



Omukaga v Tamarind Valley Embakasi Limited (Environment and Land Appeal E005 of 2023) [2025] KEELC 5951 (KLR) (27 August 2025) (Judgment)

Neutral citation: [2025] KEELC 5951 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E005 OF 2023**

**CG MBOGO, J
AUGUST 27, 2025**

BETWEEN

MILLICENT AKINYI OMUKAGA APPELLANT

AND

TAMARIND VALLEY EMBAKASI LIMITED RESPONDENT

JUDGMENT

1. Being dissatisfied with the judgment of Hon. Lucy Njora SPM delivered on 23rd June, 2023 in Civil Suit No. E388 of 2021, the appellant herein filed the memorandum of appeal dated 18th July, 2023 challenging the same on the following grounds:-
 1. That the learned trial magistrate erred in that at the hearing of the appellant's suit dated 26th July, 2021, she dropped the mantle of a magistrate and assumed the role of the advocate for the respondent.
 2. That the learned trial magistrate erred in law and fact and misdirected herself by dismissing the suit despite the same being backed up by sufficient evidence.
 3. That the learned trial magistrate erred in law and fact by holding that we had not proved and produced evidence of payment of the deposit nor acknowledgment receipt in total disregard of our attached documents, particularly a copy of our letter dated 1st July 2011 from the respondents' advocate acknowledging receipt of the deposit paid.
 4. That the learned trial magistrate erred in law and fact by failing to be guided by the evidence adduced in issuing her judgment dated 23rd June 2023 and therefore arriving at a wrong conclusion.
 5. That the trial judge erred in awarding the respondent costs despite the fact that they neither appeared nor defended the suit.



2. The appellant prays for the following orders: -
 - a. That this appeal be allowed with costs.
 - b. That the ruling of the magistrate court delivered on 23rd June, 2023 be set aside and be substituted with an order allowing with costs, the appellants plaint dated 26th July, 2021.
3. The grounds of appeal were canvassed by way of written submissions. The appellant filed her written submissions dated 11th March, 2025 where she raised two issues for determination: -
 - a. Whether the appeal has merit.
 - b. Who bears the cost of the suit/appeal.
4. On the first issue, the appellant submitted that the trial court disregarded the bundle of documents produced which was uncontroverted since the respondent failed to file any defence or adduce counter evidence contrary to Sections 107 and 35 of the *Evidence Act*. The appellant relied on the case of CMC Aviation Ltd v Cruisair Ltd [1978] eKLR, and submitted that the trial magistrate erred in considering the non-existence of proof of payment as the unicorn to dismiss the case and disregarded the sale agreement dated 25th August, 2011, while the respondent had acknowledged receipt of payment.
5. On the second issue, the appellant submitted that the respondent neither participated in the hearing nor adduced any evidence, and awarding costs to a party that failed to engage in the litigation process constitutes an abuse of judicial discretion, and an unfair penalty to her. That the trial court's decision to award costs to the respondent despite its non-participation was manifest injustice that should be set aside.
6. I have considered the grounds of appeal and the written submissions. The issue for determination is whether the appeal has merit.
7. This is a first appeal and the law is that this court is entitled to revisit the evidence on record, evaluate it and arrive at its own conclusion. Often times, an appellate court will not interfere with the findings of fact by the trial court unless they were based on no evidence at all, or were arrived at on a misapprehension of it or the trial court is shown to have acted on wrong principles in arriving at those findings as it was held in *Mwanasokoni versus Kenya Bus Service Ltd 1982 – 88 I KAR 278*.
8. The appellant filed the plaint dated 26th July, 2021 seeking judgment against the respondent for the orders that: -
 - a. An order do issue that the defendant was in breach of the contractual obligations between the parties.
 - b. The defendant do pay and/or reimburse the plaintiff the special damages.
 - c. The plaintiff be awarded general damages for breach of contract.
 - d. Interest on b and c above from the time when the project was expected to have been completed until payment in full.
 - e. Costs of the suit be provided for.
 - f. Any other relief that this honourable court may deem just and fit.
9. In the plaint, the appellant pleaded that in the year 2011, she signed a letter of offer on 14th February, 2011 for the sale and purchase of a three-bedroom maisonette at Tamarind valley in Embakasi for the



price of Kshs.6,750,000/-. She pleaded that she entered into a sale agreement dated 25th August, 2011 for the sale of unit no. 1-4 erected on consolidated reference number 7340/220 and 270 situate in Mavoko municipality and in line with the agreement, she paid Kshs.1,350,000/- being the 20% deposit. The appellant further pleaded that she had legitimate expectation that the project would be completed by 31st January, 2012 which was later pushed to 31st July, 2014, but it did not kick off.

10. The appellant pleaded particulars of breach of the contract, and contended that despite being accorded a reasonable timeline to commence the project, no reason has been given for the prolonged delay. Further, that the respondent has declined to refund the sums received despite a notice terminating the contract. The appellant further pleaded special damages owing to the notice dated 11th November, 2020.
11. The appellant's case proceeded for hearing on 23rd February, 2023. She adopted her witness statement dated 6th July, 2021 as her evidence in chief and produced the list of documents dated 26th July, 2021 as EX 1 to 19. The testimony of the appellant appears to be brief. She stated:-

“I was a purchaser of a property that was vended by the defendant sale agent. I paid 205 deposit of Kshs. 1350K. The project was not completed on interest of developer. Completion date was year 2011 and no date there was no complete house. Pray my deposit be refunded.”

12. The impugned judgment was delivered on 23rd June, 2023. The trial court noted that the plaintiff had made a deposit of 20% of the purchase price as stipulated in the same agreement clause 1.1 (g) of Kshs.1,350,000/-. The trial court thus stated:-

“I have carefully analyzed the plaintiff list of documents dated 26th July 2021. From the documents produced as exhibit, I do not see any prove of the payment of the deposit nor an acknowledgment of the same. This ruling the backbone of this suit and the plaintiff ruling failed to satisfy this one element, this court there fails to find that the claim has been proved and there proceeds to dismiss the plaintiffs claim entirety. Therefore, the plaintiff suit against the defendant is dismissed with costs to the defendant.”

13. In analyzing the above proceedings and judgment emanating from the trial court, it is clear that the court based its decision on documentary evidence as produced by the appellant in her list of documents. For clarity, the respondent herein did not file a defence and interlocutory judgment was entered on 24th June, 2022 and the matter slated for formal proof. From this, it is clear that the respondent did not participate in the proceedings, yet it was seemingly awarded costs. Having relied on the documentary evidence produced, it behooves this court to also analyze the documentary evidence that was produced to assess the averments made by the appellant as particularized in her plaint.
14. The appellant and the respondent entered into an agreement for sale of unit 1-4 being a three-bedroom semi-detached maisonette dated 25th August, 2011. There was also correspondence on the sale transaction between the appellants' advocate and the respondent's advocate more so as per the letters dated 11th March, 2011 and 1st July, 2011. Thereafter, there was further correspondences with the variation of the completion date that culminated to the appellant's notice dated 6th October 2020, and 11th November, 2020. A thorough reading of the letters and correspondences show that the appellant indeed paid the deposit of the purchase price as contained in the sale agreement. This was acknowledged in the letter dated 1st July, 2011. It was therefore incorrect for the trial court to find that there was no proof of payment yet there is an acknowledgment to that effect. In my view, and on a balance of probabilities, the appellant was entitled to her claim as the evidence tendered was not



rebutted and was sufficient in the circumstances. As earlier stated, the respondent did not participate in the proceedings yet it was awarded costs. This is my view was an error in principle.

15. From the above, this court finds merit in the memorandum of appeal dated 18th July, 2023 and it is allowed in the following terms:-
- i. The judgment delivered on 23rd June, 2023 by the Hon. Lucy Njora SPM, is hereby set aside in its entirety.
 - ii. The plaint dated 26th July, 2021 is allowed to the extent that:-
 - a. The defendant is in breach of the contractual obligations between the parties.
 - b. The defendant to pay Kshs.1,350,000/- being special damages.
 - c. Interest on b above at court rates from the time when the project was expected to have been completed i.e. 31st July, 2014 until payment in full.
 - d. The respondent to bear the costs of the suit and the appeal.

Orders accordingly.

DATED, SIGNED & DELIVERED VIRTUALLY THIS 27TH DAY OF AUGUST, 2025.

HON. MBOGO C.G.

JUDGE

27/08/2025.

In the presence of:

Mr. Benson Agunga - Court assistant

Mr. Kahia for the Appellant – present

