Mbugua v Mercantile Life & General Assurance Company Limited (Civil Suit 392 of 2003) [2025] KEHC 6649 (KLR) (Commercial and Tax) (23 May 2025) (Judgment)

Neutral citation: [2025] KEHC 6649 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL SUIT 392 OF 2003

A MABEYA, J

MAY 23, 2025

BETWEEN

PETER FREDRICK MBUGUA ..... PLAINTIFF

AND

MERCANTILE LIFE & GENERAL ASSURANCE COMPANY LIMITED ..... DEFENDANT

JUDGMENT

1. The plaintiff instituted this suit vide a plaint dated 1/7/2003 seeking judgment against the defendant for a principal sum of Kshs. 4,723,050/- together with interest from 13/8/1997 till payment in full. He also sought general damages for breach of contract together with costs of the suit plus interest.

2. The plaintiff's case was that he had entered into an insurance contract with the defendant under policy number MGL/03/030/00001 15/1993. That under the terms of the policy, the defendant had agreed to insure his property, L.R. No. 214/622, including the buildings erected thereon, against specific risks in exchange for the premium paid. That the policy stipulated that in the event of loss or damage resulting from a covered risk, the defendant was obligated to repair and reinstate the property or indemnify him, provided that the compensation did not exceed the insured sum.

3. That on or about 5/7/1997, while the policy was still in force, a storm and tempest caused trees within his premises to fall resulting in extensive damage to his property. That the damage was caused by a risk covered under the policy and promptly notified the defendant requesting that an assessor be sent to evaluate the extent of the damage.

4. He further stated that despite fulfilling his obligation under the policy, the defendant, through a letter dated 13/8/1997, disclaimed liability alleging that the incident was caused by a natural calamity, which was purportedly not covered under the policy. He contended that the said disclaimer was unlawful

and amounted to a breach of contract as the policy explicitly covered damage caused by lightning, explosion, thunderbolt, storm or tempest. He maintained that the incident fell within the policy's coverage and the defendant's refusal to honor the claim was unjustified.

5. That the defendant having refused to compensate him, he was compelled to undertake repairs at his own expense. That between August 1997 and subsequent dates, he spent Kshs. 4,723,050/- to rehabilitate and reinstate his property to its original condition. He, therefore, sought reimbursement of this sum from the defendant.

6. The defendant opposed the suit vide a statement of defence dated 4/8/2003. The defendant denied entering into a direct insurance contract with the plaintiff, stating that the policy in question was between the defendant and East African Building Society Limited ("the insured"), which had taken out the policy as the mortgagee of the plaintiff's property.

7. The defendant acknowledged that it was to indemnify the insured for covered losses. However, it denied that any storm occurred on 5/7/1997 or that any damage resulted from falling trees, putting the plaintiff to strict proof. It argued that the plaintiff failed to provide the required written notice of loss along with the necessary certificates and supporting documents in the prescribed form. That if any report was made, it was not brought to its attention in the proper manner.

8. While admitting that the policy covered certain calamities as outlined in paragraph 8 of the plaint, the defendant denied liability asserting that the plaintiff failed to give timely notice of the alleged damage. That the plaintiff had failed to disclose the presence of large trees near the insured premises when the policy was taken out. That this omission constituted material non-disclosure which contributed to the alleged loss.

9. That the plaintiff had not proved that the amount spent on repairs was reasonable. That the policy required any disputes over loss or damage to be resolved through arbitration before any legal action could be taken. That the plaintiff's claim was extinguished due to failure to promptly notify the defendant of the loss and refer the matter to arbitration within a reasonable time.

10. It further contended that the plaintiff was guilty of inordinate delay, having filed the suit nearly six years after the alleged cause of action arose. It maintained that the plaintiff had failed to institute arbitral proceedings within a reasonable time thereby forfeiting the right to claim under the policy.

11. At the hearing, PW1 Peter Mbugua relied on his witness statement dated 6/12/2011 as his evidence in chief and produced three bundles of documents dated 26/5/06, 14,12/2011 and 19/7/07 as PExh1, 2 & 3, respectively. He testified that he insured his property, LR 214/622, located in Old Muthaiga, with the defendant under policy number MGL 03/030/000115/1993. The policy initially covered a sum of Kshs. 2,406,950/- with a premium of Kshs. 6,017/-, which was later increased.

12. He renewed the policy annually and on 1/7/1997, it was renewed under policy number 03/030/00013/691997, which was to remain in force until 18/7/1998. The policy covered risks such as fire, lightning, thunderbolt, earthquake, volcanic eruption, storm, tempest and floods.

13. That on 5/7/1997, strong winds and a storm caused trees within his compound to fall, resulting in extensive damage to the roof and external walls of his house. As a result, his family was forced to seek shelter in the servant's quarters. On 7/7/1997, he lodged a claim with the defendant's agent, Fedha Insurance, requesting an urgent assessment of the damage. He further sought authorization from the defendant on 11/7/1997 to remove the collapsed roof and retrieve trapped household items.

14. However, his request was denied with the insurer insisting that an assessment had to be conducted first. After several meetings with the insurer, he was informed on 13/8/1997 that liability had been disclaimed on the basis that the damage was caused by a natural calamity not covered under the policy.

15. Feeling aggrieved, he undertook repairs at his own cost, spending Kshs. 4,723,050/- to restore his house. He was advised by the insurer's agent to seek financial assistance from East African Building Society (EABS), his mortgage financier, which was affiliated with the defendant. He subsequently took a loan, but due to increased monthly repayments, he struggled financially and defaulted, leading to the auctioning of his property in 2002. He later discovered that his insurer, the mortgage financier and insurance agent were affiliated, placing them in a conflict of interest that compromised his indemnity claim. He asserted that he was not an equal party in the contract, as the financier had signed the insurance documents as the insured, excluding him as an interested party.

16. In cross examination, he stated that EABS was the insured but he was the mortgagor. He was not sure that EABS would take out the insurance as the insured. That he did not have a contract with the defendant directly. He stated that the value of his house was understated by EABS but the same was increased from Kshs.2.4 million to Kshs 8 million.

17. In re-examination, he stated that he had pledged his property as security for a loan and he was directed to heritage insurance company. That in 1995, EABS instructed the defendant to take over the insurance. That EABS instructed him to deal directly with the defendant since he had finalized paying the first loan. That in the premium receipt he was shown as the owner and in a letter dated 21/7/97 he was to pay new insurance. He testified that an accident happened on 6/7/1997 where the roof collapsed in the sitting room, dining room and kitchen. That under the policy, he was entitled to seek repairs and the exclusion under paragraph *8* was not applicable.

18. He stated that he reported the incident to the agent 2days later and he filled the claim form and a month later, they wrote to him informing him that they had rejected the claim because it was a natural calamity. He stated that he took a loan to finance repairs and the total cost was Kshs 4,756,000/-.

19. DW1 Sarah Weru adopted the witness statement dated 10/5/19 as part of her evidence in chief and produced the bundle of documents dated 31/8/2016 as DExh1. She stated that there was no contract of insurance between the plaintiff and the defendant, as the policy was taken out by EABS, which was not a party to the suit. That the plaintiff, being only a mortgagor, had no privity of contract with the defendant and any claims under the policy could only be pursued by EABS. She further argued that the policy did not cover damage caused by falling trees and the court could not impose new obligations on the defendant beyond what was initially agreed upon.

20. That the plaintiff failed to prove the alleged expenditure of Kshs. 4,723,050/- on repairs and noted that general damages could not be awarded for breach of contract. That the plaintiff failed to promptly notify the defendant of the damage as required by the policy, and had not disclosed the presence of large trees on the property at the time of obtaining the insurance. That he did not refer the dispute to arbitration as required by the policy, making the court lack jurisdiction. Finally, that the plaintiff was guilty of undue delay, having filed the suit nearly six years after the cause of action arose.

21. In cross-examination, she stated that once a loan is repaid, the insurance policy lapses and the property is no longer covered. She was unaware whether the defendant had issued a renewal notice for the policy dated 13/5/1990 or whether the plaintiff had made any payments toward its renewal. She further explained that the lender had not established that a loss had occurred as contemplated under the policy.

22. She clarified that while storm and tempest were covered under the policy, strong winds were not. The claim was declined on the basis that the damage was not caused by a covered peril and the presence of

trees in the compound was not a reason for the denial. She emphasized that the plaintiff had a duty to disclose any factors that could affect the policy coverage.

23. Having considered the pleadings, evidence and submissions on record, the issues for determination are; whether there was a contract of insurance between the plaintiff and the defendant, whether the defendant wrongfully disclaimed liability under the insurance policy, whether the plaintiff suffered financial loss as a result of the defendant's actions.

24. On the first issue, the plaintiff's case was that he insured his property, LR 214/622, with the defendant under Policy No. MGL 03/030/000115/1993. That he paid annual premiums and renewed the policy, which was in force at the time of the loss. He contended that he was covered for losses arising from storm and tempest, the cause of the damage to his property on 5/7/1997.

25. On its part, the defendant disputed the existence of any contractual relationship with the plaintiff. It argued that the insurance policy was issued in favor of EABS, which was the mortgagee of the plaintiff's property. The defendant maintained that since the plaintiff was only a mortgagor, he had no privity of contract with the insurer and was therefore not entitled to claim indemnity directly. The defendant further argued that any claims arising from the policy should have been made by EABS which was not a party to the suit.

26. From the record, it is not in dispute that the plaintiff's property LR 214/622, located in Old Muthaiga, was insured with the defendant under policy number MGL 03/030/000115/1993. The terms of the policy were that the defendant would insure the property on storm or tempest including flood or overflow of the sea.

27. The dispute is, who are the parties to the contract since the defendant contended that its contract was not with the plaintiff but rather EABS.

28. In Halsbury's Laws of England, 3rd Edition, Volume 8, paragraph 110, it is stated: -

> " 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."

29. In Savings & Loan (K) Limited v Kanyenje Karangaita Gakombe & Another (2015) eKLR, while considering 'privity of contract', 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 principle 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."

30. From the foregoing, it is clear that the general rule is that, only parties to a contract can sue or be sued on it. That is so even if the contract is made in favor of a party. However, there are exceptions to this general rule.

31. In Aineah Liluyani Njirah v Agha Khan Health Services [2013] eKLR, the Court of Appeal held: -

> " There are now many exceptions to the privity rule, both at common law and in the statute books. They developed in an ad hoc fashion as a response to specific situations where the courts or the legislatures ascertained a need to grant third parties the right to enforce a contract made for their benefit.[11] Second, a third party should be able to enforce a term of the contract when the contract expressly states that the third party has a right of enforcement, regardless of whether or not the contract benefits the third party. Third, the third party should have a right to rely on a term of a contract which excludes or limits the liability of the third party, provided that was the intention of the parties.
>
> There is, however, an important distinction made between express and implied benefits which are enforceable under a contract by a third party. When a contract expressly benefits the third party, there is a presumption that the contracting parties intended the third party to have a right of enforcement. However, if the contract only impliedly benefits a third party, there is no such presumption, and the third party has no rights unless the contract expressly gives that third party a right to enforce the contract. This creates certainty for, and protects, contracting parties, in that third parties cannot enforce contracts which only incidentally benefit them unless the contract expressly states that they may do so.
>
> These presumptions can be rebutted by the contracting parties (or rather, the promisor) if they can show that they did not intend for the third party to have any such a right.
>
> When ascertaining the intentions of the parties, the court should interpret the contract "in light of the surrounding circumstances which are reasonably available to the third party."[12]The English Court of Appeal confirmed this position in Prudential Assurance Co Ltd v. Ayres[13] although it is unclear whether or not there is a requirement that these surrounding circumstances should be readily available to the third party."

32. In Karuri Civil Engineering (K) Limited v Equity Bank Limited [2019] eKLR, the Court of Appeal observed that: -

> " In Aineah Likuyani Njirah vs Aga Khan Health Services (2013) eKLR, this court expressed that there are now many exceptions to the privity rule, both at common law and in the statute books. One of the exceptions is the need to grant third parties the right to enforce a contract made for their benefit. In our considered view, the doctrine of privity of contract cannot be used to oust responsibility to a third-party beneficiary of a performance bond.
>
> See also Darlington Borough Council v Witshire Northern Ltd [1995] 1 WLR 68 (as cited in Mark Otanga Otiende V Dennis Oduor Aduol (2021) eKLR) to demonstrate the rationale behind exceptions to the privity of contract rule per Lord Steyn:
>
> 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."

33. From the foregoing, it is clear that there are exceptions to the privity of contract rule. These can be; where a contract is made to benefit a third party, where a contract expressly states that the third party has a right of enforcement, courts may infer the intention to benefit a third party from surrounding circumstances available to the third party at the time of contracting.

34. In the present case, I have considered the Letter of Offer dated 16/1/1995 from EABS. It clearly indicated that the plaintiff was obligated to insure the property, to which the plaintiff complied. He is the one who was paying the premiums. By a letter dated 28/11/1996, EABS wrote to the defendant requesting that its interest in the policy be deleted.

35. Additionally, EABS informed the plaintiff that it had instructed the defendant to remove its interest from the policy and that subsequent renewal notices would be forwarded directly to the plaintiff. In response to a letter dated 17/7/1997, which inquired whether EABS had cancelled the policy, EABS clarified that the insurance company was only requested to cancel the mortgage file number and not the policy itself.

36. In light of the foregoing, as at the time of the damage, the plaintiff was still insured under the said policy. The mortgagee, EABS, had expressly communicated to the defendant that its interest in the policy be deleted, thereby ceding any residual rights or control over the contract. It is also not in dispute that the property remained insured under the same policy and there was no indication that the defendant treated the policy as cancelled or lapsed.

37. In this respect, while initially the contract may have been executed in favour of EABS, it was clearly intended to benefit the plaintiff as the property owner. The correspondence from EABS directing the defendant to delete its interest and advising that renewal notices be issued directed to the plaintiff demonstrates an intention that the plaintiff was to enjoy the benefit of the cover. The surrounding circumstances and documentation support an inference that the parties intended the plaintiff to benefit from and rely on the contract. As such, the plaintiff is entitled to enforce the same notwithstanding the initial lack of direct privity.

38. The defendant insisted that EABS should have been the one to bring the claim and that it was not a party. The plaintiff claimed on oath that he discovered that both the defendant, EABS and the Insurance agent were inter-related. It would therefore not be expected that EABS would bring any claim against the defendant.

39. In any event, the contention that the plaintiff was not privy to the contract of insurance was an after-thought. As at the time the claim was first lodged, the defendant's reaction was that the risk was not covered. That remained its contention for nearly six years until this suit was lodged.

40. Accordingly, I find and hold that the plaintiff had sufficient locus standi to bring this action against the defendant.

41. The second issue was whether the defendant was entitled to disclaimed liability under the insurance policy. The plaintiff contended that his property suffered damage due to storm and tempest, a risk explicitly covered under the policy. That upon notifying the defendant, it wrongfully refused to indemnify him claiming that the damage resulted from a natural calamity not covered under the policy.

42. On its part, the defendant contended that the policy did not extend to damage caused by falling trees, which was the actual cause of the loss. Further that the plaintiff failed to promptly notify it of the damage in the required manner and that the presence of trees near the insured premises was a material fact that had not been disclosed when taking out the policy.

43. In the present case, the policy terms provided cover for storm and tempest. From the evidence on record, there was heavy rains that were accompanied with strong winds. These were the primary causes of the damage. It is as a result of those that the trees fell and caused the damage.

44. The Concise Oxford Enflish Dictionary, 12th Edn, 2011, Oxford University Press defines 'storm' and 'tempest' as follows: -

> " Storm; A violent disturbance of atmosphere with strong winds and usually rain, thunder, lightning or snow" and
>
> "Tempest; A violent windy storm".

45. From the foregoing, it is this Court's holding that the heavy rains and strong winds were storm and tempest. They were covered under the policy. It is a natural consequence that storm and tempest would led to uprooting and or the felling of trees. There was no evidence that the falling trees, as a consequence of a covered peril, were excluded from cover. Additionally, the defendant did not deny or challenge the plaintiff's assertion that storm and tempest directly caused the damage. The falling of trees was a direct consequence of the storm and tempest that took place on that material day which led to the damage complained of.

46. The defendant contended that the plaintiff failed to disclose the presence of trees near the property. This is an unconvincing argument. Insurers are known to value properties they insure before cover. There was no evidence to show that before fixing the premium, the defendant did not visit and value the property. Its agent must have seen those trees.

47. In any event, it was not demonstrated that the omission to disclose the existence of the trees materially affected the risk assessment or that it would have led to different policy terms. In the absence of a policy clause specifically excluding damage caused by falling trees or requiring disclosure of trees as a risk factor, the defendant's argument fails.

48. The final issue is whether the plaintiff suffered financial loss as a result of the defendant's actions. The plaintiff testified that, following the defendant's disclaimer of liability, he undertook repairs at his own cost, spending Kshs. 4,723,050/- to restore the damaged property. That due to financial strain, he sought a loan from EABS for the repairs but was unable to sustain the repayments, leading to the auction of his property. The defendant, however, denied that the plaintiff incurred reasonable expenses in repair and put him to strict proof.

49. The Court notes that the plaintiff provided valuation and repair cost reports to substantiate his financial loss. The defendant did not adduce any evidence to contradict the valuations or prove that the claimed amount was exaggerated. It is well established that special damages must be specifically pleaded and strictly proved. In this case, the plaintiff demonstrated that he incurred expenses in restoring his property and the defendant did not provide any basis to dispute these claims.

50. Regarding the plaintiff's claim for general damages, the defendant correctly argued that general damages are not awarded for breach of contract and the Court finds no basis for this claim.

51. In view of the foregoing, I find that the plaintiff was able to prove his case to the required standard and I enter judgment for the plaintiff against the defendant for Kshs. 4,723,050/- together with interest thereon at court rate from 13/8/1997 until payment in full. The plaintiff will also have the costs of the suit, together with interest thereon at 14% pa from the date of taxation until payment in full.

It is so decreed.

DATED and **DELIVERED** at Kisumu virtually this **23rd** day of **May, 2025**.

A. MABEYA, FCI Arb

JUDGE