



REPUBLIC OF KENYA



**Nyamota v Family Bank Limited & 2 others (Civil Appeal
997 of 2023) [2025] KEHC 9170 (KLR) (30 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 9170 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL APPEAL 997 OF 2023**

**AN ONGERI, J
JUNE 30, 2025**

BETWEEN

DAVID NYAMOTA APPELLANT

AND

FAMILY BANK LIMITED 1ST RESPONDENT

**MICAH ONYIEGO DAUDI T/A MIC SALES AND
SERVICES 2ND RESPONDENT**

SUNTRA INVESTMENTS LIMITED 3RD RESPONDENT

*(Being an appeal from the Judgment of Hon. S. A. Opande (PM) in
Milimani CMCC Case No. 5945 of 2013 delivered on 1st September 2023)*

JUDGMENT

1. The Appellant filed Milimani CMCC Case No. 5945 of 2013 against the Respondents seeking excess shares sold by the Respondents to recover an outstanding loan of Kshs. 115,000/= The Appellant was seeking:-
 - a. That the 1st Respondent to purchase on behalf of the appellant the excess shares sold without notice to the Appellant.
 - b. That the 2nd Respondent purchase the part of the shares sold to off-set the loan arrears.
 - c. That the 1st and 2nd Respondents pay the interest and costs of the suit.
2. The Respondents denied the Appellant's claim in their defence.
3. The Appellant's evidence was that he received a call from the 3rd Party – Suntra Investments Ltd that his shares had been sold to recover a loan of Kshs. 115,000/=.



4. The Appellant had 10,000 shares and his argument is that the 1st Respondent ought to have instructed the 3rd Party to sell shares worth that amount.
5. The 1st Respondent said they did not ask the 3rd Party to sell the shares but to release them.
6. The trial court found that the Appellant did not blame the 2nd Respondent for selling the shares.
7. The trial court found no rationale to hold that the 2nd Respondent was liable for sale of the shares.
8. The trial court found that it was not the 1st Respondent but the 3rd Party who occasioned the sale of the shares.
9. The trial court dismissed the Appellant's case with no orders as to costs for reasons that the sale was occasioned by the 3rd Party yet the Appellant said the 3rd Party did not do anything wrong.
10. The Appellant has appealed to this court on the following grounds:-
 - i. That the learned trial Magistrate erred in law and fact by failing to establish that the third party/ interested party was reliable to the Plaintiff's claim by their admission.
 - ii. That the learned trial Magistrate erred by failing to note that he had a legal duty under law to apportion liability between the 1st defendant and the third party as per their testimony.
 - iii. That the learned trial Magistrate erred in law and fact by failure to consider the admission by third party which sold the excess shares of the Plaintiff by passing judgment in favor of the Plaintiff against the 1st and 3rd Party.
 - iv. That the learned trial Magistrate erred in law and fact by dismissing the Plaintiff's case and yet the third party clearly admitted to have sold the excess shares of the Plaintiff which indeed the Plaintiff was claiming reimbursement.
 - v. That the learned trial Magistrate also erred in law and facts to note that there was clear communication between the third party and the 1st Defendant in re-purchasing of the excess shares that were sold by the third party. And the same was demonstrated by the payment of Kshs. 155,000/= by the 1st Defendant given to the third party to repurchase the excess shares for the Plaintiff.
 - vi. That the learned trial Magistrate erred in law and facts to note that the 1st Defendant was the cause or was the one who initiated the sale of the shares that were pledged for the loan taken by the 2nd Defendant by notifying the third party to release the shares pledged to cover the loan defaulted.
 - vii. That the learned trial Magistrate erred in law and facts by failing to consider the admission in evidence that was given by the 1st Respondent and 3rd Party in their testimonies in giving justice to the Plaintiff's claim.
11. The parties filed written submissions as follows;
12. The appellant in his submissions challenged the judgment delivered in Milimani Commercial Court Civil Case No. 5945 of 2013.
13. The case arose when the plaintiff, David Nyamota Orwenyo, acted as a guarantor for a loan taken by the 2nd defendant, Micah Onyiego Daudi, from the 1st defendant, Family Bank Limited.



14. Upon default by the 2nd defendant, the 1st defendant instructed the 3rd party, Suntra Investment Limited, to dispose of shares held as security.
15. However, the 3rd party sold shares exceeding the defaulted amount without proper authorization, leading to the plaintiff's suit against the defendants.
16. The 1st defendant subsequently blamed the 3rd party for negligence, initiating third-party proceedings under Order 1 Rule 4 of the Civil Procedure Rules.
17. The appellant argues that the 3rd party admitted during trial that it lacked instructions to sell the entire shareholding, only being authorized to release shares equivalent to the defaulted amount.
18. The appellant relies on precedents such as *ASC Metal Belgium Limited v. Blue Nile (East Africa) Ltd & 2 Others* (2018) and *Stephen Psiwa Cheprot v. Mary Mutheu Muia & Another* (2018) to assert that third-party liability pertains to indemnifying the defendant, not the plaintiff, as there is no privity of contract between the plaintiff and the 3rd party.
19. The appellant contends that the 3rd party should compensate the plaintiff for the excess shares sold at the current market rate.
20. Consequently, the appellant seeks the appeal's allowance, holding the 3rd party accountable for its unauthorized actions.
21. The 1st Respondent opposed the appeal, arguing that the trial court's judgment dismissing the Appellant's claim was correct.
22. That the Appellant had sued as a guarantor for a loan taken by the 2nd Respondent from the 1st Respondent, pledging his shares as security.
23. When the 2nd Respondent defaulted, the 1st Respondent followed due process by notifying the Appellant of the default and instructing the Central Depository and Settlement Corporation (CDSC), through the 3rd Respondent as broker, to unfreeze the shares in preparation for sale.
24. However, the 1st Respondent never issued final instructions to the 3rd Respondent to sell the shares, as the CDSC did not confirm the lapse of the mandatory 30-day objection period.
25. The 3rd Respondent proceeded to sell the shares without authorization, exceeding the defaulted loan amount.
26. The trial court found the 1st Respondent not liable because it never instructed the 3rd Respondent to sell the shares, and the Appellant himself did not blame the 3rd Respondent in his pleadings, estopping him from later holding the 3rd Respondent accountable.
27. The 1st Respondent supported this reasoning and urged the appellate court to dismiss the appeal.
28. However, should the appeal succeed, the 1st Respondent contends that liability should fall on the 3rd Respondent, not itself.
29. Ultimately, the 1st Respondent seeks the dismissal of the appeal with costs.



30. This being a first appeal, the duty of the first appellate court is to re-evaluate the evidence adduced before the trial court and to arrive at its own conclusion whether it would support the findings of the trial court. In *Selle –Vs- Associated Motor Boat Co.* [1968] EA 123 it was held in the following terms: -

“An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge’s finding of fact if it appears either that he failed to take account of particular circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.

An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.

In particular, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

31. The issues for determination in this appeal are as follows:-
- i. Whether the trial court erred in failing to establish liability against the 1st Respondent.
 - ii. Whether the 3rd Party’s admission of selling shares beyond the instructed amount established liability against it.
 - iii. Whether the Appellant is entitled to compensation for the excess shares sold at their current market value.
32. I have re-evaluated the evidence on record. I find that it is not in dispute that the Appellant gave a friend his 10,000 shares to secure a loan of Kshs. 500,000/= from the 1st Respondent.
33. It is not in dispute that the 1st Respondent wrote to the 3rd Party to release the 10,000 KCB shares, for sale clearing and settlement purposes.
34. It is not in dispute that the value of the shares was more than the outstanding loan of Kshs. 115,000/=.
35. The Appellant contends that the 1st Respondent initiated the sale of his shares by instructing the 3rd Party to “release” them, which ultimately led to their unauthorized disposal.
36. However, the 1st Respondent maintains that it merely sought the release of shares equivalent to the defaulted loan amount (Kshs. 115,000) and never issued final instructions for sale.
37. It is trite law that a lender exercising its statutory power of sale must act in good faith and ensure that the sale is conducted reasonably and procedurally fairly (see *Housing Finance Co. of Kenya v Kirigo* [2006] eKLR).
38. The trial Magistrate found that the 1st Respondent did not authorize the sale, and the Appellant did not directly implicate the 3rd Party in his pleadings.
39. This finding is consistent with the principle that a party must plead and prove their case against each defendant (see *Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others* [2017] eKLR).



40. However, the 1st Respondent's instruction to "release" the shares, rather than specifying their retention or controlled sale, created ambiguity.
41. The 1st Respondent instructed release of the entire 10,000 shares instead of release of the shares equivalent to the outstanding loan. The statement in the instruction letter was as follows:-

“We therefore request that the pledge be released on 10,000 KCB shares, for sale settlement purposes”.
42. In *Kenya Commercial Bank Limited v Nicholas Ombija* [2009] eKLR, the court held that banks must give clear instructions to avoid unauthorized actions by third parties.
43. The 1st Respondent's failure to supervise the process contributed to the excess sale, and thus, it cannot fully escape liability.
44. The 3rd Party admitted selling shares beyond the loan arrears without express instructions.
45. This unauthorized disposal constitutes negligence and breach of duty as a broker.
46. The 3rd party sold the entire 10,000 shares. The 1st Respondent ought to have specified that the shares to be sold were equivalent to the outstanding loan.
47. In *ASC Metal Belgium Limited v Blue Nile (East Africa) Ltd & 2 Others* [2018] eKLR, the court emphasized that third-party liability arises where an agent acts outside its mandate.
48. The trial court erred in failing to apportion liability against the 3rd Party despite its admission.
49. Under Section 60 of the *Evidence Act*, admissions are binding, and the court should have held the 3rd Party accountable for the excess sale (*Stephen Pswa Cheprot v Mary Mutheu Muia & Another* [2018] eKLR).
50. The 1st Respondent's ambiguous instructions and the 3rd Party's unauthorized actions jointly caused the Appellant's loss and liability should have been apportioned between them.
51. The 1st Respondent bears responsibility for failing to give precise instructions, while the 3rd Party is liable for exceeding its mandate.
52. The Appellant is entitled to compensation for the excess shares sold at the current market value, and the 1st Respondent and 3rd Party must jointly reimburse him (.).
53. The appeal is allowed in part as follows;
 - i. The trial court's judgment is set aside,
 - ii. Liability is apportioned between the 1st Respondent (Family Bank Limited) at 50% for failing to give clear instruction and;
 - iii. The 3rd Party (Suntra Investment Limited) at 50% for selling shares without authorization.
 - iv. The 1st Respondent and 3rd Party shall jointly compensate the Appellant for the excess shares sold at their current market value, plus interest at court rates from the date of filing suit.
54. Each party shall bear its own costs of the appeal.
55. Orders accordingly.



**DATED, SIGNED AND DELIVERED THIS 30TH DAY OF JUNE 2025 VIRTUALLY VIA MT AT
VOI HIGH COURT.**

ASENATH ONGERI

JUDGE

In the presence of:-

Court Assistants: Maina/Millicent

.....for the Appellant

.....for the Respondents

