REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAKURU

CORAM: WAKI, VISRAM & KOOME, JJ.A.

CIVIL APPEAL NO. 46 OF 2006

BETWEEN

JULIA WACHEKE MUNGAI *{The legal representative & administrator*

***of the estate of the late JOHN MUNGAI KARUA}*.....APPELLANT**

AND

BETTY NGENDO GACHIE

AMOSAM BUILDERS & DEVELOPERS LIMITED

NAKURU MUNICIPAL COUNCIL..... RESPONDENTS

(Appeal from the judgment of the High Court of Kenya at Nakuru (Rimita, J) dated 26th January, 2001

in

HCCC NO. 104 OF 1992)

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JUDGMENT OF KOOME, J.A.:

The 1st respondent filed a suit before the Superior Court against the 2nd and 3rd respondents claiming damages for loss as a result of poor workmanship that led to structural defects of the residential house sold to the 1st respondent by the 2nd respondent. The 3rd respondent was sued for issuing completion

certificates in respect of a house that had structural defects.

By a third party notice dated 26th July, 1994, issued by ***AMOSAM BUILDERS LIMITED*** the 2nd respondent sought indemnity and or contribution from the appellant. This was on the grounds that the appellant constructed the suit premises as an agent of the 2nd respondent for the 1st respondent. The third party (appellant) did file a defence on 1st February, 1995, in which he denied liability. The appellant fully participated in the trial; he gave evidence and filed written submissions.

Briefly summarized, this suit was instituted by Betty Ngendo Gachie (1st respondent) against Amosam Builders & Developers Limited (2nd respondent) and Nakuru Municipal Council (3rd respondent) respectively. The 1st respondent's claim against the respondents was that she purchased a residential house being LR NO: Nakuru Municipality/Block 3/293 at a price of KShs.360,000/= and she took possession in 1988 from the 1st respondent. However, six months after taking possession, the house developed serious structural defects that affected the walls, floors and roof.

The 1st respondent blamed the 2nd respondent for negligence in the construction and the 3rd respondent for negligence in issuing an occupational certification for a substandard building and for failing to inform the 1st respondent that the building was defective.

The 2nd respondent admitted in its defence that it sold the residential house to the appellant but denied the allegations of negligence. The 2nd respondent contended that if there were cracks in the building they were caused by latent land faults which could not be detected while applying reasonable diligence. The 1st and 2nd respondents gave evidence and relied on several experts who gave evidence in support of their respective prepositions by each of the party that called them as witnesses.

As regards the 3rd party, **John Mungai Karua,** who is the appellant in this appeal, he was the building contractor having been contracted by the 2nd respondent. He testified that the building plan was supplied to him and the specified materials which were used was exactly what was specified in the plan. Moreover, the project was inspected from time to time by the municipal council inspectors who approved what was going on and they issued appropriate certificates of satisfactory work.

After considering all the evidence, the learned trial judge held that the 2nd and 3rd respondents and the appellant carried out the construction of the house casually. The learned trial judge found that the 3rd respondent's personnel were negligent in supervising and directing the building. The 3rd respondent was found liable and was apportioned liability to the tune of 50% while the 2nd respondent was apportioned at 20% and the appellant 30% respectively.

Being aggrieved by that decision, the 2nd respondent filed **Nakuru Civil Appeal No. 193 of 2001**: **Amosam Builders & Developers Limited, Betty Ngendo Gachie and 2 others**.

I shall refer to that judgment which was by a bench of this court differently constituted here below. On the part of the appellant he also filed the present appeal that raises fifteen grounds of appeal. During the hearing of this appeal, it was brought to the notice of the court that the judgment in Civil Appeal No. 193 of 2001, determined the issue of apportionment of liability.

The judgment in Civil Appeal No. 193 of 2001 was as follows:

"We have analyzed all the evidence on record and it is our view that the trial judge came to the right decision that the collapse of the subject house was due to negligence and poor workmanship. It is also our view that his apportionment of blame was based on the evidence presented to him and he cannot be

faulted on that score. Moreover, that court's observation of the subject building confirmed the testimony of PW2. At the commencement of the hearing of this appeal, it was pointed out that the appellant, John Njoroge Karua, had passed away and no application had been made for his substitution. Mr Kagucia for the appellant unsuccessfully applied informally, for the consolidation of Civil Appeal No. 46 of 2006 pending before this Court relating to the subject property, with this one. Learned counsel hoped to obviate the abatement of this appeal herein against the 3rd respondent as the limitation period for his substitution had expired. The effect of the refusal to consolidate the two appeals is that the appeal against the 3rd respondent has abated. We have no hesitation in so ordering. We observe that the 3rd respondent was brought into this litigation through a third party notice. That being the case, the appellant's liability to the 1st respondent, Betty Ngendo is 50%. The apportionment of liability between the appellant and the 3rd respondent was to make it easier for the appellant to know how much it would claim from the 3rd respondent by way of indemnity. In the result, and for the foregoing reasons, this appeal fails and it is dismissed with costs to the 1st respondent. The 2nd respondent, Nakuru Municipal Council, though served, did not attend the hearing of the appeal. That being so, we make no order as to costs in respect of it''.

In my view, the above judgment made three profound determinations which touch on the present appeal:

Ø The appeal against the appellant was found to have abated following the death of the appellant who was not substituted;

Ø The judgment of the trial court was upheld in terms of the factual findings; and

Ø Liability of 30% that had been apportioned to the appellant was attributed to the 2nd respondent who was the principal in the contract of sale.

Mr Kahiga, learned counsel for the appellant, argued that the appellant was wrongly joined as a third party before directions were taken. He also argued that the evidence of Samuel Kahiga Mwiga who testified on behalf of the 2nd respondent exonerated the appellant from any blame. Consequently, since the 2nd respondent was the principal in the contract and the appellant did the work according to the specifications; it was Mr Karanja's view that the plaintiff had no claim against the appellant; no liability would have been apportioned to him.

On the part of the 1st respondent, Mrs. Wahome, learned counsel submitted that the issue of apportionment was determined in Appeal No. 193 of 2001. Mr Kagucia, learned counsel for the 2nd respondent was of the same view that Appeal No. 193 of 2001 settled the issue of apportionment and the appellant fully participated in the trial and did not seek directions after he was served with the 3rd party notice. As regards directions on the participation of the appellant as a third party, I too agree with Mr Kagucia that that issue was introduced late in the day, after the appellant fully participated in the hearing. The appellant upon being served with the third party notice should have indicated his wish to take directions and the amendment of pleadings if he so wished. Raising it at this appellate level is tantamount to an afterthought which does not afford all the parties proportionality of remedying the situation.

Mr Mbeche, learned counsel for the 3rd respondent, challenged the admission of the evidence of Jack Awuor [PW2] whose qualifications are not recognized in civil engineering. I am of the view that this argument should have been put to PW2 when he testified before the trial court by the 3rd respondent during cross-examination. It is too late to introduce the issue at the appellate level when it is next to impossible for this court to determine the qualifications of the witness that was not at all questioned

during the trial.

In my own evaluation of the entire evidence before the trial court, I, like my brother Judges in Civil Appeal No. 193 of 2001, find the learned trial Judge arrived at the correct decision. The issue of apportionment of liability was also settled at 50% to be borne by the 2nd respondent, who was the principal in the contract.

Accordingly, this appeal is allowed in terms of the apportionment of 50% of liability to the 2nd respondent. The apportionment of 20% and 30% to the 2nd respondent and the appellant respectively by the trial court, was to enable the 2nd respondent know the percentage to recover from the appellant. Since all matters were determined in Civil Appeal No. 193 of 2001, each party should bear their own costs of this appeal.

This judgment is delivered pursuant to ***Rule 32 of the Court's Rules***.

Dated and delivered at Nakuru this 9th day of August, 2012.

M. K. KOOME

JUDGE OF APPEAL