



**Mbithi v Superior Homes (Kenya) Limited (Civil Appeal E165 of 2023)
[2025] KEHC 13783 (KLR) (25 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 13783 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E165 OF 2023
EN MAINA, J
SEPTEMBER 25, 2025**

BETWEEN

URBANUS KIOKO MBITHI APPELLANT

AND

SUPERIOR HOMES (KENYA) LIMITED RESPONDENT

(Being an appeal from the judgment of Hon. B.Ojoo, Senior Principal Magistrate delivered on 21/06/2023 at the Chief Magistrates Court in Mavoko in CMCC 678 of 2020)

JUDGMENT

1. The dispute between the Appellant and the Respondent arose from a contract entered into between the Appellant and the Respondent for the sale of a house at Green Park Estate at a consideration of Ksh 13,950,000. The Appellant was to pay a deposit of 10 percent of the purchase price and the balance through a mortgage from the Kenya Commercial Bank. The Appellant duly paid the deposit of Kshs 1,395,000 but his application to the bank rejected ostensibly on account of a case between the Green Park Estate and the Water Resources Management Authority (WARMA). This culminated in forfeiture of his deposit. According to him, the forfeiture was breach of the contract between the parties. He therefore sued the Respondent for the deposit. It was his contention that the circumstances that led to his failure to raise the balance were unforeseeable and that such circumstances were provided for in the agreement.
2. At the hearing the Appellant adduced evidence of the agreement between him and the Respondent; he also adduced evidence of what had transpired between him and the bank; he contended that the Respondent sold the house to someone else despite that the agreement should have been completed on 9th June 2018. He contended that he was never informed of the sale. However, the Respondent denied that that particular house was affected by the case between it and the WARMA and accused the Appellant of breaching the contract and vehemently resisted his claim.



3. After hearing and considering the evidence adduced by the parties and the submissions of their advocates the learned magistrate found for the appellant and dismissed Appellant's case.
4. Being aggrieved by the judgment of the learned magistrate, the Appellant preferred this appeal on grounds that-
 - a. The Honourable learned trial magistrate erred and misdirected herself in both fact and law by holding that the Defendant was justified in causing the Plaintiff to forfeit 10 percent of the purchase price which finding was against the weight of evidence adduced during trial.
 - b. The Honourable learned trial magistrate erred and misdirected herself in both fact and law by failing to appreciate that the totality of evidence before her demonstrated that the Defendant made the Plaintiff not to access financing to enable him pay the balance of the purchase price.
 - c. The Learned trial magistrate erred in both fact and law by disregarding the witness statement and evidence of the Appellant.
 - d. The Learned trial magistrate erred in both fact and law by disregarding the critical evidence adduced in favour of the Plaintiff's case.
 - e. The Learned trial magistrate erred in both fact and law in disregarding the doctrine of estoppel in the case whereupon the Defendant was estopped from insisting on his strict legal rights after causing the Plaintiff to secure financing to pay the balance of the purchase price.
 - f. The Learned magistrate erred in fact and law in disregarding the Appellant's written submissions and the authorities cited therein.
 - g. The Learned trial magistrate erred in fact and law in finding that the Defendant was justified in rescinding the contract between the Plaintiff and the Defendant.
 - h. The Honourable magistrate erred and misdirected himself by relying on facts pleaded in the Respondent's Defence without considering whether such facts had been proved by way of evidence.
 - i. The Learned magistrate erred and misdirected herself when she failed to apply the well known principles of law in arriving at her decision.
 - j. The learned magistrate erred in fact and law in failing to enter judgment in favour of the Appellant as prayed for in the Plaint.
5. The Appeal was disposed by way of written submissions.
6. For the Appellant it was submitted that the forfeiture was unjust and inequitable; that the Respondent had not acted in good faith and failed to disclose that there was a demolition order by WARMA, circumstances which were beyond the Appellant's control. That the conduct of the Respondent amounted to unjust enrichment as it received and retained the deposit knowing that the property was under a physical and legal threat. In support of this argument, reliance was placed on the case of *Vinayak v Santokh & 2 others (Civil Appeal (Application) 175 of 2017) [2023] KECA 1433 (KLR)*.
7. Counsel for the Appellant further argued that the trial court did not consider the letter by the Kenya Commercial Bank which specifically referred to the demolition order by WARMA as the reason for the rejection, hence arriving at an unfair decision. Counsel asserted that the Appellant's evidence was uncontroverted; that the learned magistrate did not consider the principles of contract to wit; frustration, good faith and material disclosure. In support of these submissions, Counsel placed



reliance on the cases of *Ndungu Dennis vs Ann Wangari Ndirangu and another* [2018] KEHC 8799 KLR, *Mursal & another v Manese* (suing as the legal administrator of Dalphine Kanini Manesa) [2022] KEHC 282 (KLR), *Opailo v Olumatia & another* [2022] KECA 134 (KLR), *Murungi vs Ndetu* [2022] KEELC 15368 KLR.

8. Counsel urged this court to allow the appeal with costs to the Appellant.
9. By the time of writing and delivering this judgement, the Respondent had not filed any submissions.

Analysis and determination.

10. This being a first appeal, I have re-evaluated and considered the evidence adduced by the parties in the court below so as to arrive at my own independent conclusion whilst bearing in mind that I did not see or hear the witnesses and made provision for it.
11. That the parties herein entered into an agreement on 18th January 2017 in which the Respondent was to sell a house NO SD945E which it was constructing on LR NO. 27409 IR 103926/1, to the Appellant is not disputed. That the purchase price was Kshs 13,950,000 and that the Appellant paid a deposit of 10 percent which is Kshs 1,395,000 is also not disputed. Neither is it denied that he was to pay the balance of Kshs 12,555,000 on or before 22nd December 2017 and in any event not later than the completion date of 31st January 2018 or within thirty days of the issuance of the certificate of occupation, whichever came first. It is also not denied that the balance was to be financed by the Kenya Commercial Bank and that the bank declined to give him the mortgage due to a demolition order issued to the developer by the WARMA which was opposed to the development of the estate. The gravamen of this case concerns the forfeiture of the 10 percent deposit paid by the Appellant to the Respondent.
12. The issues for determination are therefore;
 - a. Whether the demolition order by WARMA which culminated in the rejection of the mortgage by the bank amounted to force majeure.
 - b. Whether the Respondent was guilty of material non-disclosure.
 - c. Whether the Appellant is entitled to the orders sought.
13. It is trite law that a court cannot rewrite an agreement or contract freely entered into by parties. In *National Bank of Kenya Limited vs. Pipe Plastic Samkolit (K) Ltd* [2002] eKLR, the court stated:

“A court of law cannot rewrite a contract between parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded or proved.”
14. It is also trite that parties are bound by the terms of their agreement. See the case of *Ogutu v Anjichi* (Civil Appeal E010 of 2024) [2025] KEHC 3875 (KLR). In this case the agreement between the parties was in writing and this court cannot therefore go further than the agreement. The said agreement expressly provided for forfeiture of the deposit if the balance of the purchase price was not paid within the agreed time. It is the Appellants case that the reason he was not able to raise the deposit was beyond his control and he was therefore shielded from losing his deposit. The clause he cited was Clause 12.1 on force majeure.
15. Clause 12.1 of the agreement stated;
 - 12.1. Notwithstanding anything contained or implied by this Agreement for Sale, in the event of the performance of the obligations or duties of the vendor being rendered wholly or partially



impossible for any reason beyond its control including but not limited to war, invasion, act of foreign enemy, hostilities whether war be declared or not, trade disputes acts or defaults of its suppliers, actions or acts of God, force majeure acts of government or government authorities or default of third parties, or other unforeseen circumstances then such non-performance shall not be deemed to constitute breach of those duties or obligation.

- 12.2. in the event of a party's inability to continue the performance of its /his obligations under this agreement after ninety days of an act of force majeure, either party may terminate this agreement by notice and both parties shall thereafter be discharged from its/his obligations under this agreement. The parties shall as much as possible be restituted to their original position.”
16. Whereas it is correct that the circumstances that led to him breaching the contract may have fallen under force majeure acts of government and government entities, it turned out that his house was not one of those that were affected by the WARMA demolition order. Despite that information coming to him he did not take any steps either to terminate the agreement or to raise the balance from the same financier or any other.
17. Clause 11 of the agreement required all notices to be in writing. It stated as follows;
- “Notices by either party shall be given in writing and may be delivered personally or by sending the same by registered post or recorded delivery to the addressee as set out in this Agreement and any receipt issued by postal authorities shall be conclusive evidence of the fact and date of posting of any such notice.”
18. The documents produced by the Appellant were;
- a. Letter dated 26th July 2018 from KCB to the Appellant.
 - b. Demand notice for payment of balance dated 28th August 2018 and extending the completion date to 18th September 2018.
 - c. The Respondent's response to demand dated 29th August 2018 wherein he alleged the property was likely on riparian land hence the reason the financiers were shying away. The letter was also a demand by the Appellant for refund of the sum of Kes 1,345,000 within 7 days.
 - d. The Respondent's letters dated 12th September 2018 and 14th September 2018 assuring the Appellant that the property was not among those that were earmarked for demolition and disputing that, financiers were shying away for that reason.
 - e. The Appellant's letter dated 26th September 2018 stating inter alia, that the Respondent was to blame for the rejection of his mortgage application by the bank.
19. None of the above letters amounted to a notice under Clause 11 of the agreement. Clause 2.2 of the agreement provided that;
- “In the event that any moneys due as part of the purchase price hereinabove reserved remains unpaid by the purchaser seven (7) days after the due date for payment of the same, interest shall begin to accrue on such outstanding amount at twenty four per centum (24 percent) per annum from the due date until payment in full both days inclusive. If any moneys due as part of the Purchase Price shall remain unpaid for a period exceeding two (2) months from the date when the payment was due, the vendor has the option of electing to either;
- 2.2.1. raise the purchase price by 5 percent



2.2.2. rescind this agreement without notice to the purchaser.”

20. The Respondent’s letter dated 14th September 2018 was clear on the above terms but still the Appellant failed to honour his end of the agreement and instead raised the issue of the refund and the letter from the bank.
21. This court has considered the said letter. The same is dated 26th July 2018 and states;
- “We wish to advise that we are unable to progress your application due to a demolition order issued by the Water Resources Management Authority (WARMA) against Green Park Estate...”
22. The Respondent’s letters dated 12/09/2018 and 14/09/2018, however clarified that the house was not among those that had been earmarked for demolition. This issue was subsequently laid to rest by the judgment delivered by Angote J on 8th November 2019 in the case of Superior Homes (PLC) vs Water Resources Authority (WRA); Gems Management Limited & 9 others (interested parties) [2019]Eklr where he found that the demolition notices were illegal. Similarly, in Misc Application No 192 of 2018 in the ruling delivered by Odunga J (as he then was), house no SD 945E was not one of the subject properties.
23. There is no evidence that the Appellant approached other banks and received rejection letters so as to support the allegation that other financiers were shying away. I find that the Respondent was not guilty of material non-disclosure as alleged. I also find that the letter from the KCB bank did not of itself constitute conditions beyond the Appellant’s control as he could have, armed with the information from the Respondent, very well found another financier. The clause on force majeure did not apply to his circumstances. He was given time to complete the contract but he refused to do so and instead continued to raise extraneous issues.
24. The upshot is that he did not prove his case on a balance of probabilities. I find no reason to disturb the judgment of the learned magistrate and accordingly dismiss this appeal with costs to the Respondent.
- Orders accordingly.

JUDGMENT SIGNED, DATED AND DELIVERED VIRTUALLY ON THIS 25TH DAY OF SEPTEMBER 2025.

E. N. MAINA

JUDGE

In presence of:

Mr Yala, Advocate for the Respondent

No attendance for the Appellant.

Geoffrey Court Assistance.

