



**Ogolla & 2 others (Suing as Officials of Unimerics Self Help Group) v
Unique Sacco Limited & another (Environment & Land Case 111 of 2019)
[2022] KEELC 14983 (KLR) (21 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 14983 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 111 OF 2019
CA OCHIENG, J
NOVEMBER 21, 2022**

BETWEEN

**MICHAEL OGOLLA 1ST PLAINTIFF
DAVID MANG'ONG'O 2ND PLAINTIFF
LAWRENCE MIRITI 3RD PLAINTIFF
SUING AS OFFICIALS OF UNIMERICS SELF HELP GROUP**

AND

**UNIQUE SACCO LIMITED 1ST DEFENDANT
NUMERICAL MACHINING COMPLEX LTD 2ND DEFENDANT**

JUDGMENT

1. Through a Plaint dated the October 14, 2019 and amended on December 17, 2019, the Plaintiff sought for the following orders:
2.
 - a. A mandatory order to issue compelling the Defendants herein to issue to the Plaintiffs Members Completion documents to enable the Plaintiffs process title documents for Plots LR 26699/25- 1, 2, 3, 4A, 4B, 5, 6, 7, 8, 9, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 27, 28, 29, 30, 31, 32, 33, 34, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74 and 75.
 - b. Any other relief that the Court deems fit and just to grant.
 - c. Costs of this suit.



3. The 1st Defendant filed its Statement of Defence dated the November 20, 2019 denying the averments in the Plaint except the descriptive and jurisdiction of the Court. It denied undertaking to have title documents processed for the alleged plot owners as well as selling the suit plots to the Plaintiffs and contended that it never had any contracts with the individual members of the Plaintiff. It averred that it has always been willing to assist individual members of the Plaintiff obtain their respective titles and expended a lot of money and resources to that effect which the individual plot owners have refused to refund.
4. The 2nd Defendant in its Statement of Defence dated the November 1, 2021 denied the averments in the Plaint except the descriptive and jurisdiction of the court. It denied having any contractual relationship with the Plaintiffs and invoked the doctrine of privity of contract. It further denied having issued any plot ownership certificates to either the Plaintiffs or to any member of Unimerics Self Help Group. It contended that there has never been any contractual relationship between the 2nd Defendant and Unimerics Self Help Group. It averred that it did not enter into any agreement neither did it sell the suit property to individual members of the Plaintiff and therefore it has no title to transfer to them. It insisted that the individual members of the Plaintiff should follow the due process and get their titles from whoever sold them their properties. It insisted that there has never been any agreement whatsoever, whether written or oral for the processing of titles for the individual members of the Plaintiff. It confirmed that the 1st Defendant never remitted the requisite fees to clear the process of transfer and hence the title is still in its name. It admitted that it has a contractual relationship with Unique Sacco Limited which is a Sacco formed by its employees. Further, the 'no objection' letter was to facilitate a seamless transfer of property rights to the 1st Defendant save that the 1st Defendant never paid the prerequisite land rates, rent and stamp duty to facilitate the said transfer.
5. The matter proceeded for hearing where the Plaintiff called one (1) witness while the 2nd Defendant also had one witness.

Evidence of the Plaintiff

6. PW1 Michael Ogolla stated that he was one of the Plaintiffs and adopted his witness statement dated the October 9, 2019 as his evidence in chief. It was his testimony that they were suing as officials of Unimerics Self Help Group, on behalf of the members as well as on his behalf. PW1 explained that they bought their respective plots on various dates from the year 2000 up to the year 2007. Further, that members of Unimerics which was formed in 2008 bought plots which form part of the suit land. It was his testimony that they were suing the Defendants who had infringed on their rights to own property, for the past 17 years. PW1 explained that they had not enjoyed full potential of their properties as they did not have Title Deeds. He confirmed that he did not have the list of the purchasers before court but he was able to point out the same from the 2nd Defendant's list. He further testified that some buyers bought the properties straight from the 1st Defendant whose members were staff members of the 2nd Defendant. PW1 stated that the list for Unimerics Self Help Group was used for renewal of Self-Help Group certificates. He further explained that there was a Sale Agreement between the 1st and 2nd Defendants. Further, that they also had Sale Agreements of the members but he did not have them in court. PW1 stated that the 2nd Defendant did not have an agreement with the Plaintiff but they were part and parcel of the negotiation with the 2nd Defendant as they submitted plans to it for approval as they would not do any developments on the suit land without it. PW1 averred that the 2nd Defendant was the original owner of the suit land which it sold to members of the 1st Defendant, who were its employees but they were not party to the agreement between the Plaintiff and 2nd Defendant. He reaffirmed that they had sued the 2nd Defendant because it had refused to transfer the title to the



1st Defendant to enable them get their titles. He referred to the letter dated the May 18, 2020 from the 2nd Defendant where it mentioned the Plaintiffs and acknowledged they were on the land.

7. The Plaintiffs produced the following documents as exhibits: Copy of Registration Certificate of Unimerics Self Help Group, List of Members of Unimerics Self Help Group, Copy of Title IR Number 63767 for Land Reference Number 11895/20, Copy of Letter dated September 11, 2002 by the 2nd Defendant forwarding Beacon Certificate for Plot 189, Copy of Beacon Certificate for Plot 189, Copy of acknowledgement of receipt of Beacon Certificate for Plot 189 by the 1st Defendant, Copy of Letter dated November 7, 2003 by the 2nd Defendant allowing the 1st Defendant to take possession of Plot 189, Copy of Grant IR Number 153130 for Land Reference Number 26699/25, Proposed subdivision of Land Reference Number 26699/25, Copy of letter dated October 9, 2017 by the 2nd Defendant to the Planning Officer Mavoko allowing development on Plot 31, Copy of Letter dated September 7, 2018 by the Plaintiff's advocates, Copy of letter dated September 20, 2018 by the 2nd Defendant's advocates.

Evidence of the Defendants

8. DW1, Catheline Kagwiria, stated that she works for the 2nd Defendant and was responsible for records in the Lands office. She adopted her witness statement dated the November 1, 2021 as her evidence in chief and confirmed that she had interacted with documents in respect to this dispute herein. She explained that in case they sold the land, they keep the agreements in their record. DW1 stated that she is an Interested Party as she owns land (Plot No 43) in the disputed land but she had not revealed this information in her witness statement. She averred that she had been an official of the 1st Defendant but was also representing the 2nd Defendant who is her employer. DW1 confirmed that the 2nd Defendant failed to transfer the land to the 1st Defendant as it failed to pay Stamp duty, Land Rent and Land Rates. She referred to the Sale Agreement dated the August 5, 2002, where the vendor was the 2nd Defendant while the purchaser was the 1st Defendant. Further, that in paragraphs 6(c) and (d) of the said Agreement, the Vendor was to release the Land Rates Clearance Certificate; Land Rent Clearance Certificate and Consent to transfer the said suit land. DW1 explained that Unique Sacco had no problem with the 2nd Defendant and were waiting for them to bring all the remaining documents so as to transfer the land to it. She further referred to the letter dated the November 2, 2011 from the 2nd Defendant to the 1st Defendant demanding to have land rent paid. She insisted that by the time the letter was written, she was not an official and did not know if it was received. On Re-examination DW1 stated that she was not an expert on the rules of transfer, buying and selling land. The 2nd Defendant produced the following documents as exhibits: List of Unique Sacco Society Ltd members, Grant IR No 153130 for LR No 26699/25 INO Numerical Machining Complex, Sale Agreement dated August 5, 2002 between Numerical Machining Complex and Unique Sacco Ltd, Beacon Certificate date September 4, 2002, Unique Sacco Society Ltd Internal Memo dated May 9, 2003 on Land Purchase and Balloting, Proposed (Unregistered) subdivision of LR No 26699/25 at Athi River, Letter reference CS/LOO/03 dated November 7, 2003 from NMC confirming payment of full purchase price and alienation of liability, "No Objection Letter" reference LND/MKS/1395 VOL IX/106 dated April 5, 2005 on proposed subdivision of LR No 26699/25, Letter referenced ATH/L/NMC/COR /VOL V dated November 4, 2011 forwarding the Land Rent Demand Note to Unique Sacco Society Ltd; Letter referenced ATH/L/COR dated December 9, 2011 on payment of Land Rent for Parcel LR 26699/25, Letter referenced USS/NMCO1/12-11 dated December 1, 2011 from Unique Sacco Society Ltd addressing the Land Rent Demand Notice; Letter of complaint referenced USHG/COR/01-2020 dated January 26, 2020, Letter referenced MITC/SDI/1/11 dated April 6, 2020 by the Ministry of Industrialization requesting for comments on the allegations of corruption, Letter referenced NMC/MD/CONF/MI & TED/VOL 10(34) dated May 18, 2020 by



Numerical Machining Complex in response to allegations of corruption by Michael Ogolla, and any other documents to be produced at the trial with leave of the court.

Submissions

Plaintiffs' Submissions

9. The Plaintiffs' submitted that there was uncontroverted evidence that the 1st Defendant was always involved in the process of purchase and sale of the suit plots and received payment from any person selling their property. They argued that the 1st Defendant's defence of privity of contract failed as it was a mere afterthought. They averred that the 2nd Defendant had admitted the contents of the letter referred to in paragraph 21 of the amended Plaint and produced as exhibit number 12. Further, in the said letter, which is crucial to the proceedings herein, the 2nd Defendant acknowledged that they are in possession of the original Title to the suit land and further indicated that the said suit land was sold to the 1st Defendant who sold it, to other parties including the Plaintiffs. They further argued that the advocates for the 2nd Defendant did not have any objection to transfer of the title as long as the Advocates legal costs were met and the 1st Defendant provides a written authorization to that effect. Further, from the contents of the said letter it is clear that what has delayed the process of procuring titles in the names of members of the Plaintiffs, is the 1st Defendant's failure to give an authorization to the 2nd Defendants advocates to process the said titles. They reiterated that neither the 1st nor 2nd Defendant has ever expressed any objection to dealing with the Plaintiff's members directly and this is demonstrated by the lack of any communication to that effect. Further, that the Defendants have otherwise engaged in a tussle between themselves as to who is supposed to pay for the land rates, land rent and stamp duty, and this was explained by the witness of the 2nd Defendant. They argued that the Sale Agreement between the 1st and 2nd Defendants at Clause 4(ii) stated that stamp duty and registration charges were to be borne by the 1st Defendant while at Clause 6(c) and (d) the 2nd Defendant, would provide a valid Rates Clearance Certificate including valid Rent Clearance Certificate. They stated that it was the Defendants' who were clearly inclined on frustrating the process in processing the titles for member of Plaintiffs. On objections raised against the Plaintiffs filing the suit, it relied on the case of Machakos ELC Case No 462 of 2017 *Jones Mavuti Kisiyula & 2 Others v Haron Gekonge Nyakundi & 12 Others*.

2nd Defendant's Submissions

10. It submitted that the Plaintiffs were strangers to the sale and purchase of part of Land Reference No 26699/25 Plot No 189 Deed Plan No 245660 (LR No 11865/20) between the 1st and 2nd Defendants and none of the Plaintiffs were members of Unique Sacco Limited so as to be entitled to a claim against them. It insisted that the contents of the 2nd Defendant's advocate's letter dated the September 20, 2018, where he acknowledged that the suit land was sold to the 1st Defendant, is not an admission of liability neither does it confer any claim or legal right against the 2nd Defendant. It reiterated that the 2nd Defendant had proved that it had no contractual relationship with the Plaintiffs and as such no benefit can accrue to them under the doctrine of privity of contract. To buttress its averments, it relied on the following decisions: *Savings & Loan (K) Limited v Kanyenje Karangaita Gakombe & Another (2015) eKLR*; *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd (1915) AC 847*; *William Muthee Muthoni v Bank of Baroda (2014) eKLR*; *Aineab Liluyani Njirah v Aga Khan Health Services (2013) eKLR*; and *Gladys Marjorie Akinyi v Dorcas J Jahenda & Another (2015) eKLR*



Analysis and Determination

11. Upon consideration of the Amended Plaint, Defences, Testimony of the Witnesses, exhibits and rivalling submissions, the only issue for determination is whether the Court should grant a mandatory order to compel the defendants to issue completion documents to the Plaintiffs to enable them prepare title documents for their respective plots.
12. In this instance the Plaintiffs seek the court to compel the Defendants to issue to the Plaintiffs' Members', Completion documents to enable them process title documents for aforementioned Plots. The Plaintiffs contend that they purchased their respective plots from members of the 1st Defendant while some of the Plaintiffs also directly purchased plots from the 1st Defendant. The Defendants insist that the Plaintiffs are not entitled to the orders as sought since there was no privity of contract between them. I note there was a Sale Agreement dated the August 5, 2002 between the 2nd Defendant (Vendor) and the 1st Defendant (Purchaser) in respect to sale of land parcel number 11895/20. Further, in the said Sale Agreement, the vendor had caused the subdivision of the land into plots of various sizes and it was expected to release the following documents to the purchaser: Original Deed Plan for suit land; Duly executed but undated transfer of the said property in favour of the purchaser; valid rate and rent clearance certificates and consent to transfer. The Plaintiffs contend that they proceeded to purchase their respective plots from the purchaser of the said land but the vendor has declined to transfer the land to the 1st Defendant to enable it transfer to them their plots which forms the fulcrum of the dispute herein. As per a letter dated the May 11, 2020 from the 1st Defendant to the 2nd Defendant, it admits that the resultant subdivisions of the suit land were sold to its members as well as members of the public. Further, a List was attached of the members who bought the land as well as the non-members (outsiders) who also did so. DW1 in her testimony admitted that the 1st Defendant's members were purchasers of respective plots in the suit land. The Plaintiffs have heavily relied on a letter the 2nd Defendant's advocate wrote to the 1st Defendant's Advocates, dated the September 20, 2018 where it intimated that it had no objection to processing of the titles so long as their legal fees was paid.
13. I note the Plaintiffs were not a party to the Agreement between the 2nd and 1st Defendants. The 2nd Defendant has insisted that there was no privity of contract between the Plaintiffs and itself hence the Plaintiffs are not entitled to the orders as sought in the Plaint. However, from the various correspondence produced by the parties herein, it is evident that the Defendants were aware that the Plaintiffs were on the suit land and did not object to the same. I note the 1st Defendant further never furnished any evidence to controvert the Plaintiffs averments and in accordance with Section 107 of the *Evidence Act*, I find that the Plaintiffs' claim as against the 1st Defendant is unchallenged. On privity of contract, the Court in the case of *Savings & Loan (K) Limited v Kanyenje Karangaita Gakombe & Another (2015) eKLR* rendered itself thus:-

“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*



Capitalcorporation 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 Witschire Northen 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.” Emphasis mine

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.”

14. See also decision in *Kenindia Assurance Company Limited v New Nyanza Wholesalers Ltd (2017) eKLR*
15. Insofar as there was no privity of contract between the Plaintiffs and the 2nd Defendant, noting that the Plaintiffs’ claim against the 1st Defendant is unchallenged, I opine that this court can invoke the exceptions to the privity of contract as it has emerged that there are many third parties that already



bought the resultant subdivisions of the suit land, took possession, developed the same and the delay in processing of the titles actually infringes on their rights to property. Further, since their occupation of the suit land has not been denied, nor did the 2nd Defendant stop them from doing so, bearing in mind that some of the members purchased their plots from the 1st Defendant while others bought from members of the 1st Defendant, I find that an element of constructive trust was created and hence the 2nd Defendant was actually holding that title in trust for the purchasers who have been on the land for more than a decade. I note the 2nd Defendant did not deny that it is the one that gave approvals for developments on the suit land and from the various correspondence produced herein, the Defendants were actually aware of the Plaintiffs presence on the suit land as well as the fact that they did not have their respective titles. It seems to me that there was a breach of contract by the 2nd Defendant for failing to provide the documents as agreed in the impugned Sale Agreement with the 1st Defendant and this has delayed the processing of the titles. It is my considered view that the 2nd Defendant is estopped from relying on the principle of privity of contract since its actions are to the contrary. To my mind, I find that the conduct of the Defendants made them liable to provide documents to enable the Plaintiffs who were on the suit land, process their titles. Based on the facts as presented while associating myself with the decisions cited above, I will recognize the contract between the Plaintiffs and 1st Defendant and hold that the Plaintiffs are indeed entitled to get documents to enable them process their respective titles.

16. In the circumstances, I find that the Plaintiffs have proved their case on a balance of probability and will enter Judgment in their favour and make the following final orders:

- a. A mandatory order be and is hereby issued compelling the Defendants herein to issue to the Plaintiffs Members Completion documents within ninety (90) days from the date hereof, to enable the Plaintiffs process their respective title documents for Plots LR 26699/25- 1, 2, 3, 4A, 4B, 5, 6, 7, 8, 9, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 27, 28, 29, 30, 31, 32, 33, 34, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74 and 75.
- b. Each party to bear their own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 21ST DAY OF NOVEMBER, 2022

CHRISTINE OCHIENG

JUDGE

