

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT
NANYUKI
ELC APPEAL NO. E015 OF 2024

KODI KODI HAVEN LIMITED.....
APPELLANT

VERSUS

FLORA WANJIKU KAMAU.....
RESPONDENT

***(Being an appeal from the judgement of Hon Kithinji
A.R. (CM) delivered at Nanyuki Law Courts on
16.8.2024 in CMELC No. E035 of 2022)***

JUDGMENT

The case before the trial court

1. The case before the trial court was instituted by the respondent herein vide a plaint dated 28.7.2022 claiming that the appellant was the registered owner of the suit parcel L.R.NANYUKI/MARURA/BLOCK 5/129 (ERERI). That vide an agreement dated 29.8.3018, the

respondent purchased from Kodi Kodi Limited 2 plots namely Q147 and Q148 which was a portion of the suit land at Kshs. 350 000 each, of which the respondent paid the entire purchase price.

- 2.** That in the another agreement dated 9.6.2020, the parties undertook the same terms as those entered into with Kodi Kodi Ltd in the earlier agreement of 29.8.2018. By then, the appellant had taken over the assets and liabilities of Kodi Kodi Ltd including the suit parcels. However, when the respondent was finally shown the two plots, she discovered that the suit parcel was disputed between the appellant and a third party and that plots Q147 and 148 did not exist and the appellant offered to refund the purchase price, being Kshs. 700 000, of which the appellant made a deposit of Kshs. 219 000 on 16.6.2021 leaving a balance of Kshs. 481 000 which the appellant declined to pay.
- 3.** The respondent therefore prayed for judgment against the appellant for a refund of Kshs. 481 000 plus costs.

4. In opposition thereof, the appellant who was defendant opposed the suit vide its statement of defence and counter-claim dated 5.12.2023 averring that there is no legal relationship between itself and Kodi Kodi Limited, whereby the latter is the one which entered into the initial agreement with the respondent. It admits that on 9.6.2020, it entered into an agreement with the respondent where the latter agreed to purchase its plots No's Q147 and 148 which were within the suit parcel 5/129 and the purchase price was Kshs. 350 000 for each parcel where by the parties recognized that the respondent had already paid Kshs. 226 500 for each parcel, hence a total of Kshs. 453 000. That the balance was to be paid in monthly instalments of Ksh.14000 for each parcel, hence Kshs. 28 000 every month. However, the respondent only paid instalments for the months of June - December 2020, making a total of Kshs. 196 000, hence the total amounts paid by the respondent was Ksh.659 000.

5. The appellant avers that it is the respondent who terminated the agreement without any justification and also failed to pay the balance of the purchase price. That under clause 9.1 of the agreement, the appellant was entitled to retain 70 % of the funds received amounting to Kshs. 461 300, while the respondent was only to receive Ksh.197 000 being 30%. It contended that it was always ready and willing to complete the agreement. Nevertheless, the appellant paid the respondent the sum of Kshs. 219 000 instead of the 30 %, being 197 000, hence there was an overpayment of Kshs. 21 300 which the appellant was counterclaiming.

6. At the trial, the respondent was the sole witness for her case. She adopted her witness statement dated 28.7.2022 as her evidence. She also produced documents in her lists as exhibits. Her evidence mirrors her pleadings.

7. On cross examination, she stated that she entered into an agreement with Kodi Kodi Ltd, but Kodi Kodi haven acknowledged the sum of Kshs. 226 000 for two plots

through email, but she has a letter indicating that she paid all the monies due.

8. The case for the appellant was advanced by DW1, David Lang Lang Ross, the sole witness in the defence case. He introduced himself as the beneficial owner of the appellant. He adopted his witness statement dated 11.1.2024 as his evidence and he produced 6 documents as their exhibits. Similarly, his evidence mirrors their pleadings.
9. On cross-examination, Dw1 stated that they acquired assets from Kodi Kodi Ltd but not liabilities of which they were indemnified from any claims. He admits that there were people who bought properties from Kodi Kodi Ltd which did not exist, of which the appellant was under no obligation to make refunds. He still went on to state that the agreement to recognize the purchase price paid to Kodi Kodi Ltd included the condition to pay all the amounts until completion where the total sum was Kshs. 700 000 and therefore counterclaimed the sum of Kshs. 21 300.

10. In a judgment delivered on 16.8.2024, the trial court found that the plaintiff had proved her case, that the counterclaim was not meritorious and gave judgment in the following terms;

- “a. That the plaintiff is entitled to a refund of Kshs. 481,000/=.**
- b. That the defendant’s statement of defence and counterclaim dated 5th day of December, 2023 is hereby dismissed with costs to the plaintiff.**
- c. That the plaintiff shall have interests on (a) above from the date of filing the suit till payment in full.**
- d. That the plaintiff shall have the costs of the suit and counterclaim together with interests”.**

The Appeal

11. Aggrieved by the aforesaid decision, the appellant filed its memorandum of appeal dated 29.8.2024 raising

9 grounds of appeal summarized as follows; That the learned trial magistrate erred in law and fact in failing to appreciate that in the first agreement of 29.8.2018, the appellant was not involved as the same was between the respondent and Kodi Kodi limited, that the trial court failed to invoke the none completion procedure under clause 9.1, making an erroneous finding that the respondent had made full payment and that it is the respondent who breached the agreement. The appellant therefore prays that the decision of the trial court be set aside and it be awarded costs in the trial court and at the appeal.

12. The appeal was heard by way of written submissions. The submissions of the appellant are in a set, those dated 7.8.2025 and the once of 20.11.2025. It rehashed its evidence, emphasizing that Kodi Kodi Limited was in no way a predecessor of the appellant, thus the respondent sued the wrong party where she had made payments to the tune of Ksh.453 000 to Kodikodi limited. That the trial court failed to appreciate the doctrine of

privity of contract in ordering that the appellant was liable to pay Kshs. 481 000 to the respondent. In essence, the terms of the previous contract could not be enforced against the appellant. This far, the appellant cited the case of **Savings and Loans Limited v Kanyenje Karangaita Gakombe (2015) ekr.**

13. The appellant also reiterated that the breach was made by the respondent, prompting the appellant to invoke clause 9.1. of the agreement. The appellant further faulted the trial court for not awarding it the special damages of Ksh. 21 300 which had been pleaded.

14. The submissions of the respondent are dated 16.9.2025 where it contends that the appellant acknowledged the amount of Kshs. 453 000 paid to Kodi Kodi limited and that she paid the balance of Kshs. 247 000, thus the claim by the appellant that what the respondent paid was Kshs. 196 000 was not truthful. She further reiterated that in the agreement of 9.6.2020 under clause 1(f), the appellant recognized the amounts paid to Kodi Kodi limited, thus the appellant was a

successor of Kodi Kodi Limited. Further, clause 9.1 was only to be invoked after the appellant serves the purchaser with a 21 days notice, adding that clause 9.3 permitted the respondent to come out of the agreement upon breach by the vendor. Citing the case of **Mbogo and Mbogo, (1968) EALR**, the respondent contends that the appellant has not established that the trial magistrate misdirected himself, thus arriving at the wrong decision.

DETERMINATION

15. The duty of the 1st appellate court was explained in the case of **Selle and Another Versus Associated Motor Boat Company Ltd & Others [1968] Ea 123**, where it was observed thus:-

“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 conclusion. Though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect”.

16. I have considered the pleadings, the evidence on record and the rival submissions of the parties. It is not disputed that there was an initial agreement dated 29.8.2018 between the respondent and Kodi Kodi limited where the latter was selling plots Q147 and Q148 to the former at the cost of Ksh.350 000 per plot. Further, it is not disputed that the respondent paid a sum of Kshs. 453 000 to the aforementioned entity. Further, the parties admit that they entered into an agreement dated 9.6.2020 again for the purchase of the same plots at the same price. The question for determination is who breached the agreement between the two parties.

17. The appellant vehemently contends that it has nothing to do with the entity known as Kodi Kodi Limited, thus there is no privity of contract affecting the appellant in

respect of the earlier agreement. However, nothing can be further from the truth. Firstly, the agreement of 9.6.2020 between the appellant and the respondent at clause 1 (f) stipulates that *“recognised deposit means the recorded and acknowledged amounts paid through Kodi Kodi Limited’s Bank Account prior to October 7, 2019 with respect to the purchase of the properties herein”* . Why would the appellant recognize the funds paid to the previous entity if there was no relationship between the two. The logical conclusion to make is that the appellant was the successor of Kodi Kodi Limited.

18. Secondly, there are correspondences between the protagonists indicating that indeed the appellant had taken over the responsibilities of Kodi Kodi Limited in so far as the suit plots were concerned. In the email of 21.1.2022 (page 39 of the Record of Appeal) the Appellant is recognizing the amounts paid by the respondent amounting to Kshs. 226 500 for each plot which gives a total of Kshs. 453 000. This happens to be

the amount that the appellant admits was paid to Kodi Kodi Limited.

19. On accounts, the appellant contends that the respondent failed to make all the payments, that is why they invoked clause 9.1 of their agreement. The said clause states as follows;

“If for any reason the purchaser shall be unable to perform her duties under this agreement to enable registration of the transfer within the prescribed time, then the vendor shall be entitled to serve the purchaser a twenty one (21) day’s notice (time being of the essence) in writing confirming the vendor’s readiness to complete the sale in all respects and specifying the default and requiring the purchaser to complete and/or remedy the default before the expiration of such notice”

20. There is no evidence that the appellant ever served the respondent with the aforementioned notice.

21. It is noted that in the email dated 4.3.2022 at page 66 of the record of appeal, the respondent made a formal request to the appellant for refund of Ksh 700 000 being the amounts paid for plots Q147 and 148 and states “*having completed paying for those plots, iam tired of twists and turns*”. There is no formal response from the appellant in respect of that request. What was so difficult for the appellant to tabulate the accounts so as to arrive at their own figure and communicate to the respondent accordingly.

22. This far, I come to the conclusion that the trial court while citing the case of **National Bank of Kenya Ltd vs. Pipe Plastic Samkolit (K) Ltd (2002) 3 E.A. 503, (2011) eKLR**, rightly made a finding in favour of the respondent. Thus the appeal is found to be unmerited, the same is hereby dismissed with costs to the respondent.

**DATED, SIGNED AND DELIVERED AT NANYUKI THIS
22ND DAY OF APRIL 2026 THROUGH MICROSOFT
TEAMS.**

**LUCY N. MBUGUA
JUDGE**

In the presence of:

M/s Ochorokodi h/b for Omiti for Appellant

Mageto for Respondent

CA Nancy Mwangi