KCB Bank Limited v Odhiambo t/a Karo Wholesalers & another (Civil Appeal 12 of 2020) [2023] KEHC 17948 (KLR) (26 May 2023) (Judgment)

Neutral citation: [2023] KEHC 17948 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUSIA

CIVIL APPEAL 12 OF 2020

WM MUSYOKA, J

MAY 26, 2023

BETWEEN

KCB BANK LIMITED .... APPELLANT

AND

STEPHEN ODHIAMBO T/A KARO WHOLESALERS .... 1ST RESPONDENT

UAP INSURANCE COMPANY LIMITED .... 2ND RESPONDENT

(Appeal from judgment and decree of Hon. William Chepseba, Chief Magistrate, CM, in Busia CMCCC No. 246 of 2014, of 14th July 2020)

JUDGMENT

1. The appellant, together with the 2nd respondent, had been sued by the 1st respondent, at the primary court, for Kshs. 3, 000, 900.00, plus interest and costs, arising from non-settlement of an insurance claim, following a burglary at the premises of the 1st respondent, where shop goods, which had been insured with the 2nd respondent, were stolen. The claim was founded on breach of contract. The appellant filed a defence, although acknowledging the banker-customer relationship between it and the 1st respondent, denied everything else pleaded in the plaint with respect to the compensation sought.

2. A trial was conducted. 1 witness testified for either side. In the end, the trial court entered judgment in favour of the 1st respondent, and against the appellant and the 2nd respondent.

3. The appellant was aggrieved, hence the instant appeal. The appeal has raised several grounds: that there was no evidence that the appellant was an agent of the 2nd respondent; that payment of premiums was the primary duty of the 1st respondent, and the appellant merely documented the same by way of debit of the payment in the appellant's account; that, even if the appellant was an agent of the 2nd respondent, it could not be liable for it would be an agent of a disclosed principal; that burden of proof

could only be shifted to defendants upon the plaintiff discharging the duty imposed on him; and, that the judgment was contrary to the weight of the evidence.

4. On December 5, 2022, directions were given, for canvassing of the appeal by way of written submissions. There are written submissions on record by the appellant and the 1st respondent.

5. The appellant collapsed its grounds to 2: on whether there was privity of contract between the appellant and the 1st respondent, and whether there was an agency relationship between the appellant and the 2nd respondent. On privity of contract, it is submitted that the suit was for enforcement of a contract entered into between the 1st respondent and the 2nd respondent, and the bone of contention was around notification of any loss or damage to goods being made to the 2nd respondent. It is asserted that the 1st respondent was basing his claim on a policy document made between the 2 respondents. It is submitted that there was no obligation for the 1st respondent to report any loss to the appellant, and its role had nothing to do with the policy between the 2 respondents. *Securicor Guards (K) Limited v Mohamed Saleem Malik & another* [2019] eKLR (Githua, J) and *Aineah Likuyani Njirah v Aga Khan Health Services* [2013] eKLR (Nambuye, Maraga & M'Inoti, JJA) are cited on what constitutes privity of contract.

6. On the alleged agency relationship between the appellant and the 2nd respondent, it is submitted that no documentary evidence was presented to establish existence of such a relationship, and that oral evidence could not be relied on as evidence of such a relationship where a written contract exists. Section 97 of the *Evidence Act*, Cap 80, Laws of Kenya, *HK Advocate v Muciimi Mbaka* [2004] eKLR (Emukule, J) and *United Millers Ltd v Benjamin Okari Oigo* [2010] eKLR (Asike-Makhandia, J) are cited to support that contention. It is submitted that the trial court misapprehended the nature of the written agreements made between the appellant and the 1st respondent, and that made between the respondents themselves. *Lucy Nungari Ngigi & 4 others v National Bank of Kenya Limited* [2015] eKLR (Gikonyo, J), on definition of an agency relationship, is cited. *Mbuthia Macharia v Annah Mutua Ndwiga & another* [2017] eKLR (Alnashir Visram, Karanja & Koome, JJA) and *Statpack Industries v James Mbithi Munyao* [2005] eKLR (Alnashir Visram, J), are cited, to support the submissions that the 1st respondent had not proved his case against the appellant to the required standard. *City Council of Nairobi v Wilfred Kamau Githua t/a Githua Associates & another* [2016] eKLR (Kihara Kariuki PCA, Koome & Mohammed, JJA) is cited to support the argument that where an agency relationship exists, the agent cannot be sued where the principal is disclosed.

7. On his part, the 1st respondent argues 3 grounds: on whether the appellant was an agent of the 2nd respondent, whether the appellant was liable as an agent of a disclosed principal, and whether the appellant discharged burden of proof to the required standard. On existence of the agency relationship between the appellant and the 2nd respondent, he cites *Lucy Nungari Ngigi & 4 others v National Bank of Kenya Limited* [2015] eKLR (Gikonyo, J), to argue that there existed such a relationship, for it was the appellant who referred the 2nd respondent to him; he paid the first premiums to the 2nd respondent through the appellant; the 2nd respondent confirmed payment of the said premiums through the appellant; and when the burglary happened, the first report was made to the appellant, who then relayed it to the 2nd respondent. He submits that there was an implied agency relationship.

8. On whether the appellant was liable as an agent of a disclosed principal, the 1st respondent does not dispute that an agent of a disclosed principal is usually discharged. It is argued, however, based on *Jackson Saggligram Baburam & 4 others v Suereca East Africa Limited* [2020] eKLR (Ombwayo, J), that there exist instances where an agent of such a disclosed principal can be held personally liable. It is submitted that this was one such case, as the appellant had a fiduciary duty to the 1st respondent, which he failed to discharge, when he conveyed his loss to the appellant, and the appellant failed to relay that

communication to the 2nd respondent for over 2 years. It is submitted that, whereas the principal was disclosed, the appellant was liable for its wrongful act of not informing the 2nd respondent of the 1st respondent's loss.

9. On burden of proof, *Caleb Juma Nyabuto v Evance Otieno Magaka* [2021] eKLR (Wendoh, J), is cited, on what that entails. It is submitted that the burden of proof was discharged by the 1st respondent, by establishing that he took out a credit facility with the appellant, the appellant referred him to the 2nd respondent to take out an insurance cover for the loan, he paid the premiums to the 2nd respondent through the appellant, and produced exhibits to support his case, to demonstrate that the appellant was an agent for the 2nd respondent, and that as agent the appellant failed to communicate his loss to the 2nd respondent.

10. I believe that there are 3 issues for me to determine, that is as to whether there was privity of contract between the appellant and the 2nd respondent with respect to the insurance contract, whether the appellant was an agent of the 2nd respondent for the purpose of the insurance contract, and whether the 1st respondent had discharged the burden of proof on him.

11. I will start with privity of contract. The general rule is that the only persons who have rights or obligations under a contract are those who are privy or party to it. See Tudor Jackson, The Law of Kenya, 3rd edition, Kenya Literature Bureau, Nairobi, 2005, pages 175 and 176. In other words, a contract can only be enforced by or against the persons who are parties to it, for a contract cannot confer rights or impose obligations on persons who are not party to it. See *Agricultural Finance Corporation v Lengitia Limited* [1985] KLR 765 (Hancox, Nyarangi & Platt, JJA), *Aineah Likuyani Njirah v Aga Khan Health Services* [2013] eKLR (Nambuye, Maraga & M'Inoti, JJA), *Securicor Guards (K) Limited v Mohamed Saleem Malik & another* [2019] eKLR (Githua, J), *Afroplast Industries Limited v Sanlam Insurance Co. Ltd & another* [2021] eKLR (Meoli, J), However, the principle works hardship on persons who otherwise benefit from it, and exceptions have been weaved into it to address the same. These exceptions are discussed in Tudor Jackson, The Law of Kenya, 3rd edition, Kenya Literature Bureau, Nairobi, 2005, pages 175 and 176; *Aineah Likuyani Njirah v Aga Khan Health Services* [2013] eKLR (Nambuye, Maraga & M'Inoti, JJA); *Keninidia Assurance Company Limited v New Nyanza Wholesalers Limited* [2017] eKLR (W. Korir, J) and *Helga Christa Ohany v ICEA Lion General Insurance Company Ltd* [2022] eKLR (Meoli, J), effected through legislative intervention.

12. The facts presented at the trial disclosed that there were 2 contracts. One was a money lending contract between the appellant and the 1st respondent, secured by the stock to be handled by the 1st respondent in his business. The second contract was of insurance, between the respondents, to secure the stock in the trade that the 1st respondent was engaged in. The appellant was not party to that contract. The only connection between the appellant and the second contract was that it was entered into as a condition to the 1st respondent getting the credit the subject of the first contract. To facilitate the second contract, the appellant required the 1st respondent to pick the insurer to transact with from a panel of insurers. It also emerged that part of the premium, after the contract was entered into, was or might have been paid through the appellant. .

13. From the material on record, the first contract was comprised in a document executed by the appellant and the 1st respondent, on dates that are not apparent on the face of it, but it bears a date stamp of the appellant, of September 7, 2011. Insurance as a term of the credit or money lending contract is stated in clause 4(b) in the following terms:

    b) Insurance: Insurable assets forming part of the bank's security shall be comprehensively insured against theft/damage/fire for the full value thereof during the tenure of the facilities

by an insurance company approved by the Bank with interest of the Bank being duly noted on the policy document."

14. Of course, nothing in that clause can be interpreted to mean that the appellant was going to be privy to the insurance contract, to be entered between the 1st respondent, and whichever insurer that he settled on, which turned out to be the 2nd respondent in this case. The clause merely provided that the assets, to be offered as security for the moneys advanced, had to be insured, by an insurer that was to be approved by the appellant. The clause talked of the interest of the appellant being noted in the policy document. Again, that could not, by any stretch of imagination, amount to making the appellant privy to any insurance contract entered into between the 1st respondent and the insurer. That clause conferred no rights nor imposed any obligations on either the appellant or the 1st respondent, with respect to the right to enforce the insurance contract, as between the appellant and the 1st respondent.

15. I have perused and ploughed through the record of the trial court, and the record of appeal filed herein, and I have not come across the documents that crystalized the insurance contract between the respondents. I cannot, therefore, tell whether the appellant signed into that contract or not. I cannot tell whether there were clauses in there which could be construed as making the appellant privy to that contract or not. I have equally not come across the policy document, issued to the 1st respondent, subsequent to executing the contract documents, which would have spelt out the rights and obligations of the parties. The documents on record appear to have been intended to add on to the main insurance contract, rather than being the main contract document itself. What was executed as between the respondents was not presented to the trial court. The other documents relate to paperwork generated after the burglary happened. So, without the relevant material, which comprised the contract of insurance, there would be no material upon which to gauge whether there was privity of contract between the appellant and the respondents, with respect to that insurance contract.

16. As was said, in *Afroplast Industries Limited v Sanlam Insurance Co. Ltd & another* [2021] eKLR (Meoli, J), where a contract of insurance was executed between the insured and the insurer, no privity of contract existed between the insured and the insurance agent or broker, and a contract could not confer rights or impose obligations on persons who were not privy to it. The facts of the case above are almost on all fours with the instant one. The 1st respondent was treating the appellant as an agent of the 2nd respondent. He needed to demonstrate that in that capacity the appellant had signed into the insurance contract, and, thereby, became a party to it, with rights accruing from it, and obligations imposed by it. He did not produce the contract documents for the insurance, which made the appellant a party to the insurance contract.

17. On agency, the parties have cited to me judicial authority on what constitutes an agent. Agency is defined, in Bowstead and Reynolds on Agency, 17th edition, Sweet & Maxwell, page 1-001, as "a relationship which exists between two persons, one of whom expressly or impliedly consents that the other should act on his behalf so as to affect his relations with third parties, and the other whom similarly consents so to act or so acts." In *Lucy Nungari Ngugi & 4 others v National Bank of Kenya & another* [2015] eKLR (Gikonyo, J), it was said that where there is no express consent to create such a relationship, the same could be implied, from word and conduct, and the parties themselves may not recognize it as such, and they might even have denounced it.

18. The appellant has not been clear on whether he refers to the appellant as a general agent or as an insurance agent. An agent acts on behalf of a principal, and may enter into contracts with third parties on behalf of the principal, and, in the process bind the principal. Was the appellant an agent of the 2nd respondent? I do not think so. The 2 connected at 2 levels. One, the 2nd respondent was an insurer approved by the appellant, and the 1st respondent chose to transact with it from a panel availed by

the appellant. Did that constitute the appellant a general agent for the 2nd respondent? It did not. The appellant did not direct the 1st respondent to any particular insurer, other than indicating to him, the insurers that it approved, and the choice of insurer lay with the 1st respondent. The appellant was not party to the contract that was entered into between the 1st respondent and the insurer. Secondly, the contract for the credit facility only required that the 1st respondent procures insurance to cover the assets offered as security, and that the interest of the appellant, on the insured assets, be endorsed on the policy. That did not make the appellant an agent for the purpose of the insurance. There is the issue of payment of premiums through the appellant. The appellant contested that claim by the 1st respondent. If it was true that premiums were paid by the 1st respondent to the 2nd respondent through the appellant , that did not constitute the appellant an agent for the 2nd respondent. The appellant did not enter into any contract with the 1st respondent on behalf of the 2nd respondent. Liability could not attach, on the appellant, in any form or colour, in respect of the said insurance contract. The appellant entered into only one contract with the 1st respondent, for credit facilities, it was not party, in any way, to the insurance contract, although it benefitted from it.

19. Related to that is the matter of an agent of a disclosed principal being sued. The law on this is clear. No suit is maintainable against the agent of a disclosed principal. In *Afroplast Industries Limited v Sanlam Insurance Co. Ltd & another* [2021] eKLR (Meoli, J), it was asserted that when a principal is disclosed, the agent cannot be sued, and there would be no cause of action, nor justification to join the agent to the suit. I have already held that I have not found material which established the appellant as an agent of the 1st respondent. So, the issue of the 2nd respondent being a disclosed principal should not even arise. However, if I were to find that the appellant was such an agent, I would go by the position, in *Afroplast Industries Limited v Sanlam Insurance Co. Ltd & another* [2021] eKLR (Meoli, J), that the 2nd respondent was a disclosed principal, and to that extent the 1st respondent had no cause of action against the appellant, he could not sue it nor join it as a party to a suit against the 2nd respondent.

20. The issue of notice of the loss being made to the appellant kept of being raised, that the 1st respondent notified the appellant of the loss, and that, ostensibly, served as a notice to the 2nd respondent, for the appellant was its agent. My conclusion above answers this submission. I have not seen any material which establishes that the appellant was an agent of the 2nd respondent, and, therefore, there was no basis for a notice of the loss being given by the appellant to the 2nd respondent for the purposes of the insurance contract. The credit facility contract treated the stock as security or collateral, and a duty arose from there for the 1st respondent to make a report of the loss to the appellant, and if any report was made to the appellant, then it ought to be construed to have been a report in that respect, but not in connection with the insurance contract. It has been submitted that officials from the appellant visited the shop belonging to the 1st respondent, prior to the insurance contract being made, and after the loss was incurred, ostensibly to ascertain the stock for the insurance contract and for the purposes of assessing loss. The credit facility contract, at clause 3(b)(d), granted a right to the appellant to conduct an assessment of the business of the 1st respondent, and to make regular visits to it, to assess its performance, and ensure that the loan proceeds were being utilized as intended. So, a visit by officials from the appellant could not have been only in connection with insurance. I have not seen any document stating that the 1st respondent was supposed to give notice of any loss or damage to his assets to the appellant, for onward conveyance to the 2nd respondent.

21. On burden of proof, both sides agree that that burden lay with the 1st respondent in the first instance. The appellant says that the burden of proof was not discharged as against it, while the 1st respondent submits that he did discharge the burden placed on him. The contract in dispute is the one on insurance. A copy of the document that constituted that contract, duly signed by the respondents, was

not exhibited. I have gone through the record of the proceedings before the trial court, and there is nothing to show whether any such document was ever produced. There is no evidence, therefore, of the terms that constituted the insurance contract. Of course, there are other documents that establish that such a contract existed, but the issue is not existence of the contract, but of the documents which bore the terms and conditions of that contract, duly executed by both sides. It is only from such a document that it can be assessed whether the appellant was party to the insurance contract, and, if it was, the obligations imposed upon it under that contract. Without it, the trial court had no basis to find the appellant privy to the insurance contract, and to conclude that it was an agent of the 2nd respondent, through whom a notice of the loss could be channelled, for conveyance to the 2nd respondent.

22. In view of what I have stated above, it should be clear that no suit was maintainable against the appellant by the 1st respondent, and the case against it ought to have been struck out. The appellant was not an agent of the 2nd respondent, and was not bound by the contract between the respondents. There was no privity of contract, there was no cause of action and no basis for its joinder as a party to the suit. Accordingly, the appeal is allowed in its entirety. The order, in Busia CMCCC No. 246 of 2014, allowing the suit against the appellant is hereby quashed, and shall be substituted with an order dismissing the claim against the appellant. The appellant shall have the costs, both here and below. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA THIS.................. 26TH...............DAY OF...............................MAY................................2023

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Appearances

Ms. Anuro, instructed by Owiti Otieno & Ragot, Advocates for the appellant.

Ms. Sibika, instructed by Bogonko Otanga & Company, Advocates for the 1st respondent.