REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 1785 of 2000

KANYENJE KARANGAITA GAKOMBE…….....……PLAINTIFF
VERSUS
THE AUTOMOBILE ASSOTIATION OF KENYA…….....…..1ST DEFENDANT
SAVINGS AND LOAN KENYA LIMITED…….....2ND DEFENDANT

R U L I N G

This is an application by the 2nd defendant who seeks to have the Plaint struck out, so that the suit can then be dismissed, as against the said 2nd defendant. The applicant also wishes to have the costs for both the application and the suit.

The application is founded on the following four grounds which are cited on the face of the application:

" **(a) The application's suit offends the doctrine of privity of contract.**

(b) The Plaintiff's cause of action is founded on a contract to which he is not a party.

(c) The suit is scandalous, frivolous and vexatious as against the 2nd Defendant.

(d) The suit is otherwise an abuse of the court process."

The application is supported by the affidavit of Michael S. Semera, the Branch Manager of the 2nd Defendant. He states that the whole case emanated from an Agreement dated 20th August 1997. The said Agreement was executed by the 1st Defendant, the Automobile Association of Kenya, and the 2nd Defendant, Savings and Loan Kenya Limited.

Clause (iii) of that Agreement is said to be significant, and it is therefore set out herein:

"**AAK and SAL in a joint venture have designed a special Mortgage Scheme which will offer home loans at concessionary interest rates to AAK members provided that the beneficiaries maintain their AAK membership throughout."**

The applicant emphasises that the only assignee or other person mentioned in that Agreement, apart from the said applicant, was the Automobile Association of Kenya, which is not a party to these proceedings.

In the circumstances it was only the person who executed the Agreement who derived rights and obligations thereunder, submitted the applicant. It was further contended that as the plaintiff was not a party to the Agreement, he could not found an action on it, as privity of contract excludes the plaintiff or

any other persons from asserting the Agreement.

Even though the plaintiff had adduced evidence of a statement of an account which he had opened with the 2nd Defendant, the applicant submitted that that document did not spell out any terms which could then form the basis of this action.

The applicant also pointed out that clause 14 of the contract in issue stipulated that the contract could be terminated by either party thereto, giving three (3) months notice.

It is said that the contract herein was legitimately terminated following the issuance of a three months' notice dated 22nd February 2000. That notice was issued by the 2nd Defendant, and in pertinent parts read as follows:

" **RE: AGREEMENT TO ADMINISTER**

AAK MEMBERS HOME LOAN SCHEME

The captioned matter refers.

In view of your failure to comply with the terms of Clause three (3) of the Agreement, we hereby give you a three (3) months' notice to terminate the Agreement pursuant to clause fourteen (14) thereof.

Please advice all your members of the position. Kindly also advise your members who have been contributing towards the scheme to call on us for a refund of their contributions."

Following the termination of the Agreement, the 2nd Defendant now submits that, after June 2000, there was nothing that could be enforced, even by the 1st defendant. Yet this suit was filed on 6th October 2000.

The applicant also points out that one of the prayers in the Plaint was for General Damages, for breach of contract. That claim for General Damages was said to totally lack any legal foundation, as damages are not ordinarily awardable for breach of contract, in any event.

In a nutshell, the applicant submitted that it was only through the scheme that the plaintiff could benefit. Therefore, once the Agreement itself was terminated, the plaintiff could not enforce it. The applicant then invited the court to strike out the Plaint and then dismiss the suit, on the grounds that the same was frivolous and vexatious.

It was the applicant's considered view that this court should not allow the plaintiff to burden it with claims which were bound to fail, on the uncontested facts.

When opposing the application, the 1st defendant submitted that the plaintiff's case was not just premised on the contract between the 1st and 2nd defendants. It was said that the plaintiff had a separate contract, as between himself and the 2nd defendant. The said contract is said to have been pleaded at paragraphs 8 and 10 of the Plaint.

Paragraph 8 reads as follows:

"**Further to paragraph seven (7) above, and following the same, the plaintiff was advised by the 2nd defendant to open a separate account and deposit sufficient funds to cover the mortgage approval fees, valuations and other formalities to enable his mortgage to be refinanced as agreed**."

And paragraph 10 of the Plaint reads as follows:

"**The defendants have since denied the existence of any agreement between themselves and the plaintiff and the defendants intend to, unless compelled by this Honourable Court, to commit a breach of the aforementioned agreement."**

In the light of the foregoing, the 1st defendant contends that the plaintiff did not have any contract with it; but only had a contract, if any, with the 2nd defendant. Indeed, the 1st defendant's position is that its only role was that of facilitating the bringing – together of the 2nd Defendant with individual persons, who were members of the 1st Defendant. Therefore, the 1st Defendant feels that the most appropriate action which the court could take in this application was to have the case proceed against all the parties thereto, so that the court could then arrive at a final adjudication on the issues involved.

Meanwhile, the plaintiff also opposed the application. He says that he became aware of the offer to members of the 1st defendant, through a brochure. The said brochure was obtained by the plaintiff, from the 1st Defendant. And upon reading it, the plaintiff appreciated the terms upon which the 2nd Defendant would give facilities to those members (of the 1st defendant) who met the conditions.

As far as the plaintiff is concerned, the 1st Defendant was acting on behalf of the 2nd Defendant.

After giving due consideration to the matters canvassed before me, I am satisfied that the Agreement dated 20th August 1997 was between the two defendants only. In other words, the plaintiff was not a party to that Agreement. In that regard, the doctrine of privity of contract is very clear. As the learned authors of "HALSBURY'S LAWS OF ENGLAND," 4th Edition, Vol. 9 (1) state, at paragraph 748:

"**The doctrine of privity of contract is that, as a general rule, at common law a contract cannot confer rights or impose obligations on strangers to it, that is, persons who are not parties to it."**

As I understand it, none of the parties is disputing that fundamental legal position. What the plaintiff and the 1st defendants are saying is that the plaintiff cannot be equated to a stranger, to the contract between the two defendants. The reasons for that assertion are said to arise, firstly from the brochure which the 1st defendant, (hereinafter cited as "AAK") issued to its members.

The introduction in the said brochure reads as follows:

"**AA of Kenya and Savings & Loan Kenya Ltd, in a joint venture have designed a special scheme which will offer home loan at concessionary interest rates to AAK members provided that the beneficiaries maintain their AA membership throughout the period of the mortgage."**

In my considered view those words speak for themselves. They indicate that the two defendants had come together in a joint venture. That seems to imply that the defendants are on the same side, as persons who were offering a special scheme to members of AAK.

In order to benefit from the said offer, the members of AAK were expected to meet certain specified terms and conditions. It is the plaintiff's case that he met the said conditions, including the opening of an account with the second defendant (hereinafter cited as "SAL"). The account is said to have been opened on the advise of "SAL", and the same was used by the plaintiff for the deposit of sufficient funds, for use to cover the mortgage approval fees and valuations.

The plaintiff says that SAL organised for valuation of the plaintiff's property, through Landmark Realtors, who were then paid with funds which the plaintiff had credited to his account at SAL.

As far as the plaintiff is concerned, the opening of the two accounts at SAL gave rise to separate contracts between the said plaintiff and SAL. In my considered view that is not an idle statement which can be dismissed off-hand. I believe that it would be necessary for the court to closely examine all the facts in the case, before determining whether or not there were more than one contract between the three

parties herein. To my mind, there is a possibility that the trial court may come to the conclusion that the plaintiff had a separate contract between himself and SAL. Of course, the court may also conclude that no separate contract existed between the plaintiff and SAL. However, it is not for me, at this stage, to pre-empt the findings.

In arriving at this conclusion, I have taken into account the fact that in the Replying Affidavit of Mr. David Njoroge, the Director General of AAK, he depones as follows:

"**6. <u>THAT</u> it is not true that the 1st Defendant caused the scheme to collapse as alleged in the affidavit of Michael S. Semera; the true position being as follows**:

- **The 1st Defendant's role was limited to bringing together the Plaintiff and the Defendant**

- **The 2nd Defendant prepared separate contracts between itself and the plaintiff that defined that relationship. This contract (s) did not include the 1st Defendant whatsoever."**

Whilst, I am not indicating that those depositions are necessarily reflective of the factual or legal position prevailing, I am sure that the said pronouncements need to be further explored by the court.

I say so because even as between the two defendants, each has served the other with notices seeking indemnity. In other words each of the defendants is saying that there is a possibility that the court may find them liable; but that if that happened, the other defendant should be compelled to indemnify, the one. Bearing those matters in mind, I hold the considered view that this is not a simple clear case which would warrant a striking out as sought by the 2nd Defendant.

In **MURRI V MURRI & ANOTHER [1999] 1 E.A. 212** at p 216, the Court of Appeal unanimously held as follows in a judgement pronounced by Lakha J.A.:

"**In my judgement, the summary remedy of striking out is applicable whenever it can be shown that the action is one which cannot succeed or is in some way an abuse of the process of the court or that it is unarguable."**

Being of the same persuasion, I find that the plaintiff's case herein is definitely arguable. It is certainly not the kind of case which I would say is incapable of success. And, it has not been suggested that the case is, in some way, an abuse of the process of the court.

I hold the view that the position pertaining in this case is distinguishable from that in **MWANGI V. BRAEBURN LTD [2004] 2 EA 196**, wherein at page 201 – 203 the Court of Appeal pronounced itself as follows:

"**The application was by his parents and accepted by the school. The minor was not party thereto even though it was made for his benefit. That being so, the finding by the superior court that Dickson was not privy to the contract and could not therefore sue on it cannot be faulted. The judge was right that the minor had no right of his own to the certificate or examination results independent of the contract between his parents and the school. It was fallacious to suggest, as was suggested by counsel for the appellant that the minor had an independent or quasi-contract with the school and that certificates were his own property. He could not have been in the respondent's school for a start to earn the certificates without the enrolments contract between his parents and the school."**

True, if one is not a party to a contract, he cannot seek to enforce it. He could not do so even if the contract was made for his benefit. Therefore, the plaintiff herein would not be entitled to seek to enforce the contract between the two defendants. But, I believe that the 2nd defendant may well have some obligations to the plaintiff. I say so because even the said defendant (SAL) did write to the plaintiff on 18th January 2000, stating, inter alia as follows:

"**RE; AAK MEMBERS LOAN SCHEME**

Reference is made to our meeting of December and several letters you have written to us on the above subject thereafter. A workable solution is being addressed at a higher level of our management and we shall revert to you as soon as possible.

We do appreciate all the efforts you have made and do regret the inconvenience which have been caused to you and other savers as a result of the delay in honouring our part of the obligation."

As the plaintiff was one of the AAK members who was one of the "savers" at SAL, he believes that he had a separate contract in that regard, with SAL. On their part, the applicant also talks about having failed to honour their obligation to the plaintiff and the other savers. In the circumstances, I find that there is every possibility that a trial court may find that as between the plaintiff and the 2nd defendant (SAL) there was a relationship. I think that it would be premature to conclude, at this point in time that the said relationship, out of which SAL had some obligations to the plaintiff, was not contractual or was collateral to the contract.

This situation differs from that in the case of **MWANGI V. BRAEBURN LTD**, in which the obligation to pay fees rested only on the parents. Indeed, the Court of Appeal commented that the minor was no more than a victim of the tussle between his parents and the school.

In contrast to that scenario, the plaintiff says that SAL imposed obligations directly on him, and that he discharged those obligations. Having done so, he says that SAL cannot be allowed to escape liability simply by denying the existence of privity of contract.

As I have already said, that contention by the plaintiff is not so plainly wrong that it can be dismissed without further factual and legal consideration.

For all those reasons, I find that the plaintiff's case against the 2nd defendant should not be struck out. To the contrary, I hold the view that the plaintiff's claim is deserving of consideration at a full trial.

Accordingly, the application dated 20th July 2005 is hereby dismissed, with costs to both the plaintiff and the 1st defendant.

Dated and Delivered at Nairobi this 3rd day of May 2006.

FRED A. OCHIENG

JUDGE