



**Dragon Agencies Limited v Advent Valuers Limited (Civil Appeal 276 of 2022)
[2024] KEHC 11226 (KLR) (Civ) (26 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11226 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL
CIVIL APPEAL 276 OF 2022**

JN NJAGI, J

SEPTEMBER 26, 2024

BETWEEN

DRAGON AGENCIES LIMITED APPELLANT

AND

ADVENT VALUERS LIMITED RESPONDENT

(Being an appeal from the judgment and decree of Hon. B. J. Ofisi (Mrs), Resident Magistrate and Adjudicator, in Nairobi Small Claims Court No.828 of 2021 delivered on 31/3/2022)

JUDGMENT

1. The appellant herein was contracted by a company known as Union East Africa Trust Ltd to provide security services to several of its properties in Nairobi. The Union East Africa Trust Ltd then entered into a property management agreement with the Respondent herein to manage the said properties. It was the obligation of the respondent to collect rent in the said properties, remitting the same to the landlord and to pay the appellant on behalf of its principal for the service rendered. Later the respondent terminated the contract between the appellant and Union East Africa Trust Ltd. The Appellant then instituted suit against the respondent seeking to recover a sum of Ksh.502,198.80 being outstanding payments for services rendered.
2. The respondent denied the claim on the basis that there was no privity of contract between it and the appellant and therefore that the suit was a misjoinder. After a full trial in which the appellant called one witness and the respondent did not adduce evidence, the trial Adjudicator held that the parties had entered into a contract but that the appellant had not availed a contract to prove that there were any pending payments on termination of the contract. The court consequently dismissed the suit. The appellant was aggrieved by the dismissal of the suit and lodged the instant appeal.
3. The grounds of appeal are that:



- (1) The Honourable Adjudicator erred in law and in fact in finding that there was no obligation on the part of the Respondents to pay the Appellants.
 - (2) The Honourable Adjudicator erred in law and in fact in dismissing the claim.
 - (3) That the Honourable Adjudicator erred in law and in fact in awarding the Respondents the costs of the suit.
4. The appeal was dispensed of by way of written submissions by the advocates appearing for the parties.

Appellant's Submissions

5. The appellant submitted that they produced three invoices to prove the outstanding payment of Ksh.502,198.80. That the respondent did not rebut evidence that the said sum was outstanding. That the trial court erred in fact and in law in holding that it was unable to decipher whether there was a balance due and owing to the claimant yet they did not tender evidence to rebut the appellant's case. The appellant submitted that it had proved its case against the respondent. They urged the court to allow the appeal and thereby enter judgment for the sum claimed.

Respondent's Submissions

6. The Respondent submitted that there never existed any contractual relationship between the appellant and the respondent. That the appellant did not produce such a contract.
7. It was submitted that the contract was between the appellant and Union East Africa Trust Limited but that the respondent was not privity to the said contract. That the invoices the appellant issued to the respondent being Nos.1459 and 1460 both dated 15th October 2020 were addressed to Union East Africa Trust Ltd C/O Advent Valuers Ltd (the Respondent) and not to the respondent.
8. It was submitted that the common law principle of privity of contract postulates that only parties to a contract can sue or be sued under the contract. That a contract cannot confer rights or impose obligations on any person other than the parties to it. More so that a contract cannot be enforced either by or against a third party. The respondent relied on the case of *Securicor Guards (K) Limited v Mobamed Saleem Malik & another* (2019) eKLR where the court held that:
- ...a contract cannot confer rights or impose obligations on any person other than the contracting parties; that a contract cannot be enforced by or against a 3rd party. The effect of this legal principle is that only parties who are privity to a contract can sue to enforce its terms.
9. The respondent also cited the case of *Maingi Njau v Meshack Mbogo Wambugu* (2018) eKLR where it was stated that:
- A contract affects only the parties to it and cannot be enforced by or against a person who is not a party to it.
10. It was consequently submitted that the appellant cannot maintain an action against the respondent since it does not have any rights against the respondent under the contract which it can lawfully enforce.
11. It was submitted that the evidence placed before the court indicated that the respondent was an agent for Union East Africa Trust Ltd to whom the respondent offered property management services while the appellants offered them security services.
12. The respondent submitted that the status of the respondent as an agent of its principal was disclosed to the appellant. That it is trite law that where the principal is disclosed, the agent is not to be sued.



That there was no contractual relationship between the appellant and the respondent and therefore no cause of action can be drawn against the respondent who is an agent of a disclosed principal. On this legal proposition, the respondent relied on the Court of Appeal decision in *St. Mary Academy Limited & another v Grace Njeri Mukora & another: Yvonne Jeruto & another (Contemnors)* (2021) eKLR where the court echoed the sentiment of the court in the case of *Victor Mbachii & another v Nurtun Bates Ltd* (2013) and stated thus:

In the case of *City Council of Nairobi v Wilfred Kamau Gitbua t/a Gitbua Associates & another* [2016] eKLR, the court of appeal rendered itself as follows;

Victor Mbachii & Anor V Nurtun Bates Ltd, [2013] Eklr stated:

“

“37. . It remains now to consider the second issue whether the enjoinder of the appellants in the suit in the High Court breached the principle of law that an agent cannot be sued where there is disclosed principal.”

38. In *Anthony Francis Wareheim T/A Wareheim & 2 Others V Kenya Post Office Savings Bank*, Civil Appln Nos. NAI 5 & 48 OF 2002, at page 10, this Court unanimously held as follows:

“It was also prima facie imperative that the court should have dismissed the respondent’s claim against the second and third appellants for they were impleaded as agents of a disclosed principal contrary to the clear principle of common law that where the principal is disclosed, the agent is not to be sued. Furthermore, the court having found on the evidence that the second and third appellants were principals in their own right and not agents of the first appellant in the transaction giving rise to the suit, it should have dismissed the suit against the first appellant who had been sued as the principal.”

39. In the circumstances of this case, the 2nd respondent cannot be sued as agent where there is a disclosed principal [the appellant]. There is therefore no cause of action against the 2nd respondent. The principle of common law is that where the principal is disclosed, the agent is not to be sued. In the circumstances of this case, the principal (the appellant) is disclosed and the agent (the 2nd respondent) cannot therefore be sued. There are no factors vitiating the liability of the disclosed principal. Accordingly, the enjoinder of the 2nd respondent in this case is unwarranted.

13. The respondent stressed this point in citing the case of *City Council of Nairobi v Wilfred Kamau Gitbua t/a Gitbua Associates & another* (2016) eKLR the court held that:

“The principle of common law is that where the principal is disclosed, the agent is not to be sued.”

14. The respondent submitted that it is the law of agency that where the principal is disclosed the agent is not to be sued. The respondent in this respect relied on the case of *Anthony Francis Wareham t/a AF Wareham & 2 others v Kenya Post Office Savings Bank* (2004) eKLR in the paragraph cited above.

15. In view of the foregoing submissions, the respondent urged the court to dismiss the appeal.



Analysis and Determination

16. The duty of this court as a first appellate court is as was stated by the Court of Appeal in the case of *Selle and another versus Associated Motor Boat Company and Others* [1968] EA 123 to that:

“...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 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...”

17. The issues for determination in this appeal are:

- (1) Whether there was a privity of contract between the appellant and respondent.
- (2) Whether there was misjoinder of suit.

Whether there was privity of contract

18. The respondent argued that there was no privity of contract between it and the appellant and as such the claim is not sustainable. The appellant did not respond to this argument. They instead dwelt on the argument that there was sufficient evidence to prove the claim.

19. The trial court found that there was a contract between the parties but at the same time held that no contract was produced to prove the claim.

20. In the case of *Agricultural Finance Corporation vs Lengetia Limited & Jack Mwangi* [1985] eKLR, it was stated the following on the doctrine of privity of contract:

“As a general rule a contract affects only the parties to it, and cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. The fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract.”

21. In the instant case the contract was between the appellant and a company known as Union East Africa Trust Ltd who also had a separate contract with the respondent to manage its property. There existed no contract between the appellant and the respondent herein. Though the respondent as the manager of the property used to pay the appellant for the services rendered on behalf of Union East Africa Trust Ltd, there was no privity of contract between the appellant and the respondent. The appellant was thus a stranger in the contract between the respondent and Union East Africa Trust Ltd and cannot benefit from the contract between the respondent and Union East Africa Trust Ltd. It is common law principle that a contract only binds those who are parties to it and cannot confer rights to those not part of it. The appellant cannot thus enforce the contract between the respondent and Union East Africa Trust Ltd. The argument for the respondent in this respect is therefore upheld. The trial court got it wrong in its holding that there was a contract between the parties.



Whether there was misjoinder of suit

22. The respondent submitted that it was performing its duties as an agent to Union East Africa Trust Ltd. That this fact was disclosed to the appellant. That it is a common law principle that an agent is not to be sued where the principal is disclosed.
23. The evidence before the trial court showed that the respondent was an agent for Union East Africa Trust Ltd which was a fact that was disclosed to the appellant and was well known to them. The common law principal that where the agent is disclosed the principal is not to be sued has been well articulated in the submissions of the respondent- see *Nairobi v Wilfred Kamau Githua t/a Githua Associates & another* (supra) and *Anthony Francis Wareheim T/A Wareheim & 2 Others V Kenya Post Office Savings Bank* (supra). The appellant did not respond to these submissions. In view of the fact that the position of the respondent as agent was disclosed to the appellant, it is my finding that the respondent was wrongly sued in the case. The appellant should have sued the principal, Union East Africa Trust Ltd. In suing the respondent, it is my finding that there was a misjoinder of suit.
24. In view of the foregoing, it is my finding that the appeal is bereft of merit and the same is dismissed with costs to the respondent.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 26TH SEPTEMBER 2024

J. N. NJAGI

JUDGE

In the presence of:

No appearance for Appellant

Mr Ndambiri for Respondent

Court Assistant – Amina

30 days Right of Appeal.

