



**Kingdom Bank Limited v Muchugia (Commercial Case E069 of 2024)
[2025] KEHC 3367 (KLR) (Commercial & Admiralty) (17 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3367 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND ADMIRALTY
COMMERCIAL CASE E069 OF 2024
RC RUTTO, J
MARCH 17, 2025**

BETWEEN

KINGDOM BANK LIMITED APPELLANT

AND

GERALD GAKURU MUCHUGIA RESPONDENT

*(Being an appeal and cross- appeal from the judgment of the Honourable S.A.Opande
(PM) delivered on 27th February 2024 in Milimani CMCC No. 67 of 2019)*

JUDGMENT

1. This judgment is in respect to the Appeal and the cross appeal in this matter. The main appeal was preferred by Kingdom Bank Limited whereas the cross appeal was instituted by Gerald Gakuru Muchugia.
2. The two were parties in CMCOMM No. 67 of 2019 Gerald Gakuru Muchugia versus Kingdom Bank, Formerly Jamii Bora Bank (hereinafter referred to as “the suit”). The suit related to loss of income arising out of the sale of Kajiado/Kitengela/20705 (hereinafter referred to as the “suit property”) as a result of the delay by the Bank to discharge a charge and release the title to Gerald Gakuru Muchugia. Subsequently, Gerald Gakuru Muchugia sought for general damages for detinue and conversion, exemplary damages, special damages for loss of income, costs of the suit and interest at court rates.
3. The suit was fully heard and was allowed against Kingdom Bank Limited vide a judgment rendered on 27th February 2024 where the court awarded Gerald Gakuru Muchugia Kshs 9, 000, 000 as special damages for loss of income together with costs and interest of the suit.



4. Both parties were aggrieved by the judgment of the court. Kingdom Bank Limited filed the main appeal (hereinafter referred to as “the Appellant) and Gerald Gakuru Muchugia (hereinafter referred to as the “cross appellant”) filed a cross appeal.
5. The Appellant’s appeal is premised on the grounds that the learned trial Magistrate erred in law and in fact in finding that there was inordinate delay on the part of the appellant in furnishing the respondents with the certificate of title but failed to consider that the respondent did not inform the appellant of his intention to dispose the property, nor did he communicate a request for discharge of charge as mandatorily provided for in the facility documents. Further, the trial Magistrate found that the 5 month period within which the certificate of title was released to the respondent amounted to inordinate delay, but failed to consider the plausible explanation advanced by the appellant that the acquisition of the defendant previously Jamii Bora Bank and now Kingdom bank resulted in a period of transition during which there was a merger of operations and personnel which would obviously affect the normal operations of the newly acquired bank. The trial court also upheld a letter of offer as a valid contract for the disposition of land, which finding informed the award of special damages for the loss of income of kshs.9,000,000 whilst turning a blind eye to the mandatory provisions of Section 3 of the Law of Contract Act and Section 38 of the Land Act No 6 of 2012; in granting an award of special damages that had not been proven at trial as no evidence was tabled on the existence of a valid contract between the respondents and prospective purchasers against which the respondent was incapable of performing; in awarding special damages to the respondent for alleged loss of income whilst blatantly ignoring the appellant’s pleading that the alleged attempt at disposal of the property was premature as the same would not have materialized in the absence of registration of the discharge of charge, the preparation of which was the purview of the respondent’s advocates; in making a finding of loss of income in favour of the respondent while disregarding the fact that the respondent continues to be in possession of the Certificate of Title and is free to dispose of it at will; in awarding quantum of damages that were inordinately high and is based on erroneous and unsubstantiated considerations.
6. The Appellant prayed that the appeal be allowed and the judgment of the Honourable Magistrate be reviewed, varied and or set aside accordingly. Also, the Appellant prayed for costs be in the cause.
7. The Cross Appellant’s appeal is premised on the grounds that the Learned Trial Magistrate erred in law and in fact in making the finding that the tort of conversion and Detinue can only occur when the offender takes possession of the victim’s property with the intention of asserting a right over it that is inconsistent with the owners’ rights; by failing to appreciate that the tort of conversion and detinue equally arises where one who had initial lawful custody of another’s property refuses or unreasonably stalls the return of that property when the owner has demanded for the return of the same; by declining to award the Respondent damages on account of detinue and conversion despite making a substantive finding that the appellants inordinately and unreasonably held onto the Respondent’s title for the property known as KJD/KITENGELA/20705 for 5 months despite the Respondent demanding for the same and by so doing the appellant denied the respondent herein income from the sale of the property to Antony Mwangi Githuku; in making a finding that the Respondent had not demonstrated that he was entitled to an award of damages under the tort of detinue and conversion.
8. The Cross- appellant urged the court to set aside the order dismissing the prayer for detinue & conversion and instead award him kshs.19,500,000/= as damages for detinue & conversion together with interest from the date of the judgment until payment in full and also costs of the appeal.
9. Both the appeal and the cross appeal were canvassed by written submissions.



Appellant's Submissions

10. The Appellant's submissions are dated 20th August 2024. The Appellant provided a brief background of the matter, summarizing that pursuant to a loan facility issued to the Cross-Appellant, the subject property was charged and was on the verge of being sold when the Cross-Appellant settled the outstanding loan, thereby preventing the sale. Consequently, the charge was to be discharged. However, contrary to the Cross-Appellant's assertion that the Appellant delayed in releasing the title, the Appellant submitted that, during the hearing, the Cross-Appellant confirmed that the only evidence of correspondence requesting the release of the title was a letter dated 21st January 2021. The Cross-Appellant further admitted that he had not informed the bank of any intention to sell the property. Additionally, the Appellant submitted that during the hearing, the Cross-Appellant confirmed that he was still in possession of the title and had not sold the property. Furthermore, the alleged intended purchaser, Anthony Gathuku, testified that as of the date of the purported offer letter, no agreement for sale existed, and he was no longer interested in purchasing the property.
11. The Appellant submitted on four issues that arise on both the appeal and cross appeal namely; whether the Learned Trial Magistrate erred in law and in fact in finding that there was inordinate delay on the part of the Appellant in furnishing the Respondent with the Certificate of Title, whether the Learned Trial Magistrate erred in law and in fact in upholding a letter of offer as a valid contract for the disposition of land which finding informed the award of special damages for loss of income in the sum of Kshs.9, 000, 000/=, whether the Learned Trial Magistrate erred in law and in fact in finding that the Respondent had not proven the tort of detinue and conversion and whether the Respondent's claim for Kshs.19,500,000/= as damages for detinue and conversion is merited.
12. On the first issue, the Appellant submitted that the period between the settlement of the facility and the invitation to collect the title was four months and eight days. The Appellant contended that the trial court erred in holding that the title should have been released within two months and, therefore, that the four months and eight day period constituted inordinate delay. The Appellant further argued that the only letter from the Respondent requesting the release of the title was dated 21st January 2021, and in response, the Appellant invited the Respondent to collect the title on 8th February 2021, just 16 days after receiving the Respondent's letter.
13. The Appellant relied on the cases of Cecilia Wanja Waweru v Jackson Wainaina Muiruru & Another [2014] eKLR and Unga Limited v Magina Limited [2014] eKLR, asserting that the delay in releasing the title was not inordinate given the prevailing circumstances at the time. The Appellant maintained that the 16day lapse between the Respondent's demand and the Bank's response was reasonable. Additionally, the Appellant submitted that, at the time, it was undergoing a restructuring process following its acquisition by Cooperative Bank of Kenya, which was completed in August 2021, and that this transition affected its operational efficiency. The Appellant therefore, argued that the trial court's finding was contrary to the weight of the evidence and that it failed to consider a crucial element of the Appellant's defence which is the plausible explanation for the delay.
14. Regarding the second issue, the Appellant submitted that the letter of offer to the intended purchaser was issued on 5th December 2020, while the Respondent wrote to the Bank on 21st January 2021. However, the Appellant contended that the Respondent's letter did not indicate any intention to sell the subject property. The Appellant further argued that the letter of offer was purportedly drafted by the intended purchaser's advocate, yet it did not bear the advocate's letterhead, and the signature on the document differed from that in the witness statement. Additionally, the Appellant submitted that no sale agreement was executed, nor was there any evidence of acceptance of the offer by the Respondent or proof of payment of a deposit towards the intended sale. In the absence of these crucial elements,



the Appellant contended that the Respondent's claim for loss of income was in violation of Section 3 of the *Law of Contract Act* and Section 44 of the *Land Registration Act*.

15. Relying on the cases of *Kukal Properties Development Limited v Tafazzal H Maloo & 3 Others* [1993] eKLR and *Kessel Homes Ltd v John Kimotho Nginga & Another* [2021] eKLR, the Appellant submitted that a letter of offer merely identifies the parties, their addresses, and the subject matter of the transaction. It does not, by itself, create a legally binding contract or impose enforceable obligations. The Appellant therefore argued that the trial magistrate erred in holding that the offer letter dated 5th December 2020 constituted a valid contract for the disposition of land and in subsequently awarding Kshs.9,000,000 as special damages for loss of income.
16. Regarding the third issue, the Appellant relied on the case of *Moorgate Mercantile Company Ltd v Finch and Read* [1962] 1 QB 701, submitting that the tort of detinue involves the wrongful detention of goods and is not committed until a demand for their return has been made and the defendant refuses to surrender them without a lawful reason. The Appellant argued that, immediately after the Respondent demanded the release of the title, the Appellant notified him to collect it. Therefore, the Appellant contended that there was no unlawful refusal to release the title, and as such, the claims for detinue and conversion could not be sustained.
17. Regarding the fourth issue, the Appellant submitted that for the Respondent to succeed in a claim for Kshs.19,500,000 as damages for detinue and conversion, he must establish that the alleged loss was the proximate result of a breach by the Appellant. That further, the damages were reasonably foreseeable; and that the lost profits was capable of proof with a reasonable degree of certainty. The Appellant contended that the Respondent failed to meet these requirements. In urging its case, the Appellant relied on the case of *Eric Omuodo Ounga v KCB CC 42 'A' of 2015* to support its position.
18. In conclusion, the Appellant submitted that the cross-appeal lacks merit and should be dismissed.

Respondent's/Cross-appellant's submissions

19. The Cross-Appellant's submissions are dated 15th October 2024. He began by providing a brief background of his claim. He stated that after repaying the outstanding loan balance, he contacted one Mr. Murimi, who assured him that the bank would release the title within seven days from the date of their conversation, which took place on 30th September 2020. The Cross-Appellant further submitted that he subsequently visited Mr. Murimi at the bank. However, instead of handing over the title, Mr. Murimi assured him that he would receive it within four days from Mr. Andrew Kagume, the then Branch Manager at the Appellant's Koinange Street branch. When the four day period lapsed, the Cross-Appellant repeatedly attempted to contact Mr. Kagume, but his calls went unanswered. Eventually, Mr. Murimi also became unreachable. As a result, the cross-Appellant issued a demand notice to the bank on 21st January 2021. He further submitted that after filing the suit, together with an application under a certificate of urgency seeking a mandatory injunction, the Appellant released the title to him on 3rd March 2021 just one day before the scheduled hearing of the application.
20. The cross appellant submitted on two issues namely; whether the Appellant inordinately delayed the release of the redeemed title for the subject property to him and whether the cross appellant successfully demonstrated that he lost income on account of the inordinate delay.
21. On the first issue, the Cross-Appellant relied on the cases of *Al Amin Agency v Shariff Omar & Another* [2006] eKLR and *Utalii Transport Company & 3 Others v NIC Bank Limited & Another* [2014] eKLR, submitting that there is no fixed standard or definition of what constitutes inordinate delay. The Cross-Appellant contended that the delay by the Bank in releasing the title was intentional and contumelious. He further argued that the Appellant failed to provide a cogent justification



for the delay and that the alleged merger between Jamii Bora Bank and Cooperative Bank was not substantiated with evidence during trial to support the claim that it contributed to the delay.

22. Regarding Clause 39 of the charge, which requires a written request to the Bank for the discharge of the property, the Cross-Appellant submitted that this argument was untenable. He further asserted that the Trial Court's finding that he had a duty to instruct an advocate of his own choice to prepare and convey the discharge of charge was consistent with the reasoning in *African Banking Corporation Limited v Henry Okoth* [2015] eKLR.
25. Regarding the second issue, the Cross-Appellant submitted that he had clearly pleaded and particularized the loss of earnings. He further stated that he called Mr. Anthony Mwangi Gathuku as a witness, who testified under oath that the sale transaction was frustrated due to the existence of the Appellant's subsisting charge on the property. The Cross-Appellant argued that the loss he suffered naturally and inevitably resulted from the Appellant's actions. He further contended that, under civil law, the Appellant's conduct amounted to detinue or even breach of contract, both of which warrant an award of damages. He maintained that the lost income was certain and not speculative, as the offer made for the property to Mr. Anthony Mwangi Gathuku was Kshs 17,500,000. In support of his argument, the Cross-Appellant relied on the cases of *Attorney General v Zaherali J Sunderji t/a "Crystal Ice Cream"* [1986] eKLR and *Charles Mutuma M'kanake v Diocese of Meru Trustees Registered* [2021] eKLR and submitted that detinue is a cause of action that allows for the recovery of personal chattels from an individual who lawfully acquired possession but subsequently retained them without legal justification.
26. The Cross-Appellant concluded by submitting that the Appellant's appeal lacks merit, particularly in its attempt to challenge the Trial Court's findings on the inordinate delay in releasing the title and the award for loss of income. He contended that, based on the circumstances of the case, he had successfully demonstrated that the Appellant had committed the tort of detinue against him. He concluded by submitting that the cross appeal be allowed and that he should be compensated as prayed for in the cross appeal.

Analysis and Determination

27. I have considered this appeal, submissions and the impugned judgment. I have also considered the decisions relied on and perused the trial court's record. This being a first appeal, it is by way of a retrial and this court, as the first appellate court, has a duty to re-evaluate, re-analyze and re-consider the evidence afresh and draw its own conclusions on it. The court should however bear in mind that it did not see the witnesses as they testified and give due allowance for that as was propounded in the case of *Selle v Associated Motor Boat Co Ltd & Others* [1968] EA 123.
28. I have carefully considered the evidence adduced before the trial court in its entirety; the grounds of appeal; the judgment of the learned trial magistrate and the written submissions filed by the Appellant and cross appellant together with all the authorities cited. Having done so, I find that only three key issues emerge for my determination. These are;
 - a. Whether there was inordinate delay in furnishing the Certificate of Title.
 - b. Whether the letter of offer constituted a valid contract for the sale of land and justified the award of Kshs.9,000,000/= for loss of income.
 - c. Whether the Respondent had proven the tort of detinue and conversion and consequently whether the claim for Kshs.19,500,000/= as damages for detinue and conversion is merited



a) Whether there was inordinate delay in furnishing the Certificate of Title.

29. The Appellant contends that the Respondent/Cross-Appellant did not formally request the discharge of the charge as required under the facility documents. It further asserts that the delay was due to the restructuring of the bank following its acquisition by Cooperative Bank of Kenya. Consequently, the Appellant maintains that the actual time taken from the Respondent's demand to the release of the title was only 16 days. The Respondent, on the other hand, argues that the Bank had assured him that the title would be released within seven days after 30th September 2020. However, multiple attempts to follow up with the Bank were met with delays and inaction. He further contends that the title was only released on 3rd March 2021 after he filed a suit under a certificate of urgency.
30. I note that the trial court's account of the facts in this case is accurate, having been drawn from the proceedings before it. Additionally, I have considered Clause 39 of the further charge, which pertains to the discharge of the charge, and I concur with the trial court's interpretation of this clause. There is no strict requirement as to whether the request for discharge had to be made orally or in writing. As articulated by the trial court, during the trial, DW1, the Appellant's witness, admitted that the Cross-Appellant had called him. However, while he denied the contents of the conversation as alleged by the Cross-Appellant, he failed to provide his own account of what was discussed for the court's consideration. As a result, the trial court had no alternative but to accept the Cross-Appellant's version of events.
31. The key issue before the trial court was whether a request for the release of the title was made by the Respondent after the completion of payment on 30th September 2020. The Respondent contended that he made a phone call to DW1, who assured him that the title would be released within seven days. Despite making follow-ups, the title was not released and eventually the calls were no longer going through. The record clearly shows that DW1 did not deny receiving a call from the Respondent. What he disputed was the Respondent's claim that the call concerned a request for the release of the title. However, when asked to clarify what the call was about, DW1 failed to provide an explanation. Consequently, the trial court found that, in the absence of an alternative explanation, the Respondent's assertions remained unchallenged.
32. I concur with the trial court's finding that after completing loan payments, the most logical reason for a borrower to contact a bank holding their title would be to request its release. While it would have been prudent for the Respondent to write a formal letter, nothing prevented him from visiting the bank in person or calling the relevant officials to make his demand. In this case, he did exactly that and even demonstrated how he made several follow-up calls, as would be expected in such circumstances. Accordingly, I agree with the trial court's finding that, based on the circumstances of the case, the title was released five months after a request was made.
33. As to whether the delay was inordinate, the Appellant stated that the reason for delay was also because of the take over of the Bank by the Cooperative Bank during the period dating August 2020 to February 2021 which process led to numerous structural and operational changes. The Cross-Appellant, however, contended that no evidence was provided to substantiate the alleged takeover and its impact on the delay.
34. The concept of inordinate delay is indeed assessed relative to the specific circumstances of each case. This position was articulated in the case of *Utalii Transport Company Limited & 3 Others v NIC Bank Limited & Another* [2014] eKLR. Whereas I agree with the Cross-Appellant's position that no documentary evidence was provided to demonstrate that the bank's restructuring directly affected the timely release of the title, it is generally expected that institutional changes such as corporate



restructuring may lead to operational delays ,as a matter of good practice, the bank should have communicated any challenges it was facing to its clients. In this case, the assurance given to the Respondent by the bank’s official created a legitimate expectation that the title would be released within the promised timeframe. However, this expectation was not honored until a formal demand was issued. Considering the circumstances, while the 5 months delay in releasing the title was unacceptable in the circumstances it was not inordinate.

b. Whether the letter of offer constituted a valid contract for the sale of land and justified the award of Kshs.9,000,000/= for loss of income.

35. The Appellant argues that the letter of offer does not constitute a legally binding contract for the sale of land under Section 3 of the *Law of Contract Act* and Section 38 of the *Land Act*. Additionally, the Appellant contends that no evidence was presented to demonstrate that the intended purchaser had made any deposit or entered into a legally enforceable sale agreement.
36. The Respondent, on the other hand, contends that the intended purchaser, Mr. Anthony Mwangi Gathuku, testified that he was willing to proceed with the transaction but was unable to do so due to the delay in releasing the title. The Respondent argues that the loss of income was a direct and natural consequence of the Appellant’s delay.
37. In the case of *East African Fine Spinners Ltd (in receivership) & 3 others v Bedi Investment Limited* [1994] eKLR, the Court of Appeal dealt with the question of the legal tenor of a letter of offer which was formally expressed to be subject to an anticipated formal contract that never crystalized. Gicheru JA expressed himself by adopting the words of Lord Westbury LA in *Chinnock v The Marchionesa of Ely* 4 DE GJ & 5 638 at 646 as follows:
- “As soon as the fact is established of the final mutual assent of the parties to certain terms, and those terms are evidenced by the party to be charged or his agent, lawfully authorized, there exist all the materials, which this Court requires, to make a legally binding contract. But if to a proposal or offer an assent be given subject to a provision as to a contract, then the stipulation as to the contract is a term of the assent, and there is no agreement in the absence of that stipulation.”
38. The learned JA further adopted the words of Sir Raymond Evershed MR in *Bennet, Walden & Co. v Wood* [1950] 2 ALL ER 134 at page 137, as follows:
- “Where you have a proposal or agreement made in writing expressed to be subject to a formal contract being prepared, it means what it says, it is subject to and is dependent upon a formal contract being prepared. When it is not expressly stated to be subject to a formal contract, it becomes a question of construction whether the parties intended that the terms agreed on should be subject to a new agreement the terms of which are not expressed in details.”
39. Based on the foregoing authority, it is clear that a sale that is subject to contract is not binding until a formal contract has been executed. In this case, no contract existed between the parties. Furthermore, where a party accepts an offer subject to contract, it signifies that the matter remains under negotiation until a formal agreement is concluded and the contracts are exchanged.
40. In the present case, a letter of offer was issued to the Cross-Appellant on 5th December 2020, but it was subsequently withdrawn through a letter dated 7th January 2021. The Cross-Appellant did not confirm whether he had accepted the offer, which was expressly subject to the execution of a formal



agreement for sale. Moreover, as argued by the Appellant, no payments were made that would have necessitated the Cross-Appellant to refund the intended purchaser.

41. The Cross-Appellant alleged that during a phone conversation with DW1, he mentioned the intended sale. However, I note that while the details of other aspects of the conversation between the Bank's agents were clearly outlined in the letter dated 21st January 2021, the intended sale was conspicuously missing. This omission raises doubt as to whether the Bank or its agents were aware of the Cross-Appellant's intention to sell the property.
42. In light of the fact that there was no formal agreement between the Cross-Appellant and the intended purchaser, nor any clear acceptance of the offer letter or evidence of payment by the intended purchaser, this court finds that the Trial Court erred in treating the letter of offer as a valid contract for the sale of land. Consequently, the award of Kshs.9,000,000 as special damages for loss of income was not supported by sufficient proof, as no binding agreement existed and no payment had been made. Accordingly, the award of Kshs.9,000,000 should be set aside.

c. Whether the Respondent had proven the tort of detinue and conversion and consequently whether the claim for Kshs 19,500,000/= as damages for detinue and conversion is merited

43. The plaintiff prayed for general damages for detinue & conversion. The tort of detinue must however be distinguished from the one of conversion. While conversion is the act of taking one's property unlawfully, detinue occurs where the tortfeasor take the chattel lawfully but the permission of the owner gets withdrawn or terminated and a demand is made for the return. Black's Law Dictionary provides for the definition of the two torts.

Detinue is a common law action to recover personal property wrongfully taken or withheld by another. A claim for detinue lies at the suit of a person who has an immediate right to the possession of the goods against a person who is in actual possession of them and who upon proper demand fails or refuses to deliver them up without lawful excuse.

Conversion is the wrongful possession or disposition of another's property as if it were one's own an act or series of acts of willful interference without lawful justification with an item of property in manner inconsistent with another's right whereby that other person is deprived of the use and possession of the property it is an act that interferes with the dominion of the true owner's right and depriving him of the possession of the goods to an extent as to be inconsistent with the rights of the owner.

44. The court in the case of Charles Mutuma M'kanake v Diocese of Meru Trustees Registered [2021] KEHC 4941 (KLR) while distinguishing the tort of detinue and conversion stated;

17. Moreover, like in all cases the loss must be proved. It is easy to prove the loss where the tortfeasor keep the property in that the claimant only needs to prove the value thereof. However, where the property has been returned on the date of giving evidence and judgment, it becomes a duty of the plaintiff to prove the loss incurred. In all these cases, a plaintiff who has been deprived of his chattel is ordinarily entitled to its full value, together with any special loss he may have suffered as the result of the unlawful detention or conversion or destruction or loss. The Court of Appeal in Patrick Muturi v Kenindia Assurance Company Ltd [1993] eKLR held: -

In all these cases, a plaintiff who has been deprived of his chattel is ordinarily entitled to its full value, together with any special loss he may have suffered as the result of the unlawful detention or conversion or destruction or loss.

45. From the foregoing, it is clear that for a claim in the tort of conversion to succeed, the Cross-Appellant must establish that the Appellant unlawfully took possession of his property with the intention of



asserting a right over it that is inconsistent with his ownership. Similarly, for a claim in detinue to succeed, it must be demonstrated that the Appellant wrongfully withheld the title and refused to release it without a lawful excuse.

46. This court has already found that the delay by the Appellant Bank in releasing the title was not inordinate. Consequently, the claim for detinue cannot be sustained. Regarding conversion, I concur with the Trial Court's determination that there is no evidence to suggest that the Bank took possession of the title with the intention of asserting ownership over it. Accordingly, the claim for conversion also fails.
47. The upshot of the appeal therefore is that the appeal succeeds and cross appeal fails in the following terms: -
 - a. The award of Kshs.9,000,000 for loss of income is set aside.
 - b. Each party to bear the costs of the appeal and cross appeal.

DATED AND SIGNED AT MACHAKOS THIS 17TH DAY OF MARCH, 2025.

RHODA RUTTO

JUDGE

Delivered on the virtual platform, Teams this 17th day of March, 2025.

In the presence of;

.....Appellant

.....Respondent

.....Court Assistant

