**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NYERI**

**CIVIL APPEAL NO. E007 OF 2025**

**CONSOLIDATED BANK OF KENYA LTD.....**

**APPELLANT**

**VERSUS**

**LIVING FAITH MINISTRIES..... 1ST RESPONDENT**

**SIMON MBUGUA GITHUI..... 2ND RESPONDENT**

*(Being an Appeal from the Judgment and Decree of Honourable Mary Gituma, Senior Resident Magistrate, given on 22.01.2025, arising from Nyeri CMCC No. E063 of 2023 - Living Faith Ministries v Simon Mbugua Githui and Consolidated Bank of Kenya Limited)*

**JUDGMENT**

1. This is an appeal from the Judgment and decree of Honourable Mary Gituma, Senior Resident Magistrate, given on 22.01.2025, arising from Nyeri CMCC No. E063 of 2023. The appellant was the second defendant.

2. The court heard the case and allowed the case as follows:
    a. Deposit Ksh. 2,000,000/=
    b. Legal fees Ksh 93,750/=
    c. Interest on deposit Ksh. 100,000/=

**Total Ksh. 2,193,750/=**

d. Counterclaim dismissed with costs to the first respondent and the appellant.

3. The Appellant was aggrieved by the judgment and filed a Memorandum of Appeal dated 21.02.2025, raising the following grounds of appeal:
   a. THAT the learned trial magistrate erred in law and in fact in finding that the appellant herein misrepresented to the 1st respondent as regards the discharge of title deed to land parcel No Nyeri/Municipality Block 1/985.

   b. THAT the learned magistrate erred in law and in fact in failing to appreciate that the correspondence between the appellant and the 1st respondent was on a 'without prejudice' basis and thus could not be used against the appellant in this matter.

   c. THAT the learned trial magistrate erred in law and in fact in failing to appreciate the doctrine of privity of contract thus arriving at a wrongful conclusion that the appellant was liable to pay the 1st respondent the sum of Kshs 2,000,000/= notwithstanding the fact that the appellant was not a party to the sale agreement dated 27th October 2022 entered into by the 1st and 2nd respondent.

d. THAT the learned trial magistrate erred in law and in fact in departing from the parties pleadings specifically the fact that the 2nd respondent denied knowledge of the communication between the appellant and the 1st respondent.

e. THAT the learned trial magistrate erred in law and in fact in finding the appellant jointly and severally liable with the 2nd respondent to pay the 1st respondent the sum of Kshs 2,000,000/= which finding is against the evidence adduced during the trial.

4. The appellant prayed that the appeal be allowed and the judgment delivered in Nyeri CMCC No. E063 of 2023 and the consequent decree be set aside.

Pleadings

5. The matter arose from an agreement for the sale of land parcel number Nyeri Municipality Block 1/985. The Living Faith Ministries, which was the plaintiff, described itself as a society registered under the Societies Act. The second respondent was the first defendant and the registered owner of land parcel number Nyeri Municipality Block 1/985 and a chargor to the appellant. The appellant, who was the second defendant, was the chargee.

6. It was averred that in August 2022, an agent of the appellant approached the first respondent for the sale of the suit land.

The first respondent conducted a search and found that the suit property was charged, but the same was under an irregularly serviced facility. Thereafter, the said agent introduced the first respondent to the second respondent to formalize the terms, which were agreed.

7. On 12.09.2022, the first respondent wrote to the appellant expressing its interest and to know the extent of the second respondent's liability. The appellant granted a consent and a no-objection letter for the sale transaction. The first respondent signaled its acceptance of the conditions set by the appellant. The appellant informed the 1st respondent of the amount payable to discharge the property.

8. Further, an agreement was made on 27.10.2022, where a deposit of Ksh. 2,000,000/= was made to allow the expected discharge. The appellant was to discharge the title to allow completion within 90 days. By a letter dated 30.12.2022, the first respondent learned that the discharge was not effected.

9. The first respondent sought the following:

    a. Deposit Ksh. 2,000,000/=
    b. Legal fees Ksh 93,750/=
    c. Interest on deposit Ksh. 100,000/=

    **Total Ksh. 2,193,750/=**

10. The second respondent filed a defence basically admitting the claim, except to the extent that he was not privy to the sale

by private treaty, insofar as the letter of 5.10.2022 was concerned, and the extent of the amounts to clear the loan. These were mere denials, and no concrete defence was set forth. He set forth a counterclaim that he had been informed of the private treaty and had executed the agreement in good faith.

11. The appellant failed to release the documents and fraudulently misrepresented itself to the respondents. Particulars of misrepresentation and breach of contract were set forth. This was that they knowingly formalized a contract but unilaterally terminated the same. The second respondent sought general damages for breach of contract and misrepresentation and an order to compel the appellant to indemnify the second respondent for all the loss. An order was issued further directing release of the security documents to the second respondent.

12. The appellant filed a defence on 23.1.2024. They denied being privy to the sale agreement. They admitted failure to discharge the title but alluded to the second respondent's failure to fulfil its obligations under the entire transaction. The alleged obligations were not set out.

13. The appellant filed defence to the second respondent’s claim. The same were mere denials. There was only an averment that the second respondent failed to fulfil their

transaction. However, the appellant was oblivious of their duty to the first Respondent.

Evidence

14. The first respondent testified through Jacob Kamere, who is an official of the said society. He adopted his statement dated 13.03.2023 and a list of documents dated 17.03.2023. He stated that he entered into an agreement dated 27.10.2022 pursuant to which he subsequently paid some money. They had an undertaking that, should the money be paid, they were to release title to them. The documents produced were:
    (i) Certificate of official search of Nyeri/Municipality/Block I/985 dated 31.8.2022.
    (ii) Copy of Certificate of registration of the plaintiff
    (iii) Letter dated 12.9.2022 to 2nd defendant
    (iv) Letter dated 30.9.2022 from 2nd defendant
    (v) Letter dated 5.10.2022 to 2nd defendant
    (vi) Letter dated 7.10.2022 from 2nd defendant
    (vii) Email dated 13.10.2022 from 2nd defendant
    (viii) Email dated 17.10.2022 to the 2nd defendant
    (ix) Agreement dated 7.10.2022
    (x) Funds transfer dated 27.10.2022
    (xi) Letter dated 21.12.2022 to the 2nd defendant
    (xii) Letter dated 30.12.2022 by the 1st defendant
    (xiii) Letter dated 3.2.2023 to the 2nd defendant

(xiv) Letter dated 3.2.2023 to the 1st defendant

15. On cross-examination, he stated that he was introduced to Sammy Njue, an agent of the bank. He said he did not have any documents to show that Sammy Njue was an agent of the bank. He stated that he deposited money in the 2nd respondent's account with the Appellant. He was not cross-examined by the second Respondent.

16. The second respondent was DW1. He adopted his statement dated 4.11.2023. The same rehashed the defence's. He produced his supporting documents and stated that the bank had agreed to the sale at Ksh 8,000,000/=. The bank had agreed to the sale by private treaty. On cross-examination by the first respondent, he stated that he was in financial distress and the bank had enlisted the services of Mr. Njue. The loan had been fully paid by the first respondent. He denied that there was an undertaking to withdraw the Kajiado matter before discharge. The documents produced were:

a) Agreement for sale
b) Request for the release of title documents
c) Request for waiver of interest
d) E-mail dated 4th January 2023
e) Letter from Consolidated Bank dated 7th October, 2022
f) Letter from Consolidated Bank dated 27th October, 2022
g) Letter from the defendant dated 30th September, 2022

h) Letter to Consolidated Bank of Kenya dated 5th December, 2022
i) Letter from Consolidated Bank dated 23rd December, 2022
j) Application for Funds Transfer
k) Official search dated 31st August, 2022

17. On cross-examination by the bank, he stated that there were many communications between him and the bank before 30.09.2022. He stated that the letter of 30.09.2022 was without prejudice. It was an undertaking to the bank. A sum of Ksh. 1,143,472.12 was utilized to clear the loan, but he contested and the bank took Ksh. 698,996.32. The balance was utilized for his personal work.

18. On re-examination, he stated that the letter of 29.09.2022 was addressed to him and not the first respondent. The first respondent was not a party to E009 of 2024 at the time of the agreement. He stated that they did not owe any money to the bank. He wished that the title be released to enable the sale to be completed.

19. The appellant testified through Lilian Mungai as DW2. She adopted her statement dated 4.05.2024 and produced a list of documents dated the same date. The documents produced were:

a) Letter of offer dated 9th June, 2011

b) Demand letter dated 13th May, 2022
c) Demand letter dated 16th August, 2022
d) Letter dated 30th August, 2022 by the 1st defendant
e) Letter dated 29th September, 2022 by the 2nd defendant
f) Letter dated 30th September, 2022 by the 2nd defendant
g) Letter dated 7th October, 2022 by the 2nd defendant
h) Letter dated 26th October, 2022 by the 1st defendant advocates
i) Letter dated 5th December, 2022 by the 1st defendant advocates
j) Letter dated 23rd December, 2022 by the 2nd defendant

20. She stated that the second respondent took a loan of Ksh. 2,335,000 and a development loan of Ksh. 3,534,832.60 and offered the following securities:
    a. First charge over land parcel number Ngong/Ngong/25084
    b. Further charge over land parcel number Ngong/Ngong/25084
    c. First charge over land parcel number Nyeri Municipality Block 1/985

21. The charge over land parcel number Nyeri Municipality Block 1/985 was for Ksh. 3,000,000/= and a sum of Ksh 1,143,472/= was said to be due after statutory notices were issued.

22. They said the amounts were reconsidered and a sum of Ksh 358,343/= was found to be due, but which the appellant was willing to write off. They advised the second respondent to pay a sum of Ksh. 698,999.02. They consented to a sale subject to withdrawal of E009 of 2020 - Sim*on Mbugua Githui v Consolidated Bank Ltd and another,* and payment of loan recovery costs of Ksh. 698,999.32. The second respondent accepted the terms, while the appellant accepted the sale by private treaty on a strictly without prejudice basis. They did not discharge since the 1st defendant refused to withdraw the suit, E009 of 2020 - *Simon Mbugua Githui v Consolidated Bank Ltd and another*. They said they were not liable for a sum of Ksh. 2,193,750/=.

Submissions

23. The appellant filed submission. They submitted that the second respondent defaulted in servicing his loan, prompting the appellant to exercise its statutory power of sale sometime in the year 2022. Before the property could be sold, the appellant approved the sale of the aforementioned property by way of private treaty between the two respondents. Further, that prior to the sale by way of private treaty, the appellant had given its conditions for the sale to the second respondent vide its letter dated 30.09.2022, terms of which were accepted by the second respondent. It was submitted that upon request by the first respondent, the appellant, on a 'without prejudice

basis', gave its nod to the sale and even advised on the outstanding balance.

24. The respondents proceeded to later execute the agreement for sale on 27th October 2022, whereby the first respondent paid a deposit of Ksh. 2,000,000/= in the second respondent's bank account, out of which the sum of Ksh 698,996.32 was utilized to clear the outstanding loan amount. The appellant, on the apparent failure by the second respondent to fulfill its part of the bargain in the entire transaction, never discharged the title deed to the property. They set out two issues for determination, that is:

    a. Whether appellant herein misrepresented to the first respondent regarding the discharge of the title deed for land parcel No Nyeri/Municipality Block 1/985.
    b. Whether the appellant is liable to pay the first respondent the sum of Ksh 2,000,000/=.

25. They set out the duty of this appellate court. The same was aptly put in the case of **Taj Mall Limited v Cobra Security Limited [2024] KEHC 2117 (KLR**), where the court stated as follows:

> *'This being a first appeal, the duty of the first appellate court is to reevaluate the evidence adduced before the trial court and to arrive at its own conclusion whether to support the findings of*

*the trial court while bearing in mind that the trial court had the opportunity to see the witnesses'*

26. They submitted that the appellant never made any misrepresentation to the 1st respondent as regards the discharge of the title deed for land parcel No. Nyeri/Municipality Block 1/985. The letters that the 1st respondent relied on heavily to imply misrepresentation on the part of the appellant, namely, the letters dated 30.09.2022 and 7.10.2022, were made on a without prejudice basis and cannot be used against the appellant. Further, the respondents herein proceeded to execute the sale agreement dated 27th October 2022, in which the appellant herein was not a party.

27. In impugning the letters dated 30.09.2022 and 7.10.2022, they stated that the said letters were made purely on a without prejudice basis and thus inadmissible as evidence. Reliance was placed on the *KSC International Limited (Under Receivership) & 4 others v Bank of Africa (Kenya) Limited & 7 others [2023] KEHC 24298 (KLR)*.

28. It was their submissions that there was no misrepresentation by the appellant, as both respondents proceeded to execute the sale agreement dated 27.10.2022 for the sale of land parcel No Nyeri/Municipality Block 1/985. The respondents themselves executed the agreement, thereby creating an intention to be bound, and the appellant was never a party to the said agreement.

29. It was submitted that the appellant is not in any way liable to pay the first respondent the sum of Kshs 2,000,000/= as the same was paid pursuant to a sale agreement dated 27.10.2022, which the appellant was not a party to. The amount was deposited into the second Respondent's personal account, and only Kshs. 698,996.32 was utilized by the appellant to clear the second Respondent's outstanding loan.

30. They submitted that because they were parties to the sale agreement dated 27.10.2022, the appellant was not obligated under the agreement. They submitted that, at the time of executing the agreement dated 27.10.2022, the second respondent denied having been privy to the communications between the appellant and the 1st respondent, which meant that the second respondent contracted the 1st respondent without the input of the appellant whatsoever. Further to this, the second respondent, at the time of entering into the sale agreement, was fully aware of other conditions they had agreed with the appellant regarding the sale of land parcel No. Nyeri/Municipality Block 1/985, as contained in the 29.09.2022. There was no misrepresentation whatsoever on the part of the appellant regarding the discharge of the title deed of land parcel No. Nyeri/Municipality Block 1/985.

31. The appellant submitted that they had demonstrated that there was merit in the appeal and ought to be allowed.

32. The second respondent did not file submissions despite the chances given to do so.

33. The first respondent filed submissions. They submitted that a sum of Ksh 2,000,000/= paid was to discharge all liabilities to enable the appellant to discharge the suit land. However, upon payment, the appellant reneged on its promise and refused to discharge the contract of sale, thereby frustrating the contract. The first respondent submitted that he was willing to proceed with the transaction, but the appellant frustrated it. The first appellant did not even have the decency to communicate its change of mind. The deal would have proceeded were it not for the appellant's conduct. Accordingly, they submitted that the appellant’s conduct was an express breach of an undertaking given to the first respondent.

34. They further submitted that the matters raised were not part of the matters in court and are not connected to the second respondent. They stated that the appellant was not only an interested party but also a beneficiary. They submitted that there is recognition of an exception to the general doctrine of privity of contract. This was to be seen from the parties' express intention. A court cannot hesitate to enforce a contract with third parties, especially where one has relied on it to their detriment. They placed reliance on the case of **Kega & another v Blue Nile (East Africa) Limited**

**(Environment and Land Appeal E032 of 2022) [2025] KEELC 232 (KLR)**, where J.O. Olola, J, held as follows:

> 20.As Lord Steyn stated in Darlington Bourough Council – vs- Witshire Northern Ltd. (1995) 1 WLR 68:
>
> > " The case for recognizing a contract for the benefit of a third party is simple and straightforward. The autonomy of the will of the parties should be respected. The law of contract should give effect to the reasonable expectations of contracting parties. Principle certainly recognizes that a burden should not be imposed on a third party without his consent. But there is no doctrinal, logical, or policy reason why the law should deny effectiveness to a contract for the benefit of a third party where that is the express intention of the parties. Moreover, often the parties, and particularly third parties, organize their affairs on the faith of the contract. They rely on the contract. It is therefore unjust to deny effectiveness to such a contract."
>
> 21. Arising from the foregoing, it was clear to me that the agreement relied upon by the parties falls under the exception to the rule of privity of contract and the trial Magistrate was again right in her conclusion on the second limb of the objection.

35. It was their submission that the question of without prejudice is a misdirection. They submitted that once without-prejudice results in concurrence, the protection is lost. They relied on the decision of **Mumias Sugar Co. Ltd & another**

**v Beatrice Akinyi Omondi [2016] KEHC 5129 (KLR),**

where Njoki Mwangi, J held as follows:

> 18. The cases cited in this ruling have shown that the rule of “without prejudice” is not absolute, it has exceptions. I find that since the respondent accepted the appellants' offer, the letter from the appellants written on a “without prejudice” basis was excluded from the operation of the provisions of section 23 (1) of the Evidence Act, thus rendering it admissible in evidence.
>
> 19. The treatise Halsbury's Laws of England Vol. 17 at paragraph 213 states-
>
> > "The contents of a communication made "without prejudice" are admissible when there has been a binding agreement (emphasis mine) between the parties arising out of it, or for the purpose of deciding whether such an agreement has been reached and the fact that such communications have been made (though not their contents) is admissible to show that negotiations have taken place, but they are otherwise not admissible."
>
> The above commentary solidifies the decision taken by this court that the letter in issue in this case, is admissible.
>
> If any agreement ensuing from the negotiations is enforceable in law
>
> 20. The negotiations in this case mutated and assumed the form of a contract from the date of

posting of the respondent’s Advocate's email to the appellants' Advocates on 18th of August, 2015. The general principles of contract then came into play. Chitty on Contracts, 24th edition, volume 1 at page 21, paragraph 41 states that -

> “In order to decide whether the parties have reached an agreement it is usual to inquire whether there has been a definite offer by one party and an acceptance of that offer by the other. In answering this question, the courts apply an objective test: if the parties have all outward appearances agreed in the same terms upon the same subject matter, neither can generally deny that he intended to agree."

36. They concluded that the protection of without prejudice communication lapsed when the appellant and second respondent accepted the terms of the deal. Otherwise, the second respondent would be put to a loss or would have been liable for the loss. It was thus callous, dishonest, and in bad faith to renege on a clear and unequivocal representation under the guise of a without prejudice communication. The court was urged to dismiss the appeal.

Analysis

37. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and

hearing their evidence firsthand. In the case of *Mbogo and Another vs. Shah [1968] EA 93* the Court stated:

> *"…that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."*

38. The duty of the first appellate court discussed by Clement De Lestang, VP, Duffus and Law JJA, in the locus classicus case of **Selle and another Vs Associated Motor Board Company and Others [1968]EA 123**, where the Judges in their usual gusto, held as follows:

> ".. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

39. The Court is to bear in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the

demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them. In the case of **Peters vs Sunday Post Limited [1958] EA 424**, the court therein rendered itself as follows:-

> **"It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses…But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion…"**

40. The case presents a complex deception, subterfuge, and misrepresentation of documents. It must be remembered that it is not the court's duty to amend the terms of the agreement between the parties. The four grounds raise 5 specific issues that the court should address.

41. A Court of law cannot re-write a contract between the parties. In the case of **National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another [2001] eKLR** it was held as follows: -

> "A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There

was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge.

As was stated by Shah JA in the case of *Fina Bank Limited vs Spares & Industries Limited* (Civil Appeal No 51 of 2000) (unreported):

"It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity's function to allow a party to escape from a bad bargain".

42. The issues raised are:

a. Whether the first respondent proved its case.

b. Without prejudice correspondence.

c. Whether the court failed to appreciate the doctrine of privity of contract.

d. Whether the court departed from pleadings.

e. Whether a court can decide on unpleaded issues.

43. To be able to contextualize, problematize, and conceptualize the imbroglio that affected the case in the court below, there is a need to address the documents filed by the parties. It must be remembered that documents must speak for themselves. In **Fidelity & Commercial Bank Ltd V Kenya Grange Vehicle Industries Ltd (2017) eKLR**, the Court of Appeal, Ouko, Kiage and Murgor JJA held as doth:

"Courts adopt the objective theory of contract interpretation, and profess to have the overriding

> aim of giving effect to the expressed intentions of the parties when construing a contract. This is what sometimes is called the principle of four corners of an instrument, which insists that a document's meaning should be derived from the document itself, without reference to anything outside of the document (extrinsic evidence), such as the circumstances surrounding its writing or the history of the party or parties signing it.

44. Gerald Dworkin in *Odgers' Construction of Deeds and Statutes* (5th edn, Sweet & Maxwell 1967), the learned author at p. 106 states as follows:

> "Parol Evidence and written documents. It is a familiar rule of law that no parol evidence is admissible to contradict, vary or alter the terms of a deed or any written instrument. The rule applies as well as deeds as to contracts in writing. Although the rule is expressed to relate to parol evidence, it does in fact apply to all forms of extrinsic evidence.
>
> As it stands this is not a rule of interpretation but of law, and means that the interpretation of the document must be found in the document itself with the addition if necessary of such evidence as we have previously seen is admissible for explaining or translating words and expressions used therein."

45. The transaction in question is document-based. The letter dated 12.09.2022 was sent to the appellant. I shall set the same herein in full:

Head of credit
Consolidated Bank Ltd
Consolidated Bank House
23 Koinange Street,
P.o. box 51133-00200
Nairobi

**RE: SALE AND PURCHASE OF PROPERTY LR NYERI MUNICIPALITY BLOCK 1/985**

Our client, Hilstead School, is interested in purchasing the above property.

On 10.09.2022, we met with one Sammy Njue and the proprietor, Simon Mbugua Githui. In view of the subsistence of the charge, our client has instructed us to seek further and better particulars in order to make an informed choice on the transaction;

i. If the bank is agreeable to have the property availed for sale and to that extent the willingness to grant a consent and an indemnity to the purchaser with the concurrence of the chargee.
ii. That in the event of such sale materializing, the amount due under the charge be deposited with the bank on condition that it shall discharge the property.
iii. The agreed price of Ksh. 8,000,000/= is acceptable to the bank and the registered proprietor.

Our client, who is your customer in the Nyeri branch, is keen on having the bank finance the balance of the purchase price to the extent of 75% of the purchase price. It would appreciate your appraisal if it is likely to qualify in order to commit to the transaction.

This is therefore to request you to let us know if the above proposal is agreeable. Kindly let us have your views on the same to enable us to advise further.

Yours faithfully

For: Nderi & Kiingati Advocates

46. The letter was swiftly accepted by a letter dated 30.09.2022. The latter was indicated to be without prejudice. I shall equally set it out verbatim.

Partners
Nderi & Kiingati Advocates
P.O. Box 186-10100
NYERI

**RE: SALE AND PURCHASE OF PROPERTY LR NYERI/MUNICIPALITY BLOCK 1/985**

We refer to your letter dated 12th September 2022.

The bank has reviewed the contents of your letter and wishes to confirm that the original title over the above-mentioned property is held as security for loan facilities extended to the vendor and advises as follows:

i. The bank has no objection to the sale of the subject property by private treaty.
ii. The bank shall discharge and release the original title LR Nyeri/Municipality Block 1/985 upon settlement of the outstanding loan balances plus recovery costs by the vendor.
iii. The bank is agreeable to the sale of the property at the proposed Ksh. 8,000,000/=.

*Signed*

Catherine muthiani
Recoveries officer

Faith machira
Manager recoveries

47. The said letter was received on the same day, 30.09.2022. The first respondent wrote a letter dated 5.10.2022:

**RE: SALE AND PURCHASE OF PROPERTY LR <u>NYERI/MUNICIPALITY BLOCK 1/985</u>**

Our client Living Faith Ministries is interested in the property aforementioned.

With the concurrence of the vendor, may we know the amount required towards settlement of the outstanding

facilities and loan recovery costs to enable us to consider entering into a sale agreement.

Our client intends to use the said title for payment of the balance of the purchase price.

We would be grateful to have your response.

Yours faithfully

For: Nderi & Kiingati Advocates

48. A Letter dated 7.10.222 was written to the advocates as follows:

**RE; SALE AND PURCHASE OF PROPERTY LR NYERI/MUNICIPALITY BLOCK 1/985**

We refer to your letter dated 5.10.22.

The bank has reviewed the contents of your letter and wishes to advise that the total outstanding balance on the account of vendors is Ksh. 698,996.32

*Signed*

Catherine muthiani
Recoveries officer

Faith machira
Manager recoveries

Cc: Simon Mbugua Githui

49. The matters proceeded very fast. On 13.10.2022, the firm of Mugoye and Associates Advocates, acting for the second respondent, now weighed in. They wrote an email and copied it to the bank and the second respondent. The email was to the effect that:

> October 13, 2022, at 9.18 am.
>
> Dear Mr. Nderi,
>
> Your correspondence between you, our client and Consolidated Bank has been placed in our hands with instructions to respond thereto.
>
> That yours is interested in purchase of the above named property.
>
> In view of the foregoing, kindly favour us with the particulars of registration to enable us prepare a draft agreement for sale for your perusal and record.
>
> *Signed*: George M. Mbeya
> Managing Partner

50. The agreement was reviewed and accepted. It was signed by the respondents, and a sum of Ksh 2,000,000/= was deposited with the appellant in the second respondent's account. The first respondent issued a notice dated 21.12.2022, where they referred to the previous correspondence and posited as follows:

> We are reliably informed that despite the deposit being made to you by our client purchaser on

> 27.10.2022, you are yet to discharge the title to enable the transaction to progress.
>
> Our client proceeded on the promise made by you in the aforementioned letter. In the event there is no progress, ours shall be demanding a refund of the deposit paid to yourselves and attendant costs and interest. This is to put you on notice that the period required for the transaction is fast diminishing.

51. The second respondent wrote another letter where he lamented that the condition to withdraw the Kajiado case was coercion and the same are not related. The Kajiado land involves Ngong/Ngong/25084, not the Nyeri property.

52. Subsequently, a demand notice was issued to the appellant and the second respondent. No responses were given to the last 4 letters.

53. The second respondent filed the same documents as the first respondent, except for three additional letters. The first one relates to the Ngong lot and has nothing to do with the matter herein. The second and third were letters dated 5.12.2022 and 23.12.2022. The letter dated 5.12.2022 reminded the appellant that the first respondent's payment was made following the appellant's assurance.

54. The question before the court, from the documents, is whether the appellant has laid a basis to disturb the judgment. It should be remembered that the burden of proof lies on the

party who alleges. It is provided for under sections 107-109 of the Evidence Act. The said sections provide as follows: -

> **"107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.**
>
> **(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.**
>
> **108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.**
>
> **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."**

55. This is not a criminal trial. It is a civil trial in which the court must find for one party or the other on the balance of probabilities. The question as to what amounts to proof on a balance of probabilities was discussed by Kimaru, J in **William Kabogo Gitau vs. George Thuo & 2 Others** [2010] 1 KLR 526 as follows:

> **"In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage**

**terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."**

56. This was further enunciated in the case of **Palace Investments Limited v Geoffrey Kariuki Mwenda & Dollar Auctions [2015] KECA 616 (KLR)**, where the Court of Appeal [J Karanja, GG Okwengu, CM Kariuki, JJA] stated as follows:

> The burden of proof is placed upon the appellant and is to be discharged on a balance of probabilities. Denning J. in Miller –vs- Minister of Pensions [1947] 2 ALL ER 372 discussing the burden of proof had this to say:-
>
> > "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: 'We think it more probable than not', the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un)convincing, the party bearing the

> burden of proof will lose, because the requisite standard will not have been attained."

57. Parties are bound by the pleadings. They cannot be heard on matters they did not place before the court. Further, before a party proceeds to prove a matter, they need to be pleaded. In the absence of pleadings, the court will be deluged with quicksand. In the case of **Migore v South Nyanza Sugar Co Ltd [2018] KEHC 5465 (KLR),** A C Mrima, J, stated as follows:

> 11. It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings: -
>
> *.....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way,*

*which is at variance with the averments of the pleadings goes to no issue and must be disregarded……*

*…In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.*

In the case of Malawi Railways Ltd vs Nyasulu [1998] MWSC 3, Malawi Supreme Court of Appeal stated as doth when the learned judges cited with approval an article by Sir Jack Jacob entitled The Present Importance of Pleadings published in [1960] Current Legal Problems at p 174 whereof the learned author posited that: -

*As the parties are adversaries, it is left to each one of them to formulate his case in his own way subject to the basic rules of pleadings …….for the sake of certainty and finality; each party is bound by his own pleadings and cannot be allowed to raise a different fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty court to enter upon any inquiry into the case before it other than to*

*adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice….*

*In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called Any Other Business in the sense that points other than those specific may be raised without notice.*

58. In respect to the essence of pleadings, the Supreme Court of Kenya in its ruling on *inter alia* scrutiny in the case of **Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR** found and held as follows in an election petition:

> 58. In the case of Arikala Narasa Reddy v Venkata Ram Reddy Reddygari & anr, Civil Appeal Nos 5710-5711 of 2012; [2014] 2 SCR the Supreme Court of India held that [paragraph 8]:

....

52.Further, the court went on and observed that:

> "In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings. The court cannot exercise discretion of ordering recounting of ballots just to enable the election petitioner to indulge in a roving inquiry with a view to fish material for dealing the election to be void. The order of recounting can be passed only if the petitioner sets out his case with precision supported by averments of material facts.

59. The question of without prejudice communication was neither pleaded nor left to the court. Of great importance, there was no objection to their production, hence it is not a matter left for determination. More crucially, the appellant produced the same documents in evidence. Being authors of the letters, they cannot approbate and reprobate. In the case of **KSC International Limited (Under Receivership) & 4 others v Bank of Africa (Kenya) Limited & 7 others**

[2023] KEHC 24298 (KLR), A Mabeya, J, stated as follows in regard to without prejudice communication.

> 25. In Oceanbulk Shipping and Trading SA v. TMT Asia Limited and 3 others [2010] UKSC 44, on the legal principles of the "without prejudice" rule, in a majority decision of the Supreme Court of the United Kingdom, the Judges stated-“The approach to without prejudice negotiations and their effect has undergone significant development over the years. Thus the without prejudice principle, or, as it is commonly called, the without prejudice rule, initially focused on the case where negotiations between two parties were regarded as without prejudice to the position of each of the parties in the event that the negotiations failed. The essential purpose of the original rule was that, if the negotiations failed and the dispute proceeded, neither party should be able to rely upon admissions made by the other in the course of the negotiations. The underlying principle of the rule was that parties would be more likely to speak frankly if nothing they said could subsequently be relied upon and that, as a result, they would be more likely to settle their dispute".
>
> 26.Further, in Millicent Wambui v Nairobi Botanica Gardening Ltd cause no 2512 of 2012, the Court stated that:-“…the application revolves around “without prejudice” communication. The use of the term “without prejudice” is used by parties as a means to enable offers and counter offers to be made to settle disputes or claims without fear that the said letters would later be used by the opposite party as an admission of liability in the ensuing law suit. The words “without prejudice” impose upon the

communication an exclusion of the use against the party making the statement in subsequent court proceedings. It is a well-established rule that admissions, concessions or statements made by parties in the process of trying to resolve a dispute cannot be used against that party if the dispute is not resolved thus resulting in litigation. A party making a “without prejudice “offer does so on the basis that they reserve the right to assert their original position, if the offer is rejected and litigation ensues. For correspondence between parties to be protected it must be made in a genuine attempt to settle a dispute between the parties.”

27.In addressing this issue, Halsbury's Laws of England vol 17 at paragraph 213 states-“The contents of a communication made "without prejudice" are admissible when there has been a binding agreement between the parties arising out of it, or for the purpose of deciding whether such an agreement has been reached and the fact that such communications have been made (though not their contents) is admissible to show that negotiations have taken place, but they are otherwise not admissible."

28.From the foregoing, it is clear that without prejudice communication is protected. However, it can be relied on to where there is compromise. This includes where there is acceptance of the proposal made on a without prejudice. The acceptance must be unequivocal and without conditions. Where it is accepted with conditions, the same amounts to a counter-offer and the rules relating counter-offers apply.

60. First, all the issues raised regarding the existence of E009 of 2020 - *Simon Mbugua Githui v Consolidated Bank Ltd and another* were not pleaded. The offer to the first respondent did not include a condition.

61. The most surprising element was that both the principal and interest had been paid. What was being used as bait were alleged legal fees and recovery expenses. The appellant adjusted the same. The court is, however, unable to understand how a sum of Ksh. 698,996.32 was used in the recovery of a sum of Ksh. 358,343.79. Reading the statement by the appellant's witness, it is clear that it was an admission that the principal and interest were settled.

62. What the first respondent paid were recovery charges. They were not pleaded nor set down. The court notes that the appellant's practice was symptomatic of predatory lending practices. The appellant was placing roadblocks throughout to prevent the 2nd respondent from settling the debt. Pray, if the dispute was of Ksh. 698,996.32, why not hold the entire Ksh 2,000,000/= and release the title deed?

63. The conduct of the appellant fell far below that required of a commercial entity. It may not be surprising that the title deeds were held for rent seeking, now that the second respondent was liquid.

64. The purported requirement to withdraw from a case had nothing to do with the matter other than clogging the equity of redemption. In the case of **Mbuthia v Jimba Credit Finance Corporation & another [1988] KECA 116 (KLR),** the Court of Appeal [Platt, Apaloo JJA & Masime Ag JA] posited as follows:

> The correct legal position is stated at Page 314 of Fisher and Lightwood Law of Mortgage in these words:
>
> "A sale destroys the equity of redemption in the mortgaged property, and constitutes the mortgagee exercising the power of sale a trustee of the surplus proceeds of sale, if any, for the persons interested according to priorities."
>
> The fact that some time would elapse before the conveyancing formalities are completed and the vesting of legal title in the purchaser, in no way affects the position.
>
> The decision of Crossman J was made in 1934, it was followed by Ungoed Thomas J. in the comparatively recent case of *Property & Bloodstock Ltd. vs Empton* [1967] 3 All E.R. 311: Its correctness was impugned in the Court of Appeal. That Court unanimously held that decision was correct. Dankwerts LJ who read the first judgement of the Court inter alia said:

> "In my opinion, Crossman J's decision in Lord Warring's case was plainly correct and cannot be successfully assailed."

The two other Lord Justices agreed and Sellers LJ expressed his concurrence in these words:-

> "The law as I see it, is correctly stated in the headnote to *Lord Waring v London & Manchester Assurance Company*"

which he quoted as follows:-

> "The Court will not grant to a mortgagor tendering the moneys due under the mortgage an injunction restraining the mortgagee from completing by conveyance a contract to sell the mortgaged property in exercise of his power of sale unless it is proved that the mortgagee entered into the contract in bad faith."

65. What does this mean in practical terms? What it means is that, once it was entered and payment made, the second Respondent ceased to have a say on the land, except for the money. The land was deemed sold upon signing the agreement and subsequent payment. The charge cannot renege on this, as he has no other power over that title. Any dispute between the appellant and the second respondent is outside the agreement already entered into between the appellant and the first respondent to purchase the property and payment of Ksh. 698,996.32. The payment of Ksh 698,996.32, as agreed, led to the discharge of the property. There was no justification to

delay the release of the title deed. The same had not been released for four years. The appellant cannot hold to this at all. They shall therefore release the title to the second respondent.

66. In this case, the without prejudice communication resulted in an agreement and not just the agreement, but also payment. There is no outstanding part left unexecuted or unagreed upon by the parties. Indeed, there was no dispute raised between the appellant and the first respondent. It was alleged in general terms that the second respondent failed in its obligations. These obligations were unnamed. There was an attempt to link this to a property and suit in Ngong. This will be fraudulent and dishonest on the part of the bank. The court cannot act on evidence, even where it is established, in the absence of pleadings. In the presidential Election Petition, the Court of Appeal of Nigeria, sitting as the election court, in **Peter Gregory Obi & another versus Senator Bola Ahmed Tinubu &INEC & 3 others consolidated with petitions no. 4 and 5 both of 2023**, stated as doth: -

> "In Belgore Versus Ahmed (2013) 8 NWLR (Pt.1355) 60 the complaint against averments in the petition that were unspecific, generic, speculative, vague, unreferable(sic), omnibus and general in terms. The Apex court specifically held as follows: -
> "Pleadings in an action are written statements of the parties wherein they set forth the summary of material facts on which they rely on in proof of

> this claim or his defence as the case may be, and by means of which real matters [in] controversy between the parties are to be adjudicated are pleaded in a summary form. They must nevertheless be sufficiently specific and comprehensive to elicit the necessary answers from the opponent.

67. Further, a party cannot just throw allegations at the court for the court to sweep through and believe them. In the case of **Raghbir Singh Chatte v National Bank of Kenya Limited [1996] eKLR**, the Court of Appeal stated as doth:

> This object is secured by requiring that each party, in turn, should fully admit or clearly deny every material allegation made against him. Thus, in an action for a debt or liquidated demand in money, a mere denial of the debt is wholly inadmissible", (underling supplied).
>
> I will also add that the crucial deficiency of a general denial which I have already described, also applies to the evasive, inconsistent and contradictory alternative general traverse in the appellant's defence. This was that if the respondent had extended any overdraft facilities without stating the amount involved, to the appellant which was moreover, denied, then the same and here again, without stating how and when, had been paid. Such a spurious pleading in the alternative cannot give any merit to the defence and so also makes it one which discloses no reasonable defence for all purposes …

68. There was nothing in the correspondence that was exchanged between the parties that showed that the respondents were at fault at any time.

69. Notably, the agreement between the appellant and respondent was fully executed. I do not agree with the parties that the agreement being enforced is the one dated 27.10.2022. The agreement of 27.10.2022 was between the respondents. They were subsequent to the agreement evidenced in various correspondence between the appellant and respondent. The same was thus independent of the agreement dated 27.10.2022.

70. The agreement was thus concluded. The correspondence was admissible. More critically, this was not an issue left to the court. The idea of not raising a question, implying and reserving it for evidence, is otiose and has no basis in law. There was no implication that there was no agreement, hence the question of without prejudice is irrelevant. The payment of Ksh 2,000,000/= discharged the loan indicated as communicated by the appellant as follows:

> *The bank shall discharge and release the original title LR Nyeri/Municipality Block 1/985 upon settlement of the outstanding loan balances, plus recovery costs, by the vendor.*

71. The bank did not reserve or have any other claw-back clause in its communication to the first respondent. Upon payment of the amount, clause 2 set above in the letter dated 30.09.2022, came into force. The appellant was then irrevocably bound, first to discharge the property and release. They failed to do so. The first respondent is thus entitled to full indemnity.

72. The breach does not vitiate the discharge and the payment. The only aspect is the damages for the bank's breach of the undertaking to discharge upon payment. The bank cannot introduce a term intended to coerce the second respondent into dealing with matters that had been agreed upon.

73. Regarding breach by the second respondent, I do not see any breach whatsoever; there is, however, no cross appeal.

74. The question of whether there was misrepresentation is always tested on the same level as an equitable estoppel. The first limb is the requirement of unequivocal representation. Secondly, the said representation must be to the effect that the person representing must have an intention that the same should be acted upon. Thirdly, that the plaintiff acted on the same, and fourthly, to his detriment. In **Nurdin Bandali v. Lombank Tanganyika Ltd [1963] EA 304**, the former Court of Appeal for Eastern Africa set out the conditions under which equitable estoppel arises as follows:

> **“The precise limits of an equitable estoppel are, however, by no means clear. It is clear, however, that before it can arise one party must have made to another party a clear and unequivocal representation, which may relate to the enforcement of legal rights, with the intention that it should be acted upon and the other party, in belief of the truth of the representation, acted upon it.”**

75. In this case, the appellant, through its agents, approached the first respondent. The first respondent carried out due diligence. Vide a letter dated 12.9.2022, the first Respondent made a request for confirmation of the state of the land and specifically for indemnity for any loss. Vide a letter dated 30.09.2022, the appellant gave an unequivocal representation that, should such an amount be paid, then the title was to be discharged. Meanwhile, the appellant was giving conditions to the second respondent and did not disclose that they were placing roadblocks. The roadblocks, however, were placed on Ngong Road while the transaction was on Nyeri– Nanyuki Road. The position held by the appellant is in irreconcilable conflict with bona fides.

76. The payment of Ksh 2,000,000/= completed the arrears and discharged the title. The contract between the appellant and the first respondent was completed. Only one part remained: the release of the title deed to complete the transaction. Only one party was at fault in this, the appellant.

77. The court was, however, plainly wrong to deal with the condition for withdrawal of the suit in Kajiado. The same was not disclosed and was not related to the suit land. Every party has a right to approach the court. A court withdrawing an unrelated suit is unconstitutional; even if it was pleaded, it would amount to nothing. Article 50(1) provides as follows:

> *Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.*

78. Consequently, no one can place a separate agreement for withdrawal of a suit not related to the matter in issue. Secondly, placing any condition to discharge is clogging the equity of redemption. Section 89 of the Land Act provides as follows:

> 89. (1) Any rule of law, written or unwritten, entitling a chargee (chargee) to foreclose the equity of redemption in charged land is prohibited.
> (2) Upon commencement of this Act, a chargee shall not be entitled to enter into possession of the charged land or a charged lease or to receive the rents and profits of that land or lease by reason only that default has been made in the payment of the principal sum or of any interest or other periodic payment or of any part thereof or

> in the performance or observance of any agreement expressed or implied in the charge, other than in accordance with the provisions of this Act.

79. Consequently, upon payment of the sums due, the appellant ought to have noted that the second respondent was entitled to redeem the security. Indeed, even if there was no agreement upon the sum of Ksh. 698,996.32, the second respondent regained his security.

80. A charge cannot be used for any purpose other than security. The appellant's consent is not required to discharge the charge. A charge is provided under section 80(1) of the Land Act as security. The said section provides as follows:

> 80. (1) Upon the commencement of this Act, a charge shall have effect as a security only and shall not operate as a transfer of any interests or rights in the land from the chargor to the chargee but the chargee shall have, subject to the provisions of this Part, all the powers and remedies in case of default by the chargor and be subject to all the obligations that would be conferred or implied in a transfer of an interest in land subject to redemption.

81. Therefore, the charge can only be a security securing the amounts registered. A sum of Ksh. 698,996.32 was outstanding. The appellant confirmed that the remaining

funds were spent by the second respondent. This, therefore, confirms that the security was redeemed. The only element remaining was discharge.

82. What does the law say on the discharge of a charge? Section 83 of the Land Act provides as follows:

> 85. (1) Subject to the provisions of this section, the chargor shall, upon payment of all money secured by a charge and the performance of all other conditions and obligations under the charge, be entitled to discharge the charge at any time before the charged land has been sold by the chargee or a receiver under the power of sale. (2) Any agreement or provision in a charge instrument that is inconsistent with subsection (1) shall be void to the extent that it
> (a) purports to deprive the chargor of the right to discharge;
> (b) seeks to fetter the exercise of this right; or
> (c) stipulates for a collateral advantage that is unfair and unconscionable or inconsistent with the right to discharge.
> (3) A chargee may provide, in a charge instrument, that a chargor who wishes to exercise the right to discharge the charge at any time before the expiry of the term of the charge-
> (a) shall give one month's notice of the intention to discharge; or
> (b) shall pay not more than one month's interest at the rate at which interest is payable on the principal sum secured by the charge or at any lesser rate which may be agreed, as well as paying all other money secured by the charge.

(4) A discharge of the whole or a part of a charge shall be as prescribed under this Act or any other law.
(5) For the avoidance of doubt, a discharge includes a re conveyance and a re-assignment of charge or any other instrument used in extinguishing of interests in land conferred by charges.

83. The stipulation that the discharge can only occur if a suit over Ngong/Ngong/25084 is withdrawn is contrary to Section 83(1) a, b, and c of the Land Act. The same purports to deprive the chargor of the right to discharge, seeks to fetter the exercise of this right, and stipulates for a collateral advantage that is unfair and unconscionable or inconsistent with the right to discharge. There has been no consolidation of the charge herein with that of Ngong/Ngong/25084. Therefore, the second respondent was entitled to discharge.

84. Order 42, Rule 5 of the Civil Procedure Rules, provides for the power of the appellate court as follows:

> **Where there is more than one plaintiffs or defendants than one in a suit, and the decree appealed from proceeds on any ground common to all the plaintiffs or to all the defendants, any one of the plaintiffs or of the defendants may appeal from the whole decree, and thereupon the High Court may reverse or vary the decree in favour of all the plaintiffs or defendants, as the case may be.**

85. The court found as a fact that the defendants were not at fault for the aspect of disclosure of the condition on withdrawal of the suit related to Ngong/Ngong/25084. This was a misdirection, as the appellant acted unconstitutionally by fettering the equity of redemption and the right to a fair hearing. The appellant benefited from having the loan fully paid, together with other expenses totaling Ksh.2,000,000/=. The appellant did not discharge the title deed over land parcel number Nyeri Municipality Block 1/985. They should do so.

86. Before departing, I noted that the second Respondent filed a counterclaim against the appellant, who was also a defendant. A counterclaim can only be filed against the plaintiff. Order 7, rule 3 provides as follows:

> A defendant in a suit may set-off, or set-up by way of counterclaim against the claims of the plaintiff, any right or claim, whether such set-off or counterclaim sound in damages or not, and whether it is for a liquidated or unliquidated amount, and such set-off or counterclaim shall have the same effect as a cross-suit, so as to enable the court to pronounce a final judgment in the same suit, both on the original and on the cross-claim; but the Court may on the application of the plaintiff before trial, if in the opinion of the court such set-off or counterclaim cannot be conveniently disposed of in the pending suit, or ought not to be allowed, refuse permission to defendant to avail himself thereof.

87. On the other hand, between the defendants, only a notice of claim can be filed. Only a notice of claim can be issued against a co-defendant. Order 1 Rule 24 of the Civil Procedure Rules provides as follows:

> (1) Where a defendant desires to claim against another person who is already a party to the suit—
>
> a. that he is entitled to contribution or indemnity; or
> b. that he is entitled to any relief or remedy relating to or connected with the original subject matter of the action which is substantially the same as some relief or remedy claimed by the plaintiff; or
> c. that any question or issue relating to or connected with the said subject-matter is substantially the same as some question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and the defendant and such other person or between any or either of them, the defendant may without leave issue and serve on such other person a notice making such claim or specifying such question or issue.
>
> (2) No appearance to such notice shall be necessary but there shall be adopted for the determination of such claim, question or issue the same procedure as if such other person were a third party under this Order.

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

88. The court therefore erred in entertaining a counterclaim it had no power to deal with. This affected the fidelity of the proceedings, as it permeated the issues the appellant and the second respondent were disputing and adversely affected the first respondent's case by clouding the issues. The court can only hear the matters before it. The counterclaim was a ruse to obfuscate the issues. The court can only deal with matters it has jurisdiction to deal with. In the case of **Macharia & another v Kenya Commercial Bank Ltd & 2 others [2012] KESC 8 (KLR),** the Supreme Court, [WM Mutunga, CJ, PK Tunoi, JB Ojwang, SC Wanjala & N Ndungu, SCJJ] stated as follows:

> 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. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, In the Matter of the

> Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.

89. The court could therefore not deal with the counterclaim without causing injustice to the parties herein. The counterclaim is therefore struck out.

90. What about damages? The court awarded a sum of Ksh 2,193,750/=. The court awarded the same against both defendants, that is, against the appellant and the second respondent. The 1st respondent suffered loss as a result of the omission by the appellant. The loss was quantified. In the case of **David Bagine V Martin Bundi [1997] KECA 54 (KLR),** the Court of Appeal [E. Gicheru, A.B. Shah and G. S. Pall], posited as follows:

> It has been held time and again by this Court that special damages must be pleaded and strictly proved. We refer to the remarks by this Court in the case of Mariam Maghema Ali v. Jackson M. Nyambu t/a

sisera store, Civil Appeal No. 5 of 1990 (unreported) and Idi Ayub Sahbani v. City Council of Nairobi (1982-88) IKAR 681 at page 684: "....special damages in addition to being pleaded, must be strictly proved as was stated by Lord Goddard C.J. in Bonham Carter vs. Hyde Park Hotel Limited [1948] 64 TLR 177 thus:

> “Plaintiffs must understand that if they bring actions for damages it is for them to prove damage, it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying, 'this is what I have lost, I ask you to give me these damages.' They have to prove it"

91. This money was paid over to the appellant, who obtained a benefit by having the security discharged. This was the amount by which the appellants unjustly enriched themselves, particularly the appellant. It must be remembered that the amount is not a refund for the discharge that has already occurred. It is damages for breach of contract. It does not reserve the payments or discharge of security. It is the loss due to the appellant’s impunity.

92. Secondly, a sum of Ksh 100,000/= was sought as interest. The same is interest, which is only payable from the time of filing of suit. A sum of Ksh 100,000/= is therefore set aside. The first respondent is entitled to interest on the said amount awarded. In the celebrated **Mukisa Biscuits Manufacturing Company Limited v West End**

**Distributors Limited (1970) EA 469** the court stated as follows:

> **The principle that emerges is that where a person is entitled to a liquidated amount or to specific goods and has been deprived of them through the wrongful act of another person, he should be awarded interests from the date of filing suit. Where, however, damages have to be assessed by the Court, the right to those damages does not arise until they are assessed and therefore interest is only given from the date of the judgment.**

93. The issue of interest on liquidated claims was recently addressed in the case of **Jane Wanjiku Wambu v Anthony Kigamba Hato & 3 others [2018] eKLR**, where the court posited as follows:

> 32. I have come to the conclusion that the Learned Trial erred by not adverting her mind to whether interest was payable on the liquidated sum she ordered the Respondent to pay to the Appellant. Had the Learned Trial Magistrate done so, she would have likely reached the conclusion that the Appellant was entitled to an award of interest at Court Rates from the time of filing the suit since she had already concluded that the Appellant was entitled to a liquidated amount which she had been deprived of by the actions of the Respondents. This is the predictable rule on award of interest on liquidated sums that has emerged from our Courts' repeated application of Section 26 of the

> Civil Procedure Act. The cases cited above reached the conclusion that where a claim is for liquidate damages, unless there is good cause, the interest should be calculated from the date of filing the suit.

94. In the end, the appellant's appeal lacks merit and is accordingly dismissed. This leaves the issue of costs, which is governed by Section 27 of the Civil Procedure Act, which provides as follows:

> (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.
>
> (2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

95. Costs are generally discretionary. However, the discretion is not arbitrary. The Court of Appeal in the case of **Farah**

**Awad Gullet v CMC Motors Group Limited [2018] KECA 158 (KLR)** had this to say:

> **It is our finding that the position in law is that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.**

96. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of **Rai & 3 others v Rai & 4 others** [2014] KESC 31 (KLR), as follows:

> 18.It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference, is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation
> 22. Although there is eminent good sense in the basic rule of costs - that costs follow the event- it

> is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings - a position well illustrated by the considered opinions of this Court in other cases. The relevant question in this particular matter must be, whether or not the circumstances merit an award of costs to the Applicant.

97. The second respondent did not file submissions. The first appellant defended the appeal strenuously. In the circumstances, the first Respondent shall have costs of Ksh 155,000/=.

Determination

79. In the upshot, I make the following orders:

a) The award of a sum of Ksh. 100,000/= interest is set aside. The court sets aside the award of Ksh. 2,193,750/= awarded against the appellant and the second respondent jointly and severally. In lieu thereof, the court enters judgment for a sum of Ksh. 2,093,750/= as damages pleaded in favor of the first Respondent against the appellant.

b) Appellant’s appeal on liability lacks merit and is accordingly dismissed with costs of Ksh 155,000/= to the first respondent.

c) The sum of Ksh 2,093,750/= shall attract interest at court rates from 21.03.2023, the date of filing suit.

d) For avoidance of doubt, the appellant is obligated to release the title deed to the second respondent, having settled the indebtedness.
e) The second respondent's counterclaim in the lower court is struck out with each party bearing its costs.
f) The order awarding costs on the counterclaim is set aside.
g) Security deposited in court be released to the first respondent forthwith.
h) 30 days stay of execution on costs only.
i) The file is closed.

**DELIVERED, DATED** and **SIGNED** at **NYERI** on this **13th** day of **April, 2026**. Judgment delivered through Microsoft Teams Online Platform.

**KIZITO MAGARE**

**JUDGE**

**In the presence of:-**

Mr. Macharia for the Appellant

Ms. Ngare for the 1st Respondent

No appearance for the 2nd Respondent

Court Assistant – Michael/Martin