



Saratuk v Robert Makenga Wekesa t/a Robann Energy Petrol Station; Samson Itonde Tumbo t/a Dominion Yards Auctioneers (Interested Party) (Civil Appeal 129 of 2022) [2025] KEHC 9050 (KLR) (26 June 2025) (Judgment)

Neutral citation: [2025] KEHC 9050 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL APPEAL 129 OF 2022
MS SHARIFF, J
JUNE 26, 2025**

BETWEEN

BENARD NYONGESA SARATUK APPELLANT

AND

ROBERT MAKENGA WEKESA T/A ROBANN ENERGY PETROL STATION RESPONDENT

AND

SAMSON ITONDE TUMBO T/A DOMINION YARDS AUCTIONEERS INTERESTED PARTY

JUDGMENT

1. The Appellant herein, was the Plaintiff where he sued the Respondent herein in the lower Court for :
 - a. Payment of outstanding quarterly payments of Kshs 379,812/=;
 - b. Interest on the amount from 13th November 2017;
 - c. Interests on (a) and (b) above at Court rates;
 - d. Costs of the suit and;
 - e. Any other relief deemed fit to grant by the Court.
2. The suit arose from the consensual resolution of a partnership venture between the Appellant and the Respondent which was created on or about May 2015 and named Robann Energy Business. According to the Appellant, he invested Kshs. 1,500,000/= and he was to receive profits quarterly from the Respondent herein. He averred that the said partnership was dissolved vide an agreement dated 13th November 2017, which was duly executed by the Appellant and the Respondent herein.



3. The appellant had averred that pursuant to the said dissolution agreement Robann Energy reimbursed him his capital of Kshs. 1, 500,000/= and the outstanding quarterly payment amounting to Kshs. 379,812/= was expected to be settled on or before end of March 2018, but that was not to be which default prompted the appellant to issued several demand letters to the respondent, which demands were ignored hence the filing of the suit in the subordinate court.
4. Despite duly service of summons to enter appearance, as per the Affidavit of Service sworn on 30th July 2019, the Respondent failed to enter appearance prompting the Appellant to request for ex-parte/interlocutory judgment of the Court on 9th August 2019.
5. On 9th August 2019, the trial Court proceeded to enter ex-parte/interlocutory judgement as prayed by the Appellant in his Complaint dated 30th July 2019, and filed on 10th July 2019.
6. On 24th October 2019, the matter was fixed for assessment of costs for 20th November 2019, and vide a ruling delivered on 17th July 2020, the Appellant's Bill of Costs dated 29th August 2019, was allowed and assessed at Kshs. 52,220/=
7. On 16th December 2020, the Appellant proceeded to extract his decree and the Interested Party herein was issued with a warrant of sale of property in execution of decree of money and a warrant of attachment of moveable property in execution of a decree money as against the Respondent.
8. On 14th July 2021, the Respondent proceeded to file its notice of appointment of Advocates and subsequently, file a Notice of Motion application seeking stay of execution of the Court's decree pending the taking of accounts between the Appellant and the Respondent herein, that the Court orders that accounts be taken between the Appellant and the Respondent in respect of their partnership venture, that upon taking the statements of accounts between the Appellant and Respondent, any outstanding amount thereof be paid in monthly installment and that the costs of the application be provided for.
9. The Motion application was supported by the Affidavit sworn by the Respondent herein who acknowledge that he was in a partnership venture with the Appellant herein under the name Robann Energy Petrol Station and that the same did not perform well and the parties mutually agreed vide writing to have the same dissolved on 13th November 2017, and upon dissolution the Appellant was to be paid his capital investment of Kshs. 1,500,000/= and that an outstanding amount, being quarterly profits, was calculated in the sum of Kshs. 379, 812/= which was to be paid by the end of March 2018.
10. On 10th August 2021, the lower Court issued orders that there be stay of execution of the Court decree pending the taking of accounts between the Appellant and the Respondent.

B. Appeal

11. Aggrieved by the decision of the trial Court, The Appellant herein The Appellants listed the following grounds of appeal: -
 - a. The learned magistrate erred in law and fact in holding that the Plaintiff and the Defendant are partners as they were no longer in a partnership as at 13th November 2017, and the same was confirmed by the Defendant.
 - b. The learned magistrate erred in law and fact in holding that accounts ought to be taken in respect to the Plaintiff's and Defendant's already dissolved partnership in which the Defendant obliged to make payment of the outstanding sums by March 2018.



- c. The learned magistrate erred in law and fact in allowing the Defendant's application for stay of certificate of costs issued on 7th July 2022 as the same is vexatious, frivolous and a waste of precious judicial time.
 - d. The learned magistrate erred in law and fact in holding that stay of execution be granted against the decree money owed to him.
 - e. The learned magistrate erred in law and fact in allowing the Defendant's application yet the Defendant is guilty of laches as he had sufficient time to pay the decretal sum or set aside the ex-parte judgement on record before execution.
 - f. The learned magistrate erred in law and fact in failing to order that the Defendant pay the Plaintiff the decretal sum which is past overdue.
12. The appeal was canvassed by way of written submissions. Only the Appellants filed their respective written submissions.
 13. The Appellant submitted that the Court herein became functus officio on the issues of rendering accounts by the parties as the Court had already concluded itself on the issue vide the ex-parte judgement and the Appellant had already extracted his decree. The Appellant argues that the parties had already taken accounts and signed an agreement that lead to the outcome of the Respondent paying the Appellant calculated in the sum of Kshs. 379, 812/= which was to be paid by the end of March 2018. The Appellant relied on the cases of Dinesh Construction Company Limited vs Kenya Sugar Research Foundation (2021) eKLR and Apolo Mboya & Another vs Cabinet Secretary of National Treasury 6 Others (2019) eKLR.
 14. Further, the Appellant submitted that the mutual agreement to disband the partnership with the Respondent as enforced on 13th November 2017, was a consensual decision and the same was binding on both parties as to the terms agreed. The Appellant relied on the case of Protus Hamisi Wambada & Another vs Eldoret Hospital (2020) eKLR. The Appellant urged this Court to allow the appeal with costs.
 15. The duty of the first appellate Court was stated in Peters v Sunday Post Ltd [1958] EA 424, where the Court held as follows: -

“Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide.”
 16. This is the position that was further affirmed by the Court of Appeal in Mwana Sokoni vs. Kenya Bus Service Limited (1982 -1988) 1 KAR 278 where it was held that: -

“On a first appeal it is now well settled that, the role of the court is to revisit the evidence on record, evaluate it and reach its own conclusion, however the court will not interfere with findings of facts by the Trial court unless they were based on no evidence at all or on a misapprehension of it, or the court is shown demonstrably to have acted on wrong principles in reaching its findings.”



C. Analysis and Determination

17. I have considered the Record of Appeal and the Appellant's respective submissions. The main issue for determination is whether the appeal is merited.
18. Sections 97(1) of the *Evidence Act* stipulates as follows: -
97. Written contracts and grants.
- (1) When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions of this Act.
19. As this Court has severally stated, and now a longstanding principle of law, that parties to contract are bound by the terms and conditions thereof, and that it is not the business of Courts to rewrite such contracts. In *National Bank of Kenya Limited v Pipe Plastic Samkolit (K) Ltd* [2002] 2 EA 503 [2011] eKLR at 507, this Court stated:
- “A court of law cannot rewrite a contract between parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded or proved.” See also *Pius Kimaiyo Langat v Co-operative Bank of Kenya Limited* [2017] eKLR.
20. In the House of Lord's decision in *Brogden v Metropolitan Rly Co* [1876-77] LR 2 APP CAS 66, Lord Blackburn held as follows:
- “I have always believed the law to be this, that when an offer is made to another party and in that offer, there is a request express or implied that he must signify his acceptance by doing some particular thing, then as soon as he does that thing, he is bound.”
21. In the case of *Housing Finance Co. of Kenya Limited vs. Gilbert Kibe Njuguna Nairobi HCCC No. 1601 of 1999*, it was held: -
- “...Courts are not for as where parties indulging in varying terms of their agreements with others will get sanction to enforce the varied contracts. Contracts belong to the parties and they are at liberty to negotiate and even vary the terms as and when they choose and this they must do together and with meeting of the minds. If it appears to the Court that one party varied terms of the contract with another, without the knowledge, consent or otherwise of the other, and that other demonstrates that the contract did not permit such variation, the Court will say no to the enforcement of such contract.”
22. Having considered the record as put to us, the Appellant's submissions, the pleadings and evidence as presented by the Appellant, it is clear to me that there was indeed a contract between the parties as evidenced for the dissolution of their existing partnership venture named Robann Energy Buisness Venture. As per the document annexed to the Appellant's Complaint, in the lower Court, the said partnership was mutually dissolved on 13th November 2017 and the terms of the dissolution were explicitly clear that Robann Energy Business Venture was to reimburse the Appellant herein his capital investment of Kshs. 1, 500,000/= and it was to also make outstanding quarterly payments amounting



to Kshs. 379,812/= which was to be settled on or before March 2018. Both the Appellant and the Respondent executed the dissolution agreement.

23. It is evident from the plaint that the Respondent's Robann Energy Business Venture did not fulfill the payment of the outstanding sums amounting to Kshs. 379,812/= which was to be settled on or before March 2018. The issue of stay of execution pending taking of accounts between the Appellant and the Respondent, and the request of an order that the accounts be taken by the parties is an attempt by the respondent to unilaterally vary the terms of the dissolution agreement with a view of procrastinating due performance of its contractual obligation as specifically prescribed in the said agreement. The trial court acted in error when it decided to amend the terms of the dissolution agreement, which agreement binds the appellant and the respondent.
24. Premised upon the findings made hereinabove I will allow this appeal and I proceed to make the following orders:-

D. Conclusion

25.

- a) The ruling of the lower Court dated 1st December 2022 is hereby set aside.
- b) The appellant is at liberty to proceed with the execution of the decree.
- c) The appellant is awarded costs of this appeal assessed at ksh 50,000.

This file is marked as closed

Orders accordingly.

DELIVERED, SIGNED AND DATED AT BUNGOMA THIS 26TH JUNE 2025.

M.S.SHARIFF

JUDGE

In the presence of:

No Attendance By Magare Musundi & Co For Appellant

No Attendance By Makokha Wattanga & Luyali Associates For Respondent

N/ainterested Parties

.....Court Assistant

