



Kenya Commercial Bank Limited (Formerly Known as Savings and Loans Limited) v Kede Enterprises Limited (Commercial Appeal E083 of 2023) [2025] KEHC 12491 (KLR) (Commercial and Tax) (1 September 2025) (Judgment)

Neutral citation: [2025] KEHC 12491 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL APPEAL E083 OF 2023
JWW MONG'ARE, J
SEPTEMBER 1, 2025**

BETWEEN

KENYA COMMERCIAL BANK LIMITED (FORMERLY KNOWN AS SAVINGS AND LOANS LIMITED) APPELLANT

AND

KEDE ENTERPRISES LIMITED RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. B. Cheloti, PM dated 14th April, 2023 at the Magistrates Court, Milimani in Civil Case No.275 of 2019)

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 8th May 2023 where it seeks to set aside the decision of the subordinate court dated 14th April 2023. The background giving rise to the suit before the subordinate court is that in 1994, the Appellant, then Savings and Loans Limited extended a loan facility to R and RO, secured by property Nairobi/Block90/236. The OS defaulted, leading the Appellant to enforce its security. The property was then sold to WMO and LNO, who also defaulted on their loan. The Appellant subsequently invoked its statutory power of sale, and the property was auctioned on 15th December 1998 where the Respondent was the highest bidder at Kshs.8,550,000.00/= and it was required to remit a 25% deposit and complete the balance within 90 days, that is by 16th March 1999. The Appellant asserts that the Respondent defaulted on this obligation, failing to make full payment by the deadline and leaving an outstanding balance.



2. That due to the Respondent's continued default, the Appellant rescinded the Memorandum of Sale on 3rd February 2000 and the Appellant argues that the rescission was lawful and that all necessary qualifications for a valid rescission were satisfied. Subsequent court orders in Civil Suit No. 840 of 2000 mandated the Respondent to pay the balance and interest within specified periods, with a condition that non-compliance would set aside the orders and allow the Appellant to sell the property. The Appellant contends that the Respondent still failed to comply with these orders and another suit filed by the OS (Civil Suit 863 of 2000) further restrained the Appellant and Respondent from dealing with the property until its withdrawal on 6th September 2018.
3. On its part, the Respondent contends that the full purchase price was paid by 17th January 2001 as the Court Order of 17th May 2000, granted injunctive orders to the Respondent on the condition of payment, and that the Appellant subsequently received the entire purchase price based on this Order. The Respondent argues that the issue of rescission does not arise as the Appellant received the full purchase price after the court's decree, effectively setting aside the purported rescission. The Respondent asserts that the Appellant waived its right to rescind the contract and is estopped from relying on it, particularly because the Appellant continued to receive payments after the alleged default date. It avers that this conduct, including communications pointing to the completion of the sale, is inconsistent with an intent to rescind. Thus, before the subordinate court, the Respondent sought inter alia a declaration that the purported rescission of sale agreement was null and void and an order of specific performance directing the Defendant to complete the sale agreement with the Plaintiff;
4. The matter was heard where each of the parties presented one witness and thereafter, the subordinate court rendered the judgment. The learned magistrate found that the purchase price was paid in full and that the Respondent had even made an overpayment of Kshs.700,000/= and that what it was obligated to pay was the interest balance of Kshs.1,100,000.00/= only. This decision is what has prompted the Appellant to file the present appeal which has been canvassed by way of written submissions that I have considered and I will be making relevant references to in my analysis and determination below.

Analysis and Determination

5. 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...

6. The Appellant's submissions propose various issues for the court's determination. First, it urges the court to determine whether the suit property, Nairobi/Block 90/236, was properly sold to the Respondent. The Appellant argues that the sale was not proper due to the Respondent's alleged failure to complete the payment within the stipulated time, leading to a purported rescission of the sale. Second, it also urges the court to determine whether the Memorandum of Sale dated 15th December 1998, was validly rescinded. The Appellant contends that the sale was validly rescinded due to the Respondent's breach of the terms of the Memorandum of Sale, specifically regarding the payment



- timelines. Third, the Appellant urges the court to determine whether the High Court erred in ordering specific performance. The Appellant argues that specific performance should not have been granted, especially given the alleged rescission of the sale and the Respondent's purported breach of contract. It suggests that the appropriate remedy would be to allow the Appellant to auction the property.
7. Fourth, the court is also being called upon to determine whether the Respondent is entitled to interest on the purchase price particularly in light of the delays and the purported rescission and whether the doctrine of waiver and estoppel applies. The Appellant challenges the application of these doctrines, arguing that its actions did not constitute a waiver of its right to rescind the contract or estop it from enforcing the terms of the sale agreement.
 8. In sum, the Appellant's arguments revolve around the premise that the Respondent breached the terms of the Memorandum of Sale by failing to pay the full purchase price within the agreed-upon period. It asserts that this breach gave them the right to rescind the contract, and that subsequent court orders did not negate this right. It also contends that the orders for specific performance were erroneous and that they should be allowed to proceed with the auction of the property as initially intended, in line with the Memorandum of Sale and previous court orders.
 9. In response, the Respondent stated that the balance of the purchase price was paid pursuant to an order of this court and that the issue of rescission does not arise as the Appellant received the full purchase price after the court's decree. The Respondent argues that specific performance was the appropriate and just relief given that the entire purchase price was paid as early as 2001, and the Respondent has been using the property as a matrimonial home. The Respondent states that the Appellant has not demonstrated any hardship caused by the order of specific performance and submits that interest was only applicable on the balance of the purchase price, and since the purchase price was cleared by January 2001, interest stopped accruing at that point. In conclusion, the Respondent urges the court to dismiss the appeal, emphasizing that allowing it would amount to unjust enrichment for the Appellant.
 10. I have gone through the record and the submissions of the parties highlighted above. I note that the Appellant has taken issue with the court's order of 17th May 2000 ordering specific performance of the sale agreement and not rescission of the same. However, it should not be lost that the trial magistrate is bound by the decisions of this court and there was no way she could have faulted or gone against the said order of 17th May 2000. Further, this Court cannot purport to fault the decision of a Court of concurrent jurisdiction as this would be arrogating to itself jurisdiction that it does not possess. The redress of the Appellant, if at all it was aggrieved by the decision on Hon. Mbaluto, ordering for specific performance when the Appellant had rescinded the sale agreement, lay in an appeal to the Court of Appeal and not the setting aside by the subordinate court or this court decision. (see *Stephen Mwaura Njuguna v Dougals Kamau Ngotho & another* [2012] KECA 98 (KLR))
 11. In any event, I do not fault the trial magistrate's conclusion for a couple of reasons. The Appellant cannot claim to have rescinded the sale and at the same time accept payment of the balance of the purchase price as ordered by Mbaluto J.'s orders of 17th May 2000. This payment was admitted by the Appellant and that what remained unpaid as per the memorandum of sale was interest, which both parties admitted in their evidence before the subordinate court. I therefore find no reason to interfere with the subordinate court's judgment.

Conclusion and Disposition

12. My summation of the above findings is that the Appellant's appeal has no merit and the same is hereby dismissed with costs to the Respondent. It is so ordered.



**DATED SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 1ST DAY OF SEPTEMBER
2025**

J.W.W. MONGARE

JUDGE

In The Presence Of

N/A for the Plaintiff/Applicant.

Mr. Manyera for the Respondent.

Amos- Court Assistant

