

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

HIGH COURT SMALL CLAIMS APPEAL CASE NO. E001 OF

2025

MOSES IRUNGU MUTURI.....APPELLANT

VERSUS

STEPHEN MUSAU NDUNGWA.....RESPONDENT

JUDGEMENT

1. Before this Court is the Memorandum of Appeal dated **8th April 2025** by which the Appellant **MOSES IRUNGU MUTURI** seeks for orders:-

“(a) The Appeal herein be allowed.

(b) The judgment dated 13th March 2025 be quashed and set aside.

(c) The Appellant be awarded the costs of the Appeal and costs in the Lower Court.”

2. The Respondent **STEPHEN MUSAU NDUNGWA** opposed the appeal. The matter was canvassed by way of written submissions. The Appellant filed the written submissions dated **11th August 2025** whilst the Respondent relied upon his written submissions dated **13th October 2025**.

BACKGROUND

3. The Respondent (Claimant in the Lower Court) had filed a suit in the Small Claims Court being **Nyeri SCCC No. E379/2024** seeking judgment against the Appellant in the sum of **Kshs. 144,000**. The gist of the claim was that the parties had entered into a contract for the sale of two pool tables at **Kshs. 144,000**. The Respondent alleged that despite his having paid to the Appellant the full purchase price, the pool tables were never delivered to him. The Respondent contended that the failure that to deliver the pool tables amounted to a breach of the contract. He therefore sought a refund of the amount he had paid as well as costs of the suit.
4. In response the Appellant admitted having entered into a contract with the respondent for sale of two (2) pool tables.

The Appellant readily concedes that agreed purchase price of **Kshs. 144,000** was paid to him.

5. However the Appellant stated that the Respondent opted to leave

the pool tables in the pub which the two jointly owned from **September 2022** to **December 2023** when they closed the business.

6. The Appellant added that the Respondent exclusively owned and managed the pool tables whilst they were in the pub. He denies that he ever prevented the Respondent from collecting the pool tables and states that at no time did the Respondent indicate his desire and/or intention to remove said Pool tables from the pub.

7. The suit was heard in the Small Claims Court and vide a judgment delivered on **13th March 2025**, **Hon. Stanley Imoleit** the Adjudicator found in favour of the Respondent and made the following orders:-

“(i) The contract dated 31st May 2022 is void.

(ii) The Respondent to refund the entire sum of Kshs.

144,000 to the claimant herein.

(iii) Each party to bear their own costs.”

8. Being aggrieved by this judgment the Appellant filed this Memorandum of Appeal which is premised on the following grounds:-

“1. THAT the learned Adjudicator erred in law by holding that the contract dated 31st May, 2022 was void notwithstanding:

a. That the said contract was procedurally and lawfully entered into by the parties who were clear in their minds as of its nature hence enforceable in law.

b. That the said contract was not prohibited by law and was entered into with due consideration.

c. That the suo moto declaration by the trial court that the contract was void was neither expressly contained in the parties’ prayers in the pleadings nor sought by implication.

2. **THAT** the learned Adjudicator erred in law by finding that the contract dated 31st May, 2022 was ambiguous and lacked clarity on the specificity of each party's obligations yet the same were clearly set out in the said contract.

3. **THAT** the learned Adjudicator erred in law by rewriting

the Contract dated 31st May, 2022 which was well executed between the parties yet its role was to merely enforce the same.

ANALYSIS AND DETERMINATION

9. I have carefully considered this appeal, the record of Appeal dated **12th June 2025** as well as the written submissions filed by both parties.

10. This is a first appeal and the duties of the first appellate Court were set

out in the case of **IMANYARA & 2 Others -vs- ATTORNEY GENERAL [2010] KLR** wherein the Court of Appeal stated as follows;-

This being a first appeal, it is trite law, that this Court is not bound necessarily to accept the findings of fact by the court below and that 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 allowances in this respect. See Selle and Another v Associated Motor Boat Company Limited and others [1968] EA 123 and Williamson Diamonds Ltd. V. Brown [1970] E.A.L. As we discharge our mandate of evaluating the evidence placed before the High Court, we keep in mind what the predecessor of this Court said in Peters -vs- Sunday Post Ltd [1958] EA 424. In its own words:-

“Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide....”

11. The fact that the parties herein had entered into a contract for the purchase by the Appellant of two (2) pool tables from the Respondent for a price of **kshs. 144,000** is not in any dispute. The sale Agreement dated **31st May 2022** duly executed by both parties appears at **Page 10** of the Record of Appeal.
12. I have carefully and anxiously perused the said contract for sale. It makes no provision at all for the mode, time or place of delivery of the pool tables. Further it is peculiar to note that the Respondent took no action to complain about lack of delivery until almost two (2) years **after** he had signed the

contract and paid the full purchase price. There is no evidence that the Respondent ever took steps to remove the pool tables from the pub and was prevented from doing so. Nor was any evidence availed to show that the Respondent gave directions on how, when or where the pool tables were to be delivered and this was not done. There is no evidence of payment of any delivery fee.

13. Can a contract be voided for breach for want of delivery especially where no particulars relating to delivery were included in the said contract? I think not.
14. It is not in dispute that there was a sale agreement between the parties and that a consideration was paid for the goods purchased, what is of issue is whether this Court can order restitution for breach of contract. What comes out clearly is that the parties had a cordial relationship exhibited by their entering into partnership and forming a company a month into the purchase of the tables. It is also quite peculiar that the Respondent waited for 2 years and 4 months before instituting suit for restitution. It is not known who drafted the agreement entered by the parties, but the witness in her

testimony stated that she heard the Appellant tell the Respondent that he would deliver the tables. She did not however state the **location** to which the pool tables were to be delivered. Indeed under cross-examination this witness admits that

“In the agreement there is no clause for the respondent to deliver the tables to the claimant.”

There is also no agreement of payment of a delivery fee. I am therefore of the opinion that the Respondent was not being very truthful in his claim.

15. In ***Jill Poole, Textbook on Contract Law, 13th Ed; at page 86*** it is stated that:-

“.....

However, it is equally clear that where a court can resort to clear commercial practice or to previous dealings between parties in order to ascertain the meaning of a particular contractual expression, it will do so, thereby giving effect to

what must have been the ‘obvious’ intentions of the parties...”

16. In this case the Respondent alleges that he had made several requests to the Appellant for delivery of the pool tables. It is trite law that he who alleges must prove. The Respondent did not avail any document to prove that he had made such requests for delivery. The Appellant insist that the pool tables were in his pub but were at all times under the control and management of the Respondent who was at liberty to collect them whenever he wished. I repeat that the contract which set out the terms of the agreement between the parties did not include a clause on delivery.
17. It was not for the adjudicator to impute a delivery clause when so such clause existed in the contract. It is trite law that the duty of a court is to enforce the contract as made between the parties. The court cannot purport to re-write a contract to include terms which the court feels ought to have been included.

18. In the case of **ATTORNEY GENERAL OF BELIZE -VS- BELIZE TELCOM LTD & Another (2009), WLR** it was stated that

“The court does not make a contract for the parties. The court will not even improve contract which the parties have made for themselves. If the express terms are perfectly clear and free from ambiguity, there is no choice to be made between different meaning. The clear terms must be applied even if the court thinks some other terms could have been more suitable.”

19. Therefore I find that the alleged breach of the contract by the Appellant herein has not been proved. The contract between the parties was clear and unambiguous. There cannot be a breach of a term which did not exist in the contract. In the circumstances I do fault the decision of the adjudicator to void the contract.

20. The adjudicator in my view erred in law in allowing this claim. As such this appeal succeeds. The judgment of the

trial court dated **13th March 2025** is hereby quashed and set aside. Costs of the appeal to be met by the Respondent.

Dated in Nyeri this 6th day of February 2026.

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MAUREEN A. ODERO
JUDGE

ORIGINAL