

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 47 OF 2018

VEKSONS LIMITED.....
PLAINTIFF

VERSUS

MAESTROVILLE ESTATES (K) LIMITED.....1ST
DEFENDANT

CONSOLIDATED BANK OF KENYA.....2ND
DEFENDANT

RINGA PROPERTIES LIMITED.....3RD
DEFENDANT

JUDGMENT

1. The Plaintiff, Veksons Limited, instituted this suit by a plaint dated 31st January 2018, arising from a construction project undertaken on Land Reference No. 1870/IV/206, Westlands, Nairobi.
2. In the plaint, the Plaintiff pleaded that the 3rd Defendant was the original owner of the suit property, the 2nd Defendant, Consolidated Bank of Kenya Limited, financed the development and held a charge over the property, and that the 1st Defendant, Maestroville Estates (K) Limited, later became the registered owner after purchasing the property

at a public auction conducted pursuant to the bank's statutory power of sale.

3. The Plaintiff seeks judgment against the Defendants jointly and severally for:
 - a. *General damages for breach of contract;*
 - b. *Special damages of Kshs. 49,017,372/-;*
 - c. *The value of converted property in the sum of Kshs. 9,302,242/-;*
 - d. *General damages for conversion;*
 - e. *Exemplary and punitive damages;*
 - f. *Interest at commercial rates; and*
 - g. *Costs of the suit together with any other relief the Court may deem fit.*
4. The Plaintiff's case is that in 2011, it won a tender advertised by the 3rd Defendant to construct apartments on the suit property. The tender was formalized in a construction agreement dated 15th March 2011 between the Plaintiff and the 3rd Defendant.
5. The Plaintiff pleaded that the 2nd Defendant bank financed the project, and that payment for works undertaken was structured through Interim Payment Certificates (IPCs) issued by the project architects.
6. According to the Plaintiff, by May 2015, it had completed about 80% of the construction works, but several certified sums remained unpaid.

7. The Plaintiff further pleaded that on 27th March 2017, the 1st Defendant, allegedly together with the 2nd Defendant, entered the site and evicted its workers without notice, leaving behind materials and equipment valued at Kshs. 9,302,242/-, which were allegedly retained or converted.
8. It was further pleaded that the suit property had been sold by public auction following the borrower's default on the loan facility advanced by the bank.
9. The Plaintiff contends that the Defendants were aware that it still had a valid construction contract and that its materials remained on the site.

Defence case.

10. The 1st Defendant filed a defence denying liability and contended that it was not a party to the construction contract dated 15th March 2011 and therefore bore no contractual liability to the Plaintiff.
11. It stated that it lawfully acquired the property through a public auction conducted on 26th January 2017, following the exercise of the bank's statutory power of sale.
12. The 1st Defendant contends that it purchased the property in its actual state and condition ("as is") through the auction sale.
13. It denied committing the tort of conversion and denied refusing the Plaintiff access to retrieve its goods.
14. The 2nd Defendant, also denied liability. The Bank contends that it is a stranger to the construction agreement

dated 15th March 2011, allegedly entered into between the Plaintiff and the 3rd Defendant and denies any contractual liability to the Plaintiff.

15. The Bank states that its involvement in the transaction was solely as a financier of the development project undertaken by the 3rd Defendant. It avers that it advanced a construction loan facility to the 3rd Defendant under a Letter of Offer dated 20th June 2013 for Kshs. 120,000,000/-, secured by a legal charge over the suit property. The Bank further advanced an additional facility of Kshs. 40,000,000/- under a further Letter of Offer dated 29th August 2013, also secured by a legal charge.
16. The Bank denies any obligation to pay the Plaintiff for construction works, maintaining that it did not execute any contract with the Plaintiff and therefore had no contractual duty to remunerate it for professional services rendered. It also denies the allegations that it forcibly entered the suit property or participated in any unlawful eviction of the Plaintiff.
17. The 2nd Defendant further pleaded that the 3rd Defendant defaulted in repayment of the loan facilities, thereby entitling the Bank to exercise its statutory power of sale. The Bank states that it issued the requisite statutory notices, including a 90-day statutory notice dated 12th January 2015 and a 40-day notice under Section 96(2) of the Land Act dated 27th April 2015, before instructing Valley Auctioneers to sell the charged property.

18. The Bank asserts that after several unsuccessful attempts to auction the property, the property was sold by public auction on 26th January 2017 to the 1st Defendant, and thereafter transferred and registered in the name of the 1st Defendant on 16 March 2017.
19. The Bank maintains that once the property was sold, it relinquished all rights and interest in the property, and therefore it could not have denied the Plaintiff access to the site or committed the tort of conversion as alleged.
20. At the hearing the Plaintiff called one witness (Pw1) while the 1st and 2nd Defendants each called one witness (Dw1 and Dw2 respectively).
21. Pw1 testified that the Plaintiff is a construction company which had entered into a construction agreement dated 15th March 2011 with the 3rd Defendant, Ringa Properties Limited, for the construction of residential apartments on Land Reference No. 1870/IV/206, Westlands, Nairobi. He adopted his witness statement dated 28th December 2018 as his evidence in chief and relied on the Plaintiff's list and bundle of documents filed on 10th June 2019.
22. He testified that the construction project was financed by the 2nd Defendant, Consolidated Bank of Kenya Limited, which disbursed funds for the project through payments based on Interim Payment Certificates (IPCs) issued by the project architects.

23. According to Pw1, the Plaintiff commenced construction works and by May 2015 had completed approximately 80% of the project. He stated that several interim certificates had been issued but that some certified sums remained unpaid.
24. Pw1 further testified that on 27th March 2017 the Plaintiff's workers were forcibly removed from the construction site by agents associated with the new owner of the property. He stated that the eviction occurred without prior notice and that construction materials, equipment, and tools belonging to the Plaintiff remained on the site.
25. He told the Court that the value of the equipment and materials left on the site was Kshs. 9,302,242/-. He added that the Plaintiff had prepared an inventory of those items pursuant to directions issued by the Court requiring the parties to visit the site together with their advocates.
26. Pw1 testified that during the site visit some items were recovered while others were missing or had been dismantled. He stated that certain fittings such as cupboards, toilets, and sinks had been demolished.
27. In cross-examination by counsel for the 1st Defendant, Pw1 testified that the property had been sold by auction and that the 1st Defendant later became the registered owner. He confirmed that he later saw an auctioneer's notice dated 9th January 2017, although he stated that the Plaintiff had not been notified of the impending sale before the eviction took place.

28. He further testified that although the Plaintiff had been receiving payments through the project financing arrangement, it had not been informed that the property had been sold.
29. In cross-examination by counsel for the 2nd Defendant, Pw1 acknowledged that the bank was not a party to the construction agreement but had financed the project. He also conceded that the Plaintiff had no registered legal interest over the suit property and therefore could not prevent the bank from exercising its statutory power of sale.
30. He nevertheless maintained that the bank was aware of the Plaintiff's presence on the site and should have notified the contractor before the property was sold.
31. Upon re-examination, Pw1 reiterated that the Plaintiff's equipment remained on the site after the eviction and that if the items were no longer available the Plaintiff sought monetary compensation equivalent to their value.
32. The 1st Defendant called Dw1, Dr. George Mwangi Kibongera, a director of Maestrovilla Estates (K) Limited.
33. Dw1 testified that he is a medical doctor based in the United States of America and is also engaged in real estate development. He adopted his witness statement dated 13th April 2019 as his evidence in chief and relied on the Defendant's bundle of documents dated 10th April 2019.
34. He testified that the 1st Defendant purchased the suit property through a public auction conducted on 26th January

2017 after learning about the sale through a newspaper advertisement.

35. According to Dw1, the property had been charged to the 2nd Defendant bank, and the sale arose from the bank's realization of its security after the borrower defaulted on the loan facility.

36. Dw1 stated that at the time of purchase, the development on the property was incomplete and the building was still under construction.

37. He testified that possession of the property was taken on 27th March 2017, and that many people had gathered at the site when the new owner took possession. He further stated that he did not see any representatives of the Plaintiff at the auction itself.

38. In re-examination, Dw1 clarified that his interactions concerning the property after the auction were primarily with the auctioneer and staff of the bank involved in the sale process.

39. The 2nd Defendant called Dw2, Lilian Njongani, a Debt Recovery Officer with Consolidated Bank of Kenya Limited. She adopted her witness statement dated 4th April 2019 as her evidence in chief and produced the bank's bundle of documents filed on 11th June 2019 as exhibits.

40. According to Dw2 the bank had advanced loan facilities to the 3rd Defendant, the developer of the project, for the construction of apartments on the suit property. And that the loan facility was governed by a Letter of Offer dated 20th

June 2011 and was secured by a legal charge over the property.

41. She explained that under the financing arrangement the bank would disburse funds upon presentation of interim payment certificates issued by the contractor and the project consultants.
42. Dw2 testified that the bank monitored the progress of the project and was aware that the construction contract existed between the Plaintiff and the 3rd Defendant. However, she stated that the bank had no contractual relationship with the Plaintiff and that its dealings were strictly with the borrower.
43. Dw2 further testified that the borrower subsequently defaulted in repayment of the loan facility, prompting the bank to exercise its statutory power of sale.
44. She stated that the bank issued the necessary statutory notices before instructing Valley Auctioneers to conduct the auction of the charged property.
45. According to Dw2, the outstanding loan amount at the time of the recovery process exceeded Kshs. 222 million. She maintained that the bank acted lawfully in realizing its security and denied any involvement in the alleged eviction of the Plaintiff from the construction site.
46. In re-examination, Dw2 reiterated that the relationship in the transaction was between the bank and the borrower and that the bank had no contractual obligation to the Plaintiff contractor.

Plaintiff's submissions

47. The Plaintiff submitted that its claim arises from a construction contract dated 15th March 2011 entered into with the 3rd Defendant for the construction of residential apartments on L.R. No. 1870/IV/206, Westlands, Nairobi, at a contract sum initially agreed at Kshs. 135,209,016/- and later revised to Kshs. 150,050,000/-. It argued that the project was financed by the 2nd Defendant bank, which advanced loan facilities to the 3rd Defendant secured by a charge over the suit property.
48. The Plaintiff contended that payment for works undertaken was structured through the Architect's Interim Payment Certificates (IPCs) issued by the project architects and forwarded to the bank for payment from the loan proceeds. While several certificates were honoured, the Plaintiff submitted that some certified sums remained unpaid and that the bank retained Kshs. 7,500,000/- as retention monies which ought to have been released upon completion of the relevant contractual milestones.
49. The Plaintiff further submitted that after the 3rd Defendant defaulted on the loan facility, the 2nd Defendant exercised its statutory power of sale, resulting in the property being sold by public auction on 26th January 2017 to the 1st Defendant. According to the Plaintiff, when the 1st Defendant took possession on 27th March 2017, it was evicted from the site while construction materials and

equipment valued at Kshs. 9,302,242/- remained on the premises.

50. It was the Plaintiff's case that the 3rd Defendant remained liable for unpaid certified sums under the construction contract, and that the 2nd Defendant could not rely on the doctrine of privity of contract because it had actively participated in the payment process for IPCs. The Plaintiff argued that the bank's conduct created an equitable obligation or constructive trust requiring it to ensure payment to the contractor.

51. In support of that argument, the Plaintiff relied on authorities including **Shah & 7 Others v Mombasa Bricks & Tiles Ltd & 5 Others [2023] KESC 106** and **Willy Kimutai Kitilit v Michael Kibet [2018] eKLR**, which recognize the doctrine of constructive trust as a means of preventing unjust enrichment.

52. The Plaintiff also contended that the 1st Defendant was liable in conversion for allegedly appropriating or retaining building materials and equipment left on the site, arguing that those items were movable property belonging to the Plaintiff and did not form part of the fixtures passing with the land.

53. The Plaintiff therefore urged the Court to find the Defendants jointly and severally liable and to award the unpaid certified sums, retention monies, the value of the materials allegedly converted, damages, interest and costs.

1st Defendant's Submissions

54. The 1st Defendant submitted that it lawfully acquired the suit property through a public auction conducted on 26th January 2017 following the exercise of the bank's statutory power of sale. It argued that the property was purchased on an "as-is-where-is" basis, and that the sale related only to the immovable property and fixtures attached to it.
55. The 1st Defendant contended that it was not a party to the construction contract between the Plaintiff and the 3rd Defendant and therefore bore no contractual liability to the Plaintiff. It denied forcibly entering the property or appropriating any materials belonging to the Plaintiff and stated that the Plaintiff was allowed access to the premises to inspect and identify any alleged materials.
56. It further submitted that the Plaintiff had failed to establish the essential elements of the tort of conversion, relying on **Kenya Power & Lighting Co. Ltd v Kenya Shell Ltd [2004] 2 KLR 528**, which defines conversion as deliberate and unlawful interference with another person's goods.
57. According to the 1st Defendant, the Plaintiff failed to prove ownership, presence, and value of the alleged materials as no invoices, receipts, or valuation reports were produced. It also argued that some of the items claimed were likely fixtures forming part of the building, which would pass to the purchaser upon sale of the property.
58. The 1st Defendant further contended that the Plaintiff delayed for several years before attempting to recover the

alleged materials and did not seek preservation orders. It therefore urged the Court to dismiss the claim against it with costs.

2nd Defendant's submissions

59. The 2nd Defendant bank similarly opposed the Plaintiff's claim and submitted that it had no contractual or fiduciary relationship with the Plaintiff, as its dealings were exclusively with the 3rd Defendant borrower.
60. The bank argued that the Plaintiff's claim was founded on a contract to which the bank was not a party and was therefore barred by the doctrine of privity of contract, relying on authorities including **Savings & Loan (K) Ltd v Kanyenje Karangaita Gakombe & Another [2015] eKLR** and **Agricultural Finance Corporation v Lengetia Ltd [1985] KLR**.
61. The bank further submitted that it acted lawfully as a chargee exercising its statutory power of sale after the borrower defaulted on the loan facility. It maintained that it issued the requisite statutory notices and lawfully realized the security through a public auction conducted by licensed auctioneers in accordance with the Land Act.
62. The bank also denied holding retention monies in trust for the Plaintiff or undertaking any obligation to pay the Plaintiff directly. It argued that the Plaintiff had not proved any loss attributable to the bank.

63. Finally, the bank submitted that the Plaintiff had failed to meet the legal threshold for the award of special damages, which must be specifically pleaded and strictly proved, and therefore urged the Court to dismiss the claim against it with costs.

Analysis and determination

64. Having considered the pleadings, evidence and submissions, the issues that arise are:

- i. Whether the 1st and 2nd Defendants are liable to the Plaintiff for breach of contract.*
- ii. Whether the 1st Defendant committed the tort of conversion in respect of the Plaintiff's alleged materials.*
- iii. Whether the Plaintiff proved its claim for special damages.*
- iv. What orders should issue.*

Whether the 1st and 2nd Defendants are liable

65. The Plaintiff urged the Court to look beyond the strict confines of the construction contract and to consider the role played by the 2nd Defendant bank in the financing of the project. It was contended that although the construction agreement was formally executed between the Plaintiff and the 3rd Defendant, the project was financed by the 2nd Defendant and that the bank had participated in the payment structure by honouring certain Interim Payment Certificates (IPCs) issued by the project architects. On that basis, the Plaintiff argued that the bank's conduct created an

equitable obligation to ensure that the contractor was paid for the works undertaken.

66. The Plaintiff further submitted that the bank retained Kshs. 7,500,000/- as retention monies under the construction arrangement, and that such funds were effectively held in trust for the Plaintiff pending completion of the relevant contractual milestones. It was therefore argued that the bank could not evade responsibility merely by invoking the doctrine of privity of contract.

67. The 1st and 2nd Defendants, on their part, rejected that contention and maintained that they were not parties to the construction contract dated 15th March 2011 and therefore could not be held liable for any alleged breach of that agreement. They submitted that the bank's role was confined to financing the project through loan facilities extended to the 3rd Defendant and that any obligations arising from the construction contract lay solely between the Plaintiff and the 3rd Defendant.

68. The doctrine of privity of contract is firmly embedded in Kenyan jurisprudence. In the well-known decision of **Agricultural Finance Corporation v Lengetia Ltd [1985] KECA 58 KLR**, the Court of Appeal stated in clear terms that:

“As a general rule a contract affects only the parties to it, and cannot be enforced by or

against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it.”

69. Turning to the evidence on record, it is not in dispute that the construction agreement dated 15th March 2011 was executed between the Plaintiff and the 3rd Defendant as employer. The agreement set out the terms under which the Plaintiff would undertake the construction works and the mechanism through which payment for those works would be certified and made.
70. Significantly, neither the 1st Defendant nor the 2nd Defendant executed that agreement as a contracting party, guarantor, or employer. The 1st Defendant only entered the picture after the property was sold by public auction pursuant to the exercise of the bank’s statutory power of sale. The 2nd Defendant’s role, on the other hand, was limited to that of a financier advancing loan facilities to the 3rd Defendant secured by a legal charge over the property.
71. The Plaintiff sought to overcome the doctrine of privity by invoking the equitable doctrine of constructive trust, relying on the decisions of **Willy Kimutai Kitilit v Michael Kibet [2018] eKLR** and **Shah & 7 Others v Mombasa Bricks & Tiles Ltd & 5 Others [2023] KESC 106**. Those authorities indeed recognize that constructive trusts may arise where equity requires the court to prevent unjust

enrichment or to enforce equitable obligations arising from the conduct of the parties.

72. However, for such an equitable obligation to arise, there must be clear evidence that the party sought to be bound undertook or assumed a legal responsibility toward the claimant. In the present case, the Plaintiff did not demonstrate that the bank undertook any legal obligation to pay the contractor directly or assumed responsibility for the obligations of the 3rd Defendant under the construction contract.
73. On the contrary, the evidence of Dw2, which remained largely uncontroverted, shows that the bank merely advanced loan facilities to the borrower and disbursed funds in accordance with the terms of the lending arrangement. The bank's role was to finance the development project and to monitor the progress of construction for purposes of safeguarding its security.
74. The fact that the bank released loan funds upon presentation of interim payment certificates cannot, without more, transform the bank into a party to the construction contract. Such arrangements are common in construction financing and merely reflect the lender's interest in ensuring that funds are applied to the development for which the loan was advanced.

75. Put differently, the bank's participation in the disbursement process was incidental to its role as a lender and did not create a contractual relationship between the bank and the contractor.

76. To hold otherwise would fundamentally distort the established legal relationships that ordinarily exist in construction financing arrangements between lenders, borrowers, and contractors. It would expose financial institutions to contractual liabilities for agreements to which they are not parties and would undermine the settled principle of privity of contract.

77. In the premises, and having carefully considered the evidence and the applicable legal principles, I am satisfied that neither the 1st Defendant nor the 2nd Defendant can be held liable for breach of the construction contract dated 15th March 2011.

Whether the 1st Defendant committed the tort of conversion

78. The Plaintiff further contended that following the auction sale of the suit property, the 1st Defendant took possession of the premises while construction materials and equipment belonging to the Plaintiff remained on the site. According to the Plaintiff, those items constituted movable property belonging to the contractor and did not form part of the land or fixtures passing with the property upon sale.

79. On that basis, the Plaintiff argued that the 1st Defendant unlawfully appropriated or retained those materials and was therefore liable in the tort of conversion for the value of the said items.

80. The 1st Defendant, however, denied any interference with the Plaintiff's alleged property and maintained that the Plaintiff had failed to prove the existence, ownership, and value of the items claimed.

81. The tort of conversion involves a wrongful interference with the goods of another, such as taking, using or destroying these goods in a manner inconsistent with the owner's right of possession. The tort is one of strict liability, and accordingly, it is no defence that the wrongful act was committed in all innocence. (See **Boma Manufacturing Ltd v Canadian Imperial Bank of Commerce (1996) CanLII 149 (SCC)**).

82. In the present case, the Plaintiff alleged that construction materials and equipment valued at Kshs. 9,302,242/- remained on the site following the auction sale. However, apart from the assertions made by Pw1, no independent documentary or expert evidence was produced to demonstrate the existence, ownership, or value of those materials.

83. Furthermore, some of the items described by the Plaintiff appear from their description to have been fixtures

attached to the building. In my view, fixtures attached to land ordinarily pass with the land upon sale unless there is an agreement to the contrary.

84. The evidence on record also shows that the 1st Defendant purchased the property at a public auction on an “as-is-where-is” basis, meaning that the property was acquired in its existing condition together with all fixtures attached thereto.

85. In the absence of cogent evidence clearly distinguishing movable equipment from fixtures forming part of the building, the Court is unable to conclude that the 1st Defendant unlawfully appropriated or converted property belonging to the Plaintiff.

86. It is trite that the burden of proof lies upon the party who asserts the existence of a fact. This principle is codified in Section 107 of the Evidence Act, which provides that:

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

87. In the circumstances of this case, the Plaintiff did not discharge that evidential burden. Consequently, the claim founded on the tort of conversion cannot be sustained.

Whether the Plaintiff proved its claim for special damages

88. The Plaintiff claimed special damages amounting to Kshs. 49,017,372/-, and the value of converted property amounting to Kshs. 9,302,242/-.

89. The law is settled that special damages must not only be pleaded but must also be specifically and strictly proved.

90. In the present case, although the Plaintiff particularized the sums claimed in the plaint, it did not produce sufficient documentary evidence, such as invoices, receipts, payment certificates, valuation reports, or other financial records, demonstrating the precise sums claimed.

91. In the absence of such proof, the Court is unable to verify the alleged losses. Accordingly, the Court finds that the claim for special damages was not proved to the required legal standard.

92. Since the underlying tort of conversion has not been established, the Plaintiff's claim for general damages for conversion must equally fail.

93. The Plaintiff also prayed for exemplary and punitive damages. Such damages are only awarded in limited circumstances, particularly where the defendant's conduct is oppressive, arbitrary or unconstitutional.

94. In the present case, the Plaintiff did not demonstrate conduct on the part of the Defendants that would justify the award of exemplary damages. The evidence instead shows

that the 2nd Defendant exercised its statutory power of sale following default by the borrower, while the 1st Defendant purchased the property at a public auction. No evidence of oppressive or arbitrary conduct was established.

95. The prayer for interest at commercial rates and any other consequential reliefs cannot arise where the substantive claims have not been proved.

96. In the result, and having carefully considered the pleadings, the evidence on record, and the submissions of the parties, the Court finds that the Plaintiff has failed to prove its case against the 1st and 2nd Defendants on a balance of probabilities.

97. The Court notes that an interlocutory judgment had earlier been entered on 19th April 2024 against the 3rd Defendant, Ringa Properties Limited, for failure to enter an appearance and/or file a defence.

98. From the evidence on record, the construction agreement dated 15th March 2011 was executed between the Plaintiff and the 3rd Defendant, and any contractual obligations arising therefrom lay primarily as between those two parties.

99. The dismissal of the Plaintiff's claim against the 1st and 2nd Defendants does not affect the judgment previously entered against the 3rd Defendant.

100. Consequently, I make the following final dispositive orders:

- i. The Plaintiff's suit against the 1st and 2nd Defendants is hereby dismissed in its entirety.***
- ii. The Plaintiff's prayers for general damages for breach of contract, special damages, the value of the alleged converted property, general damages for conversion, exemplary damages, and interest at commercial rates are hereby declined.***
- iii. The 1st and 2nd Defendants shall have the costs of the suit.***
- iv. The interlocutory judgment entered against the 3rd Defendant shall stand, and the Plaintiff shall be at liberty to proceed with formal proof or enforcement thereof in accordance with the law.***

JUDGMENT delivered virtually, dated and signed at **NAIROBI**

This **12th** day of **March** 2026.

P.M. MULWA
JUDGE

In the presence of:

Mr. Gichuru for Plaintiff

Mrs. Kerio for 1st Defendant

Mr. Ongeru h/b for Mr. Kithinji for 2nd Defendant

Court Assistant: Carlos