Devkan Enterprises Limited v United Footwear Limited (Civil Appeal E524 of 2022) [2023] KEHC 1198 (KLR) (24 February 2023) (Judgment)

Neutral citation: [2023] KEHC 1198 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL APPEAL E524 OF 2022

JK SERGON, J

FEBRUARY 24, 2023

BETWEEN

DEVKAN ENTERPRISES LIMITED ..... APPELLANT

AND

UNITED FOOTWEAR LIMITED ..... RESPONDENT

(Being an appeal against the ruling and order of the Senior Resident Magistrate Honourable J. P. A. Aduke in Nairobi CMCC no. E9111 of 2021 delivered on 16/6/2022)

JUDGMENT

1. The respondent in this instance instituted a suit before the Chief Magistrate's Court by way of the plaint June 17, 2021 pursuant to a road accident on June 18, 2018 along Zambezi area and sought for reliefs against the appellant in the nature of special damages plus costs of the suit and interest thereon.

2. The respondent averred in its plaint that on or about the June 18, 2018 at approximately 10:00 am, his motor vehicle registration number KAN 728C was stationed at its packing compound located at Zambezi area, in Nairobi County when the appellant's driver while reversing so negligently drove, controlled motor vehicle registration number KCG 645X that he caused or permitted the same to collide with the respondent's motor vehicle thereby causing loss and damage to the respondent.

3. The appellant entered appearance on the 2nd of November, 2021 and subsequently filed an application under article 159 of the *Constitution of Kenya* seeking for the suit to be stayed and the matter in dispute to be referred to a sole Arbitrator to be agreed by the party insurers pursuant to clause 9 and 10 of the knock for knock Agreement.

4. The application was canvassed by way of written submissions filed by the appellant and the respondent on February 2, 2022 and April 25, 2022 respectively.

5. Upon hearing the parties on the abovementioned application, the trial court dismissed it with costs vide its ruling delivered on June 16, 2022.

6. Being aggrieved by the aforementioned ruling, the appellant sought to challenge the same by way of an appeal. Through his memorandum of appeal dated July 14, 2022 the appellant put in the following grounds:

    i. The lower court exercised judicial authority not in compliance with the constitution, it failed in its duty to respect, uphold and defend the Constitution when it ignored the principles under Article 159 of the Constitution to promote the purpose and principles of the Constitution.

    ii. That after cognizance of the principle of subrogation, the Honourable Magistrate erred in not finding that General Accident Insurance Company Limited and Intra Africa Assurance Company Limited are bound by the Knock for Knock Agreement, to which agreement, both insurers are signatories.

    iii. The learned Magistrate erred in not finding that the respondent's insurer (General Accident Insurance Limited) had bound itself to resolve any material damage claim according to the terms of the knock for knock agreement.

    iv. The Honourable Magistrate erred in disregarding the knock for knock agreement pursuant to which, the aforesaid insurers agreed to bear their own losses irrespective of legal liability between the vehicle involved.

    v. Therefore, the Honourable Magistrate erred in not finding that the respondent's insurer had forfeited the right to institute the material damage claim in the Lower Court to recover its whole loss as pleaded.

    vi. The Lower court erred in not finding that the said insurers had disagreements over the interpretation and application of the knock for knock agreement and in particular, settlement of the respondent's insurer's material damage claim as per the terms of that agreement.

    vii. The Honourable Magistrate erred in not finding that the said insurers agreed (a) to settle amicably any disputes over material damage claims and (b) in case of disagreements, to refer the disputes to an arbitrator.

    viii. The honourable Magistrate erred in failing to enforce the knock for knock agreement and to refer the parties to arbitration as they agreed.

    ix. The Honourable Magistrate erred in failing to consider merits of the application by the appellant and in dismissing the application.

7. Directions were given that the appeal be canvassed by way of written submissions. Accordingly, the parties complied and filed their respective submissions. I have also considered the rival written submissions. I find two issues falling for determination namely;

    i. Whether the knock for knock agreement is binding

    ii. Whether there are disputes to be referred to arbitration.

8. On the first issue, the appellant submitted that knock to knock agreement came into force from May 1, 2007 between the representative of the respondent's insurer and the appellant's insurer and the respondent's policy is said to be effective on June 18, 2018.

9. It is the appellant's submissions that they had organized their affairs for them and their insurer with the guarantee that the respondent's insurer wouldn't file a material damage lawsuit aiming to recoup its entire loss following the accident in question.

10. The appellant further submitted that the knock-to-knock agreement exempted the appellant from the hassle of defending a lawsuit stemming from a motor vehicle accident and from being obligated to cover the respondent's insurer's loss if proven negligent. The appellant also received a similar advantage.

11. The appellant pointed out that under the doctrine of subrogation, the respondent's insurer is a successor in title. On this the appellant relied on the case of *Monicah M Musyimi v Richard Macheru Irungu* (2014) eKLR,the Court held that under the principle of subrogation ,the insurer substitutes its insured:

    In the treatise of K. I. Laibuta: *Principles of Commercial Law* at page 254 lines 24-35 the author states in part as follows:

    > " In a contract of indemnity, an insurer who indemnifies his insured against the loss incurred in consequence of the happening of the risk insured may be subrogated to insured person's rights against a third party whose negligence caused the loss.
    >
    > Having compensated the insured, the insurer is entitled to take advantage of and enforce any legal or equitable rights and remedies that insured has or might have enforced against such third party whether in contract or in tort. To enforce such rights, the insurer brings the action in the name of the insured who must lend his name in return of an undertaking that he will not be personally liable for costs in the action. The insurer is said to "step into the shoes" (stands in the place of the insured) and is subrogated to his rights. Subrogation is the substitution of one person for another so that the person substituted succeeds to and assumes the rights of the other."

12. The appellant contends that the appellant, the respondent and the appellant's insurer are beneficiaries of the knock for knock agreement and that the appellant's insurer is a direct beneficiary and the other two are third party beneficiaries.

13. The appellant further contends that for them and their insurer can enforce the knock for knock agreement against the respondent's insurer as was held in the case of *Savings & Loan (K) Limited v Kanyenje Karangaita Gakombe & another* (2015) eKLR at page 5:

    While the proposition that a contract cannot impose liabilities on a non-party has been widely embraced and accepted as rational and well founded, the proposition that a contract cannot confer a benefit other than to a party to it has not been readily accepted and has in fact been the been subject of much criticism. In *Darlington Bourough Council V Witshire Northern Ltd* [1995] 1 WLR 68 Lord Steyn eloquently demonstrated the flaw in the proposition in the following terms:

    > " The case for recognizing a contract for the benefit of a third party is simple and straightforward. The autonomy of the will of the parties should be respected. The law of contract should give effect to the reasonable expectations of contracting parties. Principle certainly requires that a burden should not be imposed on a third party without his consent. But there is no doctrinal, logical or policy reason why the law should deny effectiveness to a contract for the benefit of a third party where that is the expressed intention of the parties. Moreover, often the parties, and particularly third parties, organize their affairs on the faith

of the contract. They rely on the contract. It is therefore unjust to deny effectiveness to such a contract."

14. The appellant submits that the respondent's insurer is estopped from denying the agreement is binding. On this the appellant has relied on the case of *John Mburu v Consolidated Bank of Kenya* (2018) eKLR ,the Court of Appeal applied the decision by Lord Denning M.R in *D & C Builders v Sidney Rees* (1966) 2 QB 617 stating that:

> 'It is the first principle upon which all courts of equity proceed, that if parties, who have entered into definite and distinct terms involving certain legal results, afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or be kept in suspense, or held in any event, the person who otherwise might have enforced those rights will not be allowed to enforce them when it would be inequitable having regard to the dealings which have taken place between the parties.'

15. On the other hand, the respondent submitted that the appeal herein is centered on the interpretation of the Knock for Knock agreement that came to effect on the 1st day of May 2007 and it is not in dispute that the signatories of the said agreement were purely underwriters within the Republic of Kenya however, the parties herein were not parties to the said agreement.

16. On this the respondent relied on the case of *Agricultural Finance Corporation v Lengetia* 1982-88 I KAR 772 wherein it was stated as

> " 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."

17. The respondent submitted that the contract of Indemnity only gives the Insurance Company the right to take over the rights and priviledges of the Insured but does not create a privity of contract between the insured and third parties.

18. It is the respondent's submissions that the parties herein are strangers to the knock and knock agreement that binds only the underwriters and as such there being no privity of contract between the parties herein to the said knock for knock agreement.

19. It is clear that the subject of this appeal is the Knock to knock agreement that came into force on May 1, 2007 and that it was between the insurers of the parties herein and the issue at hand is whether the parties to this suit are also parties to the agreement by extension.

20. It is also clear that the common law principles on privity of contract is trite law that indeed a contract cannot confer rights or benefits or impose obligations upon any person who is not a party to the contract .

21. A perusal of the agreement and I have noted that the parties in this suit are distinct from the parties in the agreement.

22. This principle is in Halsbury Laws of England 4th Edition Vol 9 (1) Para 748 which provides (with emphasis underlined)that:

> The general rule. The doctrine of privity of contract is that as a general rule, at common law a contract cannot confer rights or impose obligation on strangers to it that is persons who are not parties to it.The parties to a contract are those persons who reach agreement and.....

23. It is therefore clear that the parties to this suit are not party to the said Knock to knock agreement and that a contract cannot confer rights or benefits or impose obligation upon a person who is not a party to the contract.

24. On the second issue, the appellant submitted that Clause 17 of the said Knock to Knock agreement provided for the dispute resolution, whereby the insurers first resort to amicable efforts to resolve any dispute over the interpretation and implementation of the agreement and the efforts fail, any such disputes are to be referred to arbitration.

25. The appellants stated that their insurer sought amicable resolution but the respondent's insurer disagreed and filed the suit.

26. On this the appellant relied on the case of *Brian Martin Francis & Others v Samuel Thenya Maina &Martin Munyu (Arbitrator)* (2021) eKLR, an arbitrator ought to be the adjudicator of the disputes. At paragraph 61 of the Ruling ,the Court held:

> " Having regard to the arbitration clause and the agreement as a whole, it is my view that the parties envisaged and intended, at the time of concluding the agreement, that all their disputes regarding the agreement or questions arising out of or relating to or in consequence of the agreement would be determined by way of arbitration. To view it differently would give the agreement a commercially insensible meaning."

27. On the other hand, the respondent submitted that a cursory perusal of the Knock for knock agreement will indeed reveal that time was of great essence in settling any claim under the said agreement .The respondent cited Clause 14 paragraph 2 wherein parties insurers agreed as follows:

> " It is further agreed that members shall sort out knock for knock claims within a maximum period of eighteen months from the date of the accident."

28. The respondent submitted further that what can be adduced from the foregoing is that the subject accident having occurred on the June 18, 2018 then settlement of claim if any under the Knock for Knock Agreement was to be concluded on or before the 18th day of December 2019.

29. It is the respondent's submissions that the accident having occurred on the June 18, 2018, the settlement of the incurred figure of Kshs.215,074/= by GA Insurance Company Limited Company on a knock for Knock basis was already time barred as at the June 18, 2021 by dint of clause 14 of the Association of Kenya Insurers the Knock to Knock Agreement which position was duly communicated to the appellant's advocates vide a letter dated 8th day of October 2021 .

30. From the record the subject accident having occurred on the 18th day June 2018 then settlement of claim under the Knock for Knock agreement was to be concluded on or before the 18th day of December 2019 as per Clause 14 of the Knock to Knock agreement which states that that members shall sort out knock for knock claims within a maximum period of eighteen months from the date of the accident."

31. In *Fairlane Supermarket Limted Versus Barclays Bank Ltd* Nbi Hccc No 102 of 2011, this court held that –

> " the option to refer to the matter to arbitration was sealed when the defendant herein entered appearance and followed it with a defence. In the case of Corporate Insurance Company v Wachira (1995-1998) Iea 20, it was held that if the appellant had wished to invoke the clause, it ought to have applied for a stay of proceedings after entering appearance and before delivering any pleading and that the appellant had lost its right to rely on the arbitration clause by filing a defence ..."....any party who wishes to take advantage of the arbitration clause in a contract should either at the time of entering appearance or before the entry of appearance make the application for reference to arbitration."

32. I am in agreement with the respondent that indeed Clause 14 is very clear stipulated and there is indeed no dispute over interpretation and or application of the said provision of the Knock for Knock Agreement to warrant orders sought and as such there is no dispute to be referred to Arbitration as envisaged in the said agreement between the parties insurers.

33. The upshot and conclusion from the foregoing analysis and findings is that the appeal is devoid of merit and it is dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 24TH DAY OF FEBRUARY, 2023.

.....

J. K. SERGON

JUDGE

In the presence of:

.....for the Appellant

.....for the Respondent