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George Otieno Owiye t/a Miton Terern Hotels v Odunga & 2 others (Civil Appeal E106 of 2021) [2025] KEHC 6041 (KLR) (6 May 2025) (Judgment)

Neutral citation: [2025] KEHC 6041 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL E106 OF 2021

AM MUTETI, J

MAY 6, 2025

BETWEEN

GEORGE OTIENO OWIYE T/A MITON TERERN HOTELS .... APPELLANT

AND

ELIZABETH ACHIENG ODUNGA .... 1ST RESPONDENT

KENYA COMMERCIAL BANK LTD .... 2ND RESPONDENT

SSEBO INTEL COMPANY AUCTIONEERS .... 3RD RESPONDENT

(An Appeal against the Judgment and decree of Hon.R. S Kipngeno (SRM) In Nyando SPMCC No. 253 Of 2019)

JUDGMENT

Introduction

1. The appeal arises out of a dispute between the appellant the 1st and 2nd respondent over the repayment of loan that was advanced to the 1st respondent by the 2nd respondent.

2. The appeal challenges the judgment delivered on 17/8/2021 by the Hon. R.S Kipng'eno SPM in Nyando PMCC No. 253/2019.

3. The appellant has raised the following grounds of Appeal:-

    a. The Learned Magistrate erred in law and in fact in making a finding that there was an agency relationship between the Appellant and the 1st Respondent.

    b. The Learned Magistrate misdirected himself in ordering the Appellant to fix the mess of the 1st Respondent regarding a loan advanced to the 1st Respondent by the 2nd Respondent disputed acknowledging that the Appellant was not privy to the loan.

c. The Learned Magistrate erred in fact and in law by making an order that both the Appellant and the 1st Respondent should pay the loan despite correctly making a finding that the Appellant did not execute the loan Application form at all.

d. The Learned Magistrate despite correctly finding that there was no privity of contract between the Appellant and the 2nd Respondent misdirected himself by ordering both the Appellant and the 1st Respondent to pay the loan.

e. The Learned erred in fact and in law by making a finding that the Appellant by dint of being a spouse of the 1st Respondent was bound by contractual obligations of the 1st Respondent, including paying loan advanced to the 1st Respondent.

f. The Learned Magistrate erred in Law and in fact in failing to make a finding that the Appellant was not bound to pay the 2nd Respondent a sum of Kshs 87,000/-

g. The Learned Magistrate erred in Law and in fact by failing to direct the 2nd Respondent to refund the sum of Kshs 87,200 to the Appellant.

h. The Learned Magistrate despite entering judgment against the 1st Respondent in default of filing memorandum of appearance and/or defence erred in fact and in law by finding that both the Appellant and the 1st Respondent should pay the loan.

i. The Learned Magistrate erred in law and in fact in completely ignoring and/or disregarding the submissions tendered on behalf of the Appellant

j. The Learned Magistrate misdirected himself by failing to award costs of the suit to the Appellant.

Appellants Case

4. The appellant contends that he is the sole proprietor of Tavern Mitons Hotel and the 1st respondent is his estranged wife.

5. The 2nd respondent attempted to attach properties business assets at Mitons Hotel for the recovery of the loan which had been advanced to his wife.

6. According to the appellant he had no business relationship with the 2nd respondent.

7. The appellant learnt from the 2nd respondent that there was a loan that was taken by the 1st respondent and the same was secured using the properties of the business a fact he was not privy to.

8. Appellant further contends that he did not consent to the taking of the loan.

9. The appellant further argues that in a bid to save his business properties from auction, he was forced to pay to the 2nd respondent the sum of Kshs. 87,200.

10. The appellant further states that he went to court claiming the refund of Kshs. 87,200 and a permanent injunction restraining the defendant from attaching, advertising for the same, selling or in anyway alienating his goods and tools of trade.

11. According to the appellant his estranged wife the 1st respondent did not enter appearance and judgment was entered against her in default.

12. The appellant further contends that the whole judgment by the learned Honorable court occasioned a failure of justice and in particular he took issue with the following paragraph in the judgment:-

15.

> "In conclusion therefore, I find and hold that the Plaintiff did not execute the Loan Application Forms at all. The 1st Defendant did apply and obtained the loan facility in his name, but probably not for the benefit of the business. The peculiar nature of the relations between the Plaintiff and the 1st Defendant makes it hard to put them asunder for the purpose of righting the wrongs occasioned by the 1st Defendant. They should both pay the loan. Given that the Plaintiff did not know but has since learned of the existence of the loan, the 2nd Defendant should not harass him with the execution in the manner undertaken. Instead, I urge and direct the parties to talk and consider proposals for settlement including loan renegotiation considering the impact of COVID 19 on the hospitality industry. The Plaintiff and the 1st Defendant should be given grace period to put their house in order considering the fact that the ultimate objective is the payment of the loan.
>
> Given the special relationship between the parties, each party shall bear their own costs."

13. The appellant urges this court to consider the following and enter judgment in his favor in this appeal:-

    a. That there existed no principal agency relationship between him and the 1st respondent.

    b. That he did not enter into any partnership or business relationship with the 1st respondent during the subsistence of their marriage.

    c. That he did not at any time appoint the 1st respondent as his agent to operate any business bank account.

    d. That there could not be any agency between him and the 1st respondent allowing her to secure a loan facility using assets of the appellant's business without his express consent in writing.

    e. That if indeed they were in business together the appellant and the 1st respondent would have opened a joint account for the business.

    f. That if the business relationship between the two existed they would have applied for the loan through the joint business account not the personal account of the 1st respondent.

    g. That the name appearing on the credit application appraisal is Milton Tavern which is a different entity from Milton Taverns Hotel, which is his registered business name.

    h. The appellant also urged the court to consider that the details of the PIN in the form were left blank.

    i. That his name does not feature as a loan applicant but a spouse in the forms.

    j. That the personal documents of the appellant such as a copy of his ID , or his PIN certificate were not given to the bank by the 1st respondent at the time she obtained credit.

14. The appellant therefore argues that he was a stranger to the loan facility extended to the 1st respondent thus the court decision requiring him to enter into negotiations on repayment is bad in law.

15. The appellant urges this court to find that the learned Honorable erred in arriving at the decision he did and the 2nd respondent having admitted receipt of the Kshs. 87,200 the court should have ordered a refund of the same and grant the injunction sought.

Respondent's Case

16. The 1st Respondent did not defend the suit thus judgment in default was entered. The 3rd Respondent was struck out from the suit leaving the 2nd respondent as the only party to respond to the appeal.

17. The 2nd respondent's case is simply that the Bank advanced the loan and that the same was requested for by the 1st respondent.

18. According to the 2nd respondent the borrower was the appellant.

19. The loan was secured through chattels as per the schedule set out in the letter of offer.

20. The loan amount was Kshs.200,000

21. The 2nd respondent further submitted that in addition to the chattels being offered as security there was a personal guarantee and indemnity by Emily Achieng for Kshs.200,000.

22. The borrower defaulted in repaying the loan prompting the 2nd respondent to instruct the 3rd respondent to move and recover the money. That basically summarizes the Banks case.

Analysis And Determination.

23. The duty of this court as a first appellate court is well stated in Selle v Associated Motor Boat Co. Ltd [1968] EA 123 Page 126 in the following words:-

> " this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it shall always bear in mind that it has neither seen nor heard the witnesses and should make the allowance in that respect"

24. The court notes that the undisputed facts in this matter are that a loan for the sum of Kshs.200,000 was given by the 2nd respondent and that the same was nor repaid.

25. The point of departure between the appellant and the 2nd respondent is, to whom was the loan issued and secondly who should repay the loan?

26. Further, once the above questions are answered then the court would have to determine whether the appellant should get his refund of Kshs.87,200 and whether an injunction should issue restraining the 2nd respondent from attaching any of the business properties pledged as security for the loan by the 1st respondent.

27. In answer to the 1st question as to whom the loan was advanced to, this court has perused the Bank facility appearing at page 42 of the Record of appeal and it is clear from the facility document the borrower is clearly indicated as Elizabeth Achieng Ondunga . P.O Box 18-40118 Katito.

28. Elizabeth Achieng Odungais the 1st Respondent in this appeal who did not defend the suit and jugdment was entered against her.

29. The letter of offer is specifically addressed to her.

30. The purpose of the facility as indicated is "To finance working capital requirements,"

31. Notably, the appellant is not named as a borrower and the purpose for which the working capital was being sought is also not indicated. There is no mention of Mitons Tavern Hotel. I must however point out that the document placed in the appeal record is incomplete but the original court file has the whole document which this court has perused.

32. The letter of offer is specific at Paragraph *7*. 16 that 100% of the Borrowers receivables shall be channeled through the account held with the Bank". The implication of clause being that the borrower would be required to operate an account with the Bank.

33. Further, the letter of offer makes it clear at paragraph *17* that the Borrower shall not be entitled to assign all or any parts of its rights obligation or benefits thereunder without the prior consent in writing of the Bank.

34. The clause is self- explanatory that the intention of the parties was that the facility would remain strictly a matter between the Borrower and the Bank (2nd Respondent).

35. The other critical piece of evidence that the court has had to look at is the form of Acceptance to be found at page 44 of the Record of Appeal. The form clearly shows that Elizabeth Achieng Odunga is the person who accepted the offer on 7/11/2018 and appended her signature in the acceptance form which does not bear the name of the Business Miltons Tavern Hotel.

36. The Bank officials clearly appended their signatures knowing too well the person they were advancing the money and who was under duty to repay.

37. The submission by the 2nd respondent that the facility was extended to the appellant and the 1st Respondent has no basis and there is no iota of evidence to back it.

38. As a further demonstration of the fact that the 2nd respondent knew from whom to recover the loan, at page 45 of the record of Appeal is a demand note addressed to Elizabeth Achieng Ondunga threatening to call up the entire debt of Kshs.85,381.70 together with interest. The demand note is dated 24th July 2019.

39. The bank does not name the appellant anywhere in the demand note. The submissions by the 2nd respondent that the appellant was a co-borrower is without merit.

40. Nothing would have been easier than for the Bank to issue a joint demand to both the appellant and the 1st respondent.

41. This court has also considered a document appearing at page 46 of the Record of Appeal signed by Elizabeth A. Ondunga in which she instructs the bank to pursue her husband over the loan. It is in this document that the 1st respondent alleges that she took the loan to finance their joint bushiness.

42. The court notes that by dint of the document at page 46 of the 1st respondent purports to assign her responsibility to service the loan to the appellant.

43. The document was neither copied to the appellant and there is no evidence of the Bank's concurrence in writing to the assignment as per the express provision in the letter of offer.

45. The doctrine of privity of contracts highlights the legal position that a contract only binds the principal parties to the contract. It cannot therefore be possible for a stranger to a contract such as the appellant to assume the responsibilities and obligations of 1st respondent to service the loan. The evidence in this matter does not even remotely suggest that he was aware of the loan arrangement and there is similarly no evidence that he benefited from the proceeds thereof.

46. The party who took the loan admitted the indebtedness in her letter of 30/7/2019 thus the bank should have proceeded to recover the loan from her.

47. In Savings & Loan (K) Ltd v Kanyenje Karangaita Gakombe & Another [2015] eKLR 48 the court 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 Witshire 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.” 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.”

48. In this case there was no collateral agreement between the 1st respondent and the appellant to service the loan. The 2nd respondent could not lawfully proceed to recover the money from him.

49. The case in my view brings out the need for banks and other lending institutions to be more vigilant in approving any schedules of the chattels presented to them by borrowers. The bank through its loan officials should be able to verify the ownership of any chattels offered as security. The 2nd respondent did not undertake due diligence thus they cannot compel the appellant to satisfy a facility he did not take.

50. The position of a spouse does not confer rights on the other spouse to enter into financial arrangements without involving the other spouse in the hope that if the borrower was to land into financial woes the other spouse would automatically be called upon to settle the debt. That would be a very dangerous precedent to set.

51. Even in the most stable family unions no spouse should be allowed to commit the other spouse to financial obligations without consent.

52. The upshot of the above analysis is that the decision by the learned honorable magistrate was plainly wrong and the same is hereby set aside

53. The 2nd respondent is not without recourse he remains at liberty to pursue the borrower who in this case was the first respondent and her guarantor.

54. The effect of this judgment is that this appeal is allowed with costs and the appellant should get a refund of the sum of Kshs. 87,200 Paid to the bank in a bid to save his properties.

55. It is so ordered

DATED, SIGNED AND DELIVERED IN VIRTUAL COURT AT NAIROBI THIS 6TH DAY OF MAY 2025.

A. M. MUTETI

JUDGE

In the presence of:

Kiptoo: Court Assistant

Alego holding brief for Achuka for the Appellant

No appearance for the Respondent