - ii. The learned magistrate in rendering the said judgement misdirected himself in law by re-writing the agreement between parties contrary to the basic principles of contract law which dictate that parties are bound by a contract and a court cannot purport to re-write it;



- iii. The learned magistrate erred in law by shifting the burden of proof in the suit to the appellant to disprove the allegations made by the Respondent on the alleged fraud, misrepresentation and withholding of material information without the responding having initially discharged its legal burden of proof on the said allegations;
 - iv. The learned magistrate failed to correctly apply the provisions of section 107 of the *Evidence Act* on burden of proof by holding that the respondent had successfully discharged its burden of proof on a balance of probabilities;
 - v. That the learned magistrate erred in law and in fact by failing to consider that the exchange rate/conversion rate between Nigerian Naira and the Kenya Shillings is dependent on demand and supply of the said currencies;
 - vi. The learned magistrate erred in law and in fact by failing to note that the central Bank of Kenya does not publish indicative rates for the Nigerian Naira;
 - vii. The learned magistrate erred both in law and fact in hiding that the conversion rate applied in the transaction between the parties was fraudulent and against the *Central Bank of Kenya (Foreign Exchange Business) Regulations* 2007 and Central Bank of Kenya Prudential Guidelines 2013 despite the respondent failing to discharge its burden of proving the proper and prevailing market conversion rates;
 - viii. The learned magistrate misdirected himself in fact and in law by relying on evidence of no probative value obtained from a separate forex trader to make a finding on what was the applicable exchange rate as at the time of the impugned transactions;
 - ix. The learned magistrate erred in law and in fact by using the conversion rates as advertised by a separate forex trader in awarding the sum of Kshs 12,300,000/= to the Respondent;
 - x. The learned magistrate erred in fact by failing to note that the respondent's plaint pleaded a different and contradictory exchange rate to what was stated during evidence;
 - xi. The learned magistrate erred in fact and in law by failing to hold that parties are bound by their pleadings and that the contradicting rates given by the respondent was fatal to the case;
 - xii. The learned magistrate erred in law and fact by failing to consider the facts, the evidence on record and the submissions of the appellant resulting in miscarriage of justice.
12. Parties canvassed the appeal by way of written submissions. In their submissions, the appellant identified the following issues for determination:
- i. Whether the learned Magistrate erred in his judgement by rewriting the agreement between parties contrary to the laws of contract;
 - ii. Whether the learned Magistrate erred in the application of section 107 of the *Evidence Act* on burden of proof by holding that the respondent had successfully discharged its burden of proof on a balance of probabilities by proving that the Bank applied an erroneous/fraudulent exchange rate;
 - iii. Whether the learned Magistrate erred in finding that the appellant was in contravention of the *Central Bank of Kenya (Foreign Exchange Business) Regulations* 2007 and Central Bank of Kenya Prudential Guidelines 2013;



- iv. Whether the learned Magistrate erred in failing to consider the exchange rate as pleaded by the respondent noting that parties are bound by their pleadings;
- v. Who should bear costs of the suit

Analysis & Determination

13. 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 v 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 v Mwechelesi & another* [2007] 2 KLR 159.
14. I have looked at the evidence as presented to the trial court. It is not in dispute that the respondent was a customer of the appellant, holder of account number 5501xxxxxxxxxx. It is also not in dispute that the respondent requested the appellant to convert the Nigerian Naira it held into Kenya Shillings.
15. The respondent’s case was that in February 2018, they instructed the appellant to convert NGN 50 million to Kenya Shillings. The appellant gave the respondent the exchange rate of 0.18%, whereas the applicable Central Bank of Kenya rate at the time was 1.18%. Thereafter, in March 2018, the respondent instructed the appellant to convert NGN 73 million to Kenya Shillings, which conversion was done at the rate of 0.18% instead of 1.18%, which was the prevailing market rate at the time. According to the respondent, the appellant breached its contract with the respondent by failing to apply the applicable prevailing exchange rate at the material time and misleading the respondent on the prevailing exchange rate.
16. In my considered view, the main issue in this appeal is whether the Respondent discharged its burden of proving that the Appellant applied an erroneous/fraudulent exchange rate. As a general proposition, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. Section 107(1) of the *Evidence Act*, cap 80 provides thus:

107.

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
17. There is, however, the evidential burden that is cast upon any party who desires the court to believe in the existence of a particular fact. Sections 109 and 112 of the *Evidence Act* provide as follows:

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.



18. Simply put, he who asserts must prove. This was augmented by the Court of Appeal in [*Jennifer Nyambura Kamau v Humphrey Mbaka Nandi*](#) NYR CA Civil Appeal No 342 of 2010 [2013] eKLR as follows

“We have considered the rival submissions on this point and state that section 107 and 109 of the *Evidence Act* places the evidential burden upon the appellant to prove that the signature on these forms belong to the Respondent. Section 107 of the *46 Evidence Act* provides that “whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.” Section 109 stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. If an expert witness was necessary, the evidential burden of proof was on the appellant to call the expert witness. The appellant did not discharge the burden and as section 108 of the *Evidence Act* provides, the burden lies on that person who would fail if no evidence at all were given on either side.

19. In this instance, the burden of proving that the appellant applied erroneous or fraudulent exchange rates lay on the respondent. In proof of this, the respondent produced a printout from an unknown online source indicating exchange rates for various currencies on March 26 2018. The respondent did not produce evidence of the Central Bank of Kenya exchange rates for the Nigerian Naira at that material time. The finding, therefore, by the trial court that the prevailing exchange rate at the time was 0.28% was misguided, in my view.
20. Further, the Financial Markets department under the Central Bank of Kenya compiles indicative foreign exchange rates daily for use by the general public. These rates reflect the average buying and selling rates of the major participants in the foreign exchange market at the open of trade every day, thus providing a good indicator for any interested party on the value of the shilling on any particular day.
21. An indicative rate is a reasonable estimate of a currency’s current market price. It is provided by a market maker to an investor upon request. In our case, the indicative rates are provided by the Central Bank of Kenya. However, these rates are not fixed, and thus fluctuate according to free market forces of supply and demand. Based on this, parties negotiate and agree on the rate of exchange.
22. In the case herein, there is evidence of negotiation or discussion between the appellant and respondent about the exchange rate on February 28, 2018 and March 2018. This is not in dispute. Upon meeting of minds, correspondence was exchanged confirming the rate at 0.18%, each time. The email correspondence essentially constitutes a contract between the appellant and respondent for the sale and purchase of Kenya Shillings. The agreed rate is 0.18%. As submitted by the appellant, since none of the parties complained of any vitiating factors that they could each have relied on to have avoided the contract between them, they were accordingly bound by the terms of the said Agreement.
23. 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. In [*National Bank of Kenya Ltd v Pipe Plastic Samkolit \(K\) Ltd*](#) (2002) 2 EA 503, (2011) eKLR the Court of Appeal stated as follows: -

“A court of law cannot rewrite 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.”



24. In *Pius Kimaiyo Langat v Co-operative Bank of Kenya Ltd* (2017) eKLR the Court of Appeal further stated:

“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.”

25. Based on the evidence presented before the trial court, the respondent’s suit was not proved. There was no breach of contract by the appellant and no legal basis for the finding by the trial court. Having reached this conclusion, further analysis of the grounds of appeal would be purely academic.

26. Accordingly, the appeal is allowed and the judgement of the trial court rendered on October 6, 2022 is hereby set aside. I hereby substitute that finding with an order dismissing the suit with costs to the appellant. The appellant shall also have costs of the appeal, assessed at Kshs 50,000/=.

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:

Mr. Mbabu..... for the Appellant

Mr. Museve..... for the Respondent

Ms. Libertine Achieng Court Assistant

