



**Consolidated Bank Limited v Mutisya & 2 others (Civil Appeal  
43 of 2020) [2022] KECA 1155 (KLR) (21 October 2022) (Judgment)**

Neutral citation: [2022] KECA 1155 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL 43 OF 2020  
AK MURGOR, J MOHAMMED & KI LAIBUTA, JJA  
OCTOBER 21, 2022**

**BETWEEN**

**CONSOLIDATED BANK LIMITED ..... APPELLANT**

**AND**

**BONIFACE KIVINDYO MUTISYA ..... 1<sup>ST</sup> RESPONDENT**

**ALFRED KAVILA KIVINDYO ..... 2<sup>ND</sup> RESPONDENT**

**ALMA SOLUTIONS LIMITED ..... 3<sup>RD</sup> RESPONDENT**

*(An appeal against the judgment of the High Court of Kenya at Makeni (C.  
Kariuki, J.) dated 12th November 2018 in Makeni High Court Case No. 5 of 2018)*

**JUDGMENT**

**Background**

1. Through an amended plaint dated 10<sup>th</sup> March, 2017, Boniface Kivindyo Mutisya (the 1<sup>st</sup> respondent) initially filed suit against Alfred Kavila Kivindyo (the 2<sup>nd</sup> respondent), Consolidated Bank Limited (the appellant) and Alma Solutions Limited (the 3<sup>rd</sup> respondent) in Makeni HCCC No. 5 of 2018. The 1<sup>st</sup> respondent pleaded that, at all material times, he was the registered owner of land parcels Mbooni/Iiani/107 and Mbooni/Iiani/884 (the suit properties); and that on or about the year 2012, his son, the 2<sup>nd</sup> respondent herein, took the title deeds in respect of the suit properties from him on an undertaking and understanding that he was taking them to the bank for safe-keeping. The 1<sup>st</sup> respondent averred that the 2<sup>nd</sup> respondent, the appellant and the 3<sup>rd</sup> respondent colluded and fraudulently caused the suit parcels to be charged as security for a loan advanced by the appellant to the 3<sup>rd</sup> respondent without the 1<sup>st</sup> respondent's knowledge and consent; and that the 2<sup>nd</sup> respondent, the appellant and the 3<sup>rd</sup> respondent deliberately misled the 1<sup>st</sup> respondent into signing certain documents on an understanding that they were for the safekeeping of the title deeds, and deliberately concealed material facts.



2. The 1<sup>st</sup> respondent averred that he learnt that the suit properties had been charged when the appellant issued a notification of sale to sell the suit properties in order to recover monies advanced to the 2<sup>nd</sup> respondent, who had allegedly defaulted in payment. The 1<sup>st</sup> respondent sought the following orders: an order of permanent injunction restraining the 2<sup>nd</sup> respondent, the appellant and the 3<sup>rd</sup> respondent from disposing of or selling the suit properties; a declaration that the charge registered on the suit properties in favour of the appellant is illegal and a nullity; an order discharging the charge registered against the suit properties; and costs of the suit and interest.
3. The appellant opposed the suit, filed a defence and counter-claim and denied the 1<sup>st</sup> respondent's averments, and contended that the 1<sup>st</sup> respondent executed a legal charge dated 17<sup>th</sup> April, 2012 over Mbooni/Iiani/884 in favour of the appellant to secure a loan of Kshs. 2,000,000.00; that the 1<sup>st</sup> respondent further executed a Deed of Guarantee dated 16<sup>th</sup> December, 2013 as a guarantor with a liability of Kshs. 1,800,000.00; that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents were the borrowers named therein; that the 1<sup>st</sup> respondent was fully aware of the Letter of Offer, Legal Charge, Deed of Guarantee and indemnity, the statutory notices and notification of sale; that the deed of guarantee and indemnity was executed before an Advocate of the High Court of Kenya and Commissioner for Oaths; and that the 1<sup>st</sup> respondent acknowledged receiving a copy of the guarantee by appending his signature in acknowledgment of receipt.
4. The appellant filed a counterclaim to the effect that the 1<sup>st</sup> respondent was justly and truly indebted to the appellant pursuant to the Deed of Guarantee and Indemnity dated 16<sup>th</sup> December, 2013 for the sum of Kshs. 1,800,000.00 together with interest, fees, commission, costs, charges and expenses; and that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents were justly and truly indebted to the appellant for the sum of Kshs. 2,024,098.39 as at 21<sup>st</sup> December, 2016 which sums continue to accrue interest. The appellant counterclaimed against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents for Kshs. 2,024,098.39, auctioneers' costs plus interest; and costs of the suit. From the record, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents did not enter appearance in the High Court or file a defence.
5. After considering the pleadings and evidence adduced at trial, the High Court (C. Kariuki, J.) observed that the Charge was registered with respect to land parcel no. Mbooni/Iiani/884 only. The learned Judge found that the 1<sup>st</sup> respondent understood the import of the documents he executed as he appeared before an advocate, JKN Kamunyori, who explained to him the legal implications of the Charge; and that the Guarantee was witnessed by another advocate, Musyoki Kioko. The learned Judge observed that if the two advocates had lied regarding the execution of the documents, the 1<sup>st</sup> respondent would have enjoined them in the suit or taken other legal action, such as criminal proceedings or a complaint to the Advocates Complaint's Commission against them. The learned Judge concluded that the 1<sup>st</sup> respondent had failed to prove that the Charge and the Guarantee were invalid; or that he was never served with the statutory notices of sale; and that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents were indebted to the appellant to the tune of Kshs. 2,024,098.39.00 plus costs and compound interest as from 29<sup>th</sup> May, 2017.
6. The learned Judge further found that the 1<sup>st</sup> respondent's suit was successful to the extent that Mbooni/Iiani/107 was not charged and was to be returned to him. As regards Mbooni/Iiani/884, the suit was dismissed with costs to the appellant. Judgment was entered in the appellant's favour in the counterclaim against the 2<sup>nd</sup> and 3<sup>rd</sup> respondents.
7. Dissatisfied with the judgment, the appellant has filed this appeal on the grounds that the learned Judge erred in fact and in law by: ordering the release of the title over Mbooni/Iiani/107 to the 1<sup>st</sup> respondent on the basis that it was not charged while the 1<sup>st</sup> respondent's list of documents dated 30<sup>th</sup> June, 2017



produced an official search over the property confirming that it had been charged to the bank (the appellant herein) for Kshs. 2 million; failing to comply with Order 21 Rule 6 of the *Civil Procedure Rules 2010* requiring that where there is a prayer for judgment the grant of which would result in some alteration to the title of land registered under any written law concerning registration of title to land, a certified copy of the title shall be produced to the court before any such judgment is delivered; failing to find that the legal charge over Mbooni/Iiani/884 was executed by the 1<sup>st</sup> respondent on the same day as that of Mbooni/Iiani/107 before the same advocate, JKN Kamunyoru on 17<sup>th</sup> April, 2012; failing to find that the 1<sup>st</sup> respondent duly executed the charges and confirmed that he understood the effect of Section 74 of the *Registered Land Act* (now repealed); making an order that the 1<sup>st</sup> respondent's title be released without discharging the registered charge; and by failing to evaluate the evidence adduced that the 1<sup>st</sup> respondent executed a Deed of Guarantee and Indemnity dated 16<sup>th</sup> December, 2013 for the loan of Kshs. 1,800,000.00 plus interest, fees, commission, costs, charges and expenses.

8. The appellant seeks orders that the amended plaint dated 10<sup>th</sup> March, 2017 be dismissed with costs; judgment be entered as prayed in the counterclaim dated 18<sup>th</sup> April, 2017; and that costs of the appeal be awarded to the appellant.

### **Submissions by Counsel**

9. Counsel for the appellant, Messrs Wamae & Allen Advocates, submitted that a certificate of official search was sufficient evidence of the encumbrance registered over the suit properties in accordance with Section 35 of the *Land Registration Act, 2012*. Counsel relied on the authority of this Court in *Embakasi Properties Limited & another vs. Commissioner of Lands & another* [2019] eKLR for the proposition that the law on registration of titles in Kenya is based on the Torrens system, guaranteeing that the register is the perfect mirror of the state of the title.
10. Counsel submitted that, although the learned Judge noted that the Deed of Guarantee and Indemnity was executed by the 1<sup>st</sup> respondent, he failed to make a finding that the 1<sup>st</sup> respondent was indebted to the appellant in the final orders. Counsel referred to the decision of this Court in *Lalji Karsan Rabadia & 2 others vs. Commercial Bank of Africa Limited* [2015] eKLR for the proposition that a contract of guarantee is an accessory contract by which the surety undertakes to ensure that the principal performs the principal obligations, and a contract to indemnify the Creditor upon the happening of a contingency namely the default of the principal to perform the principal obligation. Counsel also cited the decision of this Court in *Mwaniki Wa Ndegwa vs. National Bank of Kenya Ltd & another* [2016] eKLR for the proposition that, on the default of the principal debtor causing loss to the creditor, the guarantor is, apart from special stipulation, immediately liable to the full extent of his obligation, without being entitled to require either notice of the default or previous recourse against the principal.
11. Counsel went on to state that the appellant's prayers fell within Order 21 Rule 6 of the *Civil Procedure Rules*; that it was imperative that the learned Judge should have had access to certified copies of the title or register before delivery of the impugned judgment; that the certified copies were not availed; and that the learned Judge failed to consider the fact that an official search was produced, which was a reflection of the register at the Lands Office.
12. Counsel for the 1<sup>st</sup> respondent, Messrs Nyaata & Company Advocates, submitted that, after delivery of the impugned judgment, the 1<sup>st</sup> respondent commenced execution proceedings to have the title deed for Mbooni/Iiani/107 returned to him; that the appellant filed an application for review, which was dismissed on 4<sup>th</sup> July, 2019; that the review application and ruling had been omitted in the record of appeal; and that the appellant appealed against the ruling vide Civil Appeal No. 396 of 2019 between



- the parties herein. Counsel submitted that the review proceedings and appeal herein are against the same judgment.
13. Counsel submitted that, where a party opts for review, such a party cannot, after the review is rejected, opt to appeal against the same judgment that he sought to review, as per Section 80 of the *Civil Procedure Act* and Order 45 of the *Civil Procedure Rules*; that for the appellant to appeal against the judgment while at the same time pursuing review proceedings amounts to quorum shopping and an abuse of the court process; and that the appellant lacks the locus standi to bring both an appeal and review proceedings against the same judgment.
  14. Counsel further submitted that the record of appeal was incomplete since crucial documents were missing, including: the application seeking review of the judgment dated 15<sup>th</sup> May, 2019; the grounds of opposition filed by the 1<sup>st</sup> respondent; the submissions of the parties in the review application; the ruling of the court dated 4<sup>th</sup> July, 2019; and the application seeking extension of time to issue a notice of appeal and the reply thereto. Counsel submitted that these omissions were purposeful and malicious; and that the omission is fatal and incurable as the parties have already submitted on the appeal. Counsel cited the case of *Seventh Day Adventist Church East Africa Ltd & 2 others vs. Masosa Construction Company Ltd* [2005] eKLR where this Court held that no party has the right to unilaterally exclude any document that should be included in the record of appeal.
  15. On whether the 1<sup>st</sup> respondent executed a legal charge over Mbooni/Iiani/107, counsel went on to state that the appellant's witness, Jeremiah Samba (DW1) categorically denied that any charge was registered over Mbooni/Iiani/107. Counsel submitted that the failure to produce any charge purportedly executed by the 1<sup>st</sup> respondent over Mbooni/Iiani/107 indicated that there was no proof of such charge; that the appellant has always maintained that the only property charged was Mbooni/Iiani/884; that the appellant admitted in its pleadings that it was in possession of the title deed in respect of Mbooni/Iiani/107, but denied that it was charged in its favour. It was submitted that the registration of the charge was therefore a nullity and lacked basis without a validly executed charge.

### Determination

16. We have considered the record, the submissions by the parties, the authorities cited and the law. This being a first appeal, the duty of this Court is as re-stated in the case of *Abok James Odera t/a A.J. Odera & Associates vs. John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR, where it was held in part that:

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”
17. On the question of the incompleteness of the record of appeal, the 1<sup>st</sup> respondent submitted that the record of appeal is incomplete primarily because the record does not contain documents related to the application for review of the High Court's judgment. Rule 92(1) of the Civil Procedure Code provides that if a respondent is of the opinion that the record of appeal is defective or insufficient for the purposes of his case, he may lodge in the appropriate registry four copies of a supplementary record of appeal containing copies of any further documents or any additional parts of documents which are, in his opinion, required for the proper determination of the appeal.
18. The 1<sup>st</sup> respondent failed to do his part in the shared responsibility between the parties to ensure that all the relevant documents were included in the record. See *Doris M. Wanjiru Kinuthia & 2 others vs.*



*Purity Ndirangu* [2015] eKLR. The 1<sup>st</sup> respondent ought to have availed the omitted documents if he was of the view that they would be relevant to his case. Accordingly, the issue of incompleteness of the record is not a sufficient reason to render the appeal incurably defective.

19. On the question whether the appellant could lodge an appeal after its application for review was dismissed, the 1<sup>st</sup> respondent has faulted the appellant for filing this appeal after having earlier filed an application for review of the judgment of the High Court; and thereafter filed an appeal against the ruling in the review proceedings after the application was dismissed.
20. It cannot be denied that the appellant pursued a review of the High Court’s judgment through an application that was later dismissed vide a ruling dated 4<sup>th</sup> July, 2019. The appellant promptly appealed against the impugned ruling in this Court vide Civil Appeal No. 396 of 2019, which was dismissed vide a judgment delivered on 17<sup>th</sup> December, 2021. Perhaps buoyed by the words of the learned Judge in the ruling of 4<sup>th</sup> July, 2019 that the appellant should have filed an appeal, and that the doors were still open for it do so, the appellant filed an application for extension of time to file a notice of appeal 3 months later on 23<sup>rd</sup> October 2019. In a ruling dated 22<sup>nd</sup> January 2020, the learned Judge (Ong’udi, J.) stated that “it would be in the interest of justice and all parties that the Court of Appeal gets an opportunity to dissect both the judgment of 12<sup>th</sup> November, 2018 and the ruling of 4<sup>th</sup> July, 2019.” It is under these circumstances that the instant appeal was brought before this Court. The effect of this is that the appellant has been pursuing both a review and an appeal against the impugned judgment.
21. Order 45 Rule 2 of the *Civil Procedure Act* provides that:

“A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.” [Emphasis supplied].

22. It is clear, therefore, that the option of applying for a review of judgment is only open to parties who are not appealing from the same decision that they are seeking to review. The appellant chose to pursue a review of the judgment, and its application was dismissed. In dismissing the application, the learned Judge intimated that the avenue of lodging an appeal was still open. The learned Judge also allowed the appellant’s subsequent application that paved the way for the lodging of this appeal despite the fact that the appellant had already chosen to pursue a review and had appealed against the ruling dismissing its application for review.
23. This Court in *Mary Wambui Njuguna vs. William Ole Nabala & 9 others* [2018] eKLR held that an appellant could not pursue both review and appeal simultaneously, and that, by opting for a review, the appellant had effectively abandoned the option of appeal. It was held that:

“We agree with the conclusion by the learned Judge that it was not open for the appellant to pursue an appeal and at the same time a review of the same orders. The appeal could only lie on the outcome of the application for review.”

24. By parity of reasoning, this appeal has no merit and is dismissed with costs to the 1<sup>st</sup> respondent.

**DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF OCTOBER, 2022.**

**A. MURGOR**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

**DR. K. I. LAIBUTA**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original*

*Signed*

**DEPUTY REGISTRAR**

