

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ELC APPEAL NO 6 OF 2018

KABEHO HOUSING & CO LTD.....APPELLANT

VERSUS

GEORGE GITAU MBUGUA.....1ST RESPONDENT
S.L.M.H MUHIA T/A S.L.M.H MUHIA & CO ADVOCATES...2ND RESPONDENT
DAVID NJAU WAKIO T/A MILANO
COMMERICAL AGENCIES.....3RD RESPONDENT

(Being an appeal against the judgment of Hon. Chief Magistrate J. Mungai delivered in Nakuru on 13th August, 2014 in Nakuru CMCC NO 1443 OF 2004)

BETWEEN

GEORGE GITAU MBUGUA.....
PLAINTIFF

VERSUS

KABEHO HOUSING & CO. LTD.....
DEFENDANT

AND

S.L.M.H MUHIA T/A S.L.M.H MUHIA & CO ADVOCATES...1ST THIRD PARTY
DAVID NJAU WAKIO T/S
MILANO COMMERICAL AGENCIES.....2ND THIRD PARTY

JUDGMENT

1. This appeal arises from the Judgment delivered on 13th August, 2014 in Nakuru CMCC NO 1443 OF 2004. The Appellant being aggrieved by the said judgment lodged a Memorandum of Appeal dated 9th September, 2014

which was amended on 24th September, 2014. The Appellant listed the following grounds of appeal:

- 1) ***THAT the Learned Trial Magistrate erred in law and in fact in failing to appreciate the totality of evidence presented before him leading to an erroneous decision.***
- 2) ***THAT the Learned Trial Magistrate erred in law and fact in failing to appreciate and apply the evidence of the 1st Third Party thereby arriving at an erroneously conclusion on the relationship between the Plaintiff and the 2nd Third party. (sic)***
- 3) ***THAT the Learned Trial Magistrate erred in law and facts in failing to appreciate that the 2nd Third Party became an agent of the Plaintiff by virtue of receiving payments for transmission to the Plaintiff.***
- 4) ***THAT the Learned Trial Magistrate erred in law and facts in failing to appreciate the rules of estoppel which restrict the 2nd Third Party from denying involvement in the agreement after he had received payments from the 1st Defendant.***
- 5) ***THAT the Trial Magistrate erred in law and facts when he concluded that the Defendant had entered into a separate agreement with the 2nd Third party in absence of evidence to support the same.***

6) THAT the Learned Trial Magistrate erred in law and facts when he consequently found the Defendant has not proved his case on a balance of probabilities even with enough evidence produced before him to support the Defendant's counterclaim.

2. The Appellant prayed for the following orders:

a) Allowing the appeal.

b) Quashing the Judgment of the trial court in NAKURU CMCC NO 1443 OF 2004.

c) Costs and interests at court rates be awarded to the Appellant.

3. A brief background to the appeal is that the 1st Respondent sued the Appellant in the lower court vide plaint dated 1st July, 2004 seeking the following orders:

a) The said sum of Kshs 980,000/=.

b) Interest on (a) above at Court rates from the date the aforesaid amount became due i.e 15th January, 2000.

c) Costs of this suit.

d) Any other or further relief that this Court may deem fit to grant.

4. The Appellant filed a counterclaim which was further amended on 11th October, 2017 seeking the following orders:

a) A declaration order that the Defendant, now Plaintiff in this counterclaim is entitled to possession of the land known as LR NAKURU/MUNICIPALITY BLOCK 22/1209, 1210, 1211, 1213,

1214, 1215, 1216 AND 1217 and to have registration be done in the Defendant now Plaintiff's name.

- b) An order directing and commanding the Plaintiff to deliver all title documents for the suit parcels of land to wit LR NO NAKURU/MUNICIPALITY BLOCK 22/1209, 1210, 1211, 1213, 1214, 1215, 1216 AND 1217 to the Defendant and to sign all transfer and conveyance documents within 21 (TWENTY ONE) days of the delivery of judgment failing which the Executive Officer of this honourable court shall sign all such documents necessary for full and effective transfer of the land to the Defendants name and the Land Registrar be directed to cancel the title documents held by the Plaintiff and issue fresh ones in the Defendant's name.***
- c) General damages for breach of contract.***
- d) Costs and interests of this counterclaim.***
- e) Any other relief which this honourable court would deem fit and just to grant.***
5. The trial court in its judgment dated 13th August, 2014 dismissed the Appellant's counterclaim with costs to the 1st and 2nd Respondents.

APPELLANT'S SUBMISSIONS

6. Counsel for the Appellant filed submissions dated 26th June, 2023, and identified the issues for determination as to whether the appeal has merit and who should bear the costs. Counsel submitted that given that the 1st Respondent's suit had been dismissed for want of prosecution, the third party proceedings would automatically fail.

7. Counsel submitted that the Appellant had enjoined the two third parties on the basis that if the court made a finding in favour of the 1st Respondent, then it would indemnify the Appellant for any losses that he would incur. Further that the third parties ought not to have continued participating in the suit, as there was no case against them.
8. It was counsel's submission that the 3rd Respondent was an agent mutually appointed by both the Appellant and the 1st Respondent to receive and disburse monies relating to the sale of the suit land on their behalf, and as such, the doctrine of estoppel bars him from refuting the authority given to him by both parties.
9. Mr. Kahiga relied on the cases of **Hassan Farid & Another vs Sataiya EneMepukori & 6 others (2018) eKLR** and **Selle vs Assorted Motor Boat Company 1968 and Serah Njeri Mwobi vs John Kimani Njoroge (2013) eKLR**.
10. According to counsel, the 1st Respondent put the Appellant in possession of the land, and the court should find that there was an implied or constructive trust created. Further, that the 1st Respondent sold the suit land to the Appellant, received payment and the Appellant subsequently developed the suit land hence, the 1st Respondent cannot claim that there was no consent to the transaction given by the Land Control Board.
11. Counsel relied on the cases of **Macahria Mwangi Maina & 87 others vs Davidson Mwangi Kagiri (2014) eKLR**, **Mwangi & another vs**

Mwangi (1986) KLR 328, Willy Kimutai Kitilit vs Michael Kibet (2018) eKLR, William Kipsoi Sigei vs Kipkoech Arusei & another (2019) eKLR and Aliaza vs Saul (Civil Appeal 134 of 2017) [2022] KECA 583 and urged the court to allow the appeal as prayed with costs.

12. Counsel for the Respondent told the court on 16th June 2025 that they had filed their submissions in September 2023, which were neither in the CTS Portal nor in the court file.

ANALYSIS AND DETERMINATION

13. The issue for determination is whether this appeal has merit. The Appellant listed a raft of grounds in the Memorandum of Appeal, which in effect could be condensed, into two grounds.
14. The 1st respondent filed a suit in the lower court seeking Kshs. 980,000/ being the balance of the purchase price of the suit parcels of land together with costs and interest at court rates.
15. The Appellant filed a defence and counterclaim and later filed a Notice to the 1st and 2nd Third Parties. The matter was listed for hearing but neither the 1st Respondent nor his counsel attended court during the hearing hence the case was dismissed for want of prosecution. The Appellant therefore proceeded with the counterclaim, which was subsequently dismissed with costs.
16. It was the Appellant's counsel's submissions that the 1st Respondent's case having been dismissed for want of prosecution, the third parties had no

business being part of the proceedings as they had been enjoined by the Appellant in case the court made a finding in favour of the 1st respondent, to enable them indemnify the Appellant.

17. In the case of **Sammy Ngigi Mwaura Vs. John Mbugua Kagai & Another [2006] eKLR** where the High Court observed as follows:

“The Third Party has not been directly sued on its own right and has only been brought in by the defendant for indemnity should he be found liable. As against the Plaintiff, there being no suit between them, I would also find him not liable for purposes of this suit. His liability in this suit would only be through the Defendant and, to the Defendant in indemnity. The suit is dismissed with costs.” On Appeal, the Court of Appeal upheld the decision and stated;

“We have no hesitation in deciding that the learned Judge was entirely correct in his decision as to the lack of any liability resting upon the Third Party in view of the state of the pleadings. We also share in his lack of comprehension as to why the lorry driver and his employer were not sued as sole defendants or co-defendants at the outset of the case...in our view, it should be noted that the three sub paragraphs (a), (b) and (c) of Order 1 Rule 14(1) are each in the alternative and that the only alternative chosen to be relied upon by the Defendant/Respondent in his Third Party Notice was a claim for “indemnity or contribution to any Judgment that may be entered in

favour of the Plaintiff in respect of the Plaintiff's claims as is set out in the plaint.

If, as was the position in this case, there was no Judgment entered in favour of the Plaintiff against the Defendant for the very good reason that there was no evidence of any negligence by the Defendant or his employee, there could not be any amount in respect of which the Defendant could be indemnified by the Third Party or to which the Third Party could contribute however negligent the Third Party or its employee, driver of the lorry may have been.

18. Surprisingly, the Appellant's counsel, in the same breath, having submitted that the 2nd and 3rd Respondents should not have continued to be part of the proceedings, which is the correct position, is relying on the evidence that the respondents adduced to mount this Appeal. One of the grounds of Appeal is that the Learned Trial Magistrate erred in law and in fact in considering the testimony of the third parties in his judgment when there was no valid case against them.
19. Mr. Kahiga further submitted that the Trial Magistrate erred in law and fact by totally disregarding the testimony of the 2nd respondent, who witnessed the agreement between the Appellant and the 1st Respondent.
20. The parties admitted in the pleadings and in evidence that there was a sale agreement between the Appellant and the 1st Respondent. The sale

Agreements were produced, and it is further on record that the Appellant was and is still in possession of the suit parcels of land. The reason why the 1st Respondent filed the suit was for payment of the balance of the purchase price which was Kshs. 500,000/ together with a penalty for late payment of Kshs 480,000/ coming to a total of Kshs. 980,000/.

21. The 1st Respondent claimed that the Appellant only paid Ksh 1,900,000/=, leaving a balance of Ksh 500,000/= unpaid, however, the Appellant, in its amended defence dated 11th October, 2017 averred that it paid M/S MILANO AGENCIES (the 3rd Respondent) the entire purchase price for onward transmission to the 1st Respondent.
22. This evidence of payment was not contested by the 1st Respondent and the Third Parties gave evidence to that effect. It is noted that the 1st Respondent in his Complaint in the lower court neither sought the cancellation of the sale agreements nor the retaking possession of the suit parcels on land which the Appellant is in occupation of.
23. If the 1st Respondent was owed the balance of the purchase price, then after dismissal of his case for want of prosecution, he could have sought the reinstatement of the case to allow him to get what was owed by the Appellant. He could also have filed a claim for eviction of the Appellant from the suit land. The issue of the suit parcels of land remained in limbo without any order on the way forward.

24. The 1st Respondent admitted to having received Kshs 1.9 Million from the Appellant under the sale agreement that they entered into. The 1st Respondent neither offered to refund the money nor explained what would happen to the Appellant's occupation. Was the Appellant going to continue with the occupation having paid the purchase price without documentation and transfer of the same, or what was to happen to the Appellant's formal rights/registration of the land?
25. The 1st respondent having entered into a sale agreement and given possession to the Appellant who performed his part of the bargain by payment of the full purchase price, the doctrine of constructive trust kicked in.
26. In the case **Macharia Mwangi Maina & 87 Others v. Davidson Mwangi Kagiri [2014] eKLR**, a decision of the Court of Appeal sitting at Nyeri, held that the appellant's action of receiving the full purchase price and putting the respondent in possession created a constructive trust in favour of the respondent, dismissed the appellant's claim and granted an order of specific performance in favour of the respondent.
27. Similarly, in the case of **Willy Kimutai Kitilit v Michael Kibet [2018] KECA 573 (KLR)** the Court of Appeal held as follows:

“Thus, since the current Constitution has by virtue of Article 10(2) (b) elevated equity as a principle of justice to a constitutional

principle and requires the courts in exercising judicial authority to protect and promote that principle, amongst others, it follows that the equitable doctrines of constructive trust and proprietary estoppel are applicable to and supersede the Land Control Act where a transaction relating to an interest in land is void and enforceable for lack of consent of the Land Control Board.”

28. The Learned Trial Magistrate in his Judgment concluded that the transaction lacked the consent of the Land Control Board hence it was null and void. He did not take into account that the Appellant was in possession of the suit parcels of land. He further ignored the fact that there was evidence that the Appellant had paid the full purchase price.

29. The Trial Magistrate in the Judgment dated 13th August, 2014 stated as follows at paragraph 18:

‘The long and short of it all is that the defendant company is requesting the court to enforce the Sale Agreement which they have themselves admitted breaching. Their failure to secure the consent of the Land Control Board within six months after executing it exacerbates their position making the Agreement legally untenable.’

30. The Trial court based its Judgment on the lack of consent of the land Control Board, hence the transaction was null and void. The issue of lack of consent from the Land Control Board is decided on a case to case basis,

the court must apply equitable principles to do substantive justice as was held in the **Willy Kitilit case(Supra)** that:

As we have held in essence that, the lack of the consent of Land Control Board does not preclude the court from giving effect to equitable principles, in particular the doctrine of constructive trust, we find that the trial court reached the correct decision and therefore the appeal has no merit.

31. For the foregoing reasons, I find that the Appeal has merit and the Judgment of the lower court is hereby set aside and the Appellant's counterclaim in the lower court allowed as prayed except the prayer for general damages.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 13TH DAY OF AUGUST 2025.

**M. A. ODENY
JUDGE**

