



**Promotions v Standard Group Plc (Civil Appeal E112 of 2023)  
[2025] KEHC 1693 (KLR) (Commercial and Tax) (21 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1693 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL APPEAL E112 OF 2023  
CJ KENDAGOR, J  
FEBRUARY 21, 2025**

**BETWEEN**

**IMPULSE PROMOTIONS ..... APPELLANT**

**AND**

**STANDARD GROUP PLC ..... RESPONDENT**

*(Being an Appeal from the Judgement and Decree of Hon. Kabanga delivered on 3rd May, 2023  
in the Chief Magistrate Court at Milimani Commercial Courts in Civil Suit No. E5310 OF 2020)*

**JUDGMENT**

**Introduction**

1. The Appellant entered into a contractual agreement with the Respondent dated 16<sup>th</sup> May 2019. Under the agreement, the Appellant was to carry out sales activation and subscription activation campaign for the Respondent. The mode of payment and the assessment of the payment were set out in the said agreement. The Appellant provided the subscription activation campaign on diverse dates between May, 2019 and December 2019. A dispute arose on the payments and the Appellant sued the Respondent seeking a judgment against the Respondent for the sum of Kshs.2,689,993/=.
2. The Respondent filed a Statement of Defence in which it denied the Appellant's claim for the stated amount. It admitted that there was an agreement between the two, but maintained that the amounts claimed were only payable upon the Appellant achieving a recruitment target of 9000 subscribers by close of one month. It stated that the Appellant was not entitled to the claimed amount because it missed the target. It maintained that the Appellant was entitled to a much less payment, Kshs.6,800/= which was proportionate to its performance in the activation campaign and as per the contractual terms.



3. The Court delivered the judgment on 3<sup>rd</sup> May, 2023 in which it dismissed the Appellant’s case with costs. It agreed with the Respondents that, according to the terms of the contract, the payment of the claimed amount was tied to the condition that the Appellant meets the agreed target. The Court held that the Appellant did not prove it had met the target of 9000 subscribers as required under the agreement.
4. The Appellant was dissatisfied with the judgment and appealed to this Court vide a Memorandum of Appeal dated 30<sup>th</sup> May, 2023. It listed the following Grounds of Appeal;
  1. That the learned trial Magistrate erred in law and fact in failing to find that the Appellant had proved his case against the Respondent on a balance of probability.
  2. The Learned Magistrate erred in law and in fact by failing to award the Appellant the admitted amount by the Respondent.
  3. That the learned trial Magistrate erred in law and fact by failing to consider the [Appellant’s] submissions.
  4. That the learned trial Magistrate erred in law and fact by failing to determine the case on the basis of the law and the available facts before him.
  5. The Learned Trial Magistrate erred in law and in fact in otherwise failing to exercise his discretion in the proper manner resulting in injustice to the Appellant.
5. It asked the Court to allow the appeal and set aside the judgment and decree of the subordinate Court. It also asked for the costs of the Appeal and the lower Court.
6. The Appeal was canvassed by way of written submissions.

### **The Appellant’s Written Submissions**

7. The Appellant submitted that the claimed amount comprised two payment aspects, ‘Fixed Pay’ and ‘Variable Pay.’ It argued that the fixed pay or direct costs provided under the contract was not subject of the set target, and that it was entitled to the Fixed Pay regardless of its performance. It submitted that the ‘Variable Pay’ was linked to the actual performance and it was to be determined by the extent to which the Appellant had met the set target. It submitted that the lower court was wrong to hold that both the compensation for the direct costs and the variable pay were to be subjected to the achievement of the set targets.
8. The Respondents did not file their submissions.

### **Issues for Determination**

The only issue for determination is whether the Appellant is entitled to the sum of Kshs.2,689,993/= as claimed.

9. Being a first appeal, the duty of this Court is to review the evidence adduced before the lower court and satisfy itself that the decision was well-founded. This principle was set out in *Selle and another v Associated Motor Boat Company Ltd and others* [1968] 1 EA 123 where the Court held:

“...this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some



point to take account of particular circumstances or probabilities materially to estimate the evidence ...”

10. I have considered the Grounds of Appeal and the Appellant’s submissions and I find that the issue boils down to the interpretation of the Agreement, and particularly Clause 1.4, 4.1, and 4.3 of the Agreement.
11. I have seen the Agreement and I shall reproduce the relevant Clauses.
  1. Duties, Responsibilities and Obligations of [Respondent]
    - 1.4 Compensate the [Appellant] direct costs amounting to Kshs.725,100 and a variable pay of an amount of Kshs.862,000 on achievement of the agreed target to be paid as follows:-
      - 1.4.1 60% fixed pay
      - 1.4.2 40% variable pay based on the percentage of actual performance
      - .....
  4. Consideration and Payment
    - 4.1 In consideration of the Services to be provided by the Agent and based on achievement of the 9,000 Copies Target [the Respondent] shall pay the [Appellant] an amount of Kenya Shillings Seven Hundred and Twenty Five Thousand One Hundred and Fifty [725,100.00] and a variable pay of an amount of Kenya Shillings Eight Hundred and Sixty Two Thousand [Kshs.862,000.00] on achievement of the agreed target to be paid as follows:-
      - 4.1.1 60% fixed pay
      - 4.1.2 40% variable pay based on the percentage of actual performance
      - 4.3 If the Agency fails to achieve the set target, the variable pay in 4.1. Above will be paid less the payment proportionate to the missed percentage.
      - 4.4 If the Agency exceeds the set target, the variable pay in clause 4.1. Above will be paid an additional payment proportionate to the exceeded percentage.
12. The Respondent argued that the payment of the Fixed Pay and the Variable Pay was subject to the achievement of the 9,000 Copies Target. The Appellant argues otherwise and maintains that the payment of the Fixed Pay was not subject to the achievement of the 9,000 Copies Target. The lower Court interrogated this issue and held that the contents of clause 1.4 on the fixed and variable Pay are tied to the condition that the Appellant meets the agreed target.
13. I note that both parties have not challenged the validity of their agreement dated 16<sup>th</sup> May, 2019. I also note that none of them has pleaded vitiating factors like mistake or Misrepresentation. Based on this, I take the view that the duty of the court is limited to interpreting the contents of the agreement and give effect to their intentions as captured in the agreement.
14. In Commissioner of Domestic Taxes & another v Chase Bank Kenya Ltd (In Receivership) & another (Civil Appeal E080 & E073 of 2020 (Consolidated)) [2021] KEHC 28 (KLR) (Commercial and Tax)



(3 September 2021) (Judgment), the court held that courts should generally give contractual terms their literal meaning unless such an approach would lead to an absurdity. It held;

“The wording of a particular provision should be given its literal, grammatical meaning (unless there was ambiguity and a strict literal meaning would lead to absurdity. In such a case, the contra fiscum rule would apply”.

15. In *Samuel Ngige Kiarie v Njowamu Construction Company Limited & another* [2019] eKLR, the Court held as follows;

“It is trite law that parties to a contract are bound by the terms and conditions stipulated therein. That is the case in the instant appeal since the facts confirm that the parties acknowledged having entered into the agreement for the sale of the suit land. None complained of fraud or coercion and they are accordingly bound by its terms. This what this Court had in mind in *National Bank of Kenya V Pipeplastic Samkolit (k) Ltd & Another* [2001] eKLR;

“The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved.”

We thus proceed on the basis that the agreement was lawfully entered into by the parties and therefore legally binding on all of them. This leaves us with the burden of its interpretation. We must reiterate that the general rule of interpretation is to ascertain and give effect to the intention of the parties as it is that intention that was crystallized in writing in the agreement”.

16. I have relooked at the terms of contract to ascertain whether the payment of the Fixed Pay was pegged or tied to the achievement of the 9,000 Copies Target. The Contract had a special heading on Consideration. The clause
17. begins in the following terms; “In consideration of the Services to be provided by the Agent and based on achievement of the 9,000 Copies Target [the Respondent] shall pay the [Appellant] an amount of Kenya Shillings Seven Hundred and Twenty Five Thousand One Hundred and Fifty [725,100.00]. In my view the term clearly tied the payment of the Fixed Pay to the achievement of the 9,000 Copies Target. This was an express term and the Appellant must have intended to be bound by the term.
18. During the hearing, an officer of the Appellant was cross-examined on this issue and on whether the Appellant had met the target. The witness admitted that they were required to bring 9,000 subscribers within one month. She also admitted that they did not meet the target. I have relooked at the documents placed before the lower court to ascertain the extent to which the Appellant failed to meet the contractual target. The Respondent claimed that the Appellant brought 12 subscribers in the Month of June, 2019, 30 subscribers in the Month of July, 2019, and 29 Subscribers in the Month of August 2019. The Appellant did not controvert this evidence. This evidence leads this court to conclude that the Appellant did not meet the contractual target.
19. The Appellant has made an argument that the Fixed Pay was not tied to the achievement of the 9,000 Copies Target. It has argued that it was entitled to the Fixed Pay regardless of its performance in the attainment of the contractual target. During the hearing at the lower Court, the Appellant’s officer stated that his understanding of the Fixed Pay was that they were direct costs and that they were not tied to the contractual target. I find that this oral evidence contradicts the express wording of the contract, and particularly Clause 4.1 which addressed the issue of Consideration. Can this Court rely on the Appellant’s oral testimony to contradict the express terms of the contract?



20. The law relating to construction of written contracts is that no oral evidence is admissible to contradict, vary or alter the terms of such an instrument. In *Fidelity Commercial Bank Limited v Kenya Grange Vehicle Industries Limited* [2017] eKLR, the Court of Appeal expressed itself to this issue and held as follows;

“This is what sometimes is called the principle of four corners of an instrument, which insists that a document’s meaning should be derived from the document itself, without reference to anything outside of the document (extrinsic evidence), such as the circumstances surrounding its writing or the history of the party or parties signing it....

The supporting rationale for this rule is that, since the contracting parties have reduced their agreement to a single and final writing, extrinsic evidence of past agreements or terms should not be considered when interpreting that written contract agreement, as the parties had consciously decided to ultimately leave them out of the contract. In other words, one may not use evidence made prior to the written contract to contradict the ultimate contract that has been reduced into writing”.

21. It seems to the Court that the agreement dated 23<sup>rd</sup> May, 2019 between the Appellant and the Respondent speaks for itself. It sets out that the Payment of the Fixed Pay is tied to the achievement of the contractual target. The Appellant should not, in my view, be permitted to rescind from the position. This court has no power to save the Appellant from what appears to it, to have been a bad deal or poor bargain.

22. Courts have held that a Court of law cannot re-write a contract for parties but should jealously protect and enforce it to the letter. In *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another* [2001] eKLR, the Court of Appeal held 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.

As was stated by Shah JA in the case of *Fina Bank Limited vs Spares & Industries Limited (Civil Appeal No 51 of 2000)* (unreported):

“It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity’s function to allow a party to escape from a bad bargain”.

23. I agree with the lower Court that the only recourse available to the Appellant is Clause 4.3 of the agreement which provided how the Appellant would be compensated in the event it failed to meet the agreed target.

### **Disposition**

24. The Appeal fails and is hereby dismissed with costs to the Respondent.

25. It is so ordered.

**DATED, DELIVERED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS ONLINE PLATFORM THIS 21ST DAY OF FEBRUARY, 2025.**

.....



**C. KENDAGOR**

**JUDGE**

In the presence of:

Court Assistant: Beryl

Ms. K'Opiyo Advocate holding brief for Mr. Ochieng for the Plaintiff

No attendance for the Defendant

