Musau v Odwar (Civil Appeal E1512 of 2024)
[2025] KEHC 6754 (KLR) (Civ) (22 May 2025) (Judgment)

Neutral citation: [2025] KEHC 6754 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E1512 OF 2024

AC MRIMA, J

MAY 22, 2025

BETWEEN

JOYCE MUENI MUSAU ..... APPELLANT

AND

PETER ODHIAMBO ODWAR ..... RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. V. K. Momanyi [Adjudicator/ Resident Magistrate] in Nairobi [Milimani] Small Claims Court Case No. E16679 of 20243 delivered on 6th December 2024)

JUDGMENT

Introduction:

1. The parties herein are well-known to each other having been longtime family friends and more so that they fellowshipped in one Church. They entered into a contract in respect to the sale of the Appellant's bakery business in Embakasi within Nairobi County. It was that business relationship that resulted to the Respondent [as the Claimant] instituting Nairobi [Milimani] Small Claims Court Case No. E4200 of 2023 [hereinafter referred to as 'the suit'] against the Appellant [as the Respondent].

2. The suit was determined in favour of the Respondent. Dissatisfied with the decision, the Appellant preferred an appeal which is the subject of this judgment.

The Suit:

3. The Claimant averred to the contract dated 13th day of September 2024 which he entered with the then Respondent [now Appellant] towards the sale of the Appellant's bakery business as a going concern. He claimed that despite him paying Kshs. 700,000/= out of the agreed Kshs. 900,000/=, the Appellant

failed to transfer the business to him thereby frustrating the transaction. The Claimant then prayed for a refund of the sum paid as per the contract terms. On her part, the Appellant denied breaching the contract and counter-claimed for Kshs. 200,000/= being the balance of the contract sum.

4. The Respondent testified and called his wife one Mercy Akello Odhiambo as a witness. The Appellant also testified and called two witnesses being Beatrice Wanza and Vellah Achieng who were at the material times were her employees.

5. In a judgement rendered on 6th December 2024, the suit was allowed as prayed and the counter-claim dismissed. Costs were awarded to the Respondent.

The Appeal:

6. The Appellant raised the following 8 grounds in seeking that the appeal be allowed, the suit be dismissed and the counter-claim be granted: -

    1. That the learned trial magistrate erred in law by disregarding the Appellant's evidence in toto.

    2. That the learned trial magistrate erred in law by failing to uphold the express terms of the Agreement dated 13th September 2024, governing the sale of the Appellant's bakery.

    3. That the learned trial magistrate erred in law by failing to apply the established principles of contract interpretation in determining the parties' rights and obligations under the Agreement dated 13th September 2024.

    4. That the learned trial magistrate erred in law by failing to uphold the principle of party autonomy, which binds parties to the terms voluntarily agreed upon in the Agreement dated 13th September 2024.

    5. That the learned magistrate erred in law by effectively re-writing the terms of the Agreement dated 13th September 2024, between the parties in holding that the Respondent is entitled to a refund of Ksh. 700,000/=, being the deposit towards the purchase price, notwithstanding that the Respondent had taken over possession and management of the bakery, along with the Appellant's bakery equipment and machines valued at approximately Ksh. 1,000,000/= which remains in the Respondent's custody.

    6. That the learned trial magistrate erred in law by failing to uphold the Appellant's submissions that the parties were bound by their contract.

    7. That the learned trial magistrate erred in law by failing to evaluate the entire evidence on record and making a finding that the Appellant breached the terms of the Sale Agreement.

    8. That the learned trial magistrate erred in law in otherwise failing to exercise her discretion in the proper manner resulting in injustice to the Appellant.

7. She also filed written submissions dated 26th February 2025 wherein she raised three issues for determination being whether the Respondent breached the contract, whether the Respondent discharged the burden of proof and whether the Respondent was entitled to the sum of Kshs. 700,000/=. Several decisions were also referred to.

8. The appeal was opposed. To that end, the Respondent filed written submissions dated 20th March 2025 wherein he aligned with the judgment and referred to several decisions in support of his case. This Court will ingrain the gist of the parties' submissions in the analysis part of this judgment.

Analysis:

9. Section 38 of the *Small Claims Court Act* [Cap. 10A of the Laws of Kenya, hereinafter referred to as 'the Act'] provides for appeals from decisions and/or orders of the Small Claims Court. Under that provision, a party may appeal to the High Court only on matters of law and that the decision thereof is final.

What is a point of law?

10. The term 'point of law' may also be referred to as 'matter of law'. There has been no universally accepted definition of the term 'point of law' or 'matter of law'. However, there has been some working definitions thereto. The Black's Law Dictionary defines 'a matter of fact' and 'a matter of law' as follows: -

> Matter of fact: A matter involving a judicial inquiry into the truth of alleged facts and Matter of law: A matter involving a judicial inquiry into the applicable law.

11. Lord Denning, J in Bracegirdle vs. Oxley (2) [1947] 1 ALL E.R. 126 at p 130 in espousing the two terms had the following to say: -

> .... The question whether a determination by a tribunal is a determination in point of fact or in point of law frequently occurs. On such a question there is one distinction that must always be kept in mind, namely, the distinction between primary facts and conclusions from those facts. Primary facts are facts which are observed by the witnesses and proved by testimony; conclusions from those facts are inferences deducted by a process of reasoning from them. The determination of primary facts is always a question of fact. It is essentially a matter for the tribunal who sees the witnesses to assess their credibility and to decide the primary facts which depend on them. The conclusions from those facts are sometimes conclusions of fact and sometimes conclusions of law. In a case under the Road *Traffic Act*, 1930, s. 11, the question whether a speed is dangerous is a question of degree and a conclusion on a question of degree is a conclusion of fact. The court will only interfere if the conclusion cannot reasonably be drawn from the primary facts, and that is the case here. The conclusion drawn by these justices from the primary facts, was not one that could reasonably be drawn from them.

12. Drawing from the above, the Court of Appeal in Bashir Haji Abdullahi v Adan Mohammed Nooru & 3 others [2014] eKLR sated as under: -

> .... That reasoning has been adopted in this jurisdiction. In A.G. Vs. DAVID MURAKARU [1960] EA 484, for instance, Chief Justice Ronald Sinclair sitting with Rudd J. adverted to the factual foundations of legal questions by stating that an appellate court restricted to determining questions of law may yet quite properly interfere with the conclusion of a lower court if the same is erroneous in point of law. This is the case where that lower court arrives at a conclusion on the primary facts that it could not reasonably come to. Such a conclusion or decision becomes an error in point of law. See also PATEL Vs. UGANDA [1966] EA 311 and SHAH Vs. AGUTO [1970] EA 263.

13. The foregoing was reiterated in Twaher Abdulkarim Mohamed v Independent Electoral and Boundaries Commission (IEBC) & 2 others, (2014) eKLR. Further, in Peter Gichuki King'ara vs. IEBC & 2 others, Nyeri Civil Appeal No. 31 of 2013, Court of Appeal held that a decision challenged on the basis of wrongful exercise of discretion raises a point of law. The Supreme Court of Kenya in

Petition No. 7 of 2013 Mary Wambui Munene v. Peter Gichuki Kingara and Six Others, [2014] eKLR held that 'jurisdiction is a pure question of law and should be resolved on priority basis'.

14. Applying the said dichotomy in this case, it is this Court's finding that since the matters in contention in this appeal relate to the legality of a contract, its interpretation and whether the lower Court arrived at a conclusion on the primary facts that it could not reasonably come to, then such issues transcend the borders of matters of fact into the realm of matters of law.

15. Therefore, this Court is properly seized of jurisdiction over this appeal.

The issues:

16. From the perusal of the record, the parties' submissions and the decisions referred to, one of the paramount issues for determination is whether the contract was breached and if so by which party. Once that issue is answered, either way, such will open up the way to other related issues.

17. This Court has carefully considered the evidence by the parties and their witnesses. There is no doubt that the parties entered into the contract. One of the terms thereto was that 'the Vendor will sell and the Purchaser will purchase the said bakery including equipment and machines as a going concern.' It is, therefore, important to understand the term 'as a going concern'.

18. As this Court ventures into the interpretation of the terms of the contract, it remains alive to the dictates and caution ascribed to proper legal interpretation of statutes, documents or any other instrument. As a recall, Wallis JA in Natal Joint Municipal Pension Fund v Endumeni Municipality [2012] ZASCA 13 para 18 dealt with the approach to be adopted generally when meaning must be attributed to a written document. He stated as follows: -

> Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The "inevitable point of departure is the language of the provision itself", read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.

19. This Court now turns to unraveling what a 'going concern' is. According to Merriam-Webster Dictionary, the term a "going concern" is defined as follows: -

> a business that is in operation and expected to continue operating, usually for at least a year.

20. In Pankaj Somaia v Bill Kipsang Rotich & 2 others [2020] eKLR, Hon. Ochieng, J [as he then was], stated as follows: -

50. In my understanding, when the company was a going concern, that implies that it not only had the resources needed for it to continue operating, but also that it was operational.

21. The term 'going concern' is, therefore, based on an assumption that a business is expected to operate and continue its normal operations into the foreseeable future. Such a business is not expected to be liquidated or cease operations in the near future. The foregoing can be a reasonable interpretation to be ascribed to the term as used in the contract in this matter. As such, it will not be remiss of this Court to find that the bakery which was subject of the contract was not only operational as at the time the contract was entered into, but was also expected to continue operating into a reasonably foreseeable future.

22. It is settled that for a business to legally operate, it must comply with the law. In this case, the Appellant owned the bakery, the machines and other equipment, but not the premises which she had acquired under a tenancy. Therefore, for the business to continue operating, the Appellant was duty-bound to ensure that the issue of the tenancy was properly settled with the owner of the premises. From the evidence on record, the owner of the premises was not aware of the contract between the parties as at the time the Appellant handed over the premises to the Respondent. It later came out that under the tenancy, the Appellant was estopped from sub-letting or transferring the tenancy. It was, hence, incumbent upon the Appellant, in the first instance, to settle the issue of the tenancy with both the owner of the premises and the Respondent.

23. Responding to the issue, the Appellant posited that she would have done so upon receipt of the entire purchase price. Whereas the position may appear convincing, there was no way the Appellant would have transferred the remainder of her tenancy to the Respondent. In fact, upon learning that the Appellant had sub-let the premises, the owner evicted the Respondent asserting that there was no communication to that end from the Appellant. But, the Appellant had availed a Tenancy Agreement to the Respondent alleged to be from the Agent managing the premises where the Respondent filled in the required details, signed it and even provided a copy of his identity card. Obviously, from the turn of events, the alleged preparation and execution of a tenancy was the Appellant's own making since the Agent had no slightest knowledge of what was going on. The Appellant was, hence, untruthful and dishonest.

24. One, therefore, wonder why the Appellant would act as such to her close friends. As the Appellant knew that she was relocating to the United States of America to join her husband, she must have decided to pull a fast one on the Respondent and his wife. True to such, on receipt of the sum of Kshs. 700,000/= out of the Kshs. 900,000/=, the Appellant left the country without even informing the Respondent or the wife and/or the Agent managing the premises.

25. Apart from the issue of the tenancy, there was the issue of the Appellant unfairly removing vital equipment from the bakery. There is evidence that indeed the Appellant removed some equipment that almost crippled the operations of the business. The Respondent had to immediately replace the items for the business to remain afloat. Whereas the Appellant and her witnesses denied as much, the Court had observed the demeanor of one of the Appellant's witness, Vellah Achieng, during cross-examination and noted that '... the witness does not appear truthful. Is fidgeting and looking around for answers.'

26. On the flipside, the Respondent and his wife were consistent on what the Appellant removed from the premises. They affirmed that she removed vital equipment [the baker and the baking tins] and brushed off any enquiry and such stalled the operations of the bakery. Therefore, by placing the evidence by the Appellant and her witnesses on one hand and the evidence by the Respondent and his witness on the other hand, this Court finds that the evidence by the Appellant is not believable.

27. Further, there was also the issue of licensing. The Appellant said nothing on the business licenses. It remains unknown how the business was to continue operating without proper licenses and yet it was incumbent upon the Appellant to ensure that the business was a going concern.

28. Deriving from the totality of the above, this Court finds that there was no way the business would have continued to operate as before and as such the Appellant failed to ensure that the business was a going concern. Since that was a fundamental breach of the contract on the part of the Appellant, the Respondent was entitled to rescind it as he did. The Respondent was, hence, entitled to a refund of the Kshs. 700,000/= he had paid to the Appellant as per Term 4 of the contract.

29. Having found as much, there is no any other issue that arise for consideration and the appellate journey must comes to an end.

Disposition:

30. The appeal is declined. The Appellant must satisfy the judgment of the trial Court and to that end, this Court makes the following final orders: -

    (a) The appeal be and is hereby dismissed.

    (b) The Appellant shall bear the costs of the appeal.

    Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 22ND DAY OF MAY, 2025.

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of

Miss. Katao, Learned Counsel for the Appellant.

No appearance for Mr. Inyangu, Learned Counsel for the Respondent.

Amina Abdi – Court Assistant.