



Consolidated Bank of Kenya Limited v Mwangi (Suing on behalf of the Estate of Wilson Mwangi Manuthu (Deceased); Gitau t/a Rem Enterprises (Third party) (Commercial Appeal E025 of 2024) [2025] KEHC 12680 (KLR) (9 September 2025) (Judgment)

Neutral citation: [2025] KEHC 12680 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
COMMERCIAL APPEAL E025 OF 2024
FN MUCHEMI, J
SEPTEMBER 9, 2025**

BETWEEN

CONSOLIDATED BANK OF KENYA LIMITED APPELLANT

AND

ROBERT KANG'ETHE MWANGI (SUING ON BEHALF OF THE ESTATE OF WILSON MWANGI MANUTHU (DECEASED) RESPONDENT

AND

ROSEMARY NJAMBI GITAU T/A REM ENTERPRISES THIRD PARTY

(Being an Appeal from the judgment and decree of Hon. Joseph Were (CM) delivered on 16th August 2024 in Ruiru CM ELC Case No. E161 of 2021)

JUDGMENT

Brief facts

1. This appeal arises from the judgment of Ruiru Chief Magistrate court CM ELC Case No. E161 of 2021 whereby the trial court entered judgment in favour of the respondent as against the appellant and held that the loan facility of Kshs. 4,500,000/- was extended to the third party by the appellant and that the suit land title number Ruiru East/Juja East Block 2/519 was not properly charged as security for the loan facility to guarantee the facility extended to the third party. The trial court issued a declaration the registration of the charge against the deceased's property known as Ruiru East/Juja East Block 2/519 in favour of the appellant is illegal, null and void and further issued a discharge of the charge against the suit property in favour of the deceased's estate forthwith and not later than 30 days from the date of the judgment. The trial court additionally ordered for a release of the original title and all other documents in possession to the deceased's estate within 30 days of the judgment.



2. Dissatisfied with the court's decision, the appellant lodged this appeal citing 10 grounds of appeal summarized as follows:-
 - a. The learned trial magistrate erred in law and in fact in finding that the appellant's legal charge over Ruiru East/Juja East Block 2/519 was not properly charged as security against the loan facility of Kshs. 4,500,000/- disbursed to the third party.
 - b. The learned magistrate erred in law and in fact in finding that the registration of the appellant's legal charge over the suit property was illegal, null and void in the absence of any substantiating evidence by the respondent to infer the same.
 - c. The learned magistrate erred in law and in fact by relying on the testimony of an unqualified forensic document analyst to infer evidence into the respondent's claim despite admission that the impugned forensic document analyst did not examine the deceased's signature under the charge and led to an incorrect finding that the guarantee and indemnity agreement was not executed by the deceased.
 - d. The learned magistrate erred in law and in fact by wholly relying on hearsay evidence by the respondent to infer evidence and arrive at the finding that the deceased lacked the mental capacity to execute the charge, guarantee and indemnity agreement in favour of the appellant.
 - e. The learned magistrate erred in law and in fact by failing to address and determine the appellant's counter claim as against the respondent thereby prejudicing recovery of the sum of Kshs. 7,529,686/- against the third party and the deceased's estate.
 - f. The learned magistrate erred in law and in fact by failing to appreciate that the Environment and Land Division of the trial court lacked jurisdiction to hear and determine the dispute relating to the appellant's charge.
3. Parties put in written submissions.

The Appellant's Submissions

4. The appellant submits that its charge dated 21st June 2011 was a validly executed contract and registered as required by law. Once executed freely by the deceased, it created an equitable interest and upon registration of the statutory charge over the land, became enforceable against the estate. To support its contentions, the appellant refers to the cases of *Kagina vs Kagina & 2 Others (Civil Appeal 21 of 2017) [2021] KECA 242 (KLR) (3 December 2021) (Judgment)* and *Root Capital Incorporated vs Tekangu Farmers' Co-operative Society Limited [2016] eKLR*.
5. The appellant further submits that on 10th July 2012, the deceased jointly with the borrower filed a legal suit being Milimani High Court Civil Suit No. 439 of 2012 admitting to its security interest while seeking to challenge the bank's statutory power of sale which had accrued at the time. Thus, the appellant argues that the validity of the charge was never in question as the issue therein concerned the issuance of statutory notices.
6. The appellant argues that during the trial the respondent advanced the argument that the charge ought to have been invalidated because the deceased was ill and incapable of managing his own affairs at the time of creation of the charge. However, the respondent failed to lead evidence proving incapacity such as the deceased's prior medical records and a report from a medical practitioner. Relying on the cases of *Grace Wanjiru Munyinyi & Another vs Gedion Waweru Githunguri & 5 Others [2011] eKLR* and *Patel & Another vs MJC & Another (Suing as the guardians of PJP) (no citation given)*, the appellant argues that capacity to contract is a rebuttable presumption that must be strictly proved. The



respondent failed to establish that the deceased had any form of incapacity, mental or otherwise during execution of the bank's security agreements as per the strict parameters laid out under the law. Thus, as no such evidence was led before the court at trial, the presumption is that the deceased was in full control of his faculties when he signed the bank security agreements.

7. Relying on the case of *Kimatu Mbuvi t/a Kimatu Mbuvi & Bros vs Augustine Munyao Kioko* Civil Appeal No. 203 of 2001 [2007] 1EA 139, the appellant argues that for a court to rely on expert opinion, the court must first be satisfied that the expert is properly qualified and in the absence of which the court is at liberty to reject such opinion. The appellant submits that during cross examination, Mr. Kenga, the document forensic examiner, failed to adduce any evidence in support of his experience and qualifications as a forensic document examiner. The appellant further relies on the cases of *Christopher Ndaru Kagina vs Esther Mbandi Kagina & another* [2016] eKLR and *Kagina vs Kagina & 2 others* [2021] eKLR and submits that the failure to establish his credentials reduced his opinion to a mere pedestrian opinion and of no difference to that of a layman. Thus, Mr. Kenga's evidence should not have been considered to have any probative or evidentiary value to the trial court and the entire forensic report dated 10th February 2023 should have been discarded as it has no evidentiary legs to stand on.
8. The appellant submits that Mr. Kenga placed reliance on an unverified marriage certificate issued to him by the respondent in order to support the conclusion that the guarantee and indemnity agreement contained a forged signature. There was no evidence or comparison to lead the court to the conclusion that the marriage certificate was signed by the deceased or proof that the same certificate was not illegally obtained for purposes of supplementing the respondent's case. Further, the marriage certificate did not contain an authenticating stamp by the registrar of marriages and there were no conclusive comments to support the methodology or findings in the impugned forensic examination report regarding the marriage certificate. Relying on the case of *Routestone Ltd vs Minorities Finance Ltd & Another* [1977], the appellant submits that Mr. Kenga, a self-proclaimed expert with alleged years under his belt failed to appraise the court how his impartiality led him to believe that the impugned marriage certificate contained the deceased's known signature without comparison of other documents closer in time and age. However, Mr. Kenga compared documents executed 24 years apart without taking any consideration if the marriage certificate did in fact contain the deceased's known signature or how other factors such as passage of time, age and ill health could have affected the validity of his opinion or questioned handwritings. Relying on the case of *Iskorostinskaya Svetlana & Another vs Gladys Naserian Kaiyoni* [2019] eKLR, the appellant argues that Mr. Kenga relied on hearsay evidence from the respondent that the marriage certificate contained the deceased's known signature which had been established to be inadmissible before the court. Thus, the impugned report was defective for the reason that it failed to account for what constituted the deceased's known signature as Mr. Kenga failed to take into account various comparable signatures to establish the deceased's known signature. Further, the appellant submits that the report only relied on the deceased's signature in the guarantee and indemnity and not the one in the charge. Thus, it was erroneous for the trial court to invalidate the charge based on the purported expert report.
9. The appellant submits that while the respondent submitted that the expert's opinion contained exclusive evidence that the deceased's signature under the guarantee and indemnity agreement was a forgery, the evidence was controverted by direct evidence of Ms. Jacinta Omina, who testified to the bank's securitization process and Ms. Hellen Kisaka who testified on how she generally oversaw execution of the bank's financing documents. Ms Kisaka appraised the court that her practice was to interview executors and explain the contents of legal documents to ensure their understanding. Further, prior to executing any legal contract, Ms Kisaka testified that she assured herself that the person that appeared before her matched the description in the executor's identification documents. Relying on the cases of *Stephen Kinini Wang'ondy vs The Ark Limited* [2016] eKLR and *Kimatu Mbuvi t/a*



- Kimatu Mbuvi & Bros vs Augustine Munyao Kioko Civil Appeal No. 203 of 2001 [2007] 1 EA 13, the appellant submits that expert testimony is based on opinion and not facts and as such opinions cannot be elevated to the position of primary factual evidence or considered in a vacuum against the totality of evidence adduced by the court.
10. The appellant refers to the cases of Ndolo vs Ndolo [2008] 1KLR (G & F) 742, Christopher Ndaru Kagina vs Esther Mbandi Kagina & Another [2016] eKLR and Grace Wanjiru Munyinyi & Another vs Gedion Waweru Githunguri & 5 Others [2011] eKLR and submits that the burden of proving fraud or mental incapacity lies on the party who alleges it. Thus it was incumbent upon the respondent to prove that the deceased's signature was forged or procured by fraud. Furthermore, the respondent did not show that the bank knew of any infirmity.
 11. The appellant submits that the respondent did not challenge the bank's counterclaim in evidence or their written submissions in the main suit. As the bank's security agreements were validly executed by the deceased they remain binding upon his estate and continue as a continuing security until the third party's financial obligations of Kshs. 7,529,686/- is fully settled. To support its contentions, the appellant refers to the cases of Mamta Peeush Manahan (Suing on behalf of the Estate of the late Peeush Premlal Mahajan] vs Yashwant Kumari Mahajan (Sued personally and as executrix of the Estate and beneficiary of the Estate of the late Krishan Lal Mahajan] [2017] eKLR and Habib Bank A.G. Zurich vs Rajnikant Khetshi Shah [2018] eKLR.
 12. The appellant argues that the instant suit revolves around the validity of a charge and not the use, occupation or title to land as contemplated under the jurisdiction of the Environment and Land Court thus the claim falls squarely within the jurisdiction of the civil or commercial division of the Chief Magistrate Court. To support its contentions, the appellant refers to the cases of Bank of Africa Kenya Limited & Another vs TSS Investment Limited & 2 Others (Civil Appeal E055 of 2022) [2024] KECA 410 (KLR); Kinuthia vs Kanyi & Another (Environment & Land Case E007 of 2023) [2024] KEELC 1625 (KLR) (20 March 2024) (Ruling) and Kinuthia vs Kanyi & Another (supra) and argues that the trial court should have downed its tools as soon as it was bereft of jurisdiction.

The Respondent's Submissions

13. The respondent submits that the plaint was filed on 18th November 2021 and the issue of jurisdiction was never raised at any point during the trial up to the date of judgment and is thus an afterthought aimed at hoodwinking this Honourable Court. The respondent argues that despite the in the case of Cooperative Bank vs Patrick Kangethe Njuguna & 5 Others Mombasa Court of Appeal, Civil Appeal No. 83 of 2016 where the subject matter was the tabulations of the sums owing and whether the statutory notices had been issued prior to the attempted statutory of sale, the instant matter relates to a dispute over the manner in which the charge has been created which would be a dispute falling within the Land Act and Land Registration Act.
14. The respondent submits that he pleaded in his plaint that the purported loan facility of Kshs. 4,500,000/- taken by his father using the subject property RUIRU EAST/JUJA EAST BLOCK 2/519 as security is void. The respondent further submits that he averred that at the time the loan facility was taken, his father was ailing and incapable of managing his own affairs and there is no way that he would have signed the guarantee and indemnity securing the loan facility in favour of a third party thus rendering such a claim by the appellant an illegality. The appellant contended that the deceased had neither delegated any authority whatsoever to the borrower nor appointed the borrower, the 3rd party who is his daughter in law to deal with his property. Further the appellant's witnesses both admitted on cross examination that they could not remember whether the deceased was in the company of another person during the alleged execution of the deed of guarantee and indemnity which infers a higher



probability that the witness did not see the deceased sign the deed in question and that the deceased did not have an advocate during the execution of that deed.

15. The respondent argues that it established during the trial that it is highly probable that the deceased's signature was forged in favour of the borrower to facilitate the handover of title in Ruiru East/Juja East Block 2/519 to the appellant in exchange for the alleged loan facility. Relying on Section 107 of the *Evidence Act* and the case of *Virani t/a Kisumu Beach Resort vs Phoenix East Africa Assurance Company Limited* (2004) 2 KLR 269, the respondent argues that he discharged his burden of proof and succinctly with the help of an expert witness, Emmanuel Kenga that the signature of the deceased appearing on the guarantee and indemnity agreement purportedly signed by the deceased was a forgery. Thus the burden of proof shifted to the appellant when it countered his case wanting the court to believe that the deceased signed the guarantee and indemnity creating the charge against the suit property in favour of a third party while in his sound mind despite his old age and it was validly created. Relying on the case of *Raila Amolo Odinga & Another vs Independent Electoral and Boundaries Commission & 2 Others* [2017] eKLR, the respondent argues that the evidential burden of proof keeps shifting and it landed on the appellant after the trial court was seized of his evidence.
16. The respondent relies on the cases of *Stephen Kinini Wang'ondou vs The Ark Limited* [2016] eKLR and *INN vs MSC* [2018] eKLR and submits that the fact that Mr. Kenga was retained by him to conduct a handwriting analysis and prepare a report to that effect did not water down the value of his evidence as alleged by the appellant. On the issue of PW2's qualification, the respondent submits that during cross examination, the witness offered to show the appellant's advocate on record his qualification certificates while on his feet during his testimony as he had carried them with him but their advocates on record did not investigate them.
17. The respondent submits that the learned magistrate took time to test PW2's expert evidence against the background of all other evidence in the case which he accepted in order to decide which expert evidence is cogent.
18. The respondent refers to the case of *CMC Aviation Ltd vs Crusair Ltd (No 1)* [1987] KLR 103 and submits that he proved to the required standard that the security created against the deceased's property was marred with illegality and fraud as he never signed the guarantee and indemnity by his own free will. The appellant insists that he did so in the presence of Advocate Hellen Kisaka as instructed by the bank. The respondent refers to Section 50, 70 and 76 of the *Evidence Act* and submits that his witness, PW2 conclusively confirmed in his report dated 10th February 2023 that the deceased's known signature which is present on his marriage certificate was different from the questioned signatures that were present in the deed of guarantee and indemnity. Thus, the evidentiary burden of proof shifted to the appellant to prove the legality of the charge created over the deceased's property in favour of the 3rd party. DW1 testified that despite the deceased purportedly signing the charge document, indemnity and guarantee, no single coin was ever disbursed to his account but disbursed to the 3rd party. Undoubtedly, the essence of a guarantor is to discharge liability when the principal debtor fails to honour his duty. Consequently the right or obligations of a guarantor as against the creditor accrue to him/her from the relationship created by the guarantee. To support his contentions, the respondent refers to the case of *Robert Njoka Muthara & Another vs Barclays Bank of Kenya Limited & Another* [2017] eKLR.
19. DW1 further testified that the appellant did not have in its possession identification card documents belonging to the deceased and that she did not see the deceased signing any of the impugned documents. It is evident from DW2's testimony that she had no role in giving independent advice to the deceased concerning the agreement. She did not, in as much as she purported that she believed that the deceased was present at the advocate's office, invite the deceased to establish whether he had freely



consented to the transaction yet it was her role to do so. Apart from DW2, an advocate, the appellant did not call any witness from the bank as the taking of a loan is a process and the procedure of one guaranteeing is another process and if the deceased was indeed a genuine guarantor and chargee, one or two bank officials must have dealt with him. However no bank official came to testify to say that they dealt with the deceased at any one time. Furthermore, no CCTV footage was collected and presented as evidence to show that the deceased has ever been in the premises of the appellant. Furthermore, DW2 was conflicted having seemingly acted for both the appellant and the deceased person in the transaction and yet she had been summoned as a witness for the appellant. To support his contentions, the respondent refers to the case of *King Woolen Mills Ltd & Another vs M/s Kaplan & Stratton Advocates 1934*. Thus the appellant failed to discharge its evidentiary burden of proof which had shifted to them. To support his contentions the respondent relies on the case of *Evans Nyakwana vs Cleophas Bwana Ongaro (2015) eKLR*.

20. Relying on the case of *Civil Appeal 112 of 2021; Ocean Engineering Works Ltd & Another vs SBM Bank of Kenya Ltd (Civil Appeal 112 of 2021) [2024] KEELC 4724 (KLR) (5 June 2024) (Ruling)*, the respondent submits that the trial court considered his claim as against the appellant's counterclaim and made a finding in his favour. Having held that the guarantee and indemnity was marred with fraud and illegality, the appellant's remedy was to pursue the third party who actually received and benefited from the sums advanced to her. To support his contentions, the respondent refers to the case of *Elijah Makeri Nyangwara vs Stephen Mungai Njuguna & Another Eldoret ELC Case No. 609B of 2012*.

Issues for determination

21. The main issues for determination are:-
- a. Whether the court has jurisdiction to determine the appeal.
 - b. Whether the trial court had jurisdiction to determine the suit.
 - c. Whether the matter is *res judicata*.
 - d. Whether the respondent proved his case on a balance of probabilities.
 - e. Whether the trial court determined the appellant's counterclaim.

The Law

22. Being a first Appeal, the court relies on a number of principles as set out in *Selle and Another vs Associated Motor Boat Company Ltd & Others [1968] 1EA 123*:

“.....this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular,, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence.”

23. In *Gitobu Imanyara & 2 Others vs Attorney General [2016] eKLR* the Court of Appeal stated that:-

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 respect.

24. It is demonstrated from the foregoing decisions that the appropriate standard of review to be established can be stated in three complementary principles:-
- a. That on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
 - b. That in reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before it; and
 - c. That it is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

Whether the court has jurisdiction to determine the appeal

25. The law on the question of jurisdiction was enunciated in the case of Owners of the Motor Vessel “Lilian S” vs Caltex Kenya Limited [1989] KLR 1 where the court held:-

Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.

26. In the case of Samuel Kamau Macharia vs KCB & 2 Others, Civil Application No. 2 of 2011, it was stated:-

“A court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”

27. From the record, the respondent initiated the lower court matter in the Senior Principal Magistrate’s Court in Ruiru vide ELC Case No. E161 of 2021 through a plaint dated 8th November 2021. The respondent sought for judgment against the appellant for a declaration that the registration of the charge against the property known as RUIRU EAST/JUJA EAST BLOCK 2/519 in favour of the appellant is illegal null and void; an order of discharge of the charge against the property known as RUIRU EAST/JUJA EAST BLOCK 2/519 in favour of the deceased’s estate; an order for the release of the title and all other title documents in its possession to the deceased’s estate and general damages for the wrongful charge of the suit property at rates to be assessed by the court. The trial court rendered its judgment on 16th August 2024 in favour of the respondent as against the appellant. The matter having been determined by the magistrate’s Environment and Land Court ought to have been lodged as an appeal in the Environment and Land Court. It was improper for the appellant to appeal the decision of the trial court sitting as an environment and land court and institute the appeal before the High Court, irrespective of it disputes the jurisdiction of the lower court. It ought to have lodged the appeal in the Environment and Land Court then raise the question of jurisdiction for the appellate court to determine.
28. Accordingly, this court lacks the jurisdiction to entertain the instant appeal and it must therefore down its tools.
29. This appeal is hereby struck out for want of jurisdiction.



30. Each party to meet its own costs.

31. It is hereby so ordered.

**JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 9TH DAY OF
SEPTEMBER 2025.**

F. MUCHEMI

JUDGE

