



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYANDARUA

HIGH COURT CIVIL CASE NO. 8 OF 2023

NEPHY COMPANY LIMITED.....1ST PLAINTIFF

RAPHAEL NDUGIRE NYAMBURA (Suing as the legal representative of the estate of Hannah Nyambura Ndugire)2ND PLAINTIFF

VERSUS

COUNTY GOVERNMENT OF NYANDARUA.....1ST DEFENDANT

COUNTY SECRETARY, NYANDARUA..... 2ND DEFENDANT

JUDGMENT

1. Nephy Company Limited and Raphael Ndugire Nyambura are the plaintiffs in this case. In their amended plaint dated November 16, 2023, they sued both defendants for Kshs. 74,821,222.64, which is the remaining balance of Kshs. 139,681,922.00 after variation, with interest from the date of filing the suit. They are represented by Ndegwa Wahome & Company Advocates.
2. The Plaintiffs argued that they entered into a contract with the County Government of Nyandarua to construct pathways, upgrade roads, create public walkways, develop parking lots, and install stormwater drainage, amounting to Kshs. 64,860,699.36. This contract was awarded through a competitive tender process. After finishing the work, they received a certificate of completion and were paid the agreed amount. However, they complained about a verbal variation in the contract amounting to Kshs. 74,821,222.64. This unpaid balance is the cause of this case.
3. The defendants denied the claim, asserting that no such variation of the contract as alleged occurred. They were represented by Mutonyi Mbiyu & Company Advocates.
4. The issues for determination are as follows:
 - a) Whether there was a variation of the contract between the parties, and if so
 - b) Whether the defendants were in breach of the said contract.

5. Raphael Ndugire Nyambura (PW1) testified that after they were issued a letter of completion and paid for the contract that they signed after they were awarded a contract, they entered into a verbal variation of the initial contract. This, however, was denied by the defendants.
6. A contract may be varied whenever both parties consent to the changes, as long as the variation is supported by new consideration and meets any formal requirements, such as a "variation clause" in the original agreement. In the wake of the defendants' denial, the plaintiffs have a duty to prove the variation. Section 107 (1) of The Evidence Act provides:

Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

7. This statutory provision has developed into a maxim that states that he who avers must prove. This was restated in the case of **Hellen Wangari Wangechi v Carumera Muthini Gathua [2005] eKLR** as follows:

It is a well-established rule of evidence that whoever asserts a fact is under an obligation to prove it in order to succeed.

8. Typically, a variation is made prior to completing a contract. Therefore, it is puzzling that the plaintiffs claim they received a completion letter and paid the full contract amount, yet now assert a variation. As a public entity, the County Government would normally require documentation to support any variation. Since no such proof exists, I conclude that the plaintiffs have not proven their case against the defendants.
9. Based on the foregoing analysis of the evidence on record, I find that the plaintiffs have not established their claim. The same is hereby dismissed with costs.

Delivered and signed at Nyandarua, this 22nd day of April 2026

KIARIE WAWERU KIARIE

JUDGE.