



REPUBLIC OF KENYA



**KENYA LAW**  
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**Gachiu v Kamanda (Civil Appeal E324 of 2023)  
[2025] KEHC 11467 (KLR) (31 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 11467 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT THIKA  
CIVIL APPEAL E324 OF 2023**

**TW OUYA, J**

**JULY 31, 2025**

**BETWEEN**

**FELISTA WANJIRU GACHIU ..... APPELLANT**

**AND**

**BENADETTA NJERI KAMANDA ..... RESPONDENT**

*(Being an appeal from the entire judgement of Hon O.J Muthoni, Resident Magistrate delivered on 28th August 2023 in the Thika Small Claims Court Commercial Case No. E341 of 2023)*

**JUDGMENT**

1. The Respondent filed a Statement of Claim dated 17<sup>th</sup> March 2023, at the Thika Small Claims Court seeking judgement against the Appellant for a sum of Ksh. 180,000.00.
2. The Respondent's case was that she bought a business premise from the Appellant to operate the business of a pub. When she went to renew the license as required by law, she was informed that the license did not exist in the county portals and the officers claimed that the business ought to be closed for not having a license. Moreover, the license that she had presented for renewal did not belong to the said business premise as the business sold was Listas Pub while the license was under the name of Joyland Pub.
3. The Appellant on the other hand filed a counterclaim stating that she sold Listas Pub to the Respondent on 25<sup>th</sup> November 2022 at a consideration of Ksh. 230,000.00. However, the Respondent failed to clear a balance of Ksh. 78,000.00 on goods sold and delivered. Therefore, she prayed that the court delivers a judgment of Ksh. 78,000.00 against the Respondent.
4. During the oral hearing the Respondent testified that she had entered into an agreement with the Appellant for a club named Lister Pub. However, the Appellant offered a license written Joyland Pub. When she went to renew the license, the officials asked for a license for Lister Pub. As a result, she was arrested for using a name different from that on the license. Following the breach, she wanted



- refund of KSh. 180,000.00, being the amount that she had paid to the Appellant in furtherance of the agreement. She insisted that the Appellant did not explain to her the difference in names under which the business operated.
5. The Appellant, the Respondent at the Small Claims Court, on the other hand testified that she sold the business to the Respondent in November 2022 via an agreement dated 25<sup>th</sup> November 2022. The Respondent paid a deposit of Ksh. 60,000.00 and the balance was to be paid on 12<sup>th</sup> December 2022. The Respondent initially paid Ksh. 120,000.00 then subsequently paid Ksh. 100,000.00. The Respondent sought for time to pay the balance of Ksh. 60,000.00 by 10<sup>th</sup> January 2023. She admitted changing the business name from Listers Liquor Store to Joyland Pub. She reiterated that the County Government recognized Joyland Pub. She insisted that the Respondent was arrested because she was selling liquor past the required time and not merely because of the difference in the licensed name and the operating name of the business.
  6. Both the Appellant and the Respondent testified as the sole witnesses of their cases. At the end of the trial, judgment was entered in favour of the Respondent against the Appellant for Ksh. 180,000.00 on the basis that the contract was entered into by misrepresentation for the Appellant failed to disclose to the Respondent at the time of signing the agreement that though she had bought Lister Pub, the license was for Joyland Pub. The court therefore rescinded the agreement.
    - i. Aggrieved with the decision of the trial court, the appellant filed the instant appeal urging the grounds that the learned magistrate erred in law and in fact in failing to appreciate that when the business was sold, it was sold together with the then existing stock of the business, failing to appreciate that when the Respondent opted to rescind the Sale Agreement dated 25<sup>th</sup> November 2022, the stock of the business was never released back into the possession of the Appellant and failing to appreciate that the Respondent intends to divest the Appellant's right to be restored to the state she was in prior to performance of the Sale Agreement dated 25<sup>th</sup> November 2022 entered into between the Appellant and the Respondent.
  7. The Appellant therefore prayed that the appeal be allowed, the judgment of 28<sup>th</sup> August 2023 be set aside and the orders therefrom stayed.
  8. The appeal was disposed through written submissions.
  9. The appellant's submissions were premised on the fact that the trial magistrate erred in finding that the contract was rescinded on account of misrepresentation. It was submitted that the parties were very clear on the terms of the contract. No party was coerced into entering into the agreement for sale. Reliance was placed on the case of National Bank of Kenya Ltd versus Pipleplastic Samkolit (k) Ltd & another [2002] EA 503, where the court stated that 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 and proved.
  10. It was the Appellant's further submission that the decision of the trial court had unjustly enriched the Respondent as she did not return the stock that she found at the time of taking over the business, being an inclusive amount of Kshs. 230,000.00.
  11. The Respondent's submissions were premised on the fact that the appellant failed to honour her bargain by selling the pub with an invalid license. Therefore, it was just that she refunds the Ksh. 180,000.00 that had been paid by the Respondent as deposit.
  12. It was submitted that the parties were bound by the terms of the contract and any other provision outside the contract could not be enforced by the court. Reliance was placed on the case of National



- Bank of Kenya Ltd versus Pipleplastic Samkolit (k) Ltd & another [2002] EA 503 to plead that the business that was handed over to the Respondent was different from the one she had contracted for. Therefore, there was material misrepresentation of facts.
13. The Respondent further submitted that she had proved her claim against the Appellant on a balance of probabilities. She demonstrated that the validity of the license was affected by the appellant's non-disclosure of material facts. The appellant was unable to explain how the business sold as Lista Pub held a license for Joyland Pub. The invalid license not only affected the operations of the pub but also denied the Respondent the opportunity to enjoy the benefits of her business. Therefore, she prayed that the appeal be dismissed with costs.
  14. I have considered the material placed on record before me in this appeal.
  15. This being a first appellate court, it was held in *Selle vs. Associated Motor Boat Co.* [1968] EA 123 that:

“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the 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. In particular the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”
  16. In the instant case, it is the Appellant's case that she entered into a contract for sale of a business premise with the Respondent. Though according to the agreement, the business premise that she sold to the Respondent was called Lista Pub, she handed over to the Respondent a license of Joy Land Pub. The Respondent had paid a total of Kshs. 180,000.00 towards the business and was owing Kshs. 50,000.00 as the total purchase price was agreed at Kshs. 230,000.00. However, the Respondent contended that when she went to renew the license of the business premise, the same was not found in the County's data base and that she was advised to close the business as she could not operate an unlicensed business. Feeling cheated, the Respondent filed a claim at the trial court for breach of contract. The trial court found in her favour and entered judgment against the Plaintiff by rescinding the Sale Agreement. As a result, the Appellant herein was asked to refund the Respondent the Kshs. 180,000.00 that had been paid in furtherance of the Sale Agreement.
  17. The Appellant on the other hand contends that the award of Kshs. 180,000.00 would make the Respondent to benefit unfairly from the business since the trial magistrate did not take into account the stock that was available at the time that the Respondent took possession of the business. The Appellant therefore made a counterclaim for the stock in existence prior to the Respondent taking possession of the business.
  18. The Respondent insisted that had she known that there was a problem with the license, she would not have entered into the agreement for sale with the Appellant. Therefore, she maintained that the agreement for sale of Lista Pub was marred with misrepresentation as what she bargained for is not what she ultimately got.
  19. There is no dispute that the parties wilfully entered into an agreement for sale of Lista Pub on 25<sup>th</sup> November 2022. Therefore, the existence of a valid agreement of sale has not been assailed.



20. The law of contract gives effect to consensual agreements entered into by particular individuals in their own interests. Remedies granted by the courts are designed to give effect to what was voluntarily undertaken by the parties. Damages in contract are therefore intended to place the claimant in the same position as he would have been in if the contract had been performed. This position was appreciated as early as in 1848 in the case of “Robinson – Versus - Harman (1848) 1Exch 850” in which Parke B said:
- “the rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.”
21. The Court has carefully perused the sale agreement in the Record of Appeal and noted that the same is in writing and is signed by the parties. It thus met the requirements of Section 3(3) of the Contract Act. Further the agreement for sale contains the names of the parties, the description of the property, the purchase price and the conditions thereto. A look at the said sale agreement confirms that the same is a valid sale agreement which is enforceable by the parties.
22. As to whether the Appellant breached the agreement for sale, Black’s Law Dictionary, 9<sup>th</sup> Edition, Page 213, defines a breach of contract as:
- “a violation of a contractual obligation by failing to perform one’s own promise, by repudiating it, or by interfering with another party’s performance. A breach may be one by non-performance or by repudiation or by both. Every breach gives rise to a claim for damages and may give rise to other remedies. Even if the injured party sustains no pecuniary loss, or is unable to show such loss, with sufficient certainty, he has at least a claim for nominal damages.”
23. It is trite law that courts cannot re-write contracts for parties, neither can they imply terms that were not part of the contract. In the case of *Rufale v Umon Manufacturing Co. (Ramsboltom) (1918) L.R 1KB 592*, Scrutton L.J. held as follows:
- “The first thing is to see what the parties have expressed in the contract and then an implied term is not to be added because the court thinks it would have been reasonable to have inserted it in the contract.”
24. Based on the above decisions, the starting point for this Honourable Court will be the agreement that the parties signed and the terms therein. According to the agreement, the business premise that the Appellant sold to the Respondent is Listas Pub at a consideration of Kshs. 230,000.00 inclusive of all the stock, partition shelves and goodwill in the business. It was a term of the agreement that the buyer, the Respondent herein, would use the license in place until expiry and thereafter the Respondent would make arrangements for her own business permit and business user name.
25. It was the Respondents position that the Appellant breached the agreement and failed to meet the conditions set out in the agreement, to wit, issuing the Respondent with a license for a premise known as Joyland Pub when the contract was for sale of Listas Pub. As a result, the Respondent was unable to continue with the business at the expiry of the license since the county government informed her that Lista Pub did not exist in its record of licensed pubs.
26. Therefore, the Respondent moved the court to rescind the contract and have a refund of the money that she had paid to the Appellant towards the purchase of the business, being Ksh. 180,000.00.



27. Legally speaking, the principal remedy under common law for breach of contract is an award of damages, with the purpose of damages being to compensate the injured party for the loss suffered as a result of the breach, rather than (except for very limited circumstances) to punish the breaching party. This general rule, which can be traced back to “Robinson v Harman (supra)” is to place the claimant in the same position as if the contract had been performed, with the guiding principle being that of restitution. The compensatory nature of damages for breach of contract, and the nature of the loss for which they are designed to compensate, were explained by Lord Diplock in *Photo Production Ltd v Securicor Transport Ltd* (1980) AC 827 – 849”:-

“The contract, however, is just as much the source of secondary obligations as it is of primary obligations ... Every failure to perform a primary obligation is a breach of contract. The secondary obligation on the part of the contract breaker to which it gives rise by implication of the common law is to pay monetary compensation to the other party for the loss sustained by him in consequence of the breach ...” (p 849)

28. Although the contract between the parties did not provide for circumstances that would amount to breach of contract, it was a term of the contract that if the seller is in breach, she would not only refund 30% of the total purchase price but also, refund the total purchase price already paid to her. Therefore, in the circumstances, the Respondent was right in rescinding the contract and seeking a refund of the purchase price that she had paid.

29. The Court of Appeal in dealing with the effect of breach of contract held as follows in *Dhanjal Investments Limited v Shabana Investments Limited* (Civil Appeal 80 of 2019) [2022] KECA 366 (KLR):

“...the effect of the said breach is that it entitled the Appellant, as the innocent party in the circumstances, the option of treating itself as discharged from further performance of the contract, and to also claim damages for any loss it had suffered.”

30. It is in this regard explained in paragraph 21-016 of *Chitty on Contracts - Volume I* :

“that the right to terminate the contract when there is a fundamental breach may be lost where the innocent party affirms the contract, is held to have waived it, or is estopped from exercising the right to terminate. Affirmance is defined in *Black’s Law Dictionary*, Ninth Edition as “a ratification, reacceptance or confirmation”, and in relation to contracts, it is explained therein that “a party who has the power of avoidance may lose it by action that manifests a willingness to go on with the contract. Such action is known as affirmance and has the effect of ratifying the contract”. However, a party will not be held to have elected to affirm to contract unless it has knowledge of the facts giving rise to the breach, and of its legal right to choose between the alternatives open to it. In addition, where a party having this knowledge elects to affirm the continued existence of the contract, it does not necessarily relinquish its claim for damages for any loss sustained as a result of the breach.”

31. In the instant case, the Appellant has not provided any evidence that the Respondent affirmed the agreement upon realizing the breach occasioned by the Appellant. From the record, the Respondent never took any action to show a willingness to continue with the contract. In the circumstance I find that rescission was an available remedy to the Respondent.

32. Although the Appellant alleges that the Respondent was unjustly enriched by the award of the KSh. 180,000.00 as she had taken possession of the premises together with the stock and goodwill, it is



noteworthy that she occasioned the breach. The appellant should therefore not benefit from a breach that she occasioned at the expense of the Respondent.

33. The Court in *Hassan Zubeidi v Patrick Mwangangi Kibaiya & another* [2014] eKLR held that:

“The legal position is that a party should never be allowed to take advantage of his wrongs/ omissions at the expense of the other party.”

34. For the above reasons, I find that the appeal herein is without merit and proceed to dismiss it with costs.

35. Final Order:

Appeal is hereby dismissed with costs to the respondent

**DATED, SIGNED AND DELIVERED ELECTRONICALLY THIS 31<sup>ST</sup> DAY OF JULY 2025.**

**HON. T. W. OUYA**

**JUDGE**

