Skyview Gardens Limited v Ndajiwa (Commercial Case E083 of 2022)
[2025] KEHC 9427 (KLR) (Commercial and Tax) (26 June 2025) (Judgment)

Neutral citation: [2025] KEHC 9427 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL CASE E083 OF 2022

AA VISRAM, J

JUNE 26, 2025

BETWEEN

SKYVIEW GARDENS LIMITED ..... APPELLANT

AND

GEOFFREY BANDA NDAJIWA ..... RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. A.N. Ogonda, SRM dated 1st February, 2022 at the Magistrates Court, Milimani in Civil Case No. E034 of 2021)

JUDGMENT

Introduction and Background

1. Before the Court for determination is an appeal filed by the Appellant that is grounded in its Memorandum of Appeal dated 30th September, 2022, where the Appellant seeks to set aside the decision of the subordinate court dated 1st February, 2022. The impugned decision entered judgment in favour of the Respondent as against the Appellant for the net sum of Kshs. 877,000.00/- plus costs and interest.

2. In the above suit, the Respondent sought a refund of approximately Kshs. 1,380,000.00/- being part of the money paid towards the purchase of Apartment Number 8 on L.R. No. 1870.V/69, Sky View Gardens Apartments, but which transaction eventually fell through.

3. Following the non -completion of the sale and purchase and issue arose relating to the whether or not there was a binding Sale Agreement in force, and a further dispute arose concerning forfeiture of the 10% deposit of the sale price, which had been paid by the Respondent to the Appellant, in its capacity as the Vendor.

4. The Respondent averred that at the time of vacating the Apartment, he had paid approximately Kshs. 2,640,000.00/- out of the total purchase price, being Kshs. 26,000,000.00/-, and that since he had been in occupation of the Apartment since 5th October, 2019, there was an amount to be deducted from the sale price on account of rent for the duration of occupation. However, the parties could not agree on the rent payable.

5. The Respondent computed the monthly rent at Kshs. 140,000.00/- and submitted that the unutilized amount was Kshs. 1,380,000.00/- which is the amount he demanded from the Appellant.

6. The Appellant, on the other hand, denied the Respondent's claim. It counter-claimed based on the position, that because the purchase of the Apartment was no longer feasible, a proposed backdated 1-year tenancy agreement at a monthly consideration of Kshs. 213,762.00/- which was to run from 1st October, 2019 to 30th September, 2020, when the Respondent could "ceremoniously vacate" was more appropriate.

7. The Appellant averred that that it rejected the Respondent's said counter-offer to the above of Kshs. 160,000.00/- per month, and maintained that since the Respondent had paid Kshs. 1,802,000.00/- towards the purchase of the Apartment, he ought to pay the Appellant Kshs. 798,000.00/- as the outstanding balance, which sum was equivalent to 10% of the purchase price of the Apartment.

8. The Appellant accordingly sought the said amount together with interest and costs of both the suit and counterclaim. It also prayed that the Respondent's suit be dismissed.

9. In response to the counterclaim, the Respondent stated that the 10% of the purchase price together with legal costs were already paid, and that the same could only be forfeited in the instance where the Sale Agreement was executed, which was not the case because the parties had disagreed on the express terms to be included in the agreement.

10. The Respondent further stated that his counteroffer was based on the amount of rent proposed by the Appellant in the brochure provided while advertising the Apartment for sale. He stated that the alleged sum of Kshs.1,802,000.00/- excluded the three monthly payments totaling Kshs. 390,000.00/- and Kshs. 448,000.00/- consisting of refundable deposits and anticipated legal costs upon execution of the Sale Agreement. As such, the Respondent averred that the Appellant's suggestion amounted to unjust enrichment. He reiterated the averments in his plaint while urging the subordinate court to dismiss the counterclaim.

11. The matter was set down for hearing where the Respondent testified on his own behalf (PW 1), whereas the Appellant presented its Director and Sales Agent, Robert Nicholas Derby (DW 1). After considering the pleadings, evidence and rival submissions, the Learned Magistrate delivered the judgment on 1st February, 2022. She found that it was common ground that the Respondent paid a deposit of Kshs. 2,700,000.00/- and that as per Clause 9 of the Letter of Offer, which was the only document executed by the parties, the cancellation clause of the Sale Agreement would only take effect after the Respondent executed the Sale Agreement.

12. The lower court additionally found that the Sale Agreement was to be executed within 14 days of presentation, but that there was no consequence of failing to execute the same within the said period. As such, the Learned Magistrate held that the Appellant was not entitled to the 10% deposit because the Sale Agreement was never executed; and further that its counterclaim failed for the same reason.

13. Turning to the Respondent's suit, the Learned Magistrate found that even though the Respondent was responsible for the rent for the period he occupied the premises, there was no justification for the sum of Kshs. 213,762.00/- demanded as rent by the Appellant. That the sum of Kshs. 160,000.00/-

indicated in the brochures posted by the Appellant's agent was more appropriate, and as such, the Learned Magistrate calculated the refund due to the Appellant as follows: -

> Kshs. 2,700,000.00/-
>
> (Less service charge Kshs. 60,000/-)
>
> (Less legal fees Kshs.323,000.00/-)
>
> (Less 9 months rent Kshs. 1,440,000.00/-)
>
> Total Kshs. 877,000.00/-

14. The above decision precipitated the present appeal which was disposed by way of written submissions. The same form part of the record and have been referred to above. I will not rehash the entire submissions, but make relevant references in my analysis and determination below.

Analysis and Determination

15. Since this is the first appeal, this Court is enjoined by the provisions of Section 78 of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) to evaluate and examine the subordinate court record and the evidence presented before it in order to arrive at its own conclusion. This principle of law was well settled in the case of Selle v Associated Motor Boat Co. Ltd (1968) EA 123 where the Court of Appeal outlined the duties of a first appellate court as follows: -

> [An appellate court] is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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 conclusions 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. The Appellant has raised six grounds in its Memorandum of Appeal as follows: -

    1. The Honourable Magistrate erred in law and in fact in holding that the Sale Agreement subject of the proceedings was never executed.
    2. The Learned Magistrate erred by holding that the Appellant was not entitled to withhold 10% of the premium when the sale fell through
    3. The Honourable Magistrate erred in law and in fact in holding that the Law Society Conditions of Sale did not apply herein.
    4. The Learned Magistrate erred in law and in fact when she imposed on the contractual relationship between the parties herein a brochure that was alien to the subject contract and accordingly arrived at an erroneous figure to apply as rent.
    5. The Honourable Magistrate erred in law and in fact in dismissing the Counterclaim by the Appellant on the basis that there was no Demand Letter that could be synchronized to the prayers therein
    6. The Learned Magistrate accordingly erred in law and in fact in entering Judgment in favour of the Respondent and awarding him awarding costs.

17. In its submissions, the Appellant condensed the above grounds and urged the Court to deal with grounds 1, 2 & 6; ground 3 and grounds 4 & 5. Grounds 1, 2 & 6 fault the Learned Magistrate for:

holding that the Sale Agreement was never executed; finding that the Appellant was not entitled to withhold 10% of the premium when the sale fell through; and fault the court for entering Judgment in favour of the Respondent and awarding him awarding costs.

18. The Appellant submitted that Clauses 9 (a) and 10 of the Letter of Offer are crucial to the determination of whether the Sale Agreement was executed and whether the Appellant was entitled to the 10% deposit. The said provisions provide as follows: -

> Clause 9 (a): -
>
> If the Purchaser does not wish to proceed or cannot proceed with the sale after having executed the Agreement for Sale then the Purchaser will forfeit 10% of the above stated Sale Price together with the Legal Costs (excluding stamp duty) already paid and the Apartment may then be resold by the Vendor (Emphasis mine)
>
> Clause 10: -
>
> The Vendor's Advocates will prepare a standard form of agreement for Sale and the Purchaser agrees to execute the same within Fourteen (14) days of presentation. (Emphasis mine)

19. The Appellant submitted that as per Clause 9(a), if the Purchaser does not wish to proceed with the transaction, whether or not he has signed the Agreement for Sale, he forfeits 10% of the sale price together with the legal costs already paid; and if the Purchaser cannot proceed with the sale after having executed the Agreement for Sale, he forfeits 10% of the sale price together with the legal costs already paid.

20. Based on a plain reading of the above clause, I disagree. An ordinary reading and interpretation of Clause 9(a) is that the forfeiture only happens after the Purchaser executes the Sale Agreement. The Appellant also submitted that because Clause 10 provides that the Purchaser agrees to execute the [Sale Agreement] within Fourteen (14) days of presentation, he had no choice but to execute the standard form of Agreement for Sale within 14 days of being presented with it. Further that the "Standard Form" indicates no changes to the Agreement for Sale will be accepted by the Vendor. Accordingly, there is no valid reason upon which the purchaser may justify for the non-execution within the set time-frame. I do not think that such an interpretation is plausible.

21. The Appellant further submitted that on the 15th day after a Purchaser has been presented with the standard form Agreement for Sale for signature, the same automatically acquires binding force regardless of whether the Purchaser physically signs it or not. Once again, I disagree with the aforementioned submission. While Clause 10 provides that the Purchaser agrees to execute the Sale Agreement within 14 days of presentation, The Learned Magistrate found, and I agree, that there is no provision in the Letter of Offer for the consequences of non-execution.

22. Additionally, there is also no indication, impliedly or expressly, in the Letter of Offer that the Sale Agreement is deemed to have been executed on the 15th day even if the Purchaser does not physically sign it. It is not lost on me that that the life of an unsigned contract is brought into existence by the events succeeding its making or drafting or being entered into, albeit without the execution. On this point, in Erick Barasa Makokha & 2 others v Neema Ya Mungu Investment Co Ltd [2021] KEHC 1623 (KLR)) the court asked the following question:

> "What, then, is the effect in law of an unsigned contract? Is it enforceable? The life of an unsigned contract is brought into existence by the events succeeding its making or drafting or being entered into, albeit without the execution. The court in, Reveille Independent

> LLC vs. Anotech International (UK) Ltd [2016] EWCA Civ 443 (Elias, Underhill LJJ & Cranston J), said as follows, with respect to the effect of an unsigned agreement: "... a draft agreement can have contractual force, although the parties do not comply with a requirement that to be binding it must be signed, if essentially all the terms have been agreed and their subsequent conduct indicates this, albeit a court will not reach this conclusion lightly."

23. In the present matter the Appellant has not demonstrated that the terms of the Sale Agreement had been agreed upon, and further, the conduct of the Respondent after the execution of the Letter of Offer shows that he did not intend to be bound by the terms of the Sale Agreement. Further it is evident that neither of parties could agree on the terms and that is why the parties abandoned the terms entered into a tenancy agreement.

24. I am persuaded by the Respondent's submission a court ought to interpret the contract between the parties rather than rewrite the same on behalf of the parties. Based on plain reading of the express working set out in the document executed by the parties I am satisfied that the contract did not become binding.

25. In the foregoing, having found that the Sale Agreement was never executed, it follows that the Appellant is not entitled to retain the 10% deposit because Clause 9(a) of the Letter of Offer provided that the same was only available after execution of the Sale Agreement. I am satisfied that the Learned Magistrate reached the appropriate conclusion in the circumstances and I decline to interfere with the decision of the lower court in this regard.

26. With regard to the amount of rent to be paid, I am also in agreement with the Learned Magistrate that there was no basis for the Appellant to apply a sum of Kshs. 213,762.00/- as opposed to Kshs.160,000.00/- which was the rental price advertised in its advertisement brochure. DW 1 admitted that this was the amount advertised in its brochure and as such I find it was reasonable for Learned Magistrate to use the same as a basis for calculation.

27. As regards the ground stating that the Learned Magistrate erred in finding that the Law Society of Kenya's Conditions of sale did not apply, there is an express admission by DW 1 that the Letter of Offer did not refer to the LSK Conditions of Sale. I therefore find that there was no error on the part of the Learned Magistrate in this regard.

28. As regards the ground that the counterclaim was erroneously dismissed. I find this ground to be a misapprehension of the subordinate court's judgment. As stated in the introductory part, the Learned Magistrate stated at page 5 of the judgment that "...This document was never executed and there is no provision for the consequence of failing to execute the sale within 14 days of presentation. The Defendant is not entitled to 10% of the deposit as the sales agreement that was forwarded to the Plaintiff as per the provisions of Clause 10 was never executed. The counterclaim fails for that reason..." (Emphasis mine). This ground of appeal therefore has no basis.

Conclusion and Disposition

29. My summation of the above findings is that the Appellant's appeal is without merit and the same is hereby dismissed with costs.

DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 26TH { {^ } } DAY OF JUNE, 2025

ALEEM VISRAM, FCIArb

JUDGE

In the presence of;

Court Assistant: Sakina

.....for Appellant

.....for Respondent