Kenya Railways Corporation v Githendu (Civil Appeal 306 of 2019) [2025] KEHC 11675 (KLR) (Civ) (31 July 2025) (Judgment)

Neutral citation: [2025] KEHC 11675 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 306 OF 2019

AC MRIMA, J

JULY 31, 2025

BETWEEN

KENYA RAILWAYS CORPORATION .... APPELLANT

AND

SOSPETER KAMAU GITHENDU .... RESPONDENT

(Being an appeal from the judgment and decree of Hon. A. M. Obura (Mrs.) (Senior Principal Magistrate) delivered on 24th May,2019 in Nairobi (Milimani) CMCC No.4169 of 2007)

JUDGMENT

1. Sometimes in 1999, Sospeter Kamau Githendu, the Respondent herein, entered into an agreement for lease of Plot No. L.R No. 209/9534 South 'B' within the Nairobi County [hereinafter referred to as 'the Plot'] with the Appellant herein. The agreement included the sale of an incomplete house on the plot. Pursuant to the agreement, the Respondent paid a sum of Kshs.1,000,000/= vide cheque No.622398, leaving a balance of Kshs.1,533,335/=. The Respondent informed the Appellant that he will pay the balance immediately the lease documents are prepared, executed and registered. The Appellant was to prepare the said lease documents. The Appellant did not decline the proposal.

2. It turned out that the Appellant failed to complete the transaction and instead before the Respondent was handed over possession of the plot, the Appellant allocated and transferred the Plot to a third party who went ahead and took possession and even completed the house thereon. Without any other option, the Respondent instituted Nairobi [Milimani] Chief Magistrates Civil Suit No.4169 of 2007 [hereinafter referred to as 'the suit']. The Respondent, vide a Plaint dated 20th April 2007 sought a refund of the sum of Kshs. 1,000,000/= together with interest at the rate of 18% per month from 6th August 1999 until payment in full together with costs.

3. The suit was defended through a Statement of Defence dated 13th June 2007. The Appellant denied having entered into any agreement with the Respondent and averred that if there was any such a contract, then the same was cancelled as a result of the failure by the Respondent to fully perform his obligation under the said contract. The suit was eventually heard and a judgment was delivered on 24th May 2019 where the Court fallowed the suit. The Appellant was decreed to pay the sum of Kshs. 1,000,000/= with interest at Court rates from the date of filing of the suit, and costs of the suit.

4. Aggrieved by the said decision, the Appellant filed the instant appeal and vide the Memorandum of Appeal dated 6th June,2019 preferred the following grounds of appeal: -

    1. The Learned erred in law and in fact in failing to consider the terms and conditions of the letter of offer dated 6th August 1999.

    2. The Learned erred in law and in fact in coming to the conclusion or finding that both parties had frustrated the contract.

    3. The Learned erred in law and in fact in finding that the respondent is entitled to interest from the date of filing of the suit despite holding that the respondent had breached the contract.

    4. The Learned erred in law and in fact in failing to find that the respondent's suit was defective as it was a breach of the mandatory provisions of the Limitations of Actions Act Cap 22 Laws of Kenya.

    5. The Learned erred in law and in fact in finding that the plaintiff is entitled to the costs of the suit.

5. Upon the basis of the above grounds, the Appellant urged this Court to allow the appeal, set aside the judgment and dismiss the sum with costs.

6. The appeal was vehemently opposed. Parties filed written submissions wherein they referred to several decisions, the gist whereof will be ingrained in the latter part of this decision.

7. This being a first appeal, this Court is well aware of its role as reiterated in Selle and Another vs Associated Motor Boat Company Ltd & Others [1968] 1EA 123 as follows: -

> ...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. In particular, this 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 into account of particular circumstances or probabilities materially to estimate the evidence.'

8. This Court further appreciates the settled principle in Mwanasokoni vs Kenya Bus Service Ltd (1982-88)1KAR 78 and Kiruga vs Kiruga and Another that an appellate Court will not ordinarily interfere with findings of fact 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 the findings. (See also the case of Gitobu Imanyara & 2 Others vs Attorney General [2016] eKLR).

9. Having carefully perused the record, parties' submissions and the decisions therein, two main issue arise for determination being; whether: -

    i. The suit was time barred; and

ii. The claim was proved

10. This Court will now settle the above issues.

Whether the suit was time barred:

11. The Appellant submitted that the suit was time barred pursuant to the Limitations of Actions Act which imposes a six-year period for filing contractual clams. It argued that the cause of action arose on 14th August 1999 when the deposit paid was received and as such, the time lapsed noting that the suit was filed sometime in May, 2007.

12. This Court notes that a defence of limitation is jurisdictional and if successful tends to terminate the proceedings accordingly. There is no doubt that the agreement was executed sometimes in 1999. However, the terms did not provide for the completion time. Further, when the Respondent forwarded his cheque for Kshs. 1,000,000/= and informed the Appellant that he was prepared to pay the balance of the agreed sum on the registration of the necessary documents, the Appellant never repudiated the position. Therefore, the Appellant impliedly conceded to the offer and as such the Appellant was duty bound to, in the first instance, complete the transaction before the issue of the balance could arise. As the evidence would have it, it seemed the property was either transferred to a third party or otherwise dealt with differently by the Appellant. The Respondent was never informed of the termination of the agreement and when he enquired about the completion of the transaction or a refund of his deposit, he was served with a demand notice for the balance and unpaid rates on the Plot. As there seemed to be no consensus on the way forward, the suit was instituted.

13. There is usually no difficulty in dealing with the issue of limitation where the parties expressly provide for such. However, in instances where the completion is not expressly provided for and is otherwise dependent on the fulfilment or occurrence of some events, then limitation time does not begin to run until the agreed events are either fulfilled or happen. In this case, the Respondent proposed to complete payment on the registration of the title documents and the Appellant did not decline the offer. Instead, after the Respondent demanded for the completion or refund of the deposit, the Appellant served him with a demand for the balance and rates. That was in 2006 and 2007.

14. Therefore, even going by the events of 2006 only, and from the demand for rates by the Appellant, there was an implied acknowledgment by the Appellant that the agreement was still in force and as such limitation would begin running from then and not from the date the agreement was executed. As said, in this case the agreement was silent on the completion date. Since the suit was filed in 2007, then the defence of limitation does not come to the aid of the Appellant. The same is for rejection.

Whether the suit was proved:

15. The Appellant faulted the trial Court for making a finding that both parties had frustrated the contract and further that the trial Court failed to consider the terms and conditions of the letter of offer dated 6th August 1999. However, on a careful consideration of the evidence, it appears that it was indeed the Appellant who failed to hold to its part of the bargain especially when the Respondent made a part payment and proposed to pay the balance on the registration of the necessary documents. The Respondent even went ahead to call for the execution of the immediate documents. The Appellant instead opted not to respond to the Appellant's offer only to demand for the balance and rates after the Respondent raised alarm vide his demand letters.

16. The totality of the terms in the agreement coupled with the parties' subsequent actions yields that the Respondent was entitled to a refund of the sums he had paid to the Appellant. Eventually, the trial Court did err in allowing the suit.

17. The appeal is, hence, unmerited and the following final orders do hereby issue: -

    a. The appeal is hereby dismissed.

    b. Costs to the Respondent.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 31ST DAY OF JULY, 2025.

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

No appearance of the parties.

Amina/Annette – Court Assistants.