



REPUBLIC OF KENYA



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**Image Apartments Limited v Zhong (Civil Appeal E200 of 2024)  
[2025] KEHC 5012 (KLR) (Civ) (24 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 5012 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL E200 OF 2024**

**JN NJAGI, J**

**APRIL 24, 2025**

**BETWEEN**

**IMAGE APARTMENTS LIMITED ..... APPELLANT**

**AND**

**GAO YU ZHONG ..... RESPONDENT**

*(Bing an appeal from the judgment and decree of Hon. Wangari  
Mbulikab, Principal Magistrate, in Milimani Commercial  
Courts Civil Case No. 5678 of 2016 delivered on the 7/2/2024)*

**JUDGMENT**

1. The Appellant herein entered into an agreement with the respondent herein for the appellant to sell the respondent an apartment NO. B20 at a cost of Ksh.18,000,000/=. A completion date was set out in the agreement. The respondent paid a deposit of Ks.3,600,000/=. It was the contention of the respondent that the apartment was not ready on the completion date. He filed suit demanding refund of the deposit of Ksh.3,600,000/=. The appellant denied the claim. After a full trial, the trial magistrate found the appellant to have been in breach of the agreement and ordered them to refund the deposit. The appellant was aggrieved by the decision of the learned magistrate and preferred this appeal.
2. The grounds of appeal are that:
  1. The Learned Magistrate erred in law and in fact in holding that the Respondent has proved its case on a balance of probability against the Defendant for breach of contract.
  2. The Learned Magistrate erred in law and fact in failing to appreciate that there was a contract which governed the relationship between the Appellant and Respondent.



3. The Learned Magistrate erred in law and fact by finding that the Appellant was in breach of contract.
4. The Learned Magistrate erred in law and fact by failing to appreciate that the Respondent failed to pay the balance within the stipulated time frame and was thus in breach which went to the root of the contract.
5. The Learned Magistrate erred in law and fact in failing to appreciate that once the Respondent failed to pay the balance within the stipulated time frame the deposit paid stood forfeited and the Appellant was discharged from performing its end of the contract.
6. The Learned Magistrate erred in law and facts in adopting wrong principles as it is attempting to rewrite the contract between the parties.
7. The Learned Magistrate erred in law and in fact by failing to provide an analysis of the finding or any authority which the court relied on in making the decision.
8. The Learned Magistrate erred in law and in fact in failing to consider the Appellant's submissions and authorities on record.

### **Case for Respondent**

3. The respondent who was the plaintiff at the lower court stated that he entered into the agreement with the appellant on the 3<sup>rd</sup> October 2013 for the purchase of the above said apartment. The contractual completion date was stated to be on 30<sup>th</sup> of October 2013 or the date that Nairobi City Council was to issue the occupation certificate, whichever came earlier. Upon execution of the agreement, he made a deposit of Ksh.3,600,000/=. It was further agreed that the balance of the purchase price of Ksh.14,400,000/= was to be paid within 90 days or on the completion date which was to be on the 15<sup>th</sup> day after the vendor's advocate gave notice to the purchaser's advocate that the City Council had issued an occupation certificate in respect of the property on the 30<sup>th</sup> day of October 2013.
4. The Respondent continued to state that the appellant did not meet the contractual completion date as the apartment was not ready by 30<sup>th</sup> April 2014 and he was thus not put in possession of the same. The appellant refused to refund the deposit and the respondent later discovered that the apartment had been sold to someone else. He sued to recover the deposit.
5. It was the case for the respondent that he did not pay the balance of Ksh.14,400,000/= because the appellant was in breach of the sale agreement as the building was not ready for occupation. He produced a report from an architect indicating that even in August 2014 the house was not ready.

### **Case for appellant**

6. It was the case for the appellant (the defendant at the lower court) that the agreement between the parties herein was subject to the terms and conditions as contained in the agreement and in the schedules annexed thereto. That it was agreed that upon the payment of the deposit of Ksh.3,600,000/=, the balance was to be paid before 3/12/2013, failure to which the deposit stood forfeited. That the respondent failed to pay the balance as agreed and therefore the deposit stood forfeited as of 3/12/2013 and the contract elapsed by effusion of time.
7. The appellant further said that it was set out in clause 4.1 of the agreement that the deposit and the premium were to facilitate building and construction of the apartments and therefore without payment of the full premium the certificate of occupation could not issue.



8. Further that clause 15.3 of the agreement provided that once Ksh.14,400,000/= was paid the respondent was to be put in possession by 30/4/2014 but this could not be done as it was subject to payment of full premium which had not been paid. Therefore, that the apartment was available for sale to another purchaser.
9. It was averred that Schedule II to the agreement provided that the deposit of Ksh.3,600,000/= was to be paid by 3/10/2013 and the balance within 90 days that is the 3/12/2013, failing which the deposit is forfeited. That the completion date was 30/10/2013 but the respondent was obligated to make payment by 3/12/2013. The appellant denied that it was the one in breach of the agreement.

### **Submissions**

10. The appellant submitted that the trial court erred in holding that it is the one which was in breach of the agreement. The appellant referred to clause 6 of the agreement and submitted that the completion date was 30/10/2013. That the respondent did not pay the balance by that date even though payment of the balance was not predicated upon issuance of occupation certificate. Therefore, that the deposit was forfeited and the contract rescinded for failure to pay the balance.
11. The appellant submitted that the respondent entered into the contract freely and they were bound by the terms of the contract. The appellant faulted the trial court for attempting to rewrite the terms of the contract between the parties in holding that they were the ones in breach. They cited the case of National Bank of Kenya Limited v Pipe Plastic Samkolit (K) Limited (20020 eKLR 507 where the Court of Appeal held that:

“ 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.”
12. The appellant also relied on the Court of Appeal decision in Housing Company of East Africa Limited v Board of Trustees National Social Security Fund & 2 others (20180 EKLR where the court upheld a High Court decision where it was held that failure to pay the balance of the purchase price amounted to breach of contract by the purchaser giving the vendor the right to rescind the contract and the deposit in such a case would stand forfeited.
13. The Respondent on the other hand submitted that the standard of proof in civil cases is well established that the plaintiff must prove their case on a balance of probabilities as laid out in the case of Miller v Minister of Pensions [1947] 2 All ER 372.
14. The Respondent submitted that the contract explicitly required the Appellant to complete the construction of the apartment by 30<sup>th</sup> April 2014 as per clause 15.3 of the agreement but the apartments were still incomplete even as at 7<sup>th</sup> August 2014. More so that the same clause provided for the refund of the deposit if the Appellant failed to deliver the property by 30<sup>th</sup> April 2014.
15. It was submitted that the Appellant was obligated to obtain an occupation certificate from the City Council of Nairobi which was never done. That the respondent exceeded the 10% deposit requirement, which demonstrates good faith and readiness to fulfil his obligation under the contract. That non-performance by the respondent was hindered by the appellant's failure to meet its obligations.
16. The respondent submitted that the provision for forfeiture was predicated on the Appellant fulfilling its obligation. That failure to complete construction and obtain the necessary certificate nullified any claim to forfeiture. That a party who has not performed its part of the bargain cannot penalise the other party for non-performance.



## Analysis and determination

17. This being a first appeal, it is the duty of the Court to review the evidence adduced before the lower court and satisfy itself that the decision was well-founded. In *Selle & Another v Associated Motor Boat Co. Ltd & Others* [1968] EA 123, this principle was enunciated thus:

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that 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...”

18. I have considered the grounds of appeal, the record and judgment of the trial court and the submissions tendered by the respective counsels for the parties. Each of the parties blames the other to have been in breach of the contract. The issue for determination is as to who between them was in breach of the contract.
19. The trial magistrate in her judgment held that it is the appellant who was in breach of the agreement in that they did not comply with clause 6 of the agreement in that counsel for the respondent was not given the notification and occupation certificate nor was the construction ready by 30/10/2013 nor was it ready by 30/4/2014.
20. The issue as to who was in breach hinges on the completion date which required the respondent to pay the balance. The appellant contends that the completion date was 30/10/2013 while the respondent says that it was 30/4/2014.
21. The term “completion” was defined in clause 1 of the agreement to mean the completion of the purchase of the property as provided in the agreement.
21. “Completion date” was defined in the same clause to mean the date stipulated in or ascertained in accordance with the provisions of clause 6.1 of the agreement. The same provided as follows:
- The completion date shall be the 15<sup>th</sup> day after the vendor’s advocates give notice to the purchaser’s advocates that the City Council of Nairobi has issued an Occupation Certificate in respect of the property or the 30<sup>th</sup> October, 2013 whichever is earlier.
22. In my interpretation of the clause, it simply meant that the completion date could be any date between the date of the agreement (i.e. 3/10/2013) and 30/10/2013 as long as there was 15 days` notice of service of the occupation certificate on the purchaser’s advocates. BUT in the event that the notice was not served in that period the completion date would be 30/10/2013. It is clear that no occupation certificate was served on the advocates for the respondent before 30/10/2013. The completion date did not therefore take effect during that period and consequently the same reverted to 30/10/2013. The completion date was therefore 30/10/2013 which was the date by which the respondent was required to have paid the balance of Ksh.14,400,000/=.
23. Though clause 6.1 seems to be clear on the completion date, the same was compounded by the provisions in clause 4.1 and Schedule II of the agreement. Clause 4.1 provides as follows:

“The premium and the deposit are set out in Schedule II attached hereto and payable in the manner and time-line provided under that schedule. All amounts shall be released to the



vendor and/or the Developer to facilitate the construction and completion of the building of the apartment...."

24. Schedule II of the agreement provided that the 1<sup>st</sup> payment of Ksh.3,600,000/= was to be paid on signing the agreement. It further provided that:

"The balance should be paid within 90 days after execution of the Agreement for sale. The deposit will be forfeited should the purchaser fail to pay the balance of the purchase price within the period."

25. In spite of the provisions of Clause 6.1 as to the completion date, the schedule to the agreement gave the purchaser 90 days to pay the balance from the date of execution of the agreement. Would then the completion date remain as 30/10/2013 as provided under Clause 6.1 or would it be 90 days from the date of execution of the agreement?

25. Clause 16.4 of the agreement provided as follows:

Each of the provisions of this agreement is severable and distinct from the others and if any one or more of these provisions is or becomes invalid, illegal or unenforceable the validity, legality and enforceability of the remaining provisions shall not in any way be affected or impaired.

26. It is clear to me that the provisions of clause 6.1 in regard to the completion date as being 30/10/2013 was unenforceable in view of the provisions in schedule II that the balance of the purchase price was payable in 90 days from the date of execution of the agreement. The schedule seems to have invalidated the completion date stated in clause 6.1 and pushed the completion date to 90 days from the date of execution of the agreement. That means that the completion date fell on 3<sup>rd</sup> January 2014. I take that to be the completion date to the agreement.

27. That being so, the respondent was required to pay the balance by 3<sup>rd</sup> January 2014. He did not pay. What then were the consequences of non-payment?

28. The schedule provided that the deposit would be forfeited if the respondent failed to pay the balance within 90 days of the execution of the agreement. In view of the fact that the respondent did not pay the balance within the time stated the deposit stood forfeited as of 3<sup>rd</sup> January 2014.

29. The respondent argued that the contract provided for the refund of the deposit if the appellant failed to deliver the property by 30/4/2014 as provided in Clause 15.3. He argued that since the building was not complete by that date, the appellant was obligated to refund the deposit. The appellant on the other hand argued that the refund was predicated on the respondent having made full purchase price.

Clause 15.3 provided as follows:

"In the event that the vendor has failed to deliver, the property as is envisaged in these present by 30<sup>th</sup> April 2014 the purchaser shall give a fourteen (14) days' notice to the vendor to complete in compliance with this agreement. Should the vendor fail to do so the vendor will be obliged to return all the funds paid to it in lieu of the purchase of the property."

30. This clause cannot be read in isolation. It is only applicable where the respondent had done his part of the bargain by paying the purchase price and the appellant remained the one at fault. This is so because Clause 4.1 required the deposit and the premium to be utilised to facilitate the completion of the apartment. How then would the appellant have completed construction of the apartment when the



respondent did not pay the balance? I find that it is the respondent who was in breach of the contract in failing to pay the balance of the purchase price within 3 months of the execution of the sale agreement. In failing to pay the balance, his deposit stood forfeited as per the contract.

31. It is trite law that parties are bound by the 4 corners of their contract. A court of law cannot re-write the contract between the parties, see *National Bank of Kenya Limited v Pipe Plastic Samkolit (K) Limited* case (supra). In ordering the appellant to refund the deposit when the contract clearly stated that the deposit would be forfeited if the respondent failed to pay the balance within 3 months of executing the contract, the trial court was trying to enforce what was not provided for in the contract and thus re-writing the contract between the parties. The court erred as it did not factor in the obligations of the Respondent regarding the timelines to be adhered to and only focused on the fact that the Appellant had not completed the property by 30<sup>th</sup> April 2014. The court overlooked the Respondent's obligations and the reasons as to why the contract should have stood rescinded and the deposit forfeited.
32. The upshot is that the respondent is the one who was in breach of the contract. The finding of the trial court that it is the appellant who was in breach of contract is set aside. Consequently, the order that the appellant refunds the deposit paid by the respondent is set aside.
33. The appellant to have the costs of this appeal and the costs at the lower court.

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 24<sup>TH</sup> DAY OF APRIL 2025**

**J. N. NJAGI**

**JUDGE**

In the presence of:

Mr. Musundi for Appellant

Mr. Ogara HB for Dr. Khakula for Respondent

Court Assistant - Dennis

