



**Hass Consult Limited v Gathogo & 2 others (Civil Appeal E933 of 2023)  
[2025] KEHC 13077 (KLR) (Civ) (23 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 13077 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL E933 OF 2023**

**TW OUYA, J**

**SEPTEMBER 23, 2025**

**BETWEEN**

**HASS CONSULT LIMITED ..... APPELLANT**

**AND**

**MARTIN MAINA GATHOGO ..... 1<sup>ST</sup> RESPONDENT**

**WESTPOINTE REALTY LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**WESTPOINTE MANAGEMENT ..... 3<sup>RD</sup> RESPONDENT**

*(Being an appeal from the judgment and decree of the honourable  
Wendy Micheni (Chief Magistrate) dated and delivered on 14th August  
2023 in Milimani Chief Magistrate's Civil Case No. E4058 of 2020)*

**JUDGMENT**

1. This appeal emanates from a breach of a Sale Agreement whereby, by a Plaint dated 17<sup>th</sup> August 2020 whereby the 1<sup>st</sup> Respondent alleged that the Appellant failed to complete the construction of the suit premises without any notice or communication to the 1<sup>st</sup> Respondent. Subsequently causing the 1<sup>st</sup> Respondent to terminate the Sale Agreement and seek the reimbursement of the monies paid, being Kshs. 2,076,620.00.
2. Whereas the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent admitted the facts of the suit, they anchored their case on the fact that Clause 26 of the sale agreement provided that should any dispute arise, the same should be referred to arbitration. The appellant on the other hand contended that its involvement in the construction of the apartments to be known as Westpointe on L.R No. 209/20735 was limited to selling the apartments on behalf of the 2<sup>nd</sup> Respondent and receiving and dispensing money paid by



- the purchasers to the 2<sup>nd</sup> Respondent. therefore, it had no capacity to refund any monies to purchasers once it had forwarded the same to the 2<sup>nd</sup> Respondent.
3. At the end of the trial, the suit was determined in favour of the 1<sup>st</sup> Respondent whereby judgment was entered for Kshs. 2,076,620 together with interest at court rates.
  4. Being aggrieved and dissatisfied with the entire decision of the trial court, the Appellant filed the instant appeal dated 13<sup>th</sup> September 2023 urging thirty grounds. Which can be summarized as follows:
    - i. The learned trial magistrate erred in law and fact in failing to find that the Amended Plaint dated 17<sup>th</sup> August 2020 was not supported by a verifying affidavit;
    - ii. The learned trial magistrate erred in law and fact in ignoring and failing to acknowledge the Appellant's witness's testimony, defence, evidence and submissions;
    - iii. The learned trial magistrate erred in law and fact in holding that the appellant breached its obligations under the terms of the Agreement for sale when the Appellant was not a party to the said agreement;
    - iv. The learned trial magistrate erred in law and in fact in failing to acknowledge the Appellant's status as an agent of the 2<sup>nd</sup> Respondent;
    - v. The learned trial magistrate erred in finding that the 1<sup>st</sup> Respondent had proven his case on a balance of probabilities against the Appellant and consequently entering judgment against the Appellant.
  5. Reasons wherefore, the Appellant prayed that:
    - a. The appeal be allowed;
    - b. The judgment of the honourable Wendy Micheni (Chief Magistrate) dated and delivered at Nairobi on 14<sup>th</sup> August 2023 in Civil Case No. E4058 of 2020 Martin Maina Gathogo v Westpointe Realty Limited & 2 others be set aside;
    - c. The Amended Plaint dated 17<sup>th</sup> August 2020 be struck out for want of support by a verifying affidavit;
    - d. In the alternative to prayer (c) above, the 1<sup>st</sup> Respondent's suit against the Appellant be dismissed in its entirety with costs as sought in the Appellant's statement of defence dated 17<sup>th</sup> February 2021;
    - e. Costs of the appeal as well as those of the suit before the trial court.
  6. By directions of the court, the appeal was disposed through written submissions.
  7. The appellant's submissions were hinged on two issues being, the absence of a verifying affidavit to the amended plaint; and the role of the appellant in the transaction in question.
  8. On the first issue, the appellant submitted that the failure by the 1<sup>st</sup> Respondent to attach verifying affidavit to the amended plaint offended Order 4 rule 1 (2) of the Civil Procedure rules which require that a plaint be accompanied by an affidavit verifying the correctness of the averments. It was submitted that the requirement is couched in mandatory terms therefore failure to do so would make the suit



- incompetent. Reliance was placed on the case of Solomon Mukindia v Nchani Kithunguru & 2 others [2014] eKLR.
9. It was further submitted that verification of an amended plaint is unnecessary unless the amendment introduces an entirely new cause of action or new parties to a suit. See A.S. Sheikh Transporters Limited & Another v Barclays Bank of Kenya Limited & 3 others [2018] eKLR. Therefore, failure by the trial court to strike out the entire suit was erroneous.
  10. The Appellant further submitted that its involvement in the construction of the apartment including the premises to be known as Westpointe on L.R 209/20735 Nairobi was limited to selling the apartments on behalf of the 2<sup>nd</sup> Respondent and receiving and dispensing to the 2<sup>nd</sup> Respondent the monies paid by the purchasers. The appellant could not therefore reasonably refund any monies to purchasers once it had forwarded the same to the 2<sup>nd</sup> Respondent. The appellant insists that he had no obligation to refund monies to purchasers, instead, it is the 2<sup>nd</sup> Respondent who bore that Responsibility.
  11. Regarding the issue of the architect's certificate, it was submitted that the trial court decided the case against the appellant on the sole basis that the architect certificates had not been pleaded in the pleadings or otherwise brought it up in his documents, neither had it been formulated as an issue for determination either. Therefore, the trial court in determining this issue, allowed the 1<sup>st</sup> Respondent to depart from his pleadings.
  12. It was also submitted that the 1<sup>st</sup> Respondent is estopped by acquiescence or waiver, from challenging the Appellant's release of his deposit, either on account of the architect's certificates or on the basis that the deposit was released to the developer.
  13. The Appellant contended that a contract cannot confer rights or impose obligations upon any person who is not a party to the contract. Therefore, only parties to a contract should be able to sue or enforce their rights or claim damages. Since the appellant was not a party to the agreement, there was no privity of contract between the 1<sup>st</sup> Respondent and the Appellant.
  14. Finally, it was submitted that in the absence of a contractual relationship, the appellant could not commit a breach, and the 1<sup>st</sup> Respondent could not maintain a claim against the appellant. Therefore, the appellant urged that the appeal be allowed.
  15. The 1<sup>st</sup> Respondent's submissions were hinged on three issues:
    - a. Whether the failure to accompany an amended plaint with a verifying affidavit warrants the striking out of a suit;
    - b. Whether a fresh point of law can be raised in an appellate court;
    - c. Whether the 1<sup>st</sup> Respondent is entitled to a refund of Kshs. 2,076,620.00 from the Appellant.
  16. On the first issue, it was submitted that the 1<sup>st</sup> Respondent complied with the requirements of Order 4 rule 2 by filing a verifying affidavit accompanying the Plaint dated 6<sup>th</sup> August 2020. While admitting that the amended plaint was not accompanied by a verifying affidavit, the 1<sup>st</sup> Respondent contended that the Civil procedure rules are silent on whether an amended Plaint requires the filing of another verifying affidavit when there is already one on record. Reliance was placed on the case of Microsoft Corporation v Mitsumi Computer Garage Ltd & another [2001] eKLR where Ringera J (as he then was) remarked that Order VII does not require any verifying affidavit to accompany an amended plaint or indeed any other pleading save the plaint originating the action.



17. The 1<sup>st</sup> Respondent while citing Article 159 of *the Constitution* submitted that insisting that an amended plaint be struck out for lacking a verifying affidavit is a technicality.
18. It was further submitted that the incompetency of the amended plaint for lacking a verifying affidavit was raised for the first time on appeal. The appellant never raised it as an issue during the entire period that the suit was before the trial court. The appellant having fully participated in the trial court is estopped from raising the issue in appeal. The Appellant is simply trying to bar the 1<sup>st</sup> Respondent from enjoying the fruit of his judgment.
19. Regarding the question whether the 1<sup>st</sup> Respondent is entitled to the refund of Kshs. 2,076,620.00. It was submitted that although the agreement was signed between the 1<sup>st</sup> and 2<sup>nd</sup> Respondent herein, the Appellant's role in the agreement as espoused in clause 5 (c) of the agreement was that the appellant was the agent for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent solely for the purpose of selling the apartments on their behalf, receiving and dispensing the said funds as hereinbefore provided. Therefore, the appellant clearly had the duty to receive the sums paid by the 1<sup>st</sup> Respondent and only dispense these amounts to the 2<sup>nd</sup> Respondent after receipt of completion certificates issued from time to time to the architect.
20. It was submitted that despite the appellant's allegation that the learned magistrate failed to acknowledge evidence of the architect's certificates, no such certificates were presented before the learned magistrate and a quick perusal of the Record of Appeal filed by the Appellants themselves no such certificates have been presented before the court. The Appellant can therefore not therefore purport to pick and choose what part of the contract applies or is convenient to them. Having received a 20% deposit from the 1<sup>st</sup> Respondent, they were bound to the other terms of the agreement including the requirement to refund the deposit. In any case, a court has a duty to determine all aspects presented before it whether stated in pleadings or in rare circumstances such as where an aspect organically comes up during trial.
21. The 1<sup>st</sup> Respondent filed further submissions dated 26<sup>th</sup> June 2024 where it was further submitted on the basis of the Latin maxim, *Panta Sunt Servanda* i.e. Agreements must be kept. Therefore, the Appellant having been part of the agreement dated 3<sup>rd</sup> October 2016 had a vital duty to receive the purchase price and dispense it in accordance with the agreement; a duty that the appellant breached.
22. Whereas the appellant submitted that the amounts were dispensed to Shady Acres Limited, the alleged Developer of the project, the 1<sup>st</sup> Respondent submitted that if the agreements intended for the amounts to be dispensed to the Developer it would have highlighted as such. Nevertheless, the Contract clearly stated that the amount should be dispensed to the Vendor, and since it wasn't, the evidence before court showed as such.
23. The 1<sup>st</sup> respondent's prayer is that, the appeal should be dismissed.
24. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents did not participate in the Appeal.
25. Under Section 78(2) of the *Civil Procedure Act*, the appellate court shall have the same powers and shall perform nearly the same duties as are conferred and imposed by the Act on courts of original jurisdiction in respect of suits instituted herein. Accordingly, the first Appellate Court should re-evaluate the evidence and make its own conclusions albeit it must bear in mind that it did not have the opportunity of seeing or hearing the witnesses first hand. See the case of *Selle & Anor v Associate Motor Boat Co. Ltd* 1968 EA 123.
26. Upon considering the pleadings, submissions and the supporting documents, the issues that commend themselves for determination are whether; the appellant proved his case to the required standard and; whether the appeal is merited.



27. The Appellant has challenged the decision of the trial magistrate on the basis that there was no competent suit to adjudicate as the Amended Plaintiff was not accompanied by an affidavit. The Respondent on the other hand has contended that an Amended Plaintiff has a life of its own and does not need to rely on a verifying affidavit to stay alive.
28. Order 4 rule 1 (2) of the Civil Procedure Rules states that:
- The plaintiff shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in rule 1(1)(f) above.
29. It is true that the Civil Procedure Rules do not say that an amended plaintiff must be accompanied by an affidavit. This position has been the subject of judicial determination in several cases. In the persuasive decision of Stockman Rozen Kenya Ltd versus Da Gama Rose Group Company Limited HCCC 1168 of 2001 the court in addressing a similar issue addressed itself thus:
- “It is no doubt that an amended plaintiff is what stands before the court and it defines the case of the plaintiff together with the issues to be tried. The original plaintiff is no longer material (see the Rahilu Khan case above). Nobody has any problem with this state of things but this court will need to look elsewhere to come up with a finding whether a verifying affidavit should or should not accompany an amended plaintiff. It cannot be in the case of National Bank of Kenya (above). There the verifying affidavit filed was found incompetent. And so the plaintiff was considered as not having been accompanied by any. The Microsoft case (above) bears the learned Justice Ringera’s remarks as he considered competence or lack of it, of some verifying affidavits placed before him in that suit. That matter was ventilated, on preliminary points. The learned judge remarked:
- “The third point of preliminary objection is entirely well taken. Order VII does not require any verifying affidavit to accompany an amended plaintiff or indeed any other pleading, save the plaintiff originating the action.”
30. From the foregoing, I agree with the 1<sup>st</sup> Respondent’s submission that an Amended Plaintiff does not require a verifying affidavit for it to have a life of its own. The only requirement is that the Plaintiff originating the action must be accompanied by a verifying affidavit as per Order 4 rule 1(2).
31. On the issue of whether the Appellant was mandated to refund the deposit paid to the 1<sup>st</sup> Respondent as per the contract. The Appellant alleged that it was merely an agent of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent, therefore it had no capacity of refunding the sums as the monies paid were immediately transferred to the 2<sup>nd</sup> Respondent.
32. The agreement dated 3<sup>rd</sup> October 2016 was entered between the 1<sup>st</sup> Respondent and the 2<sup>nd</sup> Respondent. It was a term of the Agreement that the Appellant was the agent of the 2<sup>nd</sup> Respondent. The Appellant was specially designated as the recipient of the purchase price on behalf of the 2<sup>nd</sup> Respondent pursuant to clause 5 (a) and 5 (b) of the Agreement.
33. It was a term of the Agreement that the amount received by the Appellant would be dispensed to the 2<sup>nd</sup> Respondent from time to time based on the percentage of work completed as per the completion certificates issued from time to time by the architects towards construction.
34. Indeed, the Appellant confirmed receiving the monies from the 1<sup>st</sup> Respondent and transmitting them directly to the 2<sup>nd</sup> Respondent. In fact, the 1<sup>st</sup> Respondent was duly informed of the transmission of the monies paid from the appellant to the 2<sup>nd</sup> Respondent.



35. Parties are bound by the terms of the agreement that they have freely and voluntarily entered into and a Court will not interfere with and or re-write a contract that parties have freely entered into unless it is shown there was fraud, coercion and/or undue influence at the time the contract was entered into. In the instant case it has not been suggested there was any fraud coercion or undue influence exerted on any of the parties at the time the agreement dated 3rd October 2016 was entered into.
36. The Appellant has indeed demonstrated that it was not a party to the agreement between the 1<sup>st</sup> Respondent and the 2<sup>nd</sup> Respondent. Instead, it was merely an agent of the 2<sup>nd</sup> Respondent and therefore had no capacity to be held liable for breach of contract that he was not a party to.
37. In recognizing that there are exceptions to the doctrine of privity of contract the Court of Appeal in *Aineah Likuyani Njirah –vs- Aga Khan Health Services (2013) eKLR* stated that:

“----one of the exceptions is the need to grant Third Parties the right to enforce a contract made for their benefit. In our considered view, the doctrine of privity of contract cannot be used to oust responsibility to a Third-Party beneficiary of a performance bonds”.
38. In the present case, the agreement entered into between the 1<sup>st</sup> and 2<sup>nd</sup> Respondents was not for the benefit of the Appellant other than for the fact that he would receive the due fees as an agent of the 2<sup>nd</sup> Respondent. Which terms were not incorporated in the agreement between the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. Therefore, the exceptions to the doctrine of privity of contracts was inapplicable as the agreement dated 3<sup>rd</sup> October 2016 was not entered into for the benefit of the Appellant.
39. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, who were parties to the agreement dated 3<sup>rd</sup> October 2016, despite admitting the facts of the dispute, opted not to participate in the appeal. At the trial court, they relied on the fact that the parties had committed to have any dispute arising from the contract referred to arbitration.
40. Evidently, the appellant had no obligations to fulfil the agreement entered into between the 1<sup>st</sup> and 2<sup>nd</sup> Respondents’ and therefore no liability arising from the agreement can attach him.
41. Having come to the conclusion and finding that there was no privity of contract to bind the Appellant to the agreement dated 3<sup>rd</sup> October 2016, I am satisfied the Learned Trial Magistrate erred in his evaluation and appraisal of the evidence and the applicable law leading to the apportionment of liability jointly and severally against the appellant yet he was not a party to the agreement.
42. The upshot is that this appeal succeeds. I set aside the trial court’s finding that the appellant was jointly and severally liable with the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent for the refund owed being Ksh. 2,076, 620.00. Each party to bear its own costs.

**DATED, SIGNED AND DELIVERED ELECTRONICALLY THIS 23<sup>RD</sup> SEPTEMBER, 2025.**

**HON. T. W. OUYA**

**JUDGE**

