

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
CIVIL APPEAL NO. E010 OF 2025

JOHN MWANGALA
APPELLANT

- VERSUS -

WANYAMA NANDOKHA GEORGE
RESPONDENT

***(Being an appeal from the judgment and decree of Hon.
M.A. Onyango SPM delivered on 20/01/2025 in the
Bungoma CMCC No. E320 of 2024)***

J U D G M E N T

1. The respondent filed a suit against the appellant by a plaint dated 27/05/2024, in which he sought judgment against the appellant for Kshs. 225,000/= and an order for the appellant to surrender the original title deeds for Land Parcel Nos. E. Bukusu/N. Nalondo/2554 and E. Bukusu/S. Kanduyi/14362 for breach of the parties' service agreement.
2. The appellant entered an appearance and filed a statement of defence dated 14/08/2024, in which he partially admitted some of the respondent's averments while denying others, particularly that he was handed the title deed to Land Parcel No. E. Bukusu/N. Nalondo/2554. He put the respondent to strict proof of the same.

3. The trial court, in its decision rendered on 20/01/2025, found that the respondent had partially proved his case against the appellant and entered judgment against the appellant in the sum of Kshs. 225,000/= as prayed. The trial court declined to order the return of all documents received in connection with the land sale transactions, as they were not proved.
4. Dissatisfied with the said Judgment/deGREE, the appellant lodged this appeal by the Memorandum of Appeal dated 23/01/2025 and raised three (3) grounds of appeal as follows:
 - a) ***That the learned trial magistrate erred in law and in fact when she misdirected herself on the principle of preponderance of probability by assuming existence of a clause in an agreement which agreement was never produced in court thus arrived at wrong conclusion.***
 - b) ***That the learned trial magistrate erred in law and fact when she assumed a clause in agreement calling upon the appellant to move succession process and transfer part of the land to be registered in the name of the respondent thus arrived at a wrong conclusion.***
 - c) ***That the learned trial magistrate erred in law and fact when she cited lack of witnesses to confirm***

the terms of agreement, thus making it difficult to know exactly who breached the contract but nevertheless proceeded to believe that part of the consideration was meant for initiating succession process and subsequently transfer the land to the respondent thus arrived at a wrong conclusion.

5. The parties agreed to dispose off the appeal through written submissions. The appellant stated that he performed all tasks as agreed with the respondent, as demonstrated by the issuance of the title deed for the land not subject to succession, while the land under succession was being processed by the widow and awaiting confirmation. As a result, the trial court erred in concluding that he had not provided the agreed services, as the only remaining work related to the land under succession. The respondent failed to prove his case on a balance of probabilities to justify an award of Kshs. 225,000/= . The respondent did not request interest, and therefore, the trial court erred in awarding interest, contrary to the principle that parties are bound by their pleadings.
6. On his part, the respondent argued that he provided sufficient evidence, including oral land sale agreements, an official land registry search, WhatsApp electronic

communications, a demand letter, and affidavits of service, all of which clearly detail the terms of the service agreement. The trial magistrate did not assume the existence of any clause as suggested by the appellant. The trial magistrate acknowledged that there was no evidence of a written agreement but stressed that the evidence demonstrated communication, offer and acceptance, payment, and partial performance, which are fundamental elements of a valid and legally binding oral agreement. The trial magistrate found that the appellant was aware that some of the suit properties were registered in the name of a deceased person and that transfer would occur after succession proceedings; therefore, the appellant was bound by the service agreement.

ANALYSIS AND DETERMINATION

7. As this is the first appeal, the Court is duty-bound to re-evaluate the evidence presented before the trial court and to reach its own independent findings and conclusions. (See *Selle & Anor vs. Associated Motor Boat Co Ltd & Others* [1968] EA 123).
8. The respondent adopted his witness statement dated 27/05/2024 as his evidence in chief. He stated that he paid the appellant for services not rendered, handed over the original copies of the title deeds and sale agreements for the

estates in question to facilitate the necessary conveyance process, but the appellant only carried out the survey and demarcation. It was agreed that if the appellant failed to perform, he would be required to reimburse three-quarters of the total costs of the service. On cross-examination, the respondent admitted that in the sale agreement dated 22/07/2023 between himself and Collins Masinde Simiyu for Land Parcel No. E. Bukusu/N. Nalondo/2554, payment was to be made after confirmation of the grant, which had not yet occurred. The respondent reiterated that he paid Kshs. 300,000/= to the appellant, inclusive of stamp duty and transfer fees, and that the appellant was to facilitate the succession and transfer to his name. He further stated that the deceased's widow was the one handling the succession. The respondent admitted that there was no written agreement regarding the transaction between himself and the appellant.

9. The appellant adopted his witness statement dated 17/08/2024 as his primary evidence, in which he stated that the respondent contacted him to survey and demarcate Land Parcel Nos. E. Bukusu/N. Nalondo/2554, E. Bukusu/N. Nalondo/3094, and E. Bukusu/S. Kanduyi/14362. He testified that they agreed that, concerning Land Parcel No. E. Bukusu/N. Nalondo/2554, after purchasing the land, he would wait for the succession to be completed before

transferring it, but he had not received any communication from the respondent regarding the succession process. Regarding Land Parcel E. Bukusu/N. Nalondo/3094, he confirmed that he had completed the process, while for Land Parcel E. Bukusu/S. Kanduyi/14362, he was to verify the ground area and complete the transfer, which he did, subsequently transferring the title to the respondent. He stated that he and the respondent had agreed that he would be paid a total of Kshs. 300,000. The respondent paid this amount, and he carried out all required actions, except for the title transfer, which was pending the completion of the succession; he would undertake this once the proceedings concluded. Furthermore, he mentioned that the agreed sum covered transfer fees and stamp duty for all parcels involved. During cross-examination, the appellant reiterated that he was not to undertake succession proceedings, only to facilitate the transfer. He also noted that there are no specified timelines at the land registry for processing a title deed.

10. Based on the aforementioned facts, the trial court reached its decision. The only issue to be determined is whether the Respondent proved his case against the Appellant before the trial court.

11. I have carefully considered the evidence adduced during the trial, the grounds of appeal, and the submissions. This court finds that the appeal raises questions regarding the validity of the oral agreement, the burden of proof, and the admissibility of evidence.
12. The main issue between the parties here concerns the property, Land Parcel No. E. Bukusu/N. Nalondo/2554, which, based on the evidence presented, needed to undergo succession proceedings before being transferred into the respondent's name. Additionally, Land Parcel No. E. Bukusu/S. Kanduyi/14362, which the respondent claimed had not yet been transferred to him.
13. The undisputed facts of this case are that the appellant and respondent entered into a service agreement under which the appellant would survey and demarcate Land Parcel Nos. E. Bukusu/N. Nalondo/2554, E. Bukusu/N. Nalondo/3094, and E. Bukusu/S. Kanduyi/14362, and subsequently have the titles to those lands processed and transferred into the name of the respondent. From the evidence adduced, the only land transferred to the respondent, which is not disputed by either party, is Land Parcel No. E. Bukusu/N. Nalondo/3094. The respondent argued before the trial court and this court that he paid the appellant Kshs. 300,000/= and, as a result, the appellant would undertake all the necessary processes

and finally hand over the title deeds of the suit properties. The appellant's contention is that, at the time of purchasing the said parcels, the respondent was fully aware that Land Parcel No. E. Bukusu/N. Nalondo/2554 was subject to succession proceedings prior to transfer.

14. The agreement between the parties herein was not written and thus not presented to court. Black's Law Dictionary defines a contract as follows: -

An agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law.

15. In RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH & Co, KG (UK Production) (2010) UKSC 14, [45], the Supreme Court of the United Kingdom stated that: -

"...The general principles are not in doubt. Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the

law requires as essential for the formation of legally binding relations. even if certain terms of economic or other significance to the parties have not been finalized, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precondition to a concluded and legally binding agreement.”

16. Regarding 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 even where no words have been used, provided it can be inferred from the conduct of the parties that a contract has been concluded. The court said;

“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. In the circumstances of the instant case, there existed an enforceable contract between the parties by reason of conduct. Indeed, it was not disputed by the respondent that it supplied petroleum

products to the appellant at a specific amount per liter and for a certain period of time.”

17. It therefore follows that a contract need not be in writing but may be inferred from the conduct of the parties. It must be noted that the elements of offer, acceptance and consideration remain paramount and must be proved to establish a contract from the conduct of the parties. In *Charles Mwirigi Miriti v 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, namely an offer, acceptance and consideration.
18. In the instant case, I reiterate that there was an implied contract for the appellant to survey and demarcate Land Parcels No. E. Bukusu/N. Nalondo/2554, E. Bukusu/N. Nalondo/3094 and E. Bukusu/S. Kanduyi/14362, and subsequently to have the titles to those parcels processed and transferred into the respondent's name. That Kshs. 300,000/= was paid as consideration for the services offered to the respondent.
19. The appellant's argument that the respondent should have known that Land Parcel No. E. Bukusu/N. Nalondo/2554 was subject to succession proceedings before the transfer of title is, in my view, an invitation for the court to invoke a clause in the agreement implied from the conduct of the parties. No

evidence was presented by the appellant to the trial court to show that he would not facilitate the succession proceedings prior to the transfer. On the contrary, the evidence before the court indicated that the appellant would survey, demarcate, and have the titles over the suit properties transferred to the respondent.

20. The appellant relied on the fact that the Sale Agreement for Land Parcel No. E. Bukusu/N. Nalondo/2554 stated that the balance of Kshs. 350,000/= would be paid after confirmation of the grant. The agreement did not specify that the appellant would be excluded from processing this title on behalf of the respondent merely because the payment of the balance was due after confirmation of the grant. For the court to do so would amount to rewriting, or in this case, implying, a term of the contract on behalf of the parties, an act disapproved unless coercion, fraud, or undue influence is established, as held by the Court of Appeal in the case of National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another [2001] KECA 362 (KLR).
21. Consequently, it is my finding that, based on the evidence adduced by both parties before the trial court, the appellant was supposed to survey and demarcate Land Parcels No. E. Bukusu/N. Nalondo/2554, E. Bukusu/N. Nalondo/3094, and E. Bukusu/S. Kanduyi/14362, and to have the titles to those

parcels processed and transferred into the respondent's name. Having only done so for Land Parcel E. Bukusu/N. Nalondo/3094, the appellant was in breach of the agreement between the respondent and himself. I state this because, although the appellant testified that he had transferred Land Parcel E. Bukusu/S. Kanduyi/14362 to the respondent, no evidence was provided to support this.

22. From the foregoing, it is evident that the appellant breached the service agreement between himself and the respondent. The respondent testified, and this was not challenged, that if the appellant failed to perform, he would have to reimburse three-quarters of the total service costs. Three-quarters of Kshs. 300,000/= is Kshs. 225,000/=, which is the amount the respondent sought as judgment against the appellant.
23. I have reviewed the trial court's impugned judgement and find that the trial magistrate did not misdirect herself or assume the existence of a clause in the agreement between the parties. The trial magistrate rightly reached her decision to award the appellant Kshs. 225,000/= in lieu of the breached service agreement.
24. Accordingly, I uphold the trial court's award of Kshs. 225,000/= to the respondent against the appellant.
25. The appellant further challenged the trial court's judgment on the grounds that it awarded the respondent interest,

which was not pleaded, thereby turning the court into a drafter.

26. The trial court in its final orders stated;

“In conclusion and for avoidance of doubt the plaintiff’s suit succeeds as follows;

1. That the defendant is hereby ordered to refund Kshs. 225,000/- to the plaintiff.

2. That the defendant will bear the costs of the suit and interest will start running from the date the suit was filed.”

27. I note that the appellant never pleaded interest as a ground of appeal, and therefore, it must fail. In any case, the interest awarded was related to the costs of the suit, not the judgment of Kshs. 225,000/= awarded to the respondent.

28. In conclusion, I find that the appeal lacks merit and is dismissed entirely with costs to the respondent .

**Dated, signed and delivered at Bungoma on this 3rd Day
of March 2026.**

R.E. OUGO

JUDGE

In the presence:

Appellant in person /online

Wanyama Nandokha George/Respondent

Wilkister - C/A

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