

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
THE CIVIL APPELLATE DIVISION
(Coram: A. C. Mrima, J.)
HIGH COURT CIVIL APPEAL NO. E1440 OF 2023

-between-

THOMAS K. RUTTO
t/a T.K. RUTTO & COMPANY
ADVOCATESAPPELLANT

-versus-

KALE MAINA & BUNDOTICH ADVOCATES
LLPRESPONDENT

*(Being an appeal from the Ruling and Orders of Hon. C.K. Cheptoo (PM) in Milimani Chief Magistrates
Commercial Civil Suit No. E038 of 2023 delivered on 5th December 2023)*

JUDGMENT

Introduction:

1. The dispute, subject of this appeal, arose from a Sale Agreement dated 7th May 2021 in respect of the property known as *House Number 3 Phase III Phenom Estate, Land Reference Number 209/19939 IR. No. 131508*, for a purchase price of Kshs. 23,000,000. *Kale Maina & Bundotich Advocates LLP*, the Respondent herein, acted as the legal representative for the purchasers, *Mr. Morgan E. Kipchirchir* and *Mrs. Linah J. Kipkemoi*, while *Thomas K. Rutto t/a T.K. Rutto & Company Advocates*, the Appellant herein, acted for the Vendor, *Georgetown Travel & Tours Limited*.
2. Pursuant to the agreement, the purchasers deposited the sum of Kshs. 2,600,000 to be held by the Appellant as a stakeholder pending the completion of the transaction. The sale was conditional upon the vendor obtaining a discharge of charge over the property from *SBM Bank (Kenya) Limited*. The vendor failed to obtain the said discharge, prompting the Chargee

bank to exercise its statutory power of sale to auction the property.

3. The vendor attempted to stop the auction by filing *Nairobi [Milimani] High Court Commercial Case No. E923 of 2021* against the bank, but the application for an injunction was dismissed on 13th June 2022, wherein the Court noted that the purchasers had rescinded the sale agreement. Following the collapse of the transaction, the Respondent demanded a refund of the deposit of the Kshs. 2,600,000 from the Appellant. When the Appellant failed to refund the money, the Respondent filed *Milimani Chief Magistrates Commercial Civil Suit No. E038 of 2023* [hereinafter referred to as '**the suit**'] along with a Notice of Motion dated 14th March 2023 under Order 40 Rule 11 of the Civil Procedure Rules.
4. In its Ruling of 5th December 2023, the trial Court directed the Appellant to deposit the sum of Kshs. 2,600,000 in an interest-earning joint account operated by both law firms within forty-five days, or alternatively, to deposit sufficient security with the Court. Aggrieved, the Appellant lodged the present appeal which was heard by way of written submissions, hence, this judgment.

The Appeal:

5. The Appellant preferred the appeal through the Memorandum of Appeal dated 19th December 2023, and on the following grounds:-
 1. *The learned magistrate erred in law in failing to take into account the documentary evidence presented by the Appellant.*
 2. *The learned magistrate erred in law and in fact in ignoring the fact that there was no proof of the amount that the appellant was ordered to deposit as security.*
 3. *The learned magistrate erred in law and in failing to find that no reasonable cause of action was disclosed as against the Appellant.*
 4. *The learned magistrate erred in law and in fact in failing to appreciate that the plaintiff's claim in the suit had not*

been pleaded in accordance with the rules of pleading liquidated claims which requires that such claims be specifically pleaded and proved before they can be awarded.

- 5. The findings and conclusions arrived at by the learned magistrate and the ruling he delivered in the suit was against the weight of the evidence presented in court.*
- 6. The learned magistrate erred in law and in fact in applying wrong principles in determining the issues raised by the parties.*
- 7. The learned magistrate erred in law and in (sic) fact failing to appreciate that the respondent's Application was founded on conjecture and assumption of facts.*
- 8. The learned magistrate erred in law and in fact in not finding that the respondent was engaged in a gross abuse of the court process with a view to subvert the appellant's client efforts to implement his statutory right for breach of contract perpetuated by the respondent's client.*
- 9. That the learned magistrate erred in law and in fact in failing to find that the issues ought to have been canvassed well and fully by way of the trial in the suit on merit without unjustly locking either party out of a fair administrative action as enshrined in the constitution which guarantees fairness and justice to parties in a suit.*
- 10. The learned magistrate erred in law and in fact in not finding that the Applicant's prayers were speculative in nature and unsubstantiated and issues raised ere subject to High Court Commercial Case No: E923 of 2021 which is still pending before the courts and has jurisdiction to hear and determine each of the issues on their own merit and not to defeat the cause of justice.*
- 11. The learned magistrate erred in law and in fact in failing to comment about ongoing duplicate proceedings before the Advocates' Disciplinary Tribunal*
- 12. The learned magistrate erred in law and in fact in totally ignoring the evidence adduced and submissions put forward by the Appellant thereby arriving at a wrong decision on the issues presented before her.*

The Submissions:

6. The Appellant filed written submissions dated 29th September 2025. It argued that the purchasers breached the sale agreement by failing to complete the transaction within 90 days, failing to issue a suitable professional undertaking, and failing to refer the matter to arbitration. Consequently, the vendor exercised his rights to forfeit the deposited amount. The Appellant further contended that the purchasers deliberately frustrated the agreement in order to purchase the same property at a public auction at a gross undervalue of Kshs. 18,000,000/=.
7. The Appellant asserted that the trial Court's ruling denied them the fundamental right to be heard on merit. It drew support from various decision among them, Nyeri C.A. No. 18 of 2013, *Richard Ncharpi Leiyagu -vs- Independent Electoral and Boundaries Commission and 2 others* , *Kivanga Estates Limited v National Bank of Kenya Limited* [2017] eKLR, *Mercy Karimi Njeru & Another v Kisima Real Estate Limited* [2015] eKLR, *Trust Bank Limited v Amalo Company Limited* [2002] eKLR, and *Kiai Mbaki & 2 others v Gichuhi Macharia & another* [2005] eKLR to emphasize that a party to civil litigation should not lightly be deprived of their right to have their suit determined in a full trial.
8. Consequently, the Appellant prayed that the appeal be allowed and the impugned ruling be accordingly set-aside.

The Respondent's case:

9. *Kale Maina & Bundotich Advocates LLP* opposed the appeal through written submissions dated 14th October 2025. It was its case that their claim was strictly based on the Kshs. 2,600,000/= received by the Appellant as a stakeholder. They rebutted the Appellant's claim that there was no proof of payment of the amount claimed by pointing to the trial bundle, which contained a copy of the funds transfer showing the deposit into the Appellant's account. The Respondent argued that the vendor explicitly failed to obtain the discharge of charge, which was a condition of the sale. They further noted that this Court in its Ruling had already established that the purchasers rescinded the agreement.

10. The Respondent submitted that the application was correctly brought under Order 40 Rule 11 of the Civil Procedure Rules, the objective of which was merely to secure the sum of Kshs. 2,600,000/= pending the full hearing and determination of the suit. The Respondent emphasized that the ruling was an interlocutory order, not a final conclusive determination of the dispute that locked the Appellant out of a hearing.

Analysis:

11. Having considered the appeal, the submissions and the decisions referred to therein, the following issues arise for determination: -

- i. The propriety of the trial court's order directing the Appellant to furnish security.*
- ii. Whether the trial court's interlocutory order denied the Appellant their fundamental right to be heard on the merits of the suit.*

12. The Court will now deal with the above issues in *seriatim*.

[a] The propriety of the order on furnishing security:

13. The trial Court's decision revolved around the application of Order 40 Rule 11 of the Civil Procedure Rules. Its provision states as follows: -

Deposit of money and other deliverables

Where the subject-matter of a suit is money or some other thing capable of delivery, and any party thereto admits that he holds such money or other thing as a trustee for another party, or that it belongs or is due to another party, the court may order the same to be deposited in court or delivered to such last-named party, with or without security, subject to the further direction of the court.

14. This Court has appraised itself of the record. The Appellant did not deny that the Agreement for Sale mandated that the deposit of Kshs. 2,600,000/= be held by it as a stakeholder

pending completion. It is also apparent in the Ground of Opposition dated 18th April 2023, filed in response to the Respondent's application that the Appellant did not deny the receipt of the funds.

15. The trial Court, therefore, recognizing that the transaction had collapsed and the property had been sold by the Chargee bank, properly exercised its discretion to secure the stakeholder funds in a joint interest-earning account to preserve the substratum of the suit. In the premises, this Court finds that trial Court correctly interpreted Order 40 Rule 11 of the Civil Procedure Rules and as was well guided by the Court of Appeal decision in *George Muriani Muhoro t/a A.M. Muhoro Advocate - vs- Ndungu Kamiti, Civil Appeal No. 233 of 2003* in identifying the Appellant as a stakeholder.
16. Having so found, a consideration of the next issue follows.

[b] Whether the trial Court's interlocutory order denied the Appellant their fundamental right to be heard on the merits of the suit:

17. The Appellant drew heavy support from the decision in *Kivanga Estates Limited -vs- National Bank of Kenya Limited [2017] eKLR* and *Trust Bank Limited v Amalo Company Limited [2002] eKLR* to argue that they were condemned unheard and that their defence and counterclaim were summarily dismissed.
18. An examination of the ruling dated 5th December 2023, however, indicates that the order was strictly interlocutory in nature. The trial Magistrate directed the deposit of funds or security pending the hearing and determination of the suit. Its decision did not amount to striking out the Appellant's defence or counterclaim, neither did it constitute a final judgment on the Appellant's contention that the deposit was forfeited due to the purchasers' breach. The Appellant's right to agitate the foregoing substantive issues, and the question whether there was proof of the deposited amount, is still intact. It resides at a full trial before the trial Court. Additionally, this Court agrees with the learned Magistrate's following observation: -

...It is also admitted that the parties agreed that a deposit of Kshs 2,600,000/ was to be paid to the defendant to hold pending completion. I have looked at the agreement for sale and the same indicates that the Kshs.2,600,000/- was being held by the defendant as a stakeholder (Clause 7 of the agreement) ...

19. In sum, the Appellant's right to be heard is still intact and well preserved for the full trial.

Disposition

20. As I come to the end of this ruling, I wish to apologize to the parties for the late delivery of this decision which was to be in February 2026. The delay was occasioned by my engagement at the Judicial Service Commission where I serve as a Commissioner given that the Commission has been running interviews since December 2025 to date. Once again, galore apologies.
21. From the foregoing discourse, this Court is inclined to take the position that the learned magistrate exercised her discretion judicially and correctly applied the principles governing the preservation of subject matter under Order 40 Rule 11 of the Civil Procedure Rules. Therefore, the Appellant failed to demonstrate any legal or factual error in the trial Court's decision.
22. Accordingly, the following final orders hereby issue;

[a] The appeal is without merit and is hereby dismissed.

[b] The Ruling and Orders of 5th December 2023 are hereby affirmed.

[c] Costs of this appeal to the Respondent.

Orders accordingly.

DELIVERED, DATED and SIGNED at NAIROBI this 15th day of May, 2026.

**A.C. MRIMA
JUDGE**

Judgment virtually delivered in the presence of:

Mr. Makori, Learned Counsel for the Appellant.

Miss Kimona, Learned Counsel for the Respondent.

Michael/Amina - Court Assistants.