



REPUBLIC OF KENYA



**KENYA LAW**  
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**Co-operative Bank of Kenya Limited v Wanderi (Civil Appeal  
E056 of 2021) [2023] KEHC 4094 (KLR) (Civ) (2 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 4094 (KLR)

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

**CIVIL**

**CIVIL APPEAL E056 OF 2021**

**AN ONGERI, J**

**MAY 2, 2023**

**BETWEEN**

**CO-OPERATIVE BANK OF KENYA LIMITED ..... APPLICANT**

**AND**

**PHILIP WANGUI WANDERI ..... RESPONDENT**

*(Being an appeal from the judgment and decree of Hon. D. O. MBEJA  
(SRM) in Milimani CMCC no. 6807 of 2012 delivered on 21/6/2019)*

**JUDGMENT**

1. The Respondent sued the appellant in Milimani CMCC no. 6807 of 2012 seeking a refund of a deposit of kshs.162,500 paid for the purchase of Mweiga/Block 2/434 plus interest at commercial rates from 16/9/2011 until payment in full.
2. The Respondent's case in summary was that he paid the said amount in respect of Mweiga/block 2/434 (hereafter referred to as the suit property) but he later discovered the suit property belonged to one Erastus Kiama Gichuki and it was not for sale.
3. The trial court found that the property intended for sale by the appellant by public auction was not the property that was sold.
4. The trial court found that the plaintiff was entitled to a refund of the money he deposited and ordered the refund.
5. The appellant was aggrieved and filed this appeal on the following grounds;



- a. That the trial magistrate erred in law and fact in reaching contradictory findings on one hand that there was a valid contract between the parties and on the other that the memorandum of sale was invalid for misdescription of the property and non- execution by the plaintiff.
  - b. The learned trial magistrate erred in law and fact in holding that the plaintiff did not execute the memorandum of sale despite there being an unequivocal admission in his plaint and witness statement that he signed the memorandum of sale
  - c. The learned trial magistrate erred in fact in ignoring the memorandum of sale files by the defendant which was clearly signed by both parties and admitting the memorandum of sale by the plaintiff which was clearly a draft as the completion date for the sale was stated to be 30 days.
  - d. The learned trial magistrate erred in law and in fact holding that the memorandum of sale was invalid yet the plaintiff paid Kshs. 162,500 deposit pursuant to the said agreement.
  - e. The learned trial magistrate erred in law and in fact in holding that the memorandum of sale was invalid for misdescription of the property despite an express provision in the memorandum of sale that the sale would not be invalidated by a mere misdescription of the property.
6. The parties filed written submissions as follows: the appellant in its submission argued that the respondent submitted a draft memorandum of sale in the trial court with the aim of distorting otherwise undisputed facts. That in the memorandum of sale produced by the appellant shows that the respondent affixed his signature and that the auctioneers were witnessed by Winfred Mwangi.
  7. The appellant admitted that the memorandum of sale described the property as Mweiga Block 11/434 as was advertised instead of Title Number Mweiga/Block 2/ 434. That the misdescription of the property was not so fatal as there was a consensus that it described the same property.
  8. The appellant submitted that all the requirements under clause 6 of the memorandum of sale were met and the forfeiture of the deposit was well within the terms of the sale. Therefore the trial court was wrong in finding that the respondent was entitled to a refund of his deposit.
  9. The respondent in his submission argued that reiterated his arguments in the lower court that the memorandum of sale that was witnessed by Winfred Mwangi was null and void since it was never executed as alleged by the appellants.
  10. The respondent contended that the appellants never issued a notice of rescission of sale and the same was not served upon him as it was expressly stipulated in the memorandum. He added that the appellant never issued a written notice regarding the timeline within which the balance was to be paid failing which rescission would naturally occur. That further the retention of the deposit by the appellant was unfair and amounted to unjust enrichment on its part.
  11. This being a first appellate court, the duty of the first appellate court is re-evaluate the evidence adduced before the trial court and to arrive at my own conclusion whether to support the findings of the trial court while bearing in mind that the trial court had the opportunity to see the witnesses. In *Selle v Associated Motor Boat Co.* [1968] EA 123 in the following terms: -

“An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge’s finding of fact if it appears either that he failed to take account of particular circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.



An appeal to this court from a trial by the High 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.

In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

12. The issues for determination in this appeal are as follows;
  - i. Whether there was a valid contract between the appellant and the respondent.
  - ii. Whether the respondent was entitled to a refund of kshs.162,500.
  - iii. Who pays the costs of this appeal.
13. On the issue as to whether there was a valid contract between the appellant and the respondent, the essential components of a contract as was observed by Harris JA in *Garvey v Richards* {2011} JMCA 16 ought to ordinarily reflect the following principles:

"It is a well-settled rule that an agreement is not binding as a contract unless it shows an intention by the parties to create a legal relationship. Generally, three basic rules underpin the formation of a contract, namely, an agreement, an intention to enter into contractual relationships and consideration. For a contract to be valid and enforceable an essential terms governing the relationship of the parties must be incorporated therein. The subject matter must be certain. There must be positive evidence that a contractual obligation, born out of an oral or written agreement is in existence."

14. I find that there was a misdescription of the suit property which was stated as Mweiga/Block 11/434 instead of Mweiga/Block 2/434.
15. The trial court was right in finding that there was no meeting of minds.
16. I find that there was no valid contract between the respondent and the appellant and it cannot be said that the respondent failed to pay the balance.
17. I therefore find that the trial court was right in ordering the appellant to refund the deposit.
18. I find that this appeal lacks in merit and I dismiss it with costs to the respondent.
19. I accordingly uphold the judgment and decree of the trial court.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS  
2<sup>ND</sup> DAY OF MAY, 2023.**

.....

**A. N. ONGERI**

**JUDGE**

In the presence of:

..... for the Applicant



..... for the Respondent

