REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL APPEAL NO. E128 OF 2024

LAVENDAH MASH.....1ST APPELLANT

JACQUELINE WANJIKU KAMAU.....2ND APPELLANT

HAPPINESS NYAKENANDA.....3RD APPELLANT

ELIZABETH SHIHAFU.....4TH APPELLANT

VERSUS

WESTWICK COLLEGE OF HEALTH SCIENCES NAIROBI LIMITED.....RESPONDENT

(Appeal from the whole Judgement of the Nairobi Small Claims Court (Hon.V.K Momanyi) dated 12th April 2024 in SCCCOMM No. E1445 of 2024)

JUDGMENT

1. This appeal arises from the judgment of the Small Claims Court in SCCCOMM No. E1445 of 2024 delivered on 12th April 2024, wherein the Learned Adjudicator dismissed the Appellants' claim on the basis that the court could not rewrite a contract between contracting parties and ordered each party to bear its own costs.
2. The Appellants' case before the trial court was that on 15th January 2024 they entered into a mutual agreement with the

Respondent, a nursing training institution, whereby the Respondent undertook to train them upon registration and payment of the requisite fees. The Appellants contend that after fulfilling their financial obligations, the Respondent failed to commence classes as promised, thereby occasioning financial loss and emotional distress.

3. Aggrieved by that decision, the Appellants lodged the current appeal vide the memorandum of appeal dated 9th May 2024. They raised substantially 7 grounds as follows:
    i. *That the learned trial magistrate erred in law and in fact by delivering a judgment that was inconsistent with the law and facts and thus leading to an erroneous conclusion and occasioning a serious injustice on the Appellants.*
    ii. *That the honourable magistrate erred in law and in fact in failing to put into account the breach of contract by the Respondent who failed to fully adhere to their contractual obligation on the standard and terms of the course they would be offering.*
    iii. *That the honourable trial magistrate erred in law and in fact by not putting into account that a contract should be infused with constitutional values, which include integrity. This was not the case in the contract between the Appellants and the Respondents as the same was extremely*

unfair to the Appellants and meant to benefit the Respondent.

iv. *That the honourable learned magistrate erred in law and in fact by ignoring consumer protection rights under Article 46(a) of the Constitution of Kenya requiring provision of reasonable quality services to consumers.*

v. *That the honourable learned magistrate erred in law and in fact by overlooking consumer protection rights under Article 46 (b) that demands the offeror to give the offeree information that is necessary for her to make necessary decisions and fully gain from services.*

vi. *That the honourable learned magistrate erred in law and fact in overlooking the fact that the Appellants had little or no ability to negotiate the terms of the contract that was aimed at stream rolling them.*

vii. *That the honourable learned magistrate erred in law and fact by failing to protect the basic rights to quality education of the Appellants who were the victims of the malicious contract.*

4. The appeal was dispensed by way of written submissions. The Appellants filed submissions dated 28th March 2025, while the Respondent filed submissions dated 18th July 2025.
5. The Appellants contend that the learned Magistrate erred both in law and in fact in dismissing their claim and in failing

to properly evaluate the Respondent's alleged breach of contract. They assert that although they fulfilled their financial obligations upon enrolment, the Respondent failed to commence classes as promised, thereby breaching the agreement.

6. On grounds 1 and 2, the Appellants argue that the judgment was inconsistent with the law and failed to uphold the overriding objective under Section 1B of the Civil Procedure Act, as it did not ensure a just determination of the dispute. They maintain that the Respondent failed to adhere to the agreed commencement date and standards of instruction.
7. On ground 3, the Appellants submit that the contract ought to have been infused with constitutional values under Article 10 of the Constitution. They argue that the contract was unfair and oppressive, and that the Respondent's conduct amounted to misrepresentation. In support, they rely on **Amos Karobia Gichuki v Bernard Kamau Wagakoru [2020] eKLR** and contend that the contract ought to have been declared void *ab initio.*
8. On grounds 4 and 5, the Appellants invoke Article 46 of the Constitution, submitting that they were entitled to services of reasonable quality and full disclosure of material information. They argue that the Respondent failed to disclose the true commencement date and offered substandard educational services.
9. On grounds 6 and 7, the Appellants submit that the contract was unconscionable and that they had little bargaining

power in negotiating its terms. They rely on **Kenya Commercial Finance Company Ltd v Kipng'eno Arap Ngeny & Another [2002] eKLR** and **Pius Kimaiyo Langat v Co-operative Bank of Kenya Limited [2017] eKLR** to argue that courts have equitable jurisdiction to set aside harsh and oppressive bargains.

10. The Respondent opposes the appeal in its entirety and submits that the learned trial magistrate lawfully and properly determined the dispute on its merits. It is contended that the judgment dated 12th April 2024 was regular, sound in law, and based on a correct appreciation of the evidence on record. On the question whether there exists sufficient grounds of appeal, the Respondent maintains that the trial court properly examined the contract executed between the parties, including the Tuition Refund Policy voluntarily signed by the Appellants. The Respondent argues that a court of law cannot rewrite a contract freely entered into by parties, relying on the decision in **JNN (a Minor) v Naisula Holdings Ltd t/a N School [2018] eKLR**, and submits that the non-refund clause was clear and binding.

11. The Respondent further submits that the Appellants unilaterally withdrew from the programme after commencement and cannot now shift responsibility to the institution. It asserts that all necessary admission information, including curriculum details and refund policy, was disclosed prior to enrolment, and that the Appellants

executed the relevant documents voluntarily. With regard to accreditation, the Respondent submits that it is duly registered under TVETA and that such registration is a matter of public record. It argues that the allegation regarding accreditation was neither pleaded nor raised at trial and is now being introduced improperly at the appellate stage.

12. On the attempt by the Appellants to adduce additional evidence, particularly media reports, the Respondent relies on **Tarmohamed & Another v Lakhani & Co (1958) EA 567** and **Mzee Wanje & 93 Others v A.K. Saikwa (1982–88) 1 KAR 463**, submitting that additional evidence on appeal is only admissible under strict conditions. It argues that the proposed evidence lacks probative value and is intended merely to patch up weaknesses in the Appellants' case.

Analysis and determination

13. This being an appeal from the Small Claims Court, its scope is circumscribed by **Section 38(1)** of the **Small Claims Court Act** which provides that:

> ***1. A person aggrieved by the decision or an order of the Court may appeal against that decision or order to the High Court on matters of law.***
>
> ***2. An appeal from any decision or order referred to in subsection (1) shall be final.***

14. The legal position was reiterated in **Okal v Awiti (2024) KEHC 14405 (KLR)** when the Court held that:

> ***"This is a first appeal. Section 38(1) of the Small Claims Court Act specifically prescribes that appeals from the Small Claims Court to the High Court be premised solely on matters of law."***

15. Consequently, this Court cannot re-evaluate factual findings unless it is demonstrated that the trial court misapprehended the law or applied wrong legal principles.

16. It is not in dispute that the Appellants enrolled in the Respondent institution on 15th January 2024, paid the requisite fees, and executed a Tuition Refund Policy. The dispute revolves around whether the Respondent breached the contract by failing to commence classes as allegedly promised.

17. The Learned Adjudicator found no evidence of misrepresentation, fraud, coercion or fundamental breach. The Appellants contend that there was delay and that the Respondent failed to adhere to agreed standards.

18. The cardinal principle of contract law is that parties are bound by the terms of their contract. In **National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & Another [2001] eKLR**, the Court of Appeal held:

> ***"A court of law cannot rewrite a contract between the parties. The parties are bound by***

the terms of their contract unless coercion, fraud or undue influence are pleaded and proved."

19. The Appellants did not demonstrate that the alleged delay amounted to a repudiatory breach going to the root of the contract. There was no evidence that the Respondent permanently refused or was incapable of offering the programme. In the absence of proof of a fundamental breach, the trial court cannot be faulted for declining to order a refund contrary to the agreed refund policy.
20. The Appellants further invoke Articles 10 and 46 of the Constitution and argue that the agreement was unfair, oppressive and inconsistent with constitutional values. It is correct that contractual arrangements must not offend constitutional norms. However, not every hard bargain amounts to unconscionability. In **Kenya Commercial Finance Company Ltd v Kipng'eno Arap Ngeny & Another [2002] eKLR**, the Court of Appeal affirmed that courts may intervene where a bargain is harsh, unconscionable and oppressive.
21. Similarly, in **Pius Kimaiyo Langat v Co-operative Bank of Kenya Limited [2017] eKLR**, the Court emphasized that equitable intervention is justified where there is unconscientious conduct by the stronger party.
22. In the present case, there was no evidence of fraud, misrepresentation, inequality of bargaining power rising to the level of oppression, or any unconscientious conduct. The Appellants voluntarily enrolled and executed the refund

policy. A standard non-refund clause in an educational institution does not, without more, render a contract unconstitutional.

23. The reliance on **Amos Karobia Gichuki v Bernard Kamau Wagakoru [2020] eKLR** is misplaced, as that case concerned fraudulent misrepresentation rendering the contract void *ab initio*. No such vitiating factor was proved herein.

24. Article 46 of the Constitution guarantees consumers the right to services of reasonable quality and to information necessary to make informed choices. The Appellants did not prove that the Respondent was unaccredited or incapable of offering the course. No cogent evidence was tendered to demonstrate substandard services. Allegations raised for the first time on appeal cannot form the basis of appellate relief. The central holding of the trial court was that it could not rewrite the parties' contract. That principle remains sound.

25. In **JNN (a Minor) v Naisula Holdings Ltd t/a N School [2018] eKLR**, the Court declined to convert un-utilized school fees into a debt where the contract expressly provided that fees were non-refundable.

26. Courts must uphold the sanctity of contract unless there is illegality, fraud, coercion, undue influence, or a clear constitutional violation. None has been established.

27. The upshot of the above is that this appeal has no merit and it is hereby dismissed with costs to the Respondent.

JUDGMENT delivered virtually, dated and signed at **NAIROBI**

This **26th** day of **February** 2026.

P.M. MULWA
JUDGE

In the presence of:

Mr. Wamae h/b for Mr. Lusiola for Appellants

Mr. Kamau h/b for Mr. Njagi for Respondent

Court Assistant*: Carlos*