

**IN THE COURT OF APPEAL  
AT NAIROBI**

**(CORAM: GATEMBU, NYAMWEYA & KORIR,**

**JJ.A.) CIVIL APPEAL NO. 540 OF 2019**

**BETWEEN**

**PONANGIPALLI VENKATA RAMANA RAO ..... 1<sup>ST</sup>**

**APPELLANT KOLLURI VENKATA SUBBARAYA KANASASTRY  
(t/a TACT CONSULTANCY SERVICES ..... 2<sup>ND</sup>**

**APPELLANT AND**

**DIPIT PREMCHAND CHHEDA ..... 1<sup>ST</sup>**

**RESPONDENT NIKUNJI PREMCHAND CHHEDA .....**

**2<sup>ND</sup> RESPONDENT CONFEC INDUSTRIES E.A. LTD .....**

**..... 3<sup>RD</sup> RESPONDENT**

*(Being an appeal against the judgment and decree of the High Court of  
Kenya at Nairobi (P. J. Otieno, J.) dated 7<sup>th</sup> September 2018*

*in*

**HCCA No. 146 of 2013)**

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**JUDGMENT OF THE COURT**

1. This is a second appeal and as such, our mandate, as has been pronounced in a long chain of authorities from the Court, including **Kenya Breweries Ltd vs. Godfrey Odoyo [2010] eKLR** and **Pithoni Waweru Maina vs. Thuka Mugiria [1983] eKLR**, is confined to matters of law only, unless it is shown that the courts below considered matters they should not have considered or failed to consider matters they should have considered or that the decision is perverse.

2. The dispute between the parties was first heard by a

magistrate's court, where judgment was entered in favour of the appellants. The

learned magistrate found that there was a valid contract between the parties and therefore the deposit which had been paid by the respondents to the appellants was liable for forfeiture. The respondents' appeal to the High Court was, however, allowed with the first appellate court holding that the parties had not agreed on the terms of the deal and there was therefore no valid contract, and the forfeiture could not stand.

3. The factual background to this appeal is pretty simple. In 2007, the respondents and the appellants had a telephone conversation regarding the sale of some machinery and plant owned by Kwality Candies & Sweets Ltd, which was under receivership at the time. On 19<sup>th</sup> June 2007, the respondents' advocates wrote a letter to the appellants conveying the respondents' offer to purchase the machinery and the plant at Kshs. 20,000,000. In the letter, the respondents also sought details regarding the appellants' power to sell, the conditions of sale, and the full description of the available machinery at the plant. Through the letter, the respondents indicated that the sale would be subject to the contract to be agreed upon between the parties. The parties exchanged numerous letters regarding the intended sale. However, the deal eventually fell through the cracks. Thereafter, a dispute arose from the wording of the appellants' letter dated 19<sup>th</sup> June 2007, wherein they indicated acceptance of the respondents' proposed purchase. Apart from accepting the respondents' proposal, the appellants went ahead to indicate the purchase price as Kshs. 20,000,000, subject to the applicable V.A.T. rate, that a deposit of 10% would

be payable within 7 days from that date and the balance payable within 30 days, and that the deposit would be adjusted against the purchase price on completion, and in the event the respondents failed to complete the deal, the deposit would be forfeited.

4. Additionally, the appellants indicated in the stated letter that if the respondents accepted the proposed terms, then the respondents' advocate was to forward a draft sale agreement for their consideration. Soon thereafter, on 22<sup>nd</sup> June 2007, the respondents' advocate sent to the appellants a draft sale agreement which was discussed between the parties, yielding various versions of the agreement. The respondents deposited the 10% deposit on 22<sup>nd</sup> June 2007, and, on 3<sup>rd</sup> August 2007, their advocate forwarded a revised version of the agreement to the appellants, indicating that the balance of the purchase price would be paid upon execution of the agreement and delivery of the plant and machinery. No contract was executed. A dispute arose when the appellants moved to forfeit the deposit paid by the respondents, citing the terms set out in their letter dated 19<sup>th</sup> June 2007. The appellants then instituted suit against the respondents before the Chief Magistrate's Court at Nairobi to recover the deposit of Kshs. 2,000,000.00 and interest. In opposition to the forfeiture of the deposit, the respondents argued that there was never a written contract between the parties, but rather a series of correspondences, the payment of a deposit, and draft agreements, followed by a declaration of forfeiture of the deposit.

5. The trial Magistrate found that the deposit was forfeited and dismissed the case, but on appeal, the High Court set aside the decision of the trial court dismissing the suit and substituted there for judgment in favour of the respondents for Kshs. 2,000,000.00 and interest and costs. The Judge held that “there was never a meeting of minds on the terms of the agreement” and that “there was no agreement that failure to pay the balance of the purchase price within 30 days would entitle the [appellants] to forfeiture”.
6. In the appeal before us, the appellants raised five grounds. In our view, the appeal is grounded on the learned Judge’s interpretation of the phrase “*subject to contract*” and the finding that there was no meeting of minds between the parties, hence no contractual terms were agreed upon to support the forfeiture of the respondents’ funds by the appellants.
7. When this matter came up for hearing, learned counsel **Mr. Brian Okech** appeared for the appellants, while learned counsel **Mr. Hillary Orina** represented the respondents.
8. In support of the appeal, counsel for the appellants urged that the parties agreed to the forfeiture of the 10% deposit. Buttressing this contention, counsel argued that the respondents, vide their letter dated 22<sup>nd</sup> June 2007, did not refer to the forfeiture of the deposit, but only sent the draft agreement for perusal and execution, and they were therefore agreeable to the terms proposed by the appellants. According to counsel, a

contract indicated to be “*subject to contract*” must be looked at on a case-by-case basis, as

its unenforceability cannot be absolute, as erroneously held by the High Court. In resolving the conundrum, counsel urged us to adopt the holding in **Masters vs. Cameron (1954) 91 CLR 353** as cited in **Eldo City Limited vs. Corn Products Kenya Ltd & Another [2013] KEHC 5916 (KLR)** regarding the enforceability of preliminary agreements, where the Australian High Court held that:

***“Where parties who have been in negotiation reach an agreement on terms of a contractual nature and also agree that the matter of their negotiation shall be dealt with by a formal contract, the case may belong to any of three cases. It may be one in which the parties have reached finality in arranging all the terms of their bargain and intend to be immediately bound to the performance of those terms, but at the same time propose to have the terms restated in a form which will be fuller or more precise but not different in effect. Or, secondly, it may be a case in which the parties have completely agreed upon all the terms of their bargain and intend no departure from or addition to that which their agreed terms express or imply, but nevertheless have made performance of one or more of the terms conditional upon the execution of a formal document. Or, thirdly, the case may be one in which the intention of the parties is not to make a concluded bargain at all, unless and until they execute a formal contract.***

***In each of the first two cases there is a binding contract... Cases of the third class are fundamentally different. They are cases in which the terms of agreement are not intended to have, and therefore do not have, any binding effect of their own.”***

9. Counsel submitted that the contract in the instant case was already complete and fitted scenario one or two of the cited

authority, and that the execution of the sale agreement was just

but a mere procedural formality. He argued that the respondents had full knowledge of the forfeiture clause and acted accordingly, and that their failure to complete the transaction within 30 days constituted a clear breach, warranting enforcement of the forfeiture clause. Counsel maintained that the respondents' conduct of forwarding a draft agreement and failing to raise concerns regarding the forfeiture clause confirms that there was consensus *ad idem* and thus the High Court erred in both fact and law in concluding that there was no binding agreement. Consequently, counsel submitted that the respondents breached the agreement by failing to complete the transaction within thirty days, and that the deposit was therefore liable to forfeiture. Counsel also argued that the respondents, who bore the burden of proving their case, failed to prove the breach by the appellants hence, the judgment of the High Court should be set aside, and the judgment of the Chief Magistrate's Court restored and upheld.

10. In opposition to the appeal, counsel for the respondents referred to **Stanley N Muriithi & Another vs. Bernard Munene Ithiga [2016] KECA 821 (KLR)** to highlight the Court's role on a second appeal. Counsel expressed unreserved approval of the impugned judgment, urging that where there is a failure to have a meeting of minds by parties on proposed terms of a contract, there cannot be a binding and valid contract capable of enforcement. Counsel referred to **Bennet, Walden & Co vs. Wood (1950) 2 ALLER 134** at **page 137** as cited in **East African Fine Spinners Limited (in receivership) & 3 Others**

**vs. Bedi Investments Limited [1994]**

**eKLR** to argue that parties contracting in particular words must be assumed to intend the ordinary meaning of those words. In the end, counsel urged that the appeal lacks merit and that the High Court properly interpreted the only issue of law before it.

11. We have gone through the record and submissions by counsel for the parties, and it appears to us that the key to unlocking the dispute herein is ascertaining whether there was a valid contract between the parties. In doing so, we must interrogate whether the High Court correctly interpreted the phrase “*subject to contract*” as per the circumstances of the dispute before it.
12. This Court has had previous occasion to interpret the phrase “*subject to contract*”. Two decisions suffice. In **Guardian Bank Limited & 8 others vs. Shivali Investments Limited & 3 others [2025] KECA 1586 (KLR)**, the Court held that:

***“To be drawn from these decisions, which we endorse, is that an arrangement that is “subject to contract” should ordinarily be accepted to be just that. It is not intended to be legally binding until a formal contract is entered into. Courts should not read any other intention save where the parties waive or expunge the “subject to contract” term. The waiver may be express or through the conduct of the parties. Where it is the latter, then the conduct of the parties must unerringly point to an intention to be bound by the “subject to contract” understanding. To accede to a less yielding yardstick could weaken “subject to contract” negotiations as a facilitator of contract making as parties would be apprehensive that they will be bound by concessions and bargains made in the course of attempting to arrive at an agreeable and firm***

***commitment. There is much to be gained by safeguarding the “subject to contract” arrangement.”***

13. And, in **East African Fine Spinners Limited (in receivership) & 3 Others vs. Bedi Investments Limited** (supra), which the learned Judge also cited in the impugned judgment, the Court held that where a person accepts an offer subject to contract, it means that the matter remains in negotiation until a formal contract is settled and the formal contracts are exchanged. The Court added that until that contract is executed, there is no contract between the parties which could be enforced by an order for specific performance or mandatory injunction.
14. From the foregoing, it is evidently clear that where the phrase “*subject to contract*” is used, it implies that the parties are yet to reach a meeting of the minds. It further means that the parties intend to be bound only by the terms to be crystallised in a contract to be signed between them. Unless there is an express waiver of the “*subject to contract*” requirement, parties cannot be said to have reached an agreement, and they cannot therefore be bound by the terms arising out of their negotiations. Having arrived at this conclusion, we do not see how the learned Judge was wrong in finding that the respondents had not acceded to the appellants’ proposal to have the deposit forfeited. There was no valid contract to support the appellants’ forfeiture of the respondents’ deposit. We therefore do not find error in the learned Judge’s findings, and the judgment is hereby upheld.

15. Consequently, the appeal is dismissed with costs to the respondents.

**Dated and delivered at Nairobi this 30<sup>th</sup> day of April 2026.**

**S. GATEMBU KAIRU, FCIArb, C.Arb.**

.....  
.... JUDGE OF  
APPEAL

**P. NYAMWEYA**

.....  
.... JUDGE OF  
APPEAL

**W. KORIR**

.....  
.... JUDGE OF  
APPEAL

*I certify that this is  
a True copy of the  
original*

*Signed*

**DEPUTY REGISTRAR**