



**Swani Coffee Estates Limited v Terra Fleur Limited & another (Civil Case 202 of 2008)
[2025] KEHC 6841 (KLR) (Commercial and Tax) (8 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 6841 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 202 OF 2008**

F GIKONYO, J

MAY 8, 2025

BETWEEN

SWANI COFFEE ESTATES LIMITED PLAINTIFF

AND

TERRA FLEUR LIMITED 1ST DEFENDANT

CHANIA RIVERBANK ESTATE LIMITED 2ND DEFENDANT

JUDGMENT

1. The plaintiff filed this suit through a plaint dated 16th April 2008 against the 1st defendant and Bank of India as the 2nd defendant. The suit against Bank of India was struck off on 4th October 2010. The plaint was subsequently amended on 7th February 2011 and Chania Riverbank Estate Limited was joined as the 2nd defendant.
2. The plaintiff's case is that it owned L. R. No. 304/3/1. In May 2003, the 1st defendant offered to purchase a portion of the property, (subsequently known as L. R. No. 304/5) excised from its property for Kshs. 27,375,000/-. The purchase price, inclusive of the developments on the land, was to be paid in 24 monthly instalments. It was also agreed that during the period before completion, the suit property would be held by the plaintiff as lessor and the 1st defendant as lessee.
3. The 1st defendant would pay rent to the plaintiff for the portion of land on which it was cultivating and with flowers at different stages at the rate of USD 1,250 per hectare per year, which would be increased by 6% in year two.
4. The plaintiff and 1st defendant would continue maintaining their respective farm and irrigation equipment as well as meeting their costs separately. Upon completion of payment of the purchase price,



the plaintiff would clear any outstanding land rates and annual ground rent and facilitate the transfer of the suit property to the 1st defendant, and the lease would lapse.

5. Subsequently, following an oral agreement, the plaintiff agreed and transferred the suit property to the 1st defendant to procure a loan from Bank of India to enable it to pay the purchase price. The 1st defendant mortgaged the property to the bank, which disbursed USD 800,000/- to the 1st defendant. The bank thereafter created a further charge and disbursed further sums to the 1st defendant.
6. The plaintiff averred that no LCB Consent was obtained for the conveyance of the suit property to the 1st defendant nor in respect of the mortgage dated 16th May 2003, second further mortgage dated 8th August 2005 and the third further mortgage dated 19th February 2007.

Plaintiff's claim

7. The plaintiff's claim against the defendants is for fraud and illegality. The particulars are that:-
 - i. The 1st defendant conveyed the suit property to it, without obtaining the relevant LCB Consent.
 - ii. The 1st defendant conveyed the suit property to it, on the premise that it would then pay the purchase price to the plaintiff when it had no such intention.
 - iii. Bank of India created three mortgages over the suit property without the relevant LCB Consent.
 - iv. Bank of India created the said charges, well knowing that the mortgage sum would go towards the purchase price to the plaintiff, but failed to pay to the plaintiff the said sum.
 - v. No consideration, or sufficient consideration passed in respect of the said conveyance.
 - vi. The aforesaid conveyance would constitute unjust enrichment.
 - vii. on the premises that it would then pay the
8. The plaintiff averred that after various deliberations between the parties, a further agreement was entered into between the plaintiff and the 1st defendant. The agreement was to the effect that the liquidation of the purchase price would commence from 1st January 2007 by monthly instalments of Kshs. 750,000/- and effective from 1st January 2008, the monthly instalments would be Kshs. 1,000,000/- until payment in full. In the event of default, the whole outstanding sum would become due and payable and would carry interest at 18% per annum from 16th May 2003 on reducing balance. The 1st defendant would hand over post-dated cheques dated the first day of each month for a period of 2 years to the plaintiff.
9. The 1st defendant had paid the outstanding amount for the year 2004 and would liquidate the outstanding amount in respect of the years 2005 and 2006 amounting to USD 91,278.88 in two instalments of USD 45,639.44 on or before 15th December 2006 and USD 45,639.44 on or before 16th April 2007.
10. It was further agreed that in the event of default, the 1st defendant would be responsible to pay interest thereon effective from the dates owing, being 1st January 2005 and 1st January 2006, on reducing balances until payment in full at the rate of 18% per annum. The 1st defendant would appoint a surveyor before 30th November 2006 to draw up a sketch plan and demarcate the 15 hectares of land which was referred to in the draft agreement. This would constitute a joint venture between the parties. In consideration of the plaintiff granting the 1st defendant part of the land, the 1st defendant would pay



- the plaintiff a yearly rental of USD 1,000 with effect from 1st January 2007, which would be increased yearly.
11. Thereafter, from January 2007 to May 2007, the 1st defendant made five instalment payments of Kshs. 750,000 each to the Plaintiff, amounting to a total of Kshs. 3,750,000. Afterwards, the 1st defendant failed to make any further payments. Consequently, the entire purchase price became due together with the accrued interest of 18% from May 2003. However, the 1st defendant persisted with the default despite demand, leading to the filing of this suit.
 12. The plaintiff alleged that the 1st defendant redeemed the suit property from Bank of India and that it purported to sell it to the 2nd defendant on 21st October 2010. It contended that the purported sale is illegal, unlawful, null and void. The particulars of illegality were that:-
 - i. the sale was contrary to section 52 of the Indian Transfer of Property Act;
 - ii. the 2nd defendant knew or is construed to know of the plaintiff's interest in the suit property by reason of the Caveat Emptor Notice dated 24th April 2008;
 - iii. The 2nd defendant knew or is construed to know of the plaintiff's interest in the suit property by reason of this pending suit;
 - iv. The 1st defendant has no interest in the suit property capable of being transferred by reason that the purported conveyance to it is null and void by virtue of section 6 of the [Land Control Act](#).
 13. The plaintiff seeks entry of judgment against the 1st defendant for:-
 - A. An injunction restraining the 1st defendant or its agents from entering into, tilling, farming, accessing or in any manner whatsoever interfering with the suit property.
 - B. A mandatory injunction compelling the 1st defendant or its agents to give it vacant possession of the suit property.
 - C. An order that the 1st defendant reconveys the suit property to it.
 - D. An order that the 1st defendant gives it vacant possession of the suit property.
 - E. An order for mesne profits.
 14. The plaintiff also seeks an injunction restraining the 2nd defendant or its agents from advertising, the suit property for sale, selling, letting, alienating or dealing with it in any manner whatsoever.
 15. The plaintiff further seeks entry of judgment against the defendants jointly and severally for costs of the suit.

1st Defendant's Defence

16. The 1st defendant opposed the suit through a statement of defence. It admitted that it entered into the agreement for sale and purchase of the suit property. It also admitted that it charged the property to Bank of India as security for the loan. However, it denied the plaintiff's claims that the sale was tainted with fraud and illegality.
17. The 1st defendant averred that it faced challenges in loan repayment due to huge losses caused when the plaintiff tried to frustrate its project by denying it water for the flowers from the project's onset. It also claimed that in March 2006, the plaintiff's chairman, Mr. P. K. Shah, passed away, and the plaintiff's managing director tried to take over the suit property as the land prices had substantially increased within Thika District.



18. The 1st defendant averred that eventually, due to non-repayment, the bank moved to exercise its statutory power of sale and advertised the 1st defendant's property for sale.
19. The plaintiff then filed this suit and brought an application for injunction against the 1st defendant and the Bank of India as the 2nd defendant. An interim injunction was granted pending hearing of the application, and upon hearing the application, the application was rejected and the injunction lifted by the court. The plaintiff then moved to the court of appeal which also heard and determined the same.
20. Thereafter, Bank of India applied to the court that the suit be struck off against it and of which application was allowed on 4th October 2010 by mutual consent between the plaintiff and the bank, leaving the plaintiff's suit against the 1st defendant.
21. The bank then arranged a sale of the suit property by private treaty to the current 2nd defendant, Chania River Bank which paid the purchase price directly. The bank realized the monies owed and thereafter, the 1st and 2nd defendants entered into a conveyance dated 21st October 2010 and all the necessary consents were sought and obtained.
22. The plaintiff again sought an injunction to restrain the 1st defendant from transferring or otherwise alienating the suit property. It also sought leave to enjoin Chania River Bank as the 2nd defendant. The application was heard and dismissed by Lady Justice Mugo on 28th October 2011 and the interim orders set aside.
23. The 1st defendant further claimed that the plaintiff, through its managing director Kamlesh Shah made several attempts from 2007 to 2011 to use the CID Headquarters to frustrate the 1st defendant and its directors to illegally re-acquire the property. The CID advised him to pursue their issues through the civil process. The managing director then proceeded to file a complaint to the DCIO Thika by a letter dated 14th June 2011 alleging that the 2nd defendant was squatting on its land and that the 1st defendant had fraudulently obtained LCB Consent to transfer the property.
24. The DCIO threatened the 1st defendant's directors, the late Karim Sayed and Hasit Shah, with arrest prompting them to file HC Petition No. 432 of 2011 (J. R. 226 of 2011) wherein temporary prohibitory orders were issued restraining the police from investigating, arresting, arraigning in court or preferring charges against them. Upon hearing a ruling was issued in their favour on 17th July 2012.
25. The 1st defendant denied the allegations of illegality of the sale of the suit property to the 2nd defendant by the 1st defendant as particularised in para. 32 of the amended plaint. It averred that the issue of whether the LCB consent was sought and obtained in the transactions has been determined by the court and that the suit property is not registered in the plaintiff's name.
26. The 1st defendant thus asserted that the prayers sought in the amended plaint cannot be granted and the suit should be dismissed with costs to the 1st defendant. It also urged that the plaintiff should be restrained from harassing the 1st defendant and its directors through the civil and criminal processes.

2nd Defendant's Defence and Counterclaim

27. The 2nd defendant filed a defence and counterclaim dated 14th March 2011. It denied that the plaintiff was at all material times the registered owner of L. R. No. 304/3/1 (as the property in issue is L. R. No. 304/5/Thika) as alleged in the amended plaint. It also denied that it acted illegally, unlawfully, contrary to any valid statute or fraudulently in its contractual relationship with the 1st defendant. It denied that the sale between it and the 1st defendant was illegal, fraudulent and void.



28. The 2nd defendant further disputed the claim that the defendants are bound to reconvey the suit property to the plaintiff.
29. The 2nd defendant averred that it accepted the offer for the sale of L. R. No. 304/5, Thika and that it entered into an agreement dated 21st October 2010 for sale and paid the deposit of Kshs. 5,500,000/- and the balance of the purchase price of Kshs. 49,500,000/-, totalling Kshs. 55,000,000/- to the 1st defendant's account held with Bank of India. The agreement was actioned and approved by the Bank of India.
30. It also averred that it is entitled to the title and to specific performance of the sale transaction. It is also entitled to the protection of the law as a bonafide purchaser for value and without any notice of defect of the title. To specific performance by completion of the registration of the transfer in its favour. To the discharge of the prohibition and/ or injunctive order stopping the registration of the transfer in its favour.
31. By reason of non-joinder of the Bank of India Limited in the amended plaint, the plaintiff's claim against the defendants over matters alleged to concern or to have been known or assurances given to and by the Bank of India, are irrelevant and unjusticiable in this case and that the amended plaint is defective for non-joinder and misjoinder and should be struck out with costs against the 2nd defendant.
32. The 2nd defendant on executing the agreement for sale, paying the deposit sum and the balance of the purchase price assumed and took possession of the subject property and has cultivated, subdivided and partitioned the said parcel of land amongst its membership and shareholders and that the same is hence not available for an injunctive relief/ reconveyance in favour of the plaintiff as prayed for in the amended plaint.
33. The 2nd defendant prayed that the plaintiff's claim against the defendants is dismissed with costs and interests and that judgment be entered against the plaintiff and/ or 1st defendant for an injunction to restrain them or their agents from entering, invading, selling, transferring, letting, alienating, evicting the 2nd defendant's members or agents or interfering with L. R. No. 304/5 Thika in any manner, other than finalising the registration of the transfer in favour of the 2nd defendant.
34. General and exemplary damages and an order for mense profits as may be assessed and found fair and just by the court.
35. An order discharging, removing and set aside the injunction order or restriction on the transfer to the 2nd defendant.
36. Costs and interest thereon of the suit.

Evidence

37. Hearing commenced on 18th February 2013 before Justice Havelock and was finalized before Justice Farah Amin. The plaintiff called four witnesses.
38. Kamlesh Shah, PW1, the plaintiff's managing director, adopted his witness statement dated 6th February 2016, similar to the plaint, as his evidence in chief. He also produced the plaintiff's bundles of documents dated 16th December 2009, 16th April 2013, 28th October 2013 and 7th June 2016, marked as the plaintiff's exhibits 1-4.
39. Upon cross examination, Mr. Kamlesh testified that the conveyance dated 6th May 2003 was signed by Hitesh Shah (a director of the 1st defendant) who was a director of the plaintiff at the time. He claimed that 9,000 shares were not transferred to serve as security for payment of the purchase price. However,



he confirmed that there was evidence produced by the 1st defendant showing that 9000 of its shares were transferred to the plaintiff.

40. Mr. Kamlesh claimed that the shares were retransferred through forgery of his signature on the share transfer form. However, he acceded that this claim was not pleaded in the amended plaint. He did not dispute the signature of Mr. Hitash on the document. He also confirmed that Mr. Hitash signed a letter dated 22nd December 2003, under the plaintiff's letterhead to the effect that it had no objection to transferring its shares in the 1st defendant back to the original shareholding. However, he indicated that he had no prior knowledge of that letter. He therefore claimed that Mr. Hitash signed the letter without his knowledge.
41. Mr. Kamlesh stated that although the Bank of India was struck off from the suit, the plaintiff still had a claim regarding how the property was charged to it.
42. Mr. Kamlesh confirmed that the court found that sufficient consideration had passed for the suit property to be transferred to the 1st defendant. He indicated that they had placed a caveat emptor notice or advertisement, however he acknowledged that they did not have any order preventing the 1st defendant from disposing the land.
43. Mr. Kamlesh indicated that the 1st defendant's directors were summoned by the DCI regarding the LCB Consent, after he wrote to them to investigate the matter. He also indicated that in 2011, they wrote another complaint regarding the transfer between the 1st and 2nd defendant.
44. During re-examination, Mr. Kamlesh was firm that the 1st defendant did not pay the balance of the purchase price.
45. Mohammed Haji Tawa, PW2, was the district commissioner (DC) of Thika and a member of the Kakuzi LCB as of February 2009. He adopted his witness statement dated 6th February 2012 as his evidence. He mentioned that as the DC, he sat and chaired the LCB meetings and in his absence the district officer would preside over them. He indicated that the suit property was situated within Kakuzi and that any consent to transfer or charge ought to have been obtained from Kakuzi Land Control Board. He confirmed that he received a complaint regarding the lack of LCB Consent to transfer the property, to the 1st defendant to charge to Bank of India and to transfer to the 2nd defendant. He investigated and concluded from the minutes and inquiries made that there were no LCB Consents issued by Kakuzi LCB for the transaction.
46. Upon cross examination, Mr. Tawa confirmed that he wrote to the Kakuzi LCB members inquiring about whether they issued the consents. He indicated that there was nothing like a special board consent. He also indicated that he did not sign the consent to transfer the property to the 2nd defendant and that the consent to transfer was not in its records.
47. Mr. Tawa acknowledged the application for consent to transfer dated 8th October 2010 and indicated that the reason for rejection was that the applicant's did not appear.
48. No. 230925 C. J. Jaoko Oduor, PW3, was a document examiner attached to the Forensic Document Examination department at the Criminal Investigation Department (now Directorate of Criminal Investigation CID) Headquarters, Nairobi. He adopted his witness statement dated 19th August 2012 as his evidence. He also produced the document examination report. He indicated that in his opinion Mr. Kamlesh's signature on the share transfer form was forged.
49. Upon cross examination, Mr. Oduor acknowledged that he obtained the documents that he examined from another officer, CPL Onyango Owade who was an investigator in the land fraud department. He



- also acknowledged that he did not collect the specimen signatures from Mr. Kamlesh or witness him sign. He could not tell when the specimen was collected. He acknowledged that a person's signature could change over time.
50. Zachariah Msongo Ndege, PW4, was an employee of the Ministry of Lands stationed at Thika in 2009. He adopted his witness statement dated 6th February 2012 as his evidence. He also produced the Thika District LCB Register. He testified that the LCB Consent dated 6th February 2003 was not in respect of the suit property. This is because the LCB Consent for the property could not have been obtained from the Thika LCB as the suit property is situated in Kakuzi.
 51. On cross examination, Mr. Ndege confirmed that there was a composite Land Control Board which sat at Thika for all the areas including Murang'a and Maragua. He also confirmed that there were other minutes of the LCB meetings but he did not produce them. He did not know how the other witness obtained the Kakuzi register. He indicated that there was no such thing as a special consent.
 52. During re-examination, Mr. Ndege stated that the LCB consent was suspicious as it was not addressed to the plaintiff and did not specify at the bottom which LCB it emanated from. He also indicated that you could not get a consent to subdivide and transfer on the same day. He also mentioned that the two subdivided portions should have been registered first before applying for the transfer. He also stated that he saw the minutes for the Thika LCB but they did not have the subject sub-division and transfer in them.
 53. The 1st defendant called its managing director, Hasit Shah as DW1. He adopted his witness statement dated 12th June 2012, reflective of the defence, as his evidence in chief. He also produced the 1st defendant's bundles of documents dated 10th December 2009, 12th June 2012, 20th September 2012 and 29th August 2016.
 54. Mr. Hasit restated that they obtained approvals and LCB consent to subdivide and transfer the property. He also stated that there was conveyance of the suit property from the plaintiff to the 1st defendant and that the plaintiff was responsible for obtaining the LCB Consent. He asserted that the issue of whether the LCB Consent that was obtained from the Thika LCB was appropriate was res judicata by virtue of the ruling by Justice Warsame.
 55. Mr. Hasit confirmed that the 1st defendant purchased the suit property from the plaintiff for Kshs. 27,375,000/-. He also stated that by virtue of the conveyance dated 16th May 2003, the plaintiff acknowledged receipt of the full purchase price.
 56. Mr. Hasit stated that the agreement was that to secure its interests, the plaintiff would own shares in the 1st defendant until the 1st defendant paid it in full and then transfer the shares back. He stated that the shares were transferred on 28th February 2003.
 57. Mr. Hasit also stated that 1st defendant paid and the shareholding was reversed to original structure. He referred to the letter dated 15th December 2003 signed by the 1st defendant's managing director, Mr. Peter Kitson, to the effect that that the shares could be transferred upon confirmation by the plaintiff. He also referred to the letter dated 22nd December 2003 by the plaintiff and signed by its director, Mr. Hitesh Shah confirming that it had no objection to the reversion of the shareholding to the original structure.
 58. According to Mr. Hasit, Mr. Lloyd Bakker left in 2004 and Mr. Peter Kiltson resigned in 2006 and Mr. P. K. Shah passed away in March 2006. He then took over the running of the farm. Mr. Kamlesh put the 1st defendant under pressure to pay. They had numerous discussions about payment. They further



engaged advocates to handle the issue. However, once he had all the information and data, it became clear that all the monies had been paid to the plaintiff a long time ago.

59. Mr. Hasit testified that the property was charged to Bank of India for funding capital expenditure in terms of irrigation systems, grading hall and cold stores, not to secure the purchase price. He also testified that they took out a second mortgage to ensure credit lines and cash flow. He asserted that there was LCB consent to charge issued for the two charges. He also confirmed that the 1st defendant was responsible for obtaining these consents.
60. Mr. Hasit stated that due to the water issues, they fell into arrears and the loan became non-performing prompting the bank to exercise its statutory power of sale. Eventually the property was sold to the 2nd defendant by private treaty and the purchase price of Kshs. 55,000,000 was paid directly to the bank. The transaction was handled by the bank's advocates who prepared the application for consent to transfer.
61. As regards the complaints made by the plaintiff to the CID and investigations regarding the alleged fraudulent LCB consents, Mr. Hasit testified that they were not asked to appear before the LCB. He also stated that the CI notified them by letter dated 8th October 2009 that the file had been placed before a legal officer who had advised that the dispute should be resolved through a civil court. He further stated that there was no direct complaint from the LCBs that there was any impropriety.
62. Upon cross examination, Mr. Hasit admitted that he relied on the information from the accountants to arrive at the conclusion that the purchase price had been paid in full. He also admitted that he did not examine the records and accounting documents himself. He acknowledged that in an email dated 22nd July 2006 he admitted that the purchase price had not been paid in full. He also confirmed that he signed the agreement dated 4th October 2006 prepared by Rustam Hira. He indicated that he discovered that the payments were made in end of 2006. However, he admitted that he had not produced any evidence of payment. He acknowledged that he did not formally write and say that nothing was owed. He also acknowledged that he did not do reconciliation of accounts.
63. The 2nd defendant called one witness, Zabby Kariuki Chege, who adopted his witness statement dated 11th March 2011, similar to the 2nd defendant's defence as his evidence. He also produced the 2nd defendant's bundle of documents dated 11th December 2012.

Audited accounts

64. On 1st February 2016, Justice Farah ordered the plaintiff and the 1st defendant to file CR12 forms and their final published accounts for 2002/03, 2003/04, 2004/05, 2005/06 and 2006/07.
65. The plaintiff called Mr. Chandrakant Chauhan, a chartered accountant working with Easter Brooke and company, Certified Public Accountants. He produced the plaintiff's list of documents dated 7th June 2016, marked as PExh4. He confirmed that the firm prepared the plaintiff's audited reports for the year ended 31st December 2006, after it took over from Ernst and Young. He stated that the statements for 2005 and 2006 showed that there was outstanding balance of the purchase price of Kshs. 30,700,431 and 27,375,000 respectively.
66. Upon cross examination, Mr. Chauhan acknowledged that the accounts did not refer to the 1st defendant. He also confirmed that he adopted the accounts that were prepared by another audit firm for the years preceding 2005 and that those formed the base for their taking accounts.
67. On 15th May 2017, Justice Farah gave an order to the effect that the 1st defendant's case is deemed closed on court's acceptance of the documents filed on 8th September 2016.



Analysis and Determination

68. The plaintiff filed primary and further written submissions dated 31st August 2017 and 30th May 2018. The 1st and 2nd defendants filed written submissions dated 13th October 2017 and 12th January 2018 respectively.
69. I have carefully considered the submissions and will be considered in the analysis.

Issues

70. There are substantive as well as issues of preliminary significance. Of the latter are: jurisdiction and res judicata.
71. The overarching substantive issue is whether the 1st defendant paid the full purchase price. But, preceding and inextricable to the main issue are matters of rescission of contract, fraud, unjust enrichment, reconveyance of the land-this covers the 2nd defendant's counter-claim-, shares given as security for the balance of the purchase price.
72. I will start with those issues of preliminary nuances.

Jurisdiction

73. Jurisdiction of the court has been challenged. Jurisdiction is sine qua non adjudication of a dispute by a court of law.
74. The 2nd defendant relying on Article 162(2) of *the Constitution* argued that this Court lacks jurisdiction. The plaintiff argued that this court has jurisdiction to determine this matter as it is not a land matter, but a commercial one involving a sale of land.
75. The plaintiff cited the case of Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others [2017] KECA 79 (KLR), where, the Court of Appeal held that: -
- “41....the jurisdiction of the ELC to deal with disputes relating to contracts under Section 13 of the ELC Act ought to be understood within the context of the court's jurisdiction to deal with disputes connected to 'use' of land as discussed herein above. Such contracts, in our view, ought to be incidental to the 'use' of land; they do not include mortgages, charges, collection of dues and rents which fall within the civil jurisdiction of the High Court.”
76. In Joel Kyatha Mbaluka t/a Mbaluka & Associates Advocates v Daniel Ochieng Ogola t/a Ogola Okello & Co Advocates [2019] KECA 504 (KLR) the Court of Appeal also stated that:-
- “....in construing whether the ELC had jurisdiction in a matter, the consideration must be the dominant issue in the dispute and whether that issue relates to the environment and the use and occupation of, and title to, land.”
77. In its submissions, the 2nd defendant pointed out that the dispute relates to accounts between the plaintiff and the 1st defendant. I also note that, as highlighted by the plaintiff, the 2nd defendant's counsel indicated that this was a commercial matter during a mention on 21st September 2012.
78. It also appears from the plaintiff's materials and evidence, that the real issue is recovery of the balance of the purchase price; and taking of accounts of how much was paid and is outstanding becomes the tool for resolving the dominant issue. Therefore, this is a commercial dispute of which, the court has the jurisdiction to determine.



Res judicata

79. Both the 1st and 2nd defendants asserted that by virtue of the ruling of 24th April 2008 by Justice Warsame the issue of whether the LCB consent was irregularly obtained from Thika Municipality LCB instead of from Kakuzi Division of Thika District is res judicata.
80. The 2nd defendant added that the issues of whether there was a valid sale between the plaintiff and the 1st defendant; whether the mortgage created by Bank of India was null and whether there was any fraud on the part of the Bank, or basis of a nullity on the subsequent mortgage transactions are also res judicata.
81. On the other hand, the plaintiff relied on Civil Appeal No. 36 of 1996 Uhuru Highway Development Limited v Central Bank of Kenya, Exchange Bank Kenya Ltd (In Voluntary Liquidation) and Kamlesh Mansukhlal Pattni to the effect that a trial court, as opposed to a judge sitting in chambers hearing an application, applies and must apply its own mind to facts on evidence before it without regard to what may have been expressed by the judge or appellate court in regard to the merits of a case in determining whether or not there is a prima facie case. It was also submitted that to hold the rulings form a basis for res judicata would set a dangerous precedent. It was again submitted that when Mugo J found the issues to be res judicata, it was meant to apply at the injunction stage on prima facie basis.
82. The doctrine of res judicata is ordained in section 7 of the Civil Procedure Act. It is a jurisdiction-regulating principle.
83. In The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others, Nairobi CA Civil Appeal No. 105 of 2017 ([2017] eKLR), the Court of Appeal observed as follows:-
- “... for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;
- a) The suit or issue was directly and substantially in issue in the former suit.
 - b) That former suit was between the same parties or parties under whom they or any of them claim.
 - c) Those parties were litigating under the same title.
 - d) The issue was heard and finally determined in the former suit.
 - e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”
84. In the ruling of 24th April 2008, Justice Warsame stated as follows:-
- “Having considered the pleadings, the application, the affidavit in support and all the relevant documents by the parties, it is clear in my mind that the suit property was transferred by the plaintiff to the 1st defendant free from any encumbrances whatsoever. It is also clear in my mind that it was the duty of the plaintiff to seek and obtain the relevant consents of the land control board at the time it was offering the suit property for sale to the 1st defendant. It is clear that, consent to transfer the suit was sought and obtained from Thika municipality land control board. It is the case of the plaintiff that the said consents are null and void. And that the relevant consents should have been obtained from Kakuzi Division of Thika district. It was not the duty of the bank to seek and obtain consents from the relevant land control boards. And if the parties who are legally bound to obtain the consent from the



relevant authority did obtain from another authority then it would be absolutely unfair to condemn the bank for a transaction which it was not required to participate in.

The 1st defendant purchased the suit land from the plaintiff for valuable consideration, notwithstanding the payment of the same. The 1st defendant enjoys a registered title in its favour. Mr. Wandabwa counsel for the plaintiff has not disputed this. The suit land is registered under the RTA. Section 23 of RTA provides a certificate of title issued by the Registrar to any purchaser of land is to be taken by all courts as conclusive evidence that the person named therein as the registered proprietor of the land is the absolute and indefeasible owner and his title is not subject to challenge except on the grounds of fraud and misrepresentation to which he is proved to be a party. In this case there is no allegation that the bank was a party to any fraud or misrepresentation perpetrated upon the plaintiff in the creation of the mortgage instrument. Secondly there is no averment in the documents filed by the plaintiff that the bank had any knowledge or was a party to any irregularity in the transaction that resulted in the obtaining of the consents from the land control board.”

85. Justice Warsame went on to state that:-

“...a dispute between two sister companies on whether the initial full purchase price was paid to one party cannot be a basis to restrain a valid exercise of statutory power of sale. The plaintiff has given an express permission to the 1st defendant to mortgage the suit land before it received the full purchase price. It cannot now by starting a suit, perhaps a perfectly hopeless suit against the party it sold its property and the bank who subsequently advanced a loan on the strength of a valid title, be entitled to an order restraining the sale of the suit property on the basis of acts/events which it was bound to observe before any transfer could have been effected. In my view the plaintiff cannot derogate from that which he has, in express terms conferred by way of sale and by further consent or knowledge charged the instrument to the 2nd defendant.”

86. Justice Warsame further observed that:-

“It is clear to my mind that there is no cause of action that has been revealed by the plaintiff against the 2nd defendant and the dispute between the sister companies cannot be a basis to refuse and/ or restrain the bank from realizing the security because of an existence of a debt between them. Without making any conclusively findings, one may be tempted to say that the applicant has no recourse against the bank in the absence of fraud and/ or misrepresentation which the bank was party to. The evidence available shows that the sale of the suit land to the 1st defendant and subsequent creation of mortgages in favour of the bank were above board.”

“As stated earlier it was the duty of the plaintiff to seek and obtain consents from the relevant land control boards. There is evidence to show that the consents were obtained from Thika Municipality land control board. It is the plaintiff and the 1st defendant who made the application to Thika Land control board. In fact the application for consent to the land control board shows that it was made by the plaintiff. The application has the stamp of the plaintiff. It is also clear that the 1st defendant obtained consent before the creation of the 1st and 2nd mortgage. It is therefore my view that the contention by the plaintiff on the legality of the sale and subsequent creation of the mortgages is baseless.”



87. On 28th April 2008, the plaintiff filed a notice of appeal against that ruling and sought a temporary injunction pending the hearing and determination of the appeal. Through a ruling dated 4th December 2009, the Court of Appeal found that there was no arguable appeal as there was no privity of contract between the plaintiff and Bank of India as it neither borrowed money nor charged property to it. It also found that the issue of LCB consent, on the assumption that it was not sought or obtained, did not lie at the instance of the Bank of India.
88. To my mind, the findings by this court (Warsame J, as he then was) and the Court of Appeal, are not mere judge's views or expression of opinion which are not essential to the decision.
89. There is also no any decision from a higher court which reverses the decision of this court on these issues.
90. On another cover, the Bank of India is not a party in these proceedings. Thus, the law will not support a party's quest to litigate issues with grave consequences on, against a non-party. Issues to do with; whether the mortgage created by Bank of India was null and whether there was any fraud on the part of the Bank, or claim of nullity of the subsequent mortgage transactions; may not be litigated by the plaintiff against a non-party in the suit.
91. Therefore, from the foregoing, I am satisfied that the issue of whether the LCB Consent for the transfer and charges was obtained from the appropriate Board is res judicata. I also concur with the 2nd defendant that the court has already pronounced that the sale between the plaintiff and the 1st defendant was valid irrespective of whether the full consideration was paid. This was based on the fact that the plaintiff agreed to the transfer of the property to the 1st defendant and to the charging of the property to the Bank of India.

Substantive issues

92. I now turn to the substantive issues for determination.

Claim of fraud

93. Has the plaintiff proved its claim for fraud against the 1st defendant?
94. The plaintiff submitted that it has proved its case on the required standard and that it is entitled to judgment as prayed.
95. The plaintiff relied on the definition of fraud under section 2 of the RTA. It claimed that 1st defendant conveyed the suit property to it, on the premise that it would then pay the purchase price to the plaintiff when it had no such intention. It also claimed that no sufficient consideration passed for the conveyance of the property and that the 1st defendant was unjustly enriched.
96. On its part, the 1st defendant submitted that fraud is a serious allegation and that the plaintiff has not proved it to the required standard of above a balance of probabilities but not beyond reasonable doubt. It relied on Bullen & Leake & Jacobs, Precedent of Pleadings, 13th Edition, P. 427 and the cases of Ashit Patani & 2 Others v Dhirajulal v Patani & 2 Others [2017] eKLR, Vijay Morjaria v Nansingh Madhusingh Darbar & Another [2000] eKLR and Central Kenya Limited v Trust Bank Limited & 4 others.
97. According to Black's Law Dictionary, 2nd Ed: -

“Fraud consists of some deceitful practice or wilful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. Fraud, as applied to contracts,



is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other.”

98. Fraud is quasi-criminal and it has a higher threshold of proof than an ordinary civil claim’s proof on a balance of probabilities. *R. G. Patel v Lalji Makanji* [1957] EA 314
99. In *Vijay Morjaria v Nansingh Madhusingh Darbar & Another* [Supra] the Court of Appeal underscored 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.”
100. As earlier mentioned, the court already pronounced itself on the LCB Consent issue. Therefore, the issue that falls is whether the 1st defendant conveyed the suit property to it, on the premise that it would then pay the purchase price to the plaintiff when it had no such intention.
101. From the amended plaint, it is the plaintiff’s case that it orally agreed that the property be transferred to the 1st defendant before the full payment of the purchase price. The plaintiff also agreed to the charging of the property to the Bank of India by the 1st defendant for a loan to pay the purchase price. There is also evidence that subsequently, the plaintiff and the 1st defendant entered into some further agreements on how the balance of purchase price would be paid in instalments and penalties for default. There is also evidence that some part payment was made. Therefore, making this a case for non-payment of the balance of the purchase price which per se may not be fraud.
102. Informed by the nature of the case before the court, engagements between the parties and the evidence adduced, the plaintiff has not proved to the required standard its claim that 1st defendant conveyed the suit property to it, on the premise that it would then pay the purchase price to the plaintiff when it had no such intention.
103. I should also state that, a claim of unjust enrichment, although may be rooted in fraud, is distinct from fraud.
104. Claim of fraud fails.

Whether the plaintiff could rescind the agreement

105. The plaintiff submitted that, time was not of the essence in the agreement of 16th May 2003 and that the Law Society Conditions of Sale were not adopted. Relying on *Njamuyu v Nyaga* [1983] KLR 282, it asserted that any rescission would require a notice fixing a time of essence before rescission is actuated for it to be lawful. It highlighted that it sent the 1st defendant a completion notice giving it a twenty-one-days’ notice to complete and the 1st defendant has admitted that it did not respond to the said Notice. It therefore submitted that it rescinded the agreement through a letter dated 18th March 2008.
106. The plaintiff relied on HCCC ELC No. 106 of 2012 *Karanja Mbugua & Mary Anne Mwendwa Mwiti v Marybin Holdings Company Limited* to support the submission that it was in order for it to have sought re-conveyance of the property.



107. The 1st defendant argued that the purported rescission was of no effect. It also highlighted that the agreement between the parties did not make express provisions for the issuance of completion notice and rescission.
108. Rescission must be either mutual or judicial unless the right to rescind unilaterally is clearly provided for in the contract, or recognized under law due to a fundamental breach.
109. The agreement did not provide for unilateral rescission. Therefore, the purported rescission was of no effect.

Whether the 1st defendant paid the full purchase price

110. The linchpin issue is: whether the 1st defendant paid the full purchase price.
111. It is not disputed that the consideration for the suit property was Kshs. 27,375,000/-. The plaintiff adduced evidence that the 1st defendant paid Kshs. 3,750,000/-.
112. The plaintiff submitted that the 1st defendant did not pay the balance of the purchase price of Kshs. 23,625,000/-. It relied on the emails in which the 1st defendant made payment proposals and the subsequent agreement of 4th October 2009.
113. On the other hand, the 1st defendant asserted that it paid the full purchase price. It relied on a letter dated 22nd December 2003 to the effect that there was no objection to the transfer of the plaintiff's shares in the 1st defendant back to the original shareholding. That letter was signed by Mr. Hitesh Shah who was a joint director of both the plaintiff and the 1st defendant. It also relied on share transfer forms signed by Mr. Hitesh Shah. It was contended that PW1 did not produce evidence to show that the letter was made in error or mischief nor challenged the act of his fellow director.
114. Sections 107 (2) and 109 of the *Evidence Act* provide that:-
 - (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 proof of that fact shall lie on any particular person.”
115. The 1st defendant alleged that the agreement between it and the plaintiff was that the 1st defendant would transfer 9,000 of its shares to the plaintiff to serve as security for payment of the purchase price. Mr. Hasit referred to the share transfer forms that were exhibited at pages 4-7 of the 1st defendant's bundle of documents dated 12th June 2012. On page 4 is a copy of the 1st defendant's official company search (CR12) dated 25th May 2003 showing that the plaintiff held 9,000 shares in the 1st defendant. On page 5 is a copy of the minutes of the 1st defendant's company meeting held on 11th February 2003 resolving matters to do with the term loan of USD 800,000/- by Bank of India. However, pages 6 and 7 are missing.
116. The plaintiff produced copies of share transfer forms dated 28th February 2003, for 100 shares from Hasit Shah, 4,500 shares from Sunripe (1976) Limited, 2,150 shares from Peter John Kitson, 2,250 shares from Lloyd Andrew Bakker.
117. The plaintiff's director, Mr. Kamlesh claimed that his signatures on the share transfer forms were forged. PW3 however admitted that he was not present when Mr. Kamlesh provided the specimen



signatures. He also admitted that signatures could change over time. This element is neither here nor there.

118. However, due the defendant's official company search (CR12) dated 25th May 2003 show that the plaintiff held 9,000 shares in the 1st defendant. But, again, this is not proof that the shares were held as security for payment of the purchase price. There is no legal instrument to show the shares were security or charged as security.
119. Mr. Hasit insisted that the full purchase price was paid. He, however, wavered in his testimony by stating that initially, when he became a director in 2006, he had acknowledged that the balance of the purchase price was outstanding, evidenced by the emails of 22nd July 2006 and the agreement of 4th October 2006. He also admitted that he did not communicate in writing that he had learnt that the full purchase price was paid.
120. Mr. Hasit then indicated that he learnt that the full purchase price had been paid from the accountants. However, he did not examine the financial statements himself. Later on, the 1st defendant did not call a witness to produce its audited accounts as directed by the court.
121. The 1st defendant claimed that the fact that there was a reversion of the shareholding structure was proof of payment of the purchase price. It relied on the letters dated 15th and 27th December 2003.
122. In the former, Mr. Kitson indicated to the accountants that:-

“Avinash Shah & Company

Certified Public Accountants

O. Box 48716

Nairobi

15th December 2003

Earlier this year, the shareholders of the 1st defendant had transferred the shareholding to the plaintiff as a 90% shareholder.

At the same time, Swani Coffee Estate Limited completed an undated share transfer certificate reversing the shareholding to its original form.

Swani Coffee Estate Limited needs to confirm this action to you but, in the meantime, can you please confirm that the original shareholding will be shown in the audited accounts of both Swani and Terra Fleur in the event that this share transfer has not been formally registered with the registrar of companies.

Once Swani Coffee Estates have given their consent to transfer the shares, then please advise me and I will have one of your employees hand deliver this to the registrar.”

123. In the latter, Mr. Hitesh Shah wrote: -

“22nd December 2003

Avinash Shah & Co.

O. Box 48716,

Nairobi

Dear Sirs,



We have no objection to transferring our shares for Terra Fleur back to the original shareholding as per the attached letter.”

124. From my reading of the above, there is no disclosure from either Mr. Kitson or Mr. Hitesh that the full purchase price has been paid. Reversion of the shareholding is not per se proof of payment of the balance of the purchase price.
125. Secondly, Mr. Hitesh Shah who signed the letter dated 22nd December 2003 was a common director of both the plaintiff and the 1st defendant.
126. It was the burden of the 1st defendant to prove its claim that it paid the balance of the purchase price in full. Other than a word of mouth and re-transfer of shares-which has been contested- the 1st defendant did not provide any other evidence to show that it paid the balance of the purchase price in full. Therefore, I find that the 1st defendant did not pay the balance of the purchase price in the sum of Kshs. 23,625,000.

Whether the 1st defendant had capacity to sell and transfer the property to the 2nd defendant

127. It bears repeating that, the plaintiff conceded that it agreed to the transfer or conveyance of the suit property to the 1st defendant and charging it as security for a loan before payment of the purchase price. There was no restriction on the title or agreement impeding transfer of the property to the 2nd defendant by the 1st defendant. For this reason, the plaintiff's claims as against the 2nd defendants have no foot on which to stand and is dismissed.

Whether the 2nd defendant is entitled to judgment as sought in the counterclaim.

128. The 2nd defendant asserted that it is entitled to protection of the law as a bona fide purchaser for value and without any notice of any defect of the title. It also sought specific performance by completion of the now pending registration of the transfer in its favour and dismissal of the plaintiff's claims for re-conveyance and to the discharge of the prohibition or injunctive order stopping the registration of the transfer in its favour.
129. The 2nd defendant sought injunctive relief, general and exemplary damages and an order for mesne profits.
130. From the earlier findings by Justice Mugo, the 2nd defendant's claims have either been overtaken by events. See para. 117 thereof.
131. In the circumstances, the 2nd defendant's counter-claim fails with no orders as to costs.

Reliefs

132. Having found that there was no fraud that was established, I find that the plaintiff is not entitled to the prayers sought. Except, however, I find that the plaintiff is entitled to the balance of the purchase price in the sum of Kshs. 23,625,000 and interest of 18% p.a. from 16th May 2003 until payment in full.
133. Based on the findings of the court, the 2nd defendant's counter-claim is dismissed with no orders as to costs.
134. However, the plaintiff's suit against the 2nd defendant is dismissed with costs to the 2nd defendant.



Orders

135. Accordingly: -

1. The 2nd defendant's counter-claim is dismissed with no orders as to costs.
2. The plaintiff's case against the 2nd defendant is dismissed with cost and interest to the 2nd defendant to be paid by the plaintiff.
3. Judgment is entered for the plaintiff against the 1st defendant for: -
 - a. Kshs. 23,625,000
 - b. Interest of 18% from May 2003 until payment in full.
 - c. The plaintiff and the 1st defendant shall each bear own costs of the suit as each party was partially successful.
 - d. Unless it is specifically granted, all other reliefs sought are denied.
 - e. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 8TH DAY OF MAY, 2025.

F. GIKONYO M.

JUDGE

In the presence of: -

Ms. Gitau for Wandabwa for plaintiff

C.N Kihara/Wanyiri for 2nd defendant

Gichuki for 1st defendant-absent but Mirie appeared later and duly informed of the decision by the court

CA Kinyua

