Achievers College of Professionals Limited v Mwaniniki t/a Icons College of Prossional Studies (Civil Appeal E030 of 2023) [2025] KEHC 10485 (KLR) (17 July 2025) (Judgment)

Neutral citation: [2025] KEHC 10485 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KERUGOYA

CIVIL APPEAL E030 OF 2023

EM MURIITHI, J

JULY 17, 2025

BETWEEN

ACHIEVERS COLLEGE OF PROFESSIONALS LIMITED ..... APPELLANT

AND

MARFY WAWIRA MWANINIKI T/A ICONS COLLEGE OF PROSSIONAL STUDIES ..... RESPONDENT

(Being an appeal from the judgment delivered by Hon. Cheruto C. Kipkorir (PM) on 8/3/2023 at Kerugoya CMCC No. 201 of 2016)

JUDGMENT

1. By a plaint dated 9/11/2016, the Respondent sued the Appellant seeking the balance of Ksh. 1,975,000, Ksh. 825,000 being damages for breach of agreement, cost of this suit and interest. She pleaded that by an agreement executed on 16/2/2016, she sold to the Appellant business inventory at the cost of Ksh. 2,750,000. Pursuant to the said contract of sale, the Appellant paid the deposit of Ksh. 500,000 and the balance of Ksh. 200,000 was to be paid by monthly installments of Ksh. 187,500 for a period of 12 months. The Appellant further paid one month installment of Ksh. 187,500 and part installments of Ksh. 87,000, but has since then neglected to remit the outstanding balance to date and even after the Respondent made attempts to reach an amicable settlement of the said debt. The Appellant has shown no efforts of its intention to settle the outstanding debt, and the Respondent was thus demanding from the Appellant the outstanding amount of Ksh. 1,975,000 plus 30% of the purchase price, being the agreed damages for breach of contract as stipulated under clause 11 of the sale agreement.

2. The Appellant denied the claim by its statement of defence and counterclaim dated 19/12/2016 and prayed for the Respondent's suit to be dismissed. It averred that the Respondent had received a total of Ksh. 775,000 and not Ksh. 500,000 as misrepresented, and as a result of the Respondent's said

fraudulent misrepresentation, it entered and signed the illegal contract dated 16/2/2016 and part paid the consideration as hereinabove stated between 16/2/2016 and 31/3/2016.

3. Upon full hearing of the case, the trial court held that;

> " I did not understand paragraph 7 of the counterclaim. In any event, it was not proved that the defendant paid Kes. 400,000 to Stanley Njagi and what it was for and how the plaintiff was liable. I also with respect to paragraph 9, did not understand what "proper and accurate amounts" the Appellant spoke of. Again, this was not proved. The agreement also refers to the Law Society Conditions of Sale (1989) which it will be subject to. I read through those conditions' vis a vis the content of the agreement, I was hard pressed to find aspects that were applicable. None of the parties herein addressed me on the same either. These are the orders I have granted: a) The plaintiff is awarded prayer 1 and 2 of the plaint. Interest, at court rates, will accrue from the date of filing suit, until payment in full. The costs of the suit are awarded to the plaintiff. b) The defendant's counterclaim is dismissed with costs to the plaintiff."

The Appeal

4. On appeal, the Appellant filed its memorandum of appeal on 28/3/2023 raising 11 grounds as follows:

    1. The learned magistrate erred in law and fact by passing the judgment in favour of the Respondent against the weight of evidence.

    2. The learned magistrate erred in law and fact by finding the contract between the Appellant and the Respondent was inadequate in content and proceeded to enter judgment in favour of the Respondent.

    3. The learned magistrate misdirected herself in law by denying the respondent to tender his claim supporting documents merely on the ground that the same had not been served.

    4. The learned magistrate erred in law and fact by failing to appreciate that the Appellant had a counsel who was absent when the case was heard and failed to get the Appellant a chance to be represented by the counsel.

    5. The learned magistrate erred in law and fact by finding that the Respondent had not explained fully the kind of contract she had with Kenya College of Accountancy (KCA) but proceeded to enter judgment in her favour.

    6. The learned magistrate erred in law and fact by dismissing the Appellant's counter claim without enough justification.

    7. The learned magistrate erred in law and fact by failing to appreciate that the entire contract void for nondisclosure of material facts by the Respondent.

    8. The learned magistrate erred in law and fact by dismissing the Appellant's defence without any justification.

    9. The learned magistrate erred in law and fact by allowing the Respondent's claim as prayed without appreciating the ambiguity in the said prayers.

    10. The learned magistrate erred in law and fact by failing to state in her judgment the issues for determination, the finding on each issue and the reasons thereof.

11. The learned magistrate erred in law and fact by awarding exorbitant claim to the Respondent which is three times the principal amount.

Duty of the Court

5. This being a first appeal, this court is duty bound to delve at some length into factual details and revisit the facts as presented in the trial court, analyse the same and arrive at its own independent conclusions, but always remembering that, the trial court had the advantage of seeing the witnesses testify. (See *Selle v Associated Motor Boat Co. & others* [1968] EA 123).

Evidence

6. PW1 Mary Wawira Mwaniki and the Respondent herein adopted her statement dated 9/11/2016 as her evidence in chief and produced the demand letter, certificate of postage, sale agreement and the certificate of registration as exhibits in court. She testified that, "We did not indicate student number. We did give annual performance of college. We did not specify the number of students. We did not sell the students. I was very specific on what belonged to the college. I was very specific on what belonged and not everything. By the time a university gives a partnership with us, it shows it was a cordial relationship. I could not have misrepresented the issue of KCA. I could not kill that program. I did not manage the relationship. I did try to keep the university program to keep going. There was no breach of contract on our part. Achievers took possession in January, we did sign the agreement in May and if there was any issue, there was good time to bring it to our attention. I do pray for prayers in the plaint. I also pray for damages for breach of contract."

7. On cross examination, she stated that, "Referred to Agreement: It shows that I was selling business inventory and it is outlined in clause 8 of the sale agreement. Plaintiff is one trading as Icons College of Professional Studies. The name Icon does not appear in the Sale Agreement. I did not sell the name of the business. I did sell the inventory. Referred to Clause 9. KCA stands for Kenya college of Accountancy University. Icon was to run the Holiday Teachers Program for KCA for their degree. It did involve students. That program for KCA the proceeds were to be shared. It was a profitable value and Achievers was to take over the program. We did earn Kes would be determined by the number of students. We had twelve students and we earned. In that one holiday, we did one semester at the time. I would not know. I do not have a copy of agreement with KCA. The college did have movable assets. Building was owned by the landlord, owned by Mr. and Mrs. Njagi. They did operate a collage before I took over. It was called Ebenezer and did have movable assets bed and building. I did not hold at Mr. Njagi's property as at paragraph *8* and sell it to Defendant. Beds are not included. I did not hold at any of it as mine. I have been paid Kes. 500,000+187,000+87,500. The contract says if there is breach at clause 11 a 30% liquidated damages will be paid by the party who breaches. At the time I sold it, it had students. I do not recall the number. When I did get college from Mr. & Mrs. Njagi, It was not in use for 10 years. I did a lot of renovations and it was inspected by Defendant before sale."

8. In re-examination, she stated that, "I was in charge of the college but by the time we got into the agreement, Achievers was in charge. They did not write to me to tell me that Mr. Njagi has taken any of property listed in clause 8. Icon does appear in the agreement - reads it out. We did manage the agreement by KCA, Achievers did not have goodwill to allow us to do so, they did say they had taken over. We did not sell any students."

9. DW1 John Mukundi Njeru Zachary, and the Appellant's Director adopted his statement dated 28/11/2022 as his evidence in chief. He testified that, "I know Plaintiff. I do recall an agreement we entered on 16/02/2016. The agreement was to purchase a college which included assets students and an agreement they had with KCA University. What happened is, I realised that the Plaintiff did

misrepresent that the college had 231 students but it only had 21. I was told assets I bought belonged to Mary Wawira. Mr. Njagi the owner of the building said he owned some of them. She did say she was in collaboration with KCA which I was to take over and the agreement did not come forth. KCA and the college had an agreement to train some students and revenue was to come. I did not get anything for it. There was nothing presented to me to show the agreement existed. I did file a list of documents and I will produce it as part of my exhibits."

10. On cross examination, he stated that, "I did enter the agreement. I have a copy. (Referred to it) Clause no. 3 shows the number 3. There is no way we can have a college without the student. It is not mentioned expressly. I took possession on 04/01/2016. I did execute the agreement on 16/02/2016. At the time I was told the students were to report. There was no predefined date when they were to report. We did offer Kasneb courses and it is offered from January to end of May. As at May 23 students did report from the list we were given. I did pay Kes. 87,500. It was not a breach as we were suspicious on the number of students and the contract they had with KCA University. At the time she did say that she's pursuing it with KCA. I do not have any written communication. It was oral. I did not terminate contract, there was assumed from her. I did pay less because of the reservations I have. Landlord did claim that some of the property. He did give us a list of the documents. I did avail it as a part of my list of documents filed on 29/11/2022. They did manage the accounts and I have minutes to that effect."

11. In re-examination, he stated that, "I did file a list of documents and I do pray you consider them as well. I do pray case to be dismissed as the contract was frustrated. I did buy assets that did not belong to her and number of students was fraudulent and the revenue from KCA was not guaranteed as indicated. I do feel we were deceived."

Submissions

12. The Appellant urges that it had been unduly influenced to sign the contract on the understanding that the Respondent had a good relationship with KCA and that the profits would be shared between it and the Respondent in equal shares. It accuses the Respondent of failing to disclose that a majority of the inventory belonged to the landlord before the contract was executed, which amounted to misrepresentation and rescission of the contract. It urges that it was a miscarriage of justice to deny it representation and an opportunity to produce documents and call witnesses.

13. The Appellant filed a list of authorities dated 30/4/2025 in support of their submissions.

14. The Respondent urges that that the Appellant did not discharge the evidentiary burden, and cites *Ketno Sacco & 2 Others v Namu* (Civil Appeal E025 of 2022) [2022] KEHC 16124 (7 December 2022), *Ahmed Mohammed Noor v Abdi Aziz Osman* (2019) eKLR and *Alice Wanjiru Ruhiu v Messiac Assembly of Yahweh* (2021) eKLR.

Analysis and Determination

15. From the grounds of appeal, the issue for determination is whether the Respondent proved her case on a balance of probabilities to justify the award made.

16. It is evident from clauses 3 and 4 of the sale agreement dated 16/2/2016 that the Appellant inspected the premises and its boundaries prior to taking possession, use and control thereof on 4th January, 2016.

17. Clause 8 of the sale agreement provides that; "The purchase price includes books, furnitures, weaving machines, computers, accessories, kitchen wares, saloon wares, generator, tents and the debtors."

18. The Respondent testified that, "We did not sell the students. I was very specific on what belonged to the college. I could not have misrepresented the issue of KCA. There was no breach of contract on our

part. Achievers took possession in January, we did sign the agreement in May and if there was any issue, there was good time to bring it to our attention."

19. DW1 asserted on cross examination that, "There is no way we can have a college without the student. It is not mentioned expressly. I took possession on 04/01/2016. I did execute the agreement on 16/02/2016. There was no predefined date when they were to report. As at May 23 students did report from the list we were given. I did pay less because of the reservations I have."

20. The Appellant has admitted that out of the agreed purchase price of Ksh. 2,750,000, it only paid Ksh. 500,000 + Ksh. 187,500 + Ksh. 87,500 totaling to Ksh. 774,500. The sale agreement was very explicit on what constituted inventory and the Appellant voluntarily executed the said agreement subsequent to taking possession.

21. This court finds that, in withholding payment on account of an alleged misrepresentation on the part of the Respondent, the Appellant was in breach of the contract, and the provisions of Clause 11 of the sale agreement came into play, as follows; "Any party responsible for the breach of this agreement shall pay the aggrieved party the equivalent of 30% of the purchase price as liquidated damages over and above any other legal remedy available."

22. The Appellant is inviting the court to venture into the forbidden sphere of re-writing the agreement dated 16/2/2016 which it willingly executed with its eyes wide open and consented to be bound by its terms.

23. The contract herein was enforceable just like any other contract unless any vitiating factors are substantiated. The court will however not interfere merely because the terms of the agreement are unconscionable or unfavorable to one party. In *Pius Kimaiyo Langat v Co-operative Bank of Kenya Ltd* (2017) eKLR the Court of Appeal stated that:

> "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. See *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd* [2002] 2 EA 503. The primary task of the court is to construe the contract and any terms implied in it. See Megarry, J. in the case of *Coco v A. N. Clark (Engineers) Ltd* [1969] RPC 41."

24. As was said by Shah JA in *Fina Bank Limited v Spares & Industries Limited* (Civil Appeal No 51 of 2000) (unreported) quoted by the Court of Appeal in *National Bank of Kenya Limited v Pipe Plastic Samkolit (K) Ltd & another* [2011] eKLR:

> "It is clear beyond peradventure, that save for those special cases where equity might be prepared to release 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."

25. This court finds that there was no misapprehension of the facts and the evidence on record by the trial court, to warrant this court's interference.

26. Consequently, upon the test in *Selle v Associated Motor Boat Co. & others* [1968] EA 123, the Court does not find any reason to interfere with judgment of the court.

Orders

27. Accordingly, for the reasons set out above, the court finds the appeal is without merit and it is dismissed.

28. The appellant shall pay the costs of the appeal to the respondent.

Order accordingly.

DATED AND DELIVERED THIS 17TH DAY OF JULY 2025.

EDWARD M. MURIITHI

JUDGE

Appearances

Mr. Kinyanjui for the Appellant.

Mr. Mutua for Mr. Gichimu for the Respondent.