Kenya Electricity Transmission Company Limited (KETRACO) v Onsongo & another (Environment and Land Appeal E028 of 2022) [2025] KEELC 3161 (KLR) (2 April 2025) (Judgment)

Neutral citation: [2025] KEELC 3161 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

ENVIRONMENT AND LAND APPEAL E028 OF 2022

M SILA, J

APRIL 2, 2025

BETWEEN

KENYA ELECTRICITY TRANSMISSION COMPANY LIMITED (KETRACO) ..... APPELLANT

AND

ESTHER MORAA ONSONGO ..... 1ST RESPONDENT

ESTHER GESARE ONSONGO ..... 2ND RESPONDENT

(Being an appeal against the judgment of Hon. P.K Mutai, Senior Resident Magistrate, delivered on 7 November 2022, in the suit Kisii CMCC No. 504 of 2019)

JUDGMENT

(1st respondent filing suit to enforce an agreement made by the appellant to compensate her for a wayleave created on land that the 1st respondent had beneficial ownership of; appellant making a promise to pay an equal sum separately to the 1st and 2nd respondent who were widows of the deceased registered proprietor; no payment made to 1st respondent and on inquiry 1st respondent told that the money was paid to the 2nd respondent on the basis of an authority that she allegedly executed; 1st respondent denying signing any such authority and filing suit for compensation of the promised amount; judgment entered for the 1st respondent; on appeal, court not persuaded that the alleged authority was proved to have been executed by the 1st respondent; moreover, no evidence whatsoever presented by the appellant that any money was paid to the 2nd respondent as alleged; judgment of the trial court affirmed; appellant ordered to make good her promise to pay compensation to the 1st respondent)

1. The dispute herein relates to a complaint by the 1st respondent, that the appellant failed to pay to her compensation as promised, for a wayleave granted to the appellant to erect power transmission lines on land that the 1st respondent had beneficial ownership of.

2. Arising out of the alleged non-payment, the 1st respondent commenced the suit through a plaint filed on 12 July 2019. She pleaded to be the beneficial owner of the land parcel Bassi/Bogetaorio II/984B which was said to be registered in the name of one Nyakundi Maiko (deceased). It was pleaded that the appellant (sued as 2nd defendant) had acquired part of the suit land measuring approximately 0.30 acres for purposes of a wayleave for a power transmission line and undertook to pay the 1st respondent compensation in the sum of Kshs. 231,285.60/=. It was pleaded that the appellant requested for the 1st respondent's bank account and personal details to facilitate the payment which she averred that she supplied. She pleaded that the appellant put up the transmission infrastructure but never paid compensation to her. She averred that she followed up the issue with the appellant, and at one time she was informed by one of the appellant's staff that the money was paid to the 2nd respondent (sued in the suit as the 1st defendant). She pleaded that she wrote a letter seeking information and documentation to support the alleged payment to the 2nd respondent but that information was never supplied. She explained that she had joined the 2nd respondent as a necessary party to the suit since the appellant alleged that the money was paid to her. She contended that the appellant and the 2nd respondent colluded to defraud her of the compensation that she was entitled to.

3. In the plaint, the 1st respondent asked for the following orders :

    a. Payment of a sum of Kshs. 231, 285.60/= being compensation due to her for the 0.30 acres acquired by the appellant;

    b. Interest at court rates for the amount sought above;

    c. Costs of the suit;

    d. Any other relief as the court may deem fit and expedient to grant.

4. The appellant entered appearance and filed defence. In the statement of defence, it was pleaded that the 1st respondent did not have the locus standi to sue the appellant without any grant of letters of administration and it was pleaded that a preliminary objection will be raised at or before the hearing of the case. The appellant nevertheless admitted paragraphs 4 and 5 of the plaint which pleaded that the 1st respondent was beneficial owner of part of the suit land and that a portion of it measuring 0.30 acres was acquired upon an undertaking to pay Kshs. 231,258.60/=. It was also admitted that the appellant had asked for the bank details and personal details of the 1st respondent to enable payment to her. It was however pleaded that such details came to be of no use after the 1st respondent executed an authority directing the appellant to pay the monies to the 2nd respondent on her behalf. The appellant admitted putting up a transmission line on the suit land after the 1st respondent executed an easement that was registered in favour of the appellant. The other pleadings in the plaint were denied and the 1st respondent put to strict proof thereof.

5. The 1st respondent filed a reply to defence and joined issue with the appellant and demanded strict proof of its allegations.

6. The 2nd respondent (as 1st defendant) did not enter appearance nor file any defence and neither did she participate at the hearing of the suit.

7. Subsequently, the appellant filed an application dated 22 January 2021 seeking to have the plaint struck out inter alia on the grounds that the suit land is registered in name of a deceased person, and that the 1st respondent has no locus standi to sue without obtaining a grant of letters of administration. The application was dismissed in a ruling delivered on 17 May 2021.

8. Hearing commenced on 31 August 2022 when the 1st respondent/plaintiff testified. She largely relied on her witness statement as her evidence in chief and produced the documents that she had listed in her list of documents. In her statement, she stated that she was beneficial owner of the suit land which was registered in the name of Nyakundi Maiko. That in 2016, officers of the appellant through the area Chief approached her and informed her that they were conducting a project of constructing the Kisii-Awendo power transmission line and that the line would pass through part of the suit land. They requested her to surrender a portion measuring 0.30 acres for a consideration of Kshs. 231, 285.60/=. On the basis of the undertaking, she surrendered the said portion to them, forwarded her bank account details and some identification documents, as requested, after signing a letter of offer dated 1 February 2016. The power line was duly constructed. She visited the offices of the appellant to inquire on the status of compensation and one of the appellant's officers informed her that the money was paid to the 2nd respondent. She asserted that she never authorised the 2nd respondent to receive the compensation money on her behalf and that in any event she only had an agreement with the appellant and not with the 2nd respondent. She averred that to date she had not received the compensation monies from either the appellant or 2nd respondent (as 1st and 2nd defendants). She averred that she has now brought the suit seeking to be paid the compensation sum together with interest.

9. Cross-examined, she averred that she was told that the money was paid to the 2nd respondent. She acknowledged not having obtained letters of administration to file suit. There were documents put to her having thumb prints which she stated it was possible that she signed (though it is not clear in the record what exactly was put to her). She categorically denied authorising anybody to receive payment on her behalf or signing any such authorisation.

10. With that evidence, the 1st respondent closed her case.

11. The appellant called Edwin Mutevu as her witness. He is an advocate. He also had a witness statement which he produced together with various documents that had been listed as exhibits. In his statement, he stated that he witnessed execution by the 1st respondent of the various documents regarding the easement transaction over the suit land. He did make a mention in his statement that the 1st respondent had no locus for not having a grant of letters of administration. He acknowledged that the appellant acquired a wayleave over the suit land forming part of the estate of the deceased. He introduced the 1st and 2nd respondents as beneficiaries of the estate of the deceased by virtue of being widows to the deceased. He elaborated that they had informally subdivided the suit land into portions A and B; portion A for the 2nd respondent and portion B for the 1st respondent/plaintiff. It was the 1st respondent/plaintiff who executed the easement that he witnessed and the same was registered. He stated that each of the two widows was to be paid Kshs. 231,285.60/= . He contended that the 1st respondent/plaintiff executed an authority dated 26 January 2017 giving instructions that the compensation due to her be paid into the 2nd respondent's bank account and agreed that such payment will discharge the appellant of her obligations. He stated that in accordance with the authority to pay, the appellant deposited the sum of Kshs. 462,571.20/= as the total compensation for the easement. He stated that the 1st respondent/plaintiff executed the discharge and indemnity dated 26 January 2017, acknowledging receipt of the compensation monies on her behalf and the other beneficiaries, and confirmed not having any further claim. He closed by stating that any claim for payment ought to

have been brought against the 2nd respondent only, and not against the appellant, since the appellant had discharged her obligations.

12. In court, he supplemented his witness statement by elaborating that two letters of offer were issued, one for the portion A and the other for the portion B of the land parcel Bassi/Bogetaorio II/ 984. He produced the two letters of offer. He elaborated that this was an informal subdivision of the land as provided in a Chief's letter. Two beneficiaries were identified and it was the 1st respondent who was identified as the person to execute the documents. He reiterated that the 1st respondent appointed the 2nd respondent to receive payment; he did not know the reasons. He stated that the authority to pay was executed in his presence and he produced it as an exhibit. He testified that he was not sure whether they received payment or not.

13. Cross-examined, he affirmed that there were two letters of offer. He could see the letter of offer addressed to the 1st respondent/plaintiff. He acknowledged that the money was to be deposited into her account. He affirmed that it was agreed that the two respondents would receive Kshs. 231,285/= each. He could not confirm whether payment was done or not. He maintained that the 1st respondent/ plaintiff gave authority that money be paid to the 2nd respondent. The 2nd respondent did not signify acceptance to receive payment on behalf of the 1st respondent. He now stated that he did not know their relationship. He acknowledged that it was necessary for both of them to sign the authority. In this instance it was one party authorising the payment. He had no document to show that the 2nd respondent ever received any payment.

14. With the above evidence, the appellant closed her case. Counsel were invited to file written submissions, which they duly did, culminating into the impugned judgment delivered on 7 November 2023. In part the court had this to say :

> " The plaintiff and the 2nd defendant willingly and freely entered into an agreement. The court does not rewrite agreements for the parties. In case of dispute, the role of court is limited to interpreting and giving effect to the agreement.
>
> I find therefore that there was a valid contract between the plaintiff and 2nd defendant and by way of letter dated 1st February 2016, the plaintiff was entitled to be paid negotiated and agreed compensation amount of Kshs. 231,285/=. The plaintiff was also required to vail (sic) copy of title deed, pin certificate, national identity card and color passport photos.
>
> It is evidence of the plaintiff which evidence was not dislodged that she was never compensated and she never authorized anybody to receive payment on her behalf. On the balance of probability, the plaintiff proved her case and entered judgment (sic) for Kshs. 231,286.60 with interest at court rates against the 2nd defendant. If the 2nd defendant paid the 1st defendant ostensibly on behalf of the plaintiff, they are liberty to institute recovery proceedings. I also grant the plaintiff costs of this suit."

15. Aggrieved, the appellant has now preferred an appeal citing the following grounds :

    1. The learned Magistrate overlooked key facts and applied wrong principles of law in arriving at his determination.

    2. The learned Magistrate erred in fact and law by overlooking the fact that the 2nd defendant was a party to the suit and by rendering a judgment excluding the 2nd defendant from liability.

    3. The learned Magistrate erred in fact and law by disregarding the overwhelming evidence on record and holding that the plaintiff was never compensated and that she never authorized

anyone to receive payment on her behalf for compensation for limited use of wayleave for construction of the transmission line on the parcel of land number Bassi/Bogetaorio II/984B.

4. The learned Magistrate erred in law and fact by failing to appreciate the fact that the 2nd defendant acted upon the plaintiff's payment authorization and paid the entire compensation amounts due to the 1st defendant on behalf of the plaintiff.

5. The learned Magistrate erred in law and fact by failing to appreciate the fact that the burden of proof shifted to the plaintiff and to the 1st defendant to prove that payment was not made by the 2nd defendant.

6. The learned Magistrate erred in law and in fact by failing to observe that the plaintiff failed to meet the threshold required for proving on a balance of probability that payment was not made to the 1st defendant on her behalf and under her authorization.

For reasons above, the appellant proposes :

a. That the appeal be allowed with costs.

b. That the judgment of the trial court be set aside.

c. Any other or better relief that this Honourable Court may deem fit and just to grant to the appellant.

16. The appeal was argued through written submissions and I have on record the submissions of counsel for the appellant and counsel for the 1st respondent.

17. Before I go into the gist of the appeal, it is prudent to mention that within the course of this appeal, three applications were filed, all by the appellant. First, the appellant filed an application dated 17 February 2023 seeking orders for stay of execution of the judgment pending appeal. I allowed the application in my ruling delivered on 13 July 2023 subject to the appellant's Managing Director providing a written undertaking to make good the judgment in the event that the appeal does not succeed. This was complied with, for I have seen an undertaking dated 7 August 2023 signed by Dr. Eng. John Mativo, CE, Managing Director of the appellant, promising to pay within 30 days the decretal amount in the event that the appeal is dismissed. Secondly, the applicant filed an application dated 30 January 2024 seeking orders to be allowed to adduce additional evidence (being an alleged payment voucher) and to order the 2nd respondent compelled to produce a bank statement for an account allegedly held by her. I was not persuaded to allow the application and I dismissed it vide my ruling of 20 June 2024. I was not convinced that the threshold of availing additional evidence during appeal had been met. Particularly, I found that the alleged payment voucher was a document prepared by the appellant and therefore in her possession all along. It was a document that could therefore have been produced during trial. It was also my finding that the position of the appellant had always been that it deposited money into the account of the 2nd respondent, and if indeed this happened, then you would expect the appellant to have a bank deposit slip or bank transfer document in her possession which could have been availed at the hearing, which was not. On the prayer to compel the 2nd respondent to be called, I found no legal basis as the 2nd respondent was cited as defendant in the suit. She therefore had the right to appear or not appear in the suit and I did not find any legal foundation to compel her to come and testify at the appeal stage. That, in a nutshell, is why the applicant failed in her said application. Thirdly, the appellant filed an application dated 28 August 2024 seeking that I recuse myself from hearing this appeal. I was not persuaded that the test for recusal had been met and I dismissed the application through my ruling delivered on 10 December 2024.

18. Let me now get to the substance of the appeal. As I mentioned, the same was argued through written submissions and I have seen and read the submissions filed by Ms. Lumallas, learned counsel for the appellant, and of Mr. Ochoki, learned counsel for the 1st respondent. I have taken the same into account before arriving at my decision. I have also taken into consideration the grounds raised in the Memorandum of Appeal. I will address the grounds wholesomely rather than individually in the discourse that follows. I also have in mind the duty of this appellate court, being a first appellate court, which duty was set down in the oft cited case of Selle & Another vs Associated Motor Boat Company Limited & Others (1968) EA 123. It was stated as follows by Sir Clement De Lestang, VP at page 126 :

> " An appeal to this court from a trial by the High 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 aspect. 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 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.

19. This duty was reiterated in the case of Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR, where the court stated thus :

> " This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

20. It is also worth mentioning that an appellate court will only interfere with the judgment of the lower court if the said decision is founded on wrong legal principles. That was the holding of the Court of Appeal in the case of Makube v Nyamuro [1983] KLR at page 403, where it was held that:

> " A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion."

21. My starting point is to recognise that the basic facts of the case are largely not in dispute. The appellant wished to acquire a wayleave on a portion of the suit land for construction of the Kisii-Awendo power transmission line and she was obligated to compensate those to be affected. The suit land i.e the land parcel Bassi/Bogetaorio II/984, was owned by a deceased person named Nyakundi Maiko. It would appear that he had two wives and the suit land was informally subdivided between the two of them for purposes of compensation. These two portions were identified as Portion A for the 2nd respondent, and Portion B for the 1st respondent. The total compensation payable for the whole of the portion of the suit land that was affected by the wayleave was Kshs. 462,571.20/=. This was to be split equally between the two beneficiaries, so that each beneficiary would individually receive Kshs. 231,285.60/ = as compensation. In that respect two letters of offer were made, one to the 1st respondent offering to pay her Kshs. 231,285.60/= for the portion B, and the second letter of offer to the 2nd respondent, promising to pay her Kshs. 231,285.60/= for the portion A of the suit land. The two letters of offer were produced as exhibits at the hearing of the suit. The letters of offer are both dated 1 February 2016 and they are executed on 12 February 2016. It would mean that the appellant made two separate promises

with each of the two respondents and bound herself to pay each the sum of Kshs. 231, 285.60/=in consideration of them allowing the appellant to have a wayleave traversing the suit land. Up to this point, there is no dispute.

22. The point of departure is the contention by the appellant that the 1st respondent executed an authority, authorising the appellant to pay to the 2nd respondent the money that was receivable by the 1st respondent, so that the 2nd respondent would receive the whole of the compensation amount i.e Kshs. 462,571.20/=. This is vehemently denied by the 1st respondent and she asserts that she signed no such authority. In her plaint she contended that if such payment was ever made, then the appellant colluded with the 2nd respondent to defraud her of her just compensation. That is the reason that she sued both the appellant and the 2nd respondent who it was alleged received the money on her behalf. In essence, the 1st respondent was calling for proof as to whether indeed this money was paid to the 2nd respondent as claimed.

23. It was of course the appellant who was claiming that she paid the 2nd respondent pursuant to an authority executed by the 1st respondent. It follows that the burden of proof rested upon the appellant to prove that indeed there was such authority that was executed and that she complied with its terms. This is trite following Sections 107 and 109 of the *Evidence Act*, Cap 80, Laws of Kenya, which are drawn as follows :

> 107.
>
> (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
>
> 109. 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 poof of that fact shall lie on any particular person.

24. We may also wish to add Section 112 of the *Evidence Act* which provides as follows:

> 112. Proof of special knowledge in civil proceedings.
>
> In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.

25. The question whether there was payment made as alleged was within the special knowledge of the appellant. It was thus upon her to prove that payment was made as allegedly instructed.

26. In her submissions, Ms. Lumallas, learned counsel for the appellant, made the argument that the trial court improperly placed the burden of proof on the appellant. It is also in ground 5 of the Memorandum of Appeal, that the trial Magistrate erred by failing to appreciate that the burden of proof shifted to the respondents to prove that payment was not made by the appellant. This, respectfully, cannot be correct.

27. The case of the 1st respondent was that she was not paid. It was the appellant who was now asserting that it had paid pursuant to her instructions. In other words, it was not for the 1st respondent to prove that the 2nd respondent was not paid, as contended in ground 5 of the Memorandum of Appeal. It was for the appellant to prove that she paid the money to the 2nd respondent, and further, that part of what was paid was the share due to the 1st respondent, and that this share of the 1st respondent was paid to

the 2nd respondent, pursuant to instructions received from the 1st respondent. It follows, as we have seen above pursuant to Section 107, 109 and 112 of the *Evidence Act*, that the burden of proving that payment was indeed made, as allegedly directed by the 1st respondent, was a burden that was squarely upon the appellant. Indeed, the appellant needed to prove two things, being :

1. That there was executed by the 1st respondent a letter of authority directing the appellant to pay the 2nd respondent on her behalf; and

2. That payment was made as directed.

I proceed to analyse these two issues.

i. Whether the appellant proved that there was executed by the 1st respondent a letter of authority

28. On this first point, i.e whether there was executed a letter of authority by the 1st respondent, it was the contention of the appellant that there was in fact executed a letter of authority, which letter she produced as an exhibit. The 1st respondent denied executing this letter. I have seen in the submissions of counsel for the appellant, pointing to the evidence of the 1st respondent when she acknowledged that she may have signed some documents. I have looked at the evidence. The record does not show exactly what document she was stating she may have signed and we cannot categorically say that it was in relation to the letter of authority. In any event, assuming that it was this letter of authority that was referred to her, she never affirmed signing only saying that 'it is possible.' Given that position, the purported letter of authority was a document that needed to be proved pursuant to Section 70 of the *Evidence Act* which provides as follows :

> 70. Proof of allegation that persons signed or wrote a document.
>
> If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting.

29. I have looked at the document. There is inserted the name of the 1st respondent and against her name is an apparent finger impression. Now, pursuant to Section 70 above, the appellant bore the burden of proving that the finger impression on the document was the finger impression of the 1st respondent. This was not a hard thing to do. It could easily have been proved by a document examiner comparing the finger impression on the document and the true finger impressions of the 1st respondent, say from her identity card. No such document examination report was availed. It cannot therefore be said that the appellant discharged the burden of proving that the apparent finger impression was one of the 1st respondent.

30. Apart from the above, it was acknowledged by the appellant's witness that it was necessary for both persons to sign the authority. In other words, one needed to confirm that the other can be paid on her behalf, and the other acknowledge that she can indeed be paid on behalf of the first party. This, the appellant's witness confirmed was not done and he further yielded that it was necessary to do this.

31. Given the foregoing, it is my finding that the appellant failed to prove that there was any authority executed by the 1st respondent authorising the appellant to pay what was due to her for the Portion B of the suit land to the 2nd respondent.

ii. Whether it was proved that money was paid ?

32. Assuming that there was such authority as alleged, has it been proved that any money was paid pursuant to such authority ? The answer is a big 'NO' and this is very clear from the evidence of the appellant's witness. This is what he said during examination in chief :

> " Am not sure whether they received payment or not."
>
> During cross-examination, this is what he said :
>
> > " I have no document to show that Esther Gesare (2nd respondent) received any payment."

33. This is coming from the witness of the appellant. He states that he does not know whether payment was received and has no document to show that money was indeed paid to the 2nd respondent. In those circumstances, how can the appellant claim that she paid the money in issue to the 1st respondent ? It was the appellant contending that she has made payment and it was her burden to prove that. And again, this was not a difficult thing to prove. When money is paid, there is proof of its payment. In this case, it was alleged that a bank account of the 2nd respondent was provided. If indeed the appellant deposited money into the bank account of the 2nd respondent, where is the bank deposit slip or bank transfer document ? It would be the appellant to make the payment meaning that if payment was indeed made she would be the person in possession of the documentation showing such payment. In fact, I would have thought that given the nature of the suit, if indeed payment was made, that would have been the first exhibit of the appellant. I would have thought that the appellant would readily avail the requisite bank deposit slip or bank transfer instruments to absolve herself. She never provided any of such documents.

34. In her submissions, Ms. Lumallas curiously submitted that they have demonstrated that the appellant furnished the trial court with evidence that payment was made to the 2nd respondent on her behalf and that of the 1st respondent. Surely, with utmost respect, where is that evidence ? There is completely no evidence of any payment being made to the 2nd respondent either on her own behalf or on behalf of the 1st respondent. Ms. Lumallas again ventured to submit that the 1st respondent exhibited lack of effort to follow up with the 2nd respondent to get her portion of the payment. As I have said there is no proof of payment and no proof of any authority. The contract was between her and the appellant. She did not need to chase a person different from the one she had a contract with so as to follow a payment that is not even proved to have been made.

35. It was also submitted that the 2nd defendant never defended herself or discharged her liability. That does not help the appellant. The appellant was sued as an individual defendant. It was for the defendant to prove what she alleged in her defence. If indeed she paid money as she alleged, it was the appellant to prove that she made that payment.

36. It was further submitted by Ms. Lumallas, that the trial court ignored a plea to serve a 3rd party claim. I have seen no such plea that was rejected. In any event, a 3rd party claim would be a strange proceeding herein. It is a defendant, not a plaintiff, who files 3rd party proceedings against a person who is not a party to the suit. This is clear in Order 1 Rule 15 which provides as follows :

> Order 1 Rule 15 : Notice to third and subsequent parties
>
> (1) Where a defendant claims as against any other person not already a party to the suit (hereinafter called the third party)—

(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 suit and 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 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 defendant and the third party or between any or either of them, he shall apply to the Court within fourteen days after the close of pleadings for leave of the Court to issue a notice (hereinafter called a third party notice) to that effect, and such leave shall be applied for by summons in chambers ex parte supported by affidavit.

(2) A copy of such notice shall be filed and shall be served on the third party.

37. Thus, the onus was not on the plaintiff but on the appellant to take out 3rd party proceedings if there was such wish.

38. But even then, this wouldn't be a case for taking out of 3rd party proceedings. The 1st respondent had already pointed at possible fraudulent collusion between the appellant and the 2nd respondent. If indeed the appellant paid the 2nd respondent as she had contended, and the appellant wished to claim what had been paid, the correct procedure would have been for the appellant to file a notice of claim against co-defendant, pursuant to Order 1 Rule 24 which provides as follows :

Order 1 Rule 24 : Defendant claiming against a co-defendant

(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.

(3) Nothing contained in this rule shall operate or be construed so as to prejudice the rights of the plaintiff against any defendant to the action.

39. The onus was therefore on the appellant to take out any notice of claim against the 2nd respondent. No such notice against co-defendant was ever taken out by the appellant.

40. Ms. Lumallas, further submitted that there is a scheme to unjustly enrich the 1st and 2nd respondents at the expense of the appellant who discharged its responsibility to pay. I repeat, there is absolutely no evidence of any payment. In fact if you are talking of schemes, the opposite would be what is reasonable to infer. With the evidence presented, one may be forgiven for concluding that there is a scheme by personnel of the appellant to allege that payment has been made when in fact no such payment is made, and then the money vanishes into thin air. I pose the same question : if at all payment was indeed made, what was so hard in providing the evidence of that payment ? It is very possible that some shady deals and dirty games are being played by personnel of the appellant which they are trying to cover up through this appeal. That of course is only a theory. Could there also have been intention to forum shop and cause delays in this matter based on the same reason ? Maybe, or maybe not; we will probably never know. Whatever the true scenario, the fact remains that there was no proof tendered within these proceedings of any money having flowed from the appellant to the account of the 2nd respondent as alleged. Even the additional evidence sought to be produced in the application that I rejected was never any bank deposit slip or bank transaction document. It is a legitimate question as to whether there was a scheme by people within the institution of the appellant to use their weight and might to defraud this poor widow now in court. Even the fight over locus standi is telling. Somehow the appellant considered the 1st respondent to have locus to sign the very wayleave which she proceeded to register and make use of, but when she asked to be paid, she suddenly lost locus. Anyway, the issue of locus seems to have been dropped after the ruling of the trial court that dismissed the issue.

41. I feel that the 1st respondent has been unfairly harassed by the appellant; all for asking to be paid what the appellant promised to pay her. The 1st respondent deserves justice and justice demands that she be paid what was rightfully promised to her by the appellant.

42. I see no reason to fault the trial Magistrate for reaching the conclusion that he did for it is the same conclusion that I also reach. The appellant has failed to prove that there was any authority signed by the 1st respondent authorising her to pay her entitlement to compensation to the 2nd respondent. The appellant has also failed to prove that she made any payment at all to the 2nd respondent. The trial court held that if any money was paid to the 2nd respondent then the appellant is at liberty to pursue recovery proceedings against her. I do not know why the appellant does not wish to pursue that path if at all she paid the money to the 2nd respondent. If she paid the 2nd respondent as she alleges, and wants to safeguard loss of public funds, she can as well pursue the 2nd respondent for recovery. What is critical for this suit is that the appellant needs to make good her promise to pay the 1st respondent.

43. The 1st respondent made out a good case that she was never paid as contracted with the appellant. The trial court was correct in holding the appellant liable and demanding that she pays the 1st respondent with interest. I uphold that judgment. For avoidance of doubt, interest will be payable from the time of filing suit to the time of full settlement at court rates. In essence the appellant now needs to make good the undertaking to pay the decretal sum now that she has lost the appeal.

44. From the foregoing, it will be seen that I find no merit in this appeal. It is hereby dismissed with costs to the 1st respondent.

45. Judgment accordingly.

DATED AND DELIVERED THIS 2ND DAY OF APRIL 2025

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

Delivered in the presence of :

Mrs. Omondi for the appellant

Mr. Ochoki for the 1st respondent

N/A for the 2nd respondent

Court Assistant – Michael Oyuko