



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

CIVIL APPEAL NO. 111 OF 2017

KENYA WOMEN FINANCE TRUST.....APPELLANT

-VERSUS-

1. BERNARD OYUGI JAOKO

2. BENTA AKOTH

3. KENNEDY ODHIAMBO GEKO.....RESPONDENTS

(Appeal arising from the ruling and orders of Hon. E. Muriuki Nyagah,

Principal Magistrate in Migori Chief Magistrate's Court

Civil Case No. 323 of 2017 delivered on 16/11/2017)

JUDGMENT

Background:

1. This appeal arose from the ruling on two applications in **Migori Chief Magistrates Civil Suit No. 323 of 2017** (hereinafter referred to as '**the suit**'). The first application was the Notice of Motion evenly dated and filed on 01/08/2017 by **Bernard Oyugi Jaoko**, (hereinafter referred to as '**Bernard**') who was the Plaintiff in the suit and is the First Respondent in the appeal. The second application was also by way of a Notice of Motion. It was dated 23/09/2017 and filed on 26/09/2017 by **Kenya Women Finance Trust** (hereinafter referred to as '**KWFT**'), the Appellant herein and the Third Defendant in the suit.

2. In this discussion I will refer to the application filed by Bernard as '**Bernard's application**' and the application filed by KWFT as '**KWFT's application**'. Bernard's application sought the following orders: -

1. THAT an order restraining the 3rd Defendant from selling and or disposing motor VEHICLE REGISTRATION NO. KDC 478 Q pending hearing and determination of this application interparties.

2. THAT the 3rd Defendant be compelled to release MOTOR VEHICLE REGISTRATION KCD 478Q, ISUZU, PICK UP to the Applicant herein unconditionally, the Applicant is not a party to the loan between the 1st and 2nd Defendant and the Applicant is the owner of the said MOTOR VEHICLE REGISTRATION NO. KCD 478 Q by virtue of sale. The Motor Vehicle be released, to the Applicant pending the hearing of the sit herein.

3. THAT cost of this application be in cause.

3. On the other hand, KWFT's application sought the following orders: -

1. THAT this Application be certified as extremely urgent and be handled expeditiously.

2. THAT this Court be pleased to make interim orders of preservation of Motor Vehicle Registration Number KCD 478Q pending the hearing and determination of this application.

3. **THAT the Plaintiff / Respondent, 1st and 2nd Defendant / Respondent be ordered to release Motor Vehicle Registration Number KCD 478 Q to the Applicant forthwith.**

4. **THAT in the alternative, Motor Vehicle Registration Number KCD 478Q be preserved by the Applicant pending the hearing and determination of this case.**

5. **THAT cost of this application be provided for.**

4. Upon filing of the Bernard's application under a certificate of urgency, the lower court issued an *ex parte* mandatory injunction on the release of the Motor Vehicle registration No. KCD 478Q make Isuzu Pick Up (hereinafter referred to as '**the vehicle**') by KWFT to Bernard for the reason that Bernard was not a party to the contract between KWFT and **Kennedy Odhiambo Geko** (hereinafter referred to as '**Kennedy**') and **Benta Akoth** (hereinafter referred to as '**Benta**'). The twin applications were heard together and the impugned ruling, which confirmed the *ex parte* mandatory injunction, was rendered on 16/11/2017 thereby prompting the appeal subject of this judgment.

The Appeal:

5. Being dissatisfied with the ruling and orders, KWFT filed an evenly dated Memorandum of Appeal in this Court on 15/12/2017 where it raised ten grounds of appeal. The said grounds were tailored as follows:

1. **The Learned Trial Magistrate erred in law by failing to make a finding that there was no binding contract between the Appellant and the 1st Respondent to warrant the issuance of an injunction restraining the Appellant from repossessing the Chattel herein, Motor Vehicle Number KCD 478Q.**

2. **The Learned Trial Magistrate erred in law by failing to rule that there was no privity of contract between the Appellant and the 1st Respondent herein.**

3. **The Learned Trial Magistrate erred in law and fact by totally failing to rule on the Appellant's Application dated 23rd September, 2017**

4. **The Learned Trial Magistrate erred in law and fact by failing to analyze all issues in the applications dated 1st August 2017 and 23rd September 2017 and arrived at a lawful conclusion.**

5. **The Learned Trial Magistrate erred in law and fact by failing to consider that the Respondents had admitted there being a default in the loan repayment warranting the repossession of the chattel by the Appellant.**

6. **The Learned Trial Magistrate erred in law and fact in improperly analyzing and hence misapplied the law on injunctions which led to travesty of justice.**

7. **The Learned Trial Magistrate erred in law by failing to secure the Chattel (Motor Vehicle KCD 478Q) and instead gave it to the 1st Respondent who is a stranger to the Appellant**

8. **The Learned Trial Magistrate erred in law by holding that the Chattels Mortgage herein was transferred without the involvement of the appellant herein and without the same being registered as a legal instrument in law.**

9. **The Learned Trial Magistrate erred in law and fact by holding that the Appellant was aware of the arrangement between the respondents which knowledge ought to have been demonstrated by way of evidence.**

10. **The Learned Trial Magistrate erred in law, facts and analysis of the applications presented before him, delivered a ruling which was wholly erroneous and in contravention of the law and Precedents.**

6. Contemporaneously with the filing of the appeal KWFT filed a Notice of Motion dated 15/12/2017 seeking the impoundment and preservation of the vehicle. The application was certified as urgent and fixed for hearing. Directions were subsequently taken and Counsels for the parties agreed and with the approval of this Court the Notice of Motion dated 15/12/2017 was abandoned in favour of hearing of the main appeal. The Record of Appeal and a Supplementary Record of Appeal were filed, and the appeal was heard by way of written submissions which were highlighted on. Kennedy and Benta did not however participate in the appeal. I must acknowledge the industry on the part of the Counsels in filing well researched submissions and who also referred to various relevant judicial decisions.

7. In a nut shell, KWFT contended in its submissions that there was no privity of contract between itself and Bernard and as such Bernard did not have the *locus standi* to be in possession of the vehicle which KWFT funded its purchase and had it jointly registered in its name and those of Kennedy and Benta. On its part, Bernard contended that he was entitled to the vehicle by privity of the contract entered between KWFT, Kennedy and Benta. That, he was in lawful possession of the vehicle and had all along, and to KWFT's full knowledge and approval, remitted the monthly instalments agreed under the contract through his wife's account with KWFT and that there were no arrears thereof. Bernard relied on the agreement it entered with Kennedy and Benta on 13/07/2016 on the sale of the vehicle which I will refer to as '**the Sale Agreement**'.

8. It is on the foregone that this Court is now called upon to render itself on the appeal.

Analysis and Determinations:

9. As the first appellate Court against the impugned ruling and order the role of this Court is to revisit the entire record in the suit and the Records of Appeal before this Court alongside the parties' submissions and the law and to reach its own conclusion in the matter. To that end, I have keenly read and understood the records in the suit and before this Court and I hereby formulate the following issues for determination: -

- (a) Whether there was any privity of contract between KWFT and Bernard;
- (b) Whether the mandatory injunction was properly issued.

Whether there was any privity of contract between KWFT and Bernard: -

10. **Mr. Odhiambo Kanyangi**, Counsel for Bernard traced the origin of the doctrine of privity of contract from the case of **Price vs. Eaton (1833) 4b & Ad 433** until recently and made a comparative analysis in its application in other jurisdictions. Of utmost importance is the fact that the doctrine is premised on the existence of a valid contract which in principle only binds the parties thereto. In this case, there is no dispute on the existence of such a valid contract between KWFT on one hand and Kennedy and Benta on the other hand. The contract was an Asset Finance Facility on the purchase of the vehicle where KWFT paid the full purchase price of Kshs. 3,000,000/= and Kennedy and Benta were to repay the advancement over a period of 48 months. The contract was secured by the Letter of Offer dated 04/05/2015, the Chattels Mortgage dated 22/06/2015 and the Addendum to the Letter of Offer dated 06/08/2015.

11. The Court of Appeal had an opportunity to and deliberated on the doctrine of privity at length in **Savings & Loan (K) Limited vs. Kanyenje Karangaita Gakombe & Another (2015) eKLR**. The Court rendered itself as under: -

“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. In DUNLOP PNEUMATIC TYRE CO LTD v SELFRIDGE & CO LTD [1915] AC 847, Lord Haldane, LC rendered the principles thus:

“My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it.”

In this jurisdiction that proposition has been affirmed in a line of decisions of this Court, among them AGRICULTURAL FINANCE CORPORATION v LENDETIA LTD (supra), KENYA NATIONAL CAPITAL CORPORATION LTD v ALBERT MARIO CORDEIRO & ANOTHER (supra) and WILLIAM MUTHEE MUTHAMI v BANK OF BARODA, (supra).

Thus in AGRICULTURAL FINANCE CORPORATION v LENDETIA LTD (supra), quoting with approval from Halsbury's Laws of England, 3rd Edition, Volume 8, paragraph 110, Hancox, JA, as he then was reiterated:

“As a general rule a contract affects only the parties to it, it 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.”

Over time some exceptions to the doctrine of privity of contract have been recognized and accepted. Among these exceptions is where a contract between two parties is accompanied by a collateral contract between one of them and a third party relating to the same subject matter. Thus in SHANKLIN PIER v DETEL PRODUCTS LTD (1951) 2 KB 854, for example, the plaintiff owned a pier, which it wished to be repainted. After the defendant represented to the plaintiff that some particular paint was fit for purpose, the plaintiff directed its contract to use that paint. The contractor purchased the paint from the defendant, which proved unfit for purpose. Upon a suit by the plaintiff against the defendant, the court found for the plaintiff notwithstanding the fact that there was no privity of contract between the plaintiff and the defendant, as far as the contract for the sale of the paint was concerned.

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 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.”

Some jurisdictions have, accordingly and in a bid to introduce reforms and ameliorate the harshness of the rule, resorted to legislative intervention. The best examples are the United Kingdom and Singapore where the Contracts (Rights of Third Parties) Act, 1999 and the Contract (Rights of Third Parties Act, 2001 have respectively been enacted.'

12. It is the position of Bernard that the Sale Agreement was a collateral contract between Kennedy, Benta and himself relating to the vehicle and that Bernard was in lawful possession of the vehicle. I have carefully perused the Sale Agreement and it relates to the vehicle. I have also juxtaposed the Sale Agreement between the Plaintiff, the Defence and Counterclaim and the twin applications and noted that once the issue of privity of contract is conclusively dealt with before this Court, then the pending suit and the rights of the parties will be prejudiced. As this is an appeal on interlocutory applications this Court must tread so carefully so as not to finally determine the issues which call for proper interrogation before a trial court. Such issues include whether the doctrine of privity has a legal leg to stand on based on the Sale Agreement, the validity of the Sale Agreement, the conduct of the parties, among several others. (See the Court of Appeal decisions in **Savings & Loan (K) Limited vs. Kanyenje Karangaita Gakombe** (supra), **BP (Kenya) Limited vs. Kisumu Market Service Station C.A. No. 25 of 1992** and **David Kamau Gakuru vs. National Industrial Credit Bank Ltd C.A. No. 84 of 2001**).

13. Having said so, I return the finding that this Court cannot render itself on whether there was any privity of contract in the circumstances of this matter at this stage. It is only imperative that the issue be first dealt with in a full hearing before the trial court where documents shall be produced and witnesses examined on various issues.

Whether the mandatory injunction was properly issued: -

14. For the sole purpose of this appeal and not otherwise, I will put forth this question: Suppose it is assumed that the Sale Agreement is valid and enforceable in law, will Bernard have any obligations towards the contract? The answer is in **Section 47** of the **Chattels Transfer Act, Cap. 28** of the Laws of Kenya which provides as follows: -

'An instrument may be transferred by a document in the form in the Fifth Schedule or to the same effect, and every transferee, his executors, administrators and assigns shall, in respect of the instrument transferred, have the same rights, powers and remedies, and be subject to the same obligations, as the transferor.'

15. In such a scenario, Bernard takes all the obligations of Kennedy and Benta in the contract. One such obligation is the payment of all due instalments and to ensure that any such default is remedied as provided for under the contract. That obligation remains the cardinal one in the contract and the lower court was legally called to address itself on the same in the consideration of the twin applications. The court considered the issue in the impugned ruling. The court found that ***'the 1st and 2nd defendants then defaulted in payments and sold the vehicle to the plaintiff through an agreement dated 13th July 2016...'*** Having so found the court was duty bound to ascertain the then arrears under the contract and to either call upon Bernard to make them good as provided for in the contract or to allow for the repossession of the vehicle. Respectfully, the court erred in holding that ***'...In any event, if one were to assume that the agreement was not proper, the loan facility advanced to the 1st and 2nd respondents was for a period of 48 months from 4th May 2015 and is still in force, therefore the bank has no reason to repossess the vehicle..'*** That finding must be interfered with.

16. The circumstances of this case did not therefore favour the grant of a blanket mandatory injunction order. If such an order was to be issued, then it was to be conditional to Bernard paying all arrears.

Conclusion:

17. Having considered the issues for determination in this appeal and in view of foregone findings, this Court hereby makes the following final orders: -

- a) **The appeal be and is hereby allowed and the order allowing the Notice of Motion dated 01/08/2017 is hereby set-aside.**
- b) **The parties herein shall take accounts in respect of the contract within 10 days of this judgment and ascertain if there are any repayment arrears to date. In the event of any such arrears, Bernard Oyugi Jaoko shall satisfy the same within 30 days thereof and on such compliance, Bernard Oyugi Jaoko shall continue being in possession of the vehicle pending the determination of the suit with access to KWFT as provided for in the contract. For avoidance of doubt, if there shall be no repayment arrears the vehicle shall as well remain in the possession of Bernard Oyugi Jaoko pending the determination of the suit.**
- c) **In the event Bernard Oyugi Jaoko fails to satisfy the arrears, if any, KWFT shall be at liberty to repossess the vehicle and keep it in safe custody pending the determination of the suit.**
- d) **In view of the commercial nature of the suit, the parties herein are directed to seek an amicable resolution to the dispute and in default the trial court shall take steps towards its earliest determination.**
- e) **Costs of the appeal to be borne by the First Respondent herein, Bernard Oyugi Jaoko.**

18. These are the orders of this Court.

DELIVERED, DATED and SIGNED at MIGORI this 08th day of August 2018.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of: -

Mr. Abisai Counsel instructed by the firm of Messrs. Abisai & Company Advocates for the Appellant.

Mr. Odhiambo Kanyangi Counsel instructed by the firm of Messrs. Odhiambo Kanyangi & Company Advocates for the First Respondent.

Evelyne Nyauke - Court Assistant