



**Roack Consult Limited v Wachanga & another (Civil Appeal
E277 of 2022) [2024] KEHC 7838 (KLR) (Civ) (2 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 7838 (KLR)

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

CIVIL

CIVIL APPEAL E277 OF 2022

DAS MAJANJA, J

JULY 2, 2024

BETWEEN

ROACK CONSULT LIMITED APPELLANT

AND

JESSE MWANGI WACHANGA 1ST RESPONDENT

THIKA RIVIERA COURT LIMITED 2ND RESPONDENT

*(Being an appeal from the Judgement and Decree of Hon. D.W. Mburu SPM dated
01.04.2022 at the Magistrates Court at Nairobi, Milimani in Civil Case No.7168 of 2021)*

JUDGMENT

Introduction and Background

1. By a plaint dated 07.08.2018, the 1st Respondent filed a suit in the Subordinate Court against the Appellant and the 2nd Respondent seeking damages for breach of contract. He claimed that the Appellant, through a letter of offer dated 26.09.2011 (“the Letter of Offer”) and on behalf of the 2nd Respondent offered to sell to him the property described as Maisonette No. 49, Thika Riviera Court Title Number Thika Municipality Block 13/314 (“the suit property”). The 1st Respondent contended that he made a deposit of Kshs. 630,000.00 to the Appellant as stipulated in the Letter of Offer and further executed a sale agreement dated 08.11.2011 (“the sale agreement”) but that the Appellant and the 2nd Respondent breached their contractual obligations by inter alia failing to commence construction of the suit property within the scheduled time and ultimately failed to hand it over within the agreed timelines. The 1st Respondent sought a refund of the deposit paid plus interest on that amount totalling Kshs. 1,812,932.66, general damages, interest and costs of the suit.



2. In its response, the Appellant stated that it was merely an agent of the 2nd Respondent and that it could not be held liable for any actions in the circumstances. The Appellant further stated that it was not party to the sale agreement between the Respondents and as such, the same was not enforceable against it. The 2nd Respondent also filed a defence and principally denied that the Appellant was acting on its behalf or that it received the deposit. As such, it stated that the Appellant, as the recipient of the deposit, was liable to refund the deposit. The 2nd Respondent further invoked the doctrine of frustration in explaining reasons as to why it was unable to complete the suit property within the contractual timeline. The 2nd Respondent stated that the project was subject to an ownership court dispute and as such, it could not as at that time, continue with construction works on the suit property.
3. At the hearing, the 1st Respondent (PW 1) testified on his own behalf and called Ng'ang'a Thaim (PW 2), an auditor as his witness. The Appellant called its director, Dr. Soik Omido (DW 1) and the 2nd Respondent called Kinuthia Wamwangi (DW 2), the owner of the parcel of land where the suit property is located. In the judgment rendered on 01.04.2022, the trial magistrate identified three issues for determination; whether the Letter of Offer was binding upon the 2nd Respondent, whether there was actual breach of contract and if so, whether the 1st Respondent was legally entitled to the damages claimed and if in the affirmative, who is liable for payment of the special damages.
4. The trial court found that the Letter of Offer was executed by the 1st Respondent and the Appellant on 29.09.2011 and that the deposit was paid to the Appellant. That from a copy of the banker's cheque used for payment and the wording of the letter suggested that it was strictly between the 1st Respondent and the Appellant. It found that the purpose of the deposit was to clear the stamp duty, and other ancillary costs and charges for the purposes of preparing and registering the lease, incorporation of the Management Company, transfer of shares to the 1st Respondent and issuance of share certificates to him as captured under the schedule of closing costs in the Letter of Offer as well as condition H under the special conditions in the sale agreement. Further that PW 1 and DW 1 all acknowledged that the deposit was paid to the Appellant but that DW 1 contended in the letter dated 31.07.2012 that the deposit was used to settle the costs for inter alia payments for statutory approvals, advertising and outsourced consultancy services. However, the trial magistrate held that DW 1 as well as the Appellant did not tender evidence to corroborate the aforementioned expenditures. Consequently, the trial court found that the Appellant was liable for the deposit of Kshs. 630,000.00.
5. On the interest payable on the deposit, the trial court held that the Appellant enjoyed the benefits of the deposit for a period of 5 years and 11 months to the detriment of the 1st Respondent and that as per the sale agreement, the deposit was to be refunded within 30 days from the date of the letter demanding a refund. That since the letter demanding the refund was dated 16.07.2012, the trial court found that the deposit ought to have been refunded by 17.08.2012 and that from this date, the Appellant was holding the deposit without justification and therefore getting unjustified benefit. On the basis of section 26 of the Civil Procedure Act (Chapter 21 of the Laws of Kenya), the Subordinate Court awarded the 1st Respondent interest amounting to Kshs. 1,182,932.66 on the deposit paid.
6. The Subordinate Court entered judgment for the 1st Respondent against the Appellant for Kshs, 1,812,932.66 together with interest thereon at the contractual rate of 18% per annum from the 18.07.2018 until payment in full and dismissed the suit against the 2nd Respondent.
7. Being dissatisfied with the judgment, the Appellant presents this appeal anchored on the memorandum of appeal dated 28.04.2022. The parties have filed written submissions in support of their respective positions. Since the submissions restate the parties' positions I have already highlighted above, I will only make relevant references rather than summarize the same in my analysis and determination below.



Determination

8. The Appellant is aggrieved by the Subordinate Court's appreciation of the evidence and overall findings and thus urges the court to find otherwise and set aside the subordinate court's decision. This brings to fore the approach by this court to this appeal that is to analyze and re-assess the evidence on record and reach its own conclusions in the matter while making an allowance that it neither saw or heard the witnesses (see *Selle v Associated Motor Boat Co .* [1968] EA 123).
9. The Appellant submits that it was acting as an agent of the 2nd Respondent in the sale of the suit property to the 1st Respondent and that the Letter of Offer and the sale agreement were not enforceable against it. The Appellant further submits that the award of interest was unlawful and the rate applied was not based on any contractual agreement. In any event, the Appellant submits that the interest amount that was awarded was more than the principal amount rendering it punitive hence warranting the intervention of the court.
10. From the record, it is common ground that the Letter of Offer was entered into between the Appellant and the 1st Respondent. The contents partly indicate that the offer was "on behalf of Thika Riviera Court Limited" and the same was, "subject to Sale Agreement". It is also not disputed that the Letter of Offer states that the vendor of the suit property is the 2nd Respondent and that the 1st Respondent was to make a deposit of Kshs. 630,000.00 to the Appellant as stipulated in the Letter of Offer. It is further common ground that the Respondents executed the sale agreement where it was recognized that the Kshs. 630,000.00 deposit was to be paid to the Appellant and that further balances were to be paid to the 2nd Respondent.
11. The question before the Subordinate Court and now this court is whether the Appellant received the deposit as an agent of the 2nd Respondent. I am in agreement with the Appellant's submission that *Bowstead and Reynolds on Agency* (17th Ed.) *Sweets Maxwell*, defines an agency relationship to be "... a relationship which exists between two persons, one whom expressly or impliedly consents that the other should act on his behalf so as to affect his relations with third parties, and the other of whom similarly consents so to act or so acts." From this, an agency relationship and the consent of such a relationship can be inferred from the conduct of the parties and that once the Appellant stated that it was offering the suit property to the 1st Respondent on behalf of the 2nd Respondent, then it was presumed that it had such valid consent from the 2nd Respondent and the onus shifted to the 2nd Respondent to prove that the Appellant did not have the consent. I have already stated that from the sale agreement, the 2nd Respondent agreed that the deposit for the suit property was to be paid to the Appellant, just as it was indicated in the Letter of Offer. DW 2 admitted that the 2nd Respondent and the Appellant did enter into a Project Management Agreement. He further admitted that the 2nd Respondent is owned by the Appellant and one Kinuthia Wamwangi. In essence, the Appellant and the 2nd Respondent have shared ownership. DW 2 further admitted that the sale agreement mentions the Letter of Offer.
12. The Court of Appeal in *East African Fine Spinners Limited (in receivership) & 3 others v Bedi Investments Limited* [1994] eKLR held that a Letter of Offer is not binding and enforceable upon the parties if it is "subject to contract" and that the same only becomes binding and enforceable once the contract is executed. It is for this reason that I disagree with the 1st Respondent's submission that the Letter of Offer consisted a valid acceptance of the offer once executed. In the said decision by the Court of Appeal, Gicheru JA., adopted the following words of Sir Raymond Evershed MR in *Bennet, Walden & Co v Wood* [1950] 2 All ER 134 at page 137 that "An offer subject to contract lacks that essential characteristic, for its acceptance does not create a contract." Therefore, it is only once the



sale agreement was executed that the Letter of Offer had a binding effect. I agree with the Appellant that at the point of execution of the sale agreement, neither the Letter of Offer nor the sale agreement could be read in isolation. From the foregoing I hold that the Appellant and the 2nd Respondent had a relationship and that the Appellant expressly represented itself to the 1st Respondent as an agent of the 2nd Respondent and that the 2nd Respondent admitted this relationship expressly in the sale agreement and impliedly by its conduct. The 1st Respondent paid the deposit to the Appellant knowing that the same was being received by the Appellant on behalf of the 2nd Respondent and the 2nd Respondent admitted this in the sale agreement. This explains why the 1st Respondent sent the demand letter dated 16.07.2012 for the refund of the deposit to both the 2nd Respondent's advocates and the Appellant. I find that the 2nd Respondent's denial of the agency relationship between itself and the Appellant was threadbare and could not upstage the overwhelming documentary evidence of this relationship. The fact that the Appellant never remitted the deposit to the 2nd Respondent did not negate the agency and if anything, this was an issue between the Appellant and the 2nd Respondent which the 2nd Respondent was at liberty to pursue.

13. From the totality of evidence, I find that the Appellant was the agent of the 2nd Respondent in the sale of the suit property and that the deposit was received by the Appellant on behalf of the 2nd Respondent. Since the Appellant was the agent of the 2nd Respondent, a disclosed principal, it could not be sued in that capacity (see *Anthony Francis Wareham and 2 Others v Kenya Post Office Savings Bank* [2004] eKLR and *City Council of Nairobi v Wilfred Kamau Githua t/a Githua and Associates and Another* [2016]eKLR).
14. Having reached the aforesaid conclusion, I allow the appeal. I note that 1st Respondent did not cross-appeal against the judgment. In the circumstances, the court cannot enter judgment against the 2nd Respondent as the 2nd Respondent would, in effect, be denied the opportunity to contest the claim against it in this appeal.

Disposition

15. The Appellant's appeal is allowed on terms that the judgment of the Subordinate Court dated 01.04.2022 is set aside and substituted with an order dismissing the suit against the Appellant. The 2nd Respondent shall bear the costs of the suit before the Subordinate Court. The Appellant is awarded costs of this appeal assessed at Kshs. 40,000.00 to be borne by both Respondents jointly and severally.

DATED AND DELIVERED AT NAIROBI THIS 2ND DAY OF JULY 2024.

D. S. MAJANJA

JUDGE

