

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT THIKA
CIVIL APPEAL NO. E062 OF 2024

**FLORENCE NJERI
MACHARIA.....APPELLANT**

VERSUS

**CAROLYNE WANJIKU KIMUNDUI.....1ST
RESPONDENT**

**DANIEL MBIYU KURIA.....2ND
RESPONDENT**

*(Being an appeal against the judgment of the Small Claims
Court at Thika Hon. Sylvia A. Ayodi (RM & Adjudicator) dated
14th March 2024)*

JUDGEMENT

1. The 1st Respondent lodged a statement of claim dated 23rd May 2023 claiming kshs. 800,000 from the appellant for breach of contract.
2. It was alleged that the 1st Respondent bought land reference number Kamiti/Anmer/1338 from the Appellant vide a sale agreement dated 30th March 2017. The 2nd Respondent deposited the sum of Ksh. 1,300,000.00 to the Appellant's bank account domiciled at Equity Bank. The Respondents paid a further sum of Ksh. 21,000.00 to the Appellant as membership fee of Kamiti Anmer Development Association which was duly receipted.
3. However, in November 2018, the 1st Respondent was surprised when some other people claimed ownership of the parcel that she had bought, Kamiti/Anmer/1338, alleging that the same had been sold to them by the Appellant. When the 1st Respondent realized that she had been defrauded, she lodged a complaint at Kiamumbi

Police Station being O.B No. 17/07/06/2019. The appellant was subsequently arrested and charged with the offence of Obtaining money by false pretence contrary to section 313 of the penal Code among many others.

4. Accordingly, the Appellant refunded Kshs. 560,000.00 to the 1st Respondent, the last refund being on 2nd December 2020. The Respondent thus claimed the balance of the purchase price of Kshs.740,000.00 and special damages in terms of membership registration fees of Kshs. 21,000.00 and advocates fee of Ksh. 39,000.00.
5. The Appellant denied the claim and the matter proceeded to trial.
6. The 1st Respondent testified by adopting her witness statement and bundle of documents. It was her testimony that she bought the land from Florence and Edith and the allotment was from Edith. She paid Kshs. 1.3 million to Edith's account. Florence had been refunding the money to her account. She had no proof that Florence and Edith were working together. She met Edith first who introduced her to one Mr. Kinyanjui, to whom she paid the membership fee for the association of Ksh. 21,000.00. She was represented by an advocate during the purchase of the property. Florence only paid Kshs. 81,000.00 directly to her, the rest of the money was through bank deposit, a total of Ksh. 560,000.00.
7. Edith testified as DW1 and confirmed to have sold land to the 1st Respondent in her capacity as the appellant's agent. She confirmed receiving money from the 1st Respondent and transferring it to the Appellant. She never disclosed to the 1st Respondent that she was selling the land on behalf of the appellant. The appellant had desired to remain anonymous as she worked with the council. There was no agency contract between her and the

appellant, as she would withdraw the money and pay to her via cash.

8. John Kinyanjui testified as DW2 an confirmed receiving Kshs. 21,000.00 form the 1st Respondent as payment of money for membership to the association. He also confirmed that Edith used to bring to him letters of allotment issued to her by the appellant.
9. At the end of the trial, the court found that there existed an implied agency between the appellant and one Edith Wangui Githua. Therefore, the agent bound the principal and as a result, the appellant was liable. The court entered judgment in favour of the 1st Respondent against the Appellant in the sum of Kshs. 740,000.00. The 1st Respondent was tasked to seek the refund of Kshs. 21,000.00 directly from Kamiti Anmer Development Association with the assistance of John Kinyanjui.
10. Aggrieved and dissatisfied with the decision of the trial court, the Appellant lodged the instant appeal on grounds that:
 - i. The honourable magistrate erred in law and fact in holding that the appellant and the 1st Respondent had an implied agency relationship and that the 1st Respondent was dealing as an agent of the appellant.
 - ii. The honourable magistrate erred in law and fact in pronouncing herself to be satisfied with the Respondent's case, lack of evidence brought forth before the Court to substantiate their unfounded allegations notwithstanding.
 - iii. The honourable magistrate erred in law and fact in not considering the appellant's case and submissions.
 - iv. The honourable magistrate erred in law and fact in finding that the Respondent had established and proved their case to the required standard.

11. Therefore, the appellant prayed that the judgment of the trial court dated 14th March 2024 be set aside and the Respondents claim be dismissed.
12. The court directed that the appeal be canvassed through written submissions.
13. The Appellant submitted that the trial court erred in presuming the existence of an implied agency relationship between the appellant and *Edith* as there was no mutual consent between them contrary to **Section 135 of the Law of Contract Act**. Edith did not provide any proof of existence of an agency relationship between her and the appellant. Accordingly, there was no privity of contract between the parties. Liability found against the appellant had no legal basis and could therefore not stand in law. Reliance was placed on **Kenya Commercial Bank Ltd v Osebe [1982] KLR 296** where the court held that agency cannot be implied where there is no unequivocal conduct or representation by the alleged principal. Similarly, in **Ali Abdi Mohamed v Kenya Power and Lighting Co. Ltd [2018] eKLR**, the court reiterated that an agency relationship cannot be inferred from mere proximity or association.
14. The Respondents submitted that the learned magistrate correctly addressed her mind and applied the law and facts correctly in finding that there existed an agency relationship between one *Edith Wangu* and the appellant. Citing **Industrial & Commercial Development Corporation v Pantheon Limited [2015] KECA 96 (KLR)**, the Respondents submitted that even if parties do not recognise their agency relationships, or even if they disclaim or deny it for various reasons, the consent implied or expressly given and accepted holds their agency relationship. In any case, the 1st Respondent's

claim against the appellant was duly corroborated by John Kinyanjui who confirmed that the Appellant used to send *Edith Wangui* to their office for land transactions.

15. The Respondents prayed that the appeal be dismissed with costs.

16. As the first appellate Court, the role of this Court is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. (**See the case of *Selle & Ano. vs. Associated Motor Boat Co. Ltd (1968) EA 123***). This Court nevertheless appreciates that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in ***Mwanasokoni v Kenya Bus Service Ltd. (1982-88) 1 KAR 278*** and ***Kiruga v Kiruga & Another (1988) KLR 348***).

17. Upon considering the pleadings, the parties' submissions and the record of appeal, the issue that commend itself for determination is whether an agency relationship existed between the appellant and one *Edith Wangui*.

18. *Edith Wangui* contended that she was an agent of the appellant, while the appellant denied the existence of such an agency relationship.

19. The starting point is to define an agent-principal relationship. I am guided by the case of ***Lucy Nungari Ngigi & 4 others v National Bank of Kenya Limited & another [2015] eKLR***, where the High Court states as follows:

“Ample judicial authorities were cited by both sides on agent-principal relation arising from the addendum herein. I am content to rely on the literary work in Bowstead and Reynolds on Agency Seventeen Edition, Sweets Maxwell Page 1-001, which defines such a 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.”

20. A contract is defined in the **Blacks Law Dictionary** as an agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law.

21. On implied contracts, the Court of Appeal in **Ali Abid Mohammed versus Kenya Shell & Company Limited (2017) eKLR**, stated that a contract between parties can exist where no words have been used but where it can be inferred from the conduct of the parties that a contract has been concluded. The court stated that:

“It therefore follows that a contract can exist where no words have been used but where it can be inferred from the conduct of the parties that a contract has been concluded. See Timoney and King v King 1920 AD 133 at 141.”

22. Similarly, the Court of Appeal in **Industrial & Commercial Development Corporation (ICDC) v Patheon Limited [2015] eKLR**, states as follows:

“The Concise Dictionary of Law, 2nd Edition, page 17 defines an “agent” as, a person appointed by another (the principal) to act on

his behalf, often to negotiate a contract between the principal and a third party.

In Garnac Grain Co. Inc. v H.M. Faure & Fair Dough Ltd and Bunge Corporation (1967] 2 All E.R. 353 Lord Pearson with the concurrence of the House used the words:

The relationship of the Principal /Agent can only be established by the consent of the Principal and Agent. They will be held to have consented if they have agreed to what amounts in law to such a relationship, even if they do not recognize it themselves and even if they have professed to disclaim it.. the consent must, however, have been given by each of them, either expressly or by implication from their words and conduct.”

23. It therefore follows that a contract need not be in writing but can be inferred from the conduct of the parties. It must be noted that the elements of offer, acceptance and consideration must be proved, in implying a contract the conduct of the parties remain paramount.

24. In **Charles Mwirigi Miriti versus Thananga Tea Growers Sacco Limited and Another (2014) eKLR** the Court of Appeal stated that it is trite that there are three essential elements for a valid contract. That is an offer, acceptance and consideration.

25. This Court is therefore enjoined to ascertain whether the pleadings, the evidence and the general conduct of the parties reveal any agency contract.

26. In the instant case, the record demonstrates that *Edith* testified to have been in an agency relationship with the Appellant. The appellant would instruct her to sell parcels of land on her behalf, the purchase price would be sent to

her account, and she would proceed to withdraw the money and give the amount in cash to the appellant. *John Kinyanjui* corroborated this by stating that he knew *Edith* as he had seen her on several occasions transacting on behalf of the appellant. It can therefore be deduced that *Edith* had apparent authority to transact with the 1st Respondent on behalf of the appellant.

27. Although the 1st Respondent confirmed that she paid the contractual sum to *Edith's* account, it was her testimony that the appellant was present during all the meetings for processing the refund. In fact, she had received Kshs. 81,000.00 from the appellant directly. Flowing from the above, it is only logical to deduce that the basis for the appellant's action to refund part of the contractual sum to the 1st Respondent was in recognition of the fact that *Edith*, to whom the 1st Respondent had paid the contractual sum, was her agent.

28. **Black's Law Dictionary 10th Edition** defines apparent authority as authority that a third party reasonably believes an agent has based on the third party's dealings with the principle even though the principal did not confer or intend to confer the authority. Apparent authority can be created by law even when no actual authority has been confirmed.

29. Based on the above authorities, I agree with the Respondents that *Edith Wangui* was an agent of the Appellant. The totality of the evidence placed before the trial court reveals that the Appellant wanted the *Edith Wangui* to act on her behalf and had in fact engaged her in five other occasions to avoid the creation of any link between her and the 1st Respondent. The evidence shows that the appellant, was the consistent person in all the refund meetings and had in fact directly refunded kshs.

81,000.00 to the 1st Respondent. *Edith Wangui* was merely facilitating or assisting the appellant to sell the plots in question.

30. In light of my summation of relevant legal provisions as well as case law as herein above summarized and having been persuaded by the legal expositions made by Counsel for the Respondent in his submissions in response to the grounds of appeal raised by the appellant, I am satisfied that the honorable adjudicator correctly applied herself in the case and did not reach an erroneous finding. There was indeed an enforceable and implied agency agreement between *Edith Wangui* and the appellant.

31. ***In this regard, it is my finding that the Appellant's Appeal lacks merit and the same is dismissed in its entirety with costs to the respondents.***

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 26TH DAY OF FEBRUARY, 2026.

**HON. T. W. Ouya
JUDGE**

**For Appellant.....Omondi H/B Mr Ikua
For Respondent.....Mathenge
COURT ASSISTANT.....Brian**