



**National Bank of Kenya Ltd v Omwoyo & another (Civil Appeal
67 of 2018) [2023] KEHC 22777 (KLR) (27 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22777 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL 67 OF 2018
HM NYAGA, J
SEPTEMBER 27, 2023**

BETWEEN

NATIONAL BANK OF KENYA LTD APPELLANT

AND

THOMAS ORESI OMWOYO 1ST RESPONDENT

SAMUEL NYAMWAKA BOSIRE 2ND RESPONDENT

*(Being an appeal from the Judgment delivered on 8th May, 2018 by Hon.
B.Mararo, Principal Magistrate in Nakuru CMCC No. 932 of 2001)*

JUDGMENT

Introduction

1. The 1st Respondent *vide* a plaint dated 16th May, 2001 instituted a suit against the Appellant and the 2nd Respondent praying for judgment against them severally and jointly as follows:-
 - a. That the charge created over Land Title Number Nakuru/Municipality Block 2/410 be found to be null and void and the same to be deregistered.
 - b. Costs of the Suit.
 - c. Any other relief the trial court may deem fit and just to grant.
2. It was the 1st Respondent's case that he was the co-proprietor of all that parcel of Land Known as Nakuru Municipality Block 2/410 together with the 2nd Respondent. That on or about September 1987, the 2nd Respondent obtained a loan of Ksh.100,000/= from the Appellant by executing a charge over the aforementioned parcel of Land illegally and fraudulently since the same was created without his permission, authority or consent as the co-owner of that land.



3. He also averred that the 2nd Respondent defaulted in paying the loan and the Appellant had instructed the auctioneers to sell the aforesaid parcel of land and that he had neither been served with the statutory notice of sale nor supplied with any bank statements.
4. The Appellant through its statement of defence dated 17th September, 2015 denied the 1st Respondent's claim. It admitted that the 1st Respondent was a co-proprietor of the aforesaid Land with the 2nd Respondent and averred that they had defaulted in repaying their loan which stood at Ksh.1,923,793.40 and thus it was entitled to exercise its statutory power of sale.
5. It was the Appellant's position that the 1st Respondent was provided with bank statements and statutory notices were duly served on the respondents.
6. The appellant also stated on a without prejudice basis that if the property in issue was fraudulently charged by the 2nd Respondent as a Co-owner then it would file a claim against him so as to sell his half share in the aforesaid property.
7. The 2nd Respondent through his statement of defence dated 31st August, 2016 denied the 1st Respondent's case. According to him, the 1st Respondent was supplied with documents but he declined to sign as he was trying to deny him the loan unfairly. He also averred that the documents in question were prepared by the Appellant and it was its responsibility to ensure that they were signed and that in case of any mistake he should not be held responsible.
8. The trial court upon hearing the evidence of the parties delivered its judgement on 8th May,2018 allowing the 1st Respondent's case in the following terms:-
 - a. The Charge credited over Land Title Number Nakuru/Municipality Block 2/410 is hereby declared null and void and the same is to be deregistered forthwith.
 - b. In title documents of all the parcel of land being held by the 2nd Defendant to be returned to the Plaintiff and the 1st Defendant jointly, forthwith.
 - c. The 2nd defendant is at liberty to pursue the 1st Defendant for monies advanced to him with or without interest in any lawful manner.
 - d. Plaintiff will pay costs of this suit with interest at court rates to be shared by the 1st and 2nd Defendants jointly and severally.

The Appeal

9. Being dissatisfied with the above decision, the Appellant filed the instant appeal dated 7th June,2018 raising the following grounds:-
 - i. That the Honourable Principal Magistrate erred in Law and fact by allowing the Plaintiff's Claim based on the available evidence.
 - ii. That the Honourable Principal Magistrate erred in Law in finding that the Plaintiff did not execute the charge and or did not know about the charge.
 - iii. That the Honourable Principal Magistrate erred in law in discharging the entire charged property on alleged grounds of fraud.
 - iv. That the Honourable Principal Magistrate erred in Law in failing to find that no formal or criminal complaint has ever been raised by the Plaintiff against the use of his property as security.



- v. That the Judgement of the court did not meet the set legal standards.
 - vi. That the Honourable Principal Magistrate erred in Law and fact by failing to consider the evidence by the 2nd defendant
 - vii. That the Honourable Principal Magistrate erred in allowing the 1st Respondent to benefit from his own mischief and illegal action.
10. The Appellant thus proposed that the said Judgment be set aside and the 1st Respondent and or the 2nd respondent do meet their legal obligation to repay the loan and or half of the attached property be charged.
 11. The Appeal was canvassed via written submissions.

Appellant's Submissions

12. The Appellant filed its submissions on 15th May, 2023. In regards to ground one of the Appeal, the Appellant submitted that there was no evidence of fraud since there was no letter or demand notice addressed to it complaining about the charge, that no complaint was reported to the police in regards to the alleged fraud and it took the 1st respondent 12-14 years to take any action to protect his interest.
13. With respect to ground 2 of the Appeal, the Appellant argued that the trial magistrate erred in holding that the 1st Respondent did not execute the charge because the charge dated 6th October, 1987 was not the first charge over the charged property; the charge and the individual guarantee were executed before an advocate who issued the appropriate certificate confirming executors appeared before him and signed the documents.
14. The Appellant further argued it is paradoxical that the 2nd respondent alleged to have executed the charge document and left it to the bank to deal as appropriate including looking for the guarantor to execute. It contended that by necessary inference, if the 2nd respondent's signature and execution is admitted, the 1st respondent signature should be equally accepted as they appeared together before the same advocate.
15. In support of its submissions, the Appellant cited the court of appeal decision of *Abdulkadir Shariff Abdirahim & another vs Awo Shariff Mohammed T/A A. S. Mohammed Investments* [2014] eKLR where it quoted the case of *R. G. Patel vs Lalji Makanji*, (1957) EA 314 where the former Court of Appeal for Eastern Africa stated that;

“allegations of fraud must be strictly proved, the standard of proof may not be so heavy as to require proof beyond reasonable doubt; what is required is something more than a mere balance of probabilities”
16. In regards to ground 3 of the Appeal, the Appellant submitted that the title Nakuru Municipality Block 2/410 is registered in the names of the Respondents as proprietors in common in equal shares and faulted the trial court for treating it as joint proprietorship. To support its submissions the appellant relied on the provisions of Section 103(i) of the *Registered Land Act* and the cases of *Isabel Chelangat vs Samuel Tiro Rotich & 5 others* [2012] eKLR & *In re Estate Dorica Lumire Mapesa (Deceased)* [2018] eKLR on the difference between joint tenancy and tenancy in common.
17. With regard to ground 4 of the Appeal, the Appellant contended that for the last 36 years this matter has been in existence, no criminal complaint has ever been raised against it or the 2nd respondent and as such the 1st respondent is estopped by conduct from alleging that there was fraud.



18. In regards to the fifth ground of the Appeal, the appellant submitted the trial court did not set out the issues for determination and its findings on the same but rather accepted wholesale the explanation by the 2nd Respondent that the charge documents were left with the Appellant who somehow faked the Respondent's signature and issued the loan.
19. He argued that the 2nd respondent gave different version on how the documents were executed as evidenced in the letter dated 19th April, 2001 and 2nd Respondent's witness statement.
20. This court was referred to the case of *James Muniu Mucheru vs National Bank of Kenya Limited* [2019] eKLR where the court quoted the case of *Karugi & Another vs Kabiya & 3 Others* [1987] KLR 347, where it was held that the burden on a plaintiff to prove his case remains the same throughout the case and that the burden of proof is in no way lessened because the case is heard by way of formal proof.
21. The appellant argued that the 1st respondent did not prove on a balance of probabilities that he did not execute the charge and or did not know about the charge.
22. It was contended that the trial court in its judgement did not consider the law on equity and public policy that the appellant debt ought to be paid and holding otherwise would be unjust enrichment against the appellant.
23. The Appellant asserted that the judgement failed to consider that the appellant herein had failed to accommodate payments of a debt truly owing which had been secured by the security which was in the said judgement declared null and void leaving it with no security to recover its debts.
24. With respect to the 6th ground of appeal, the appellant submitted that the 1st Respondent misled court by stating that the Identity Card in the charge and guarantee was not his. The Appellant argued that the respondent apparently had different identity cards with same number but with different serial numbers which fact demonstrated that he has two different identity cards.
25. The Appellant did not submit on ground 7 of the Appeal.

1st Respondent's submissions

26. In regards to grounds 1 and 2 of the Appeal, the 1st Respondent submitted that he tendered credible evidence that a charge was created over a property that he co-owned with the 2nd Respondent without his knowledge or approval and that the appellant and 2nd respondent did not procure him to sign the charge and guarantee documents or informed him of the same until when the appellant attempted to sell the property.
27. He contended that the Appellant produced in evidence several correspondences between it and the 2nd Respondent but none was copied to him if at all he had executed the contested charge instrument and the individual guarantee.
28. He submitted that at trial, the Appellant did not produce his National Identity Card which was availed at execution of the contested bank documents which ought to have been one of the primary documents to accompany a charge instrument and individual guarantee.
29. He referred the court to provisions of Sections 109 and 112 of the *Evidence Act* and the cases of *Vijay Morjaria vs Nansingh Madhusingh Darbar & another* [2000] eKLR and *Kinyanjui Kamau v George Kamau Njoroge* [2015] eKLR to support his averment that the particulars of fraud were specifically pleaded and proved and urged the court to dismiss these grounds



30. In regards to ground three of the appeal, the 1st respondent referred this court to the pleadings of the appellant and the 2nd respondent and submitted that none of them sought for any substantive prayers or any form of declaratory orders and urged this court not to find any merit on the same.
31. On ground 4 of the Appeal, the 1st Respondent submitted that in determination of civil cases before the court is based on the evidence tendered by witnesses and documentary evidence produced as exhibits and that the Evidence on police investigations or criminal proceedings and/or traffic proceedings are of no probative value. To buttress this fact, reliance was placed on the case of *Erastus Wade Opande vs Kenya Revenue Authority & Another* Kisumu HCCA No. 46 of 2007
32. He therefore submitted that contention by the appellant that he should be estopped by conduct from alleging fraud has no legal basis.
33. He contended that the issues as to whether the charge over the property was fraudulent or not and the remedies he had sought to protect his interest in the property as a co-proprietor could only be granted by a civil court.
34. In respect to ground 5 of the Appeal, he submitted that the trial court judgment largely conformed with the requirements of provisions of Order 21 Rule 4 of the *Civil Procedure Rules* save for failure to formulate the issues for determination. However, according to him that is a non-issue as this being a first appellate court it is required to independently evaluate the evidence and arrive at its independent decision.
35. The 1st respondent posited that the court took into account the evidence by all parties before arriving at its determination.
36. On ground 7 of the Appeal, the 1st respondent submitted that he did not benefit in any manner by the fraudulent creation of a charge over the property in issue and to the contrary he has been exposed to expensive and costly litigation occasioned by lack of due diligence on the part of the Appellant.
37. He submitted that the appellant has not made any submissions on this ground and it should be presumed that it has abandoned it.
38. He urged the court to dismiss appeal in its entirety with costs to him.

2nd Respondent's Submissions

39. With respect to whether there was a properly executed charge in place, the 2nd respondent submitted that the 1st respondent did not execute the charge and that he signed the same in his absence.
40. He contended that the charge was rightly an illegality and cannot find a lawful and binding contract between the Appellant and the respondents capable of being performed by them.
41. On whether the statutory notices were served on the respondents, he submitted that it is clear from the evidence on record that the appellant did not prove that it served statutory notices on them.
42. The 2nd respondent relied on the Court of Appeal case of *Stephen Boro Gitiba v Nicholas Ruthiru Gatoto & 2 others* [2017] eKLR for the proposition that non service of a notice is a fundamental breach of Section 74 of the *Registered Land Act* which derogates from the chargor's equity of redemption.
43. He thus argued that pursuant to section 74 (3) of the *Registered Land Act*, the action for sale therefrom remains premature. The 2nd respondents also relied on the case of *Nyangilo Ochieng & another v Fanuel B. Ochieng & 2 others* [1996] eKLR where the court *inter alia* stated that it is for the chargee to make



sure that there is compliance with the requirements of Section 74(1) of the [Registered Land Act](#) and the burden to prove service of statutory notice is on the chargee.

44. The 2nd respondent thus urged this court to uphold the trial court’s judgement and dismiss the appeal with costs to the respondents.

Issues for determination

45. Having considered the appeal, record of appeal and the submissions rendered, I frame the following questions as arising for my determination;
1. Whether the trial court erred in not framing issues for determination.
 2. Whether the trial court failed to consider the evidence by the 2nd Defendant/appellant.
 3. Whether or not the 1st Respondent proved the particulars of fraud against the Appellant.
 4. Whether the trial court erred in law in discharging the entire charged property on alleged grounds of fraud.

Analysis

46. Being the first appellate court it is incumbent upon this court to reconsider the evidence on record re-evaluate it and draw its own independent conclusion bearing in mind that it did not have the opportunity to hear or see the witnesses. Refer to the cases of *Selle vs Associated Motor Boat Co.* [1968] EA 123); *Abdul Hameed Saif vs. Ali Mohamed Sholan* (1955) 22 E. A. C. A. 270 & *Arrow Cars Limited vs Bimomo & 2 Others*, C.A. No. 344 OF 2004.

Whether the trial court erred in not framing issues for determination

47. The Appellant submitted that the trial court failed to set out the issues for determination and findings on the same.

48. The East African Court of Appeal in *Haj Ibrahim Mohamed Saeed vs Al-Haj Othman Kaid Sallam* [1962] EA 149 restated the importance of framing of issues by the trial court when it stated that:

“The need to frame issues has been repeatedly stressed by the Court. Here the failure to do so, or to refer to the terms of the Rent Restriction Ordinance, appears to some extent to have misled the learned Judge in his consideration of the case.”

49. The importance of framing issues for determination was appreciated by the Supreme Court of Uganda (per Oder, JSC) in *Rukidi vs. Iguru and Another* [1995-1998] 2 EA 318 where expressed itself as hereunder:

“The discretion of framing issues at trials lies on the court and Order 13 rule 3 of the Civil Procedure Rules does not say that the Court may only frame issues from all the items listed therein since the discretion is left to the Court and since it may frame issues from any or all of the items listed in the rule means that the Court may frame issues at any time from the commencement of trials up to the writing of the judgement by the trial court... Whereas Order 13, rule 3 of the Civil Procedure Rules clearly indicates that issues must be framed before the production of evidence in a case and it is in rare cases that framing of issues is postponed till after hearing evidence of one or two witnesses, this ground of appeal must fail since no failure of justice occurred by framing of one issue.”



50. It was noted by Serگون, J in *Ngugi Peter Ngumi Gichobo Alias Peter Ngumi Gichobo Ngugi vs Ambrose Wanjohi Migwi T/A Migan Hardware Store Nyeri* HCCA No. 138 of 2003 that:

“A perusal of the record shows that the learned Principal Magistrate did not frame up the issues for determination which he was enjoined to do under Order 22 rule 5 of the Civil Procedure Rules. But the deficiency in failing to evaluate the evidence can be corrected by the first appellate court. Though the learned Principal Magistrate did not frame up the issues, he nevertheless ably analysed the evidence presented before him.”

51. It is well settled that the failure to frame issues is not necessarily fatal, as was held by the East African Court of Appeal in *Norman vs. Overseas Motor Transport (Tanganyika) Limited* Civil Appeal No. 88 of 1958 1959] EA 131 where it stated that:

“If, though no issue is framed on the fact, the parties adduce evidence on the fact and discuss it before the court, and the court decides the point, as if there was an issue framed on it, the decision will not be set aside on appeal on the ground merely that no issue was framed... In the instant case it would seem that the failure of the court to frame issues was to some extent the fault of counsel on both sides. Nevertheless, the failure to frame the issues is an irregularity and the question is whether, notwithstanding the failure to frame the issues, the parties at the trial knew what the real question between them was, that the evidence on the question had been taken and the court duly considered it.”

52. The court in the case of *North Kisii Central Farmers Limited vs Jeremiah Mayaka Ombui & 4 Others* [2014] eKLR held that the issues for determination in a suit flow from the pleadings filed by the parties.

53. The primary issue for determination as disclosed in the plaint and defence was whether the Appellant had obtained the 1st Respondent’s consent before executing a charge over the parcel of land known as Nakuru Municipality Block 2/410 that he co-owned with the 2nd respondent.

54. It is discernible from the analysis of the judgment of the trial court that the above issue was duly considered and determined. It suffices to state that it is not mandatory for the court to list the issue for determination or to have specific title for the same.

Whether the trial court failed to consider the evidence by the 2nd Defendant

29. The answer to this issue is quite straight forward. I have perused the impugned judgment and noted that at page 259 thereof, the trial court clearly analyzed the evidence of the appellant as follows:

“The 2nd defendant on their part allege that they advanced the 1st defendant a facility of Ksh.100, 000/= and he was guaranteed by the plaintiff and they charged the aforementioned property. They mentioned that the charge was rectified by the bank, the plaintiff and 1st defendant defaulted in repayment of the loan and the 2nd defendant exercised its rights as per the charge. I have considered the material placed before me and it is not in dispute that the 1st defendant obtained a loan facility of Ksh.100, 000/= from the 2nd defendant and that he charged the aforementioned property....

I am convinced the plaintiff did not execute the charge as alleged by the 2nd defendant.....”

30. From the above and the record, it is patent that the learned magistrate considered the evidence of the 2nd Appellant in arriving at his decision. Whether that decision was correct or not is the subject of this appeal.



Whether Or Not The 1st Respondent Proved The Particulars Of Fraud Against The Appellant

55. It is trite law of evidence that he who alleges a fact must prove its existence. This is provided for in section 107 and 109 of the Evidence Act. Section 107 provides thus;
- “The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”
56. Fraud’ has been defined in Blacks Laws Dictionary as;
- “Fraud consists of some deceitful practice or wilful device, resorted to with intent to deprive another of his right, or in some manner to cause him an injury.”
57. Further Black’s Law Dictionary Ninth Edition at Page 731 also defines ‘fraud’ as:-
- “A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment.”
58. Blacks’s Law Dictionary 10th Edition defines the term “Civil Fraud” as an intentional fraud which carries only a monetary, non-criminal penalty. That “fraud” is a knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment. That fraud is usually a tort but in some cases (especially when the conduct is willful) it may be a crime.
59. It is trite law that any allegations of fraud must be pleaded and strictly proved to the standard of proof required in Civil cases, which is obviously higher than that required in ordinary civil cases namely proof upon a balance of probabilities but certainly not beyond any reasonable doubt as in criminal cases. (see *Ndolo vs Ndolo* (2008) 1KLR (G & F) 742.)
60. The 1st Respondent in his plaint averred that the 2nd respondent obtained a loan of Kshs.100, 000/= from the Appellant by executing a charge over a parcel of Land known as Nakuru Municipality Block 2/410 which he co-owned with him without his authority or consent and he prayed that the aforesaid charge be declared null and void and to be consequently deregistered.
61. The 1st Respondent contended that the said charge was created fraudulently and enumerated the particulars of fraud as follows:-
- a. Creating the said charge without the knowledge and approval of the Plaintiff.
 - b. Failing to procure the Plaintiff to sign or consent to the charge while knowing or having reason to know that he was a registered co-proprietor.
 - c. Concealing the existence of the charge from the plaintiff.
62. The 1st Respondent, during hearing reiterated the above position. He stated that the title deed of the aforesaid parcel was charged to the Appellant and it was used as security by the 2nd respondent to secure a loan. He said the Appellant issued a loan to the 2nd respondent without his involvement. It was his evidence that he did not guarantee the loan nor signed the individual guarantee, and that the ID number 4836530 appearing therein was not his. He said his ID number is 2755837.
63. The 2nd respondent confirmed that he owns the aforementioned land together with the 1st Respondent. He also confirmed he used the same parcel of land as a security to secure a loan of Ksh.100, 000/- from the Appellant. He said the loan was issued without the 1st respondent’s involvement. He said the



charge was not proper as his co-owner did not sign and prayed to be allowed to return the said sum of Ksh.100,000/= to the Appellant.

64. Morris Simp, the credit remedial manager with the appellant, that the 2nd respondent took a loan of ksh.100, 000/= guaranteed by the 1st respondent and supported by legal charge for property Nakuru Municipality Block 2/410 registered in the names of the respondents herein. He said the charge was duly executed by the respondents in presence of the late Kagunda Advocate. He also told court that the individual guarantee was equally signed by the 1st respondent as a guarantor for the 2nd respondent in the presence of the said Advocate. He produced the list of documents dated 17th September, 2015 and a further list of documents dated 14th June, 2017 in evidence.
65. A cursory perusal of the Appellant's documents filed on 17th September, 2015 does show that the Appellant relied on the security documents, namely the Charge and the individual Guarantee, which on the face thereof show that they were executed by both respondents herein before the same Advocate on 23rd September 1987.
66. The 1st Respondent disputed that he did not sign the above documents and that the ID number appearing therein i.e. 4836530/67 did not belong to him. This was the ground relied upon by the trial court to find in favour of the 1st Respondent.
67. In the case of *Vijay Morjaria vs Nansingh Madhusingh Darbar & Another* [2000] eKLR, Tunoi, JA. (as he then was) stated as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”
68. As regards the standard of proof, this Court in the case of *Kinyanjui Kamau vs George Kamau* [2015] eKLR stated that the burden to prove fraud lay squarely on a party alleging it.
69. The onus was therefore on the 1st Respondent who sought to rely on fraud to prove to the court that he did not sign any of the aforesaid documents relied upon by the Appellant in support of its case. He did not produce any evidence to support this. He could easily have sought the services of a document examiner to prove that the signature therein was a forgery. He never reported the alleged fraud to the relevant authorities for investigation.
70. The 1st Respondent placed much weight on the ID number indicated on the guarantee and indemnity. I note that the charge document and the individual guarantee were drawn in the year 1987. It is common knowledge that during this period the old/first generation Identification cards were still in force. This position changed in 1995 and the said first generation identity card was replaced by the so called 2nd generation identity card. Those old enough, like myself are fully aware of this fact. This can be verified by a simple search on several official websites belonging to the Government and the media. (See for example <https://www.theelephant.info/data-stories/2019/06/14/toa-kitambulisho-evolution-of-registration-of-persons-in-kenya/>The Elephant - Explaining Society to the People.)
71. The ID number the 1st Respondent tendered in support of his case was issued on 6th January,2011. Certainly, it was not the one that was used in the guarantee forms that were signed. He ought to have produced the old ID or disclose his old ID number so that the court could ascertain that indeed the ID number appearing on the charge instrument and individual guarantee was not his. He however chose not to do so.



72. I also note that the 1st Respondent did not dispute appearing before the advocate Kagunda who drew the charge instrument and the individual guarantee. The said advocate certified that both respondents appeared before him on 23rd September 1987 and that they signed the documents in his presence.
73. In the premises therefore, I have no choice but to hold that the 1st Respondent failed to prove his allegation of fraud against the Appellant and it follows that the charge in issue was created with the knowledge and approval of the 1st respondent.
74. Looking at the evidence tendered by both Respondents, it is evident that the two colluded to present the case before the trial court. Unfortunately, or fortunately for them, they have benefitted from that collusion for many years.

Whether the trial court erred in law in discharging the entire charged property on alleged grounds of fraud

75. This issue was raised in ground no.3 of the memorandum of appeal. The appellant submitted that the title of the property in issue shows that the same is owned equally in common by the Respondents.
76. The appellant faulted the trial court for treating the same as joint proprietorship. Its position is that the 2nd respondent's share in the security is distinct and does not merge into that of the 1st respondent.
77. The Appellant pleads with this court to have the aforesaid property subdivided and the charge to remain in the 2nd respondent's portion.
78. The 1st respondent urged this court to not find merit on this ground for reasons that it was not raised by the appellant in its defence.
79. It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded.
80. That settled position was re-affirmed by the Court of Appeal in the case of *Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others* (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in *Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002* where Adereji, JSC expressed himself thus on the importance and place of pleadings:

“.....it is now trite Principal in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....

...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”

81. The Appellant in its defence at paragraph 10 pleaded as follows:-

“without prejudice to the foregoing defence, the 2nd Defendant if which is denied, the property known as Nakuru Municipality Block 2/410 was fraudulently charged by the 1st



Defendant as a Co-owner then, the 2nd Defendant shall file a claim against the co-defendant and the right to sell his half share in the property aforesaid.”

82. Order 1 rule 24 of the [Civil Procedure Rules](#) provide for claims of one defendant against a co-defendant. It reads as follows;

“Defendant claiming against a co-defendant [Order 1, rule 24.]

- (1) Where a defendant desires to claim against another person who is already a party to the suit—
 - (a) that he is entitled to contribution or indemnity; or
 - (b) that he is entitled to any relief or remedy relating to or connected with the original subject-matter of the action which is substantially the same as some relief or remedy claimed by the plaintiff; or
 - (c) that any question or issue relating to or connected with the said subject matter is substantially the same as some question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and the defendant and such other person or between any or either of them, the defendant may without leave issue and serve on such other person a notice making such claim or specifying such question or issue.
- (2) No appearance to such notice shall be necessary but there shall be adopted for the determination of such claim, question or issue the same procedure as if such other person were a third party under this Order.”

83. The Appellant neither raised any counter-claim against the 1st respondent nor a cross-claim against the 2nd Respondent. It never sought for substantive prayers in regards to the above issue.

84. The filing of a counterclaim by a defendant makes a plaintiff aware of the case is against them and enables them to respond appropriately. A counter-claim or cross-claim also enables the Court to pronounce a final judgment in the same suit, both on the original and on the cross-claim.

85. In the present case, the Appellant ought to have raised his claim against the 2nd respondent and have the same disposed of in the suit before the trial court.

86. The Appellant had an opportunity to exercise his right of counter-claim against the Respondents, but for whatever reason, chose not to exercise the same. Without a counter-claim or cross-claim before trial court, the trial magistrate had no basis to consider the issue herein. He restricted himself, and rightly so, to the issue that was before him and that was whether the 1st respondent signed the guarantee or not.

87. This position was very well expressed in [Alex Gichira Mwachha Vs. Joshua M. Maina](#) [2016] eKLR, where the court opined:

“Secondly the appellant did not seek any relief in his prayers before the trial court on account of the alleged damages which were not ascertained in the pleadings. It is correct therefore for the respondent to term this appeal as a non-starter because the appellant cannot fault the decision of the trial court for not granting what was not prayed for in the first place. A trial



court cannot make assumptions on the reliefs being sought. It has to be moved specifically to grant a certain relief...”

88. Guided by the principles enunciated in the above case, I find that the Appellant did not raise this issue in its pleading for the trial court to succinctly determine and I hereby proceed to disregard the submissions made by the Appellant on that particular point.
89. Considering the totality of the evidence availed in this case, and applying the legal principles outlined in the law and authorities referred to hereinabove, I come to the conclusion that the learned trial magistrate erred in law in holding that the 1st Respondent had proved the particulars of fraud against the Appellant. I find that the 1st respondent duly signed the indemnity and guarantee in question and is bound by it.
90. Accordingly, I allow the appeal, set aside the Judgement of the trial court.
91. The Respondents herein, being bound by the guarantee in question, ought to make good the loan obtained by the 2nd respondent and in default the appellant is at liberty to exercise its powers of sale under the charge in question.
92. On costs of this appeal, the Appellant has been successful and it follows that it is entitled to the same. I so order, to be borne by the respondents, jointly and severally.
93. The appellant is also awarded costs in the Lower Court to be borne by the 1st Respondent, who filed the suit.
94. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 27TH DAY OF SEPTEMBER, 2023.

H. M. NYAGA,

JUDGE.

In the presence of;

C/A Jeniffer

Mr. Kamonjo Kiburi for appellant

Ms Bosibori for 1st respondent

Ms Oganga present for 2nd respondent

