



**Agolla & another v Manager Housing Finance Co-operation Limited Kisumu Branch
(Miscellaneous Civil Case E157 'A' of 2021) [2022] KEHC 10215 (KLR) (28 June 2022) (Ruling)**

Neutral citation: [2022] KEHC 10215 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
MISCELLANEOUS CIVIL CASE E157 'A' OF 2021
RPV WENDOH, J
JUNE 28, 2022**

BETWEEN

CHARLES ODHIAMBO AGOLLA 1ST APPLICANT

JUDITH AGWANDA AGOLLA 2ND APPLICANT

AND

**MANAGER HOUSING FINANCE CO-OPERATION LIMITED KISUMU
BRANCH RESPONDENT**

RULING

1. Before this court, is a Notice of Motion Application dated 15/2/2022 filed by the applicants who are seeking the following orders: -
 - a) Spent.
 - b) The court be pleased to issue an order of temporary injunction restraining the defendant/respondent her agents, servants, and/or employees from proceeding with the execution notice by Keysian Auctioneers served on the 2nd applicant pending the inter-parties hearing of this application.
 - c) The court be pleased to grant an order of temporary injunction restraining the defendant/respondent her agents, servants, and/or employees from proceeding with the execution notice by Keysian Auctioneers served on the 2nd applicant pending the inter-parties hearing of the intended appeal.
 - d) That the court be pleased to grant the applicants leave to file the appeal out of time.
 - e) That the court be pleased to give such orders as it may deem fit and just to grant.
 - f) Costs be provided for.



2. The application is based on grounds appearing on the application and is supported by the Affidavit of Judith Agwanda Agolla, the 2nd applicant. She deposed that a decree was passed against the applicants and the applicants entered into negotiations with the respondent with a view to settling the matter. The negotiations stalled and the respondent is threatening to proceed with execution through Keysian Auctioneers; that the delay in filing this application for injunction was occasioned by the Counsel who filed an application with clerical errors dated 8/2/2022 on the face of the certificate of urgency dated 8/2/2021 on the notice of motion that occasioned dismissal of the earlier application.
3. In opposing the application, the respondent filed a Replying Affidavit sworn by Julie Ambundo, the current Acting Branch Manager at Housing Finance Company Limited - Kisumu Branch dated 15/3/2022. The respondent deposed that the application as drawn is incompetent and incurably defective; that the subject matter in the instant suit is a contractual (Chargor - Chargee) relationship between the 1st applicant and Housing Finance Company Limited (HFC Ltd) for a loan facility of Kshs. 1,800,000/=; that she is an employee of HFC Ltd and therefore an agent of a disclosed principal.
4. Pursuant to the principal - agent relationship, the agent is not liable for its principal's actions except in specific instances where the agent enters into personal contracts with a party or commits acts of negligence or fraud which is not the case here. It was further deposed that the party against whom the relief of permanent injunction is being sought against, is not a party to this suit and any such adverse orders issued in its absence will be in vain; that the respondent is a stranger to these proceedings and has been wrongly joined.
5. The respondent further asked this court to consider the previous rulings of 8/3/2021 and 27/3/2021 before the Senior Resident Magistrate's Court in Rongo ELC Case No. 5 of 2021 where the applications were dismissed on the basis of misjoinder of the respondent.
6. I have considered the application, its supporting affidavit and the annexure thereto, the replying affidavit and the submissions by both parties. The main issue for determination is whether the respondent is properly sued as a party in this suit.
7. The subject matter of this dispute is the Chargor - Chargee relationship which arose from a loan facility agreement of Kshs. 1,800,000/= dated 22/7/2016. The loan facility agreement was entered into between the 1st applicant and Housing Finance Company Limited (HFC Ltd) and it was secured over Title No. Kamagambo/Kabuoro/5293 in favour of HFC Ltd.
8. The 1st applicant defaulted in repayment of the loan and in exercise of its statutory power of sale, HFC Ltd instructed Keysian Auctioneers Limited to auction the property. The applicants then filed in the first instance, Misc. ELC No. E011 of 2021 before the Rongo Senior Resident Magistrate Court against the respondent seeking injunctive orders against the intended sale.
9. The respondent contends that she is an employee of HFC Ltd and therefore she has been wrongly sued as she is just an agent of an already disclosed principal.
10. Having determined that the issue in controversy is a contractual one, the doctrine of privity of contract states that the rights and obligations therein cannot be conferred to a third party who was not party to the contract. This was the finding of the Court of Appeal in *Savings & Loan (K) Limited vs Kanyenje Karangaita Gakombe & Another* (2015) eKLR. The Court rendered itself: -
11. In its classical rendering, the doctrine of privity of contract postulates that a contract cannot confer rights or impose obligations on any person other than the parties to the contract. Accordingly a contract cannot be enforced either by or against a third party.



12. In *Agricultural Finance Corporation v Lengetia Limited & Another* [1985] eKLR the Court of Appeal also held: -

“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.”

13. Where there is a contractual dispute, an aggrieved party can only bring an action against the person with whom it entered the contract with, unless there is evidence that the parties relegated their contractual obligations to third parties through a deed of novation or such like agreements. In the instant case, the contractual relationship was between the 1st applicant and HFC Ltd. Thus, the proper party to be sued is HFC Ltd.

14. The respondent submitted that she is an employee of HFC Ltd, an agent of a disclosed principal a fact which has not been disputed. In the case of *City Council of Nairobi vs Wilfred Kamau Githua t/a Githua Associates & another* [2016] eKLR the Court of Appeal considered whether it was proper to sue an agent where there is a disclosed principal and held:

“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.”

15. A similar holding was made in Civil Application No. Nai 5 and 48 of 2002 *Anthony Francis Wareheim t/a A. F. Wareheim & 2 Others vs Kenya Post Office Savings Bank* 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.”

16. It is evident that the respondent has been sued wrongly in these proceedings. The applicants have not produced evidence to show that there was a collateral contract to the one in question that the respondent was a party to. There is no order which can be made against the respondent which can be legally executed. In addition, the court cannot proceed to make orders against a party who is not properly before it. It will be tantamount to condemning a party unheard to their detriment and against the universal principle of audi alteram partem rule of natural justice, in which the court is required to adjudicate over a matter by according the parties a full and fair hearing before deciding the dispute or issue on merit.

17. The foregone conclusion is that the application dated 15/2/2022 is devoid of merit and it is dismissed with costs to the respondent.

DATED, DELIVERED AND SIGNED AT MIGORI THIS 28TH DAY OF JUNE 2022.



R. WENDOHO

JUDGE

Ruling delivered in the presence of

N/A for the 1st and 2nd Applicants.

N/A for the Respondent.

Nyauke Court Assistant.

