Ndungi v Ndungi & another (Civil Appeal E034 of 2021)
[2024] KEHC 7 (KLR) (11 January 2024) (Judgment)

Neutral citation: [2024] KEHC 7 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MAKUENI

CIVIL APPEAL E034 OF 2021

TM MATHEKA, J

JANUARY 11, 2024

BETWEEN

JONATHAN MUEMA NDUNGI ..... APPELLANT

AND

HARRISON NDUNGI ..... 1ST RESPONDENT

KENYA COMMERCIAL BANK ..... 2ND RESPONDENT

(Appeal from the Judgment of Hon JD Karani RM in Makindu CMCC 271 of 2014 delivered on the 28th April 2021)

JUDGMENT

1. Harrison Mutua Ndungi purchased m/v registration no. KBV 029A with a financial facility from the 2nd Respondent

2. Following some financial constraints, he entered into an agreement with Jonathan Muema Ndungi, whereby Muema would take over the loan facility and the ownership of the said m/v would be transferred to him.

3. By a letter dated April 1, 2015, Mutua wrote to the bank to the effect that with respect to the loan facility for m/v reg no. KBV 029a he had 'handed over both the loan and the m/v to Muema Ndungi in continuation of the repayment of the loan.

4. The bank wrote to Mutua on the February 15, 2016 acknowledging other correspondence from Mutua dated February 19, 2016. The bank informed him that the loan was outstanding by the sum of Ksh 2,749852/40 and was to mature on the August 30, 2018. Secondly that the repayment account had been amended from his account to that on Muema with effect from 29th February 2018 and that Mr. Muema had been duly notified.

5. Muema's response was an objection to the amendment on the ground that the agreement between him and Mutua was to transfer both the loan and the ownership of the m/v to him. This objection was acknowledged by the bank *vide* its letter of February 19, 2016 to Mutua to the effect that following Muema's objection then the loan facility would remain as it were.

6. By a letter dated February 23, 2016, Muema informed the bank that Mutua had taken away the m/v from him on reasons unknown to him(Muema)

7. On the June 22, 2016 Muema file Makindu CMCC 271 of 2016 claiming breach of contract on the part of Mutua. That the contract was that Mutua would transfer both the loan facility and the m/v KBV 029A to him. That this agreement was shared with the Bank and the loan facility was transferred from Mutua to Muema. That he Muema took possession of the M/v which he put to use at his hardware business while he continued to repay the loan. That the Bank proceeded to change this arrangement on the instructions of Mutua without consulting him, and thereafter Mutua forcefully took away the m/v from his (Muema's) premises.

8. It was also Muema's position that he incurred the sum of Ksh 900,000 as repair and insurance expenses after the said m/v was involved in a road traffic accident.

9. He sought the judgment against the defendants for

    i. A refund of the monies paid towards the loan repayment

    ii. Special damages of Ksh 900,000

    iii. General damages

    iv. Costs of the suit

    v. Interest on the above

    vi. Any other relief that the court may deem just to grant

10. *Vide* a statement of defence dated December 7, 2016 the 2nd defendant, the Bank, denied any contractual relations with the plaintiff- Muema, denied all the allegations of breach of contract, of negligence or any liability and put the Muema to strict proof thereof.

11. The first defendant never filed any response to the suit and a judgment was entered against him for the sum of Ksh900,000 on the April 9, 2018.

12. The matter was heard. The Plaintiff testified and called one witness. In his testimony he made reference to an agreement for ownership of the m/v between him and the defendants. He testified that the m/v had been in an accident, there had been arrears of one year. That he incurred repairs of Ksh 200,000, insurance of Ksh 200,000, that he repaid the loan for one year to a sum of over Ksh 1,000,000 and the 2nd defendant continued to deduct the loan 4 months after the m/v was taken away from him.

13. On cross examination he told the court that the agreement that the Bank would transfer the m/v to him was contained in the correspondence exhibited, but conceded that the said term was not expressly indicated in the correspondence. He confirmed that he objected to the amendment of the loan repayment from that of the 1st defendant to his account but that the bank 'did not approve it'. He said the statement he relied on was in the name of the first defendant. He told the court that the m/v was lying at Mtito Andei Police Station. That he towed it to the garage and had it repaired. He concedes that he did not produce any involve to show that the m/v was being repaired. On reexamination he told the court that the loan stamen of January 1, 2015 to June 4, 2016 showed an arears on Ksh 190,000.

14. PW2 Livingston Nzomo Mutunga told the court that he was an insurer. He confirmed that the Muema and Mutua were brothers. That in March 2016 he issued an insurance cover for the m/v reg. no KBV 029A whose logbook was in the names of the 1st defendant and the bank. He said the document he produced in court was the invoice to pay.

15. The 2nd defendant called one witness Antony Mutua, the branch manager for Makindu branch. He told the court that the bank had a loan facility with the 1st defendant for the purchase of the m/v KBV 029A. That he fell into distress and brought in the plaintiff to assist him. That the agreement was for the plaintiff to pay the loan arrears. That the plaintiff paid for while then the situation changed. That the m/v was registered in the joint names of the defendants and the 2nd defendant was not a party to the agreement between the plaintiff and the 1st defendant. That there was no way the bank could have transferred ownership of the m/v to the plaintiff because there was no contractual relationship between them. That the plaintiff did not apply to have the loan facility changed. That any transfer between the plaintiff and the 1st defendant could only have occurred after the full payment. He testified that the 1st defendant ultimately fell into arrears, the m/v was repossessed and sold. On cross examination he told the court that the amount that was being paid was Ksh 112,000. That the plaintiff got the exclusive use of the m/v during that period. That the bank acted in good faith within its mandate.

16. *Vide* a judgment dated April 28, 2021, the learned trial magistrate asked and answered the following questions: whether the plaintiff was privy to the contract between the defendants; whether there was any negligence and where the plaintiff was entitled to the prayers sought.

17. She found that the plaintiff was not privy to the contract between the defendants. That when he took over the loan he also took over possession of the m/v and therefor was compensated for the payments he made. That the 1st defendant was rightfully in ownership of the m/v during that time as it was his loan facility and any transfer could only be effected after the repayment of the full loan. That the 2nd defendant was not guilty of any wrong in that regard.

18. The court found that the fact that the 2nd defendant continued to obtain payments from the plaintiff even after they had received the 1st defendant's objections was negligent and therefor were liable to refund the sums so collected.

19. The court found that the 1st defendant acted in bad faith in leading the plaintiff to believe that his repayment of the loan would lead to his acquisition of an asset in the form of the m/v subject of the loan and hence deserved compensation. The court found that the claim to general and special damages was not proved.

20. Untimely the court entered judgment against the 2nd defendant for the sum of Ksh 429, 530.57 being the refund od he monies wrongfully deducted from the plaintiff's account.

21. Plus, costs and interest from the date of filing suit- this to be borne at 50:50 by the defendants.

22. The plaintiff was aggrieved by the judgment and filed this appeal on eight grounds; That the learned trail magistrate erred both in fact and law by failing: to appreciate that a contract arose between he appellant and the 2nd respondent when the loan repayment obligation was taken over by the appellant; to evaluate the evidence in totality; to award special damages claimed by the appellant when the same was sufficiently proved to the threshold required by law; to appreciate the fact that appellant had suffered loss of business a fact that was proved on a balance of probabilities; to award general damages when the said damages were manifestly clear from the pleadings and proceedings; not recognizing the fact that the appellant suffered loss of business and earnings when the m/v KBV 029A ; by taking into

account extraneous matters in arriving at her conclusions ; that the learned trial magistrate misdirected herself on the law of contracts;

23. Parties took directions to proceed by way of written submissions. The 2nd respondent filed submissions together with a notice of grounds affirming the decision of the subordinate court. The appellant filed submissions in support of the appeal.

24. I have carefully considered the same.

25. I am reminded that the role of the court on appeal has been settled; it is to reevaluate the evidence on record and draw its own conclusions always aware that the court never heard or saw the witnesses. This is in the oft cited case of *Selle & another v Associated Motor Boat Co Ltd & other*s [1968] EA 123. Due to the 'time saving' practice over the years of filing written submissions, the appeal judge is left to read over the dry pages of the written submissions , without the human interactions of each advocate spending time in oral submissions to persuade the judge to take the side of their client. That art of persuasion can only be expressed on paper to a certain extent.

26. That said the appellant decided to argue the grounds of appeal into three clusters: Whether there was a contract between the plaintiff and the 2nd respondent, whether the appellant was entitled to special damages and whether he was entitled to general damages.

27. On the first ground it is argued that the correspondence between the appellant and the respondents presents a legally binding contract between the appellant and the 2nd respondent because it is evidence that the arrangement assigned contractual obligations on the appellant by the 1st respondent with the consent of the 2nd respondent. It is urged that this court ought to recognize a contract for the benefit of the appellant as the third party on the strength of *Aineah Liluyani Njirah v Aga Khan Health Services* [2013] eKLR where the Court of Appeal cited Lord Steyn in *Darlington Borough Council v Wiltshier Northern Ltd* [1995] 1 WLR 68 at 76 to the effect that the autonomy of the will of the parties should be respected...where that is the will of the parties.

28. In *Middle Africa Acceptance & another v Peter Njoka* [1998] eKLR the learned judge cited Collins MR in *Tolhust v Associated Portland Cement Manufactures* (1900) 2KB 660 at 668 where the court was of the view that 'a debtor cannot relief himself of his liability to his creditor by assigning the burden of the obligation to somebody else; Thai can only be brought about by the consent of the three and invives the release of the original debtor'

29. It is further argued that there was an implied term of the contract which was intended to give the 'businesses among the parties 'reality'. See *Caleb Onyango Adongo v Benard Ouma Ogur* [2020] eKLR.

30. On special damages the appellant relied on *Provincial Insurance Co EA Ltd v Mordekai Mwanga Nandwa* and argued that the appellant had during the trial produced receipts as evidence of payment for repairs and insurance

31. On general damages, it was argued that there was breach of contract as the appellant suffered loss due to the 2nd respondent's actions of ending the contractual relations unilaterally. That the subsequent repossession of the m/v by the 2nd respondent and sale of the same occasioned the appellant loss and that if nothing else he deserved nominal general damages. He cited *Kinakie Cooperative Society v Green Hotel* (1988) KLR 242 where the Court of Appeal held inter alia that where ...a specific loss is to be compensated and the party was given a chance to prove the loss and did not he cannot have more than nominal damages , *Peter Umbuku Muyaka v Henry Sitati Mmbasu* [2018] eKLR to the effect that a claimant for damages for breach of contract 'who has not suffered any loss by reason of the breach

is nevertheless entitled to a verdict but the damages recoverable will be purely nominal'. This was the position in *Halsbury's Laws of England* 3rd Edition Vol II as cited in the same case.

32. The 2nd respondent submitted that the jurisdiction of the appellate court was summarized in *Susan Munyi v Keshar Shiani* [2013] eKLR as follows;

> 'As a first appellate court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyze, evaluate, assess, weigh, interrogate and scrutinize all the evidence and arrive at our own independent conclusions...from the evidence captured in the cold letter of the record. We therefore operate under a decided handicap as there is much to be gleaned from the demeanor and nuanced communications of a love witness...for precisely this common sense reason an appeal court must accord respect to the factual findings of the trial court and will be circumspect and slow to disturb them.

33. The 2nd respondent submitted on three areas of the grounds of appeal: whether a contractual relation arose between itself and the appellant when he took over the loan repayments; whether the trial magistrate considered extraneous matters in arriving at the conclusions she did; whether the appellant was entitled to both special and general damages.

34. It was argued that the arrangement that was entered into between the appellant and the 1st respondent did not confer any contractual obligations on the 2nd respondent with respect to the appellant. That the contract was between the 2nd respondent and the 1st respondent. To support this the 2nd respondent cited the words quoted in *Kenya Women Finance Trust v Bernard Oyugi Jaoko & 2 others* [2018] eKLR from *Savings & Loans (K) Ltd v Kenyenje Karangaita Gakombe & another* [2015] eKLR

> '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.

The 2nd responded submitted that this was also the position held in *David Njuguna Ngotho v Family Bank Limited & another* [2018] eKLR

35. It was submitted that the judgment of the subordinate court will demonstrate that it was based on the evidence on record.

36. On special damages, the 2nd respondent while relying on the *Joseph Kipkorir Rono v Kenya Breweries Limited & another* Kericho HCCA No 45 of 2003 where it was held that special damages must not only be specifically pleaded but proved strictly in accordance with the law. Special damages emanate from a sum already spent or loss already incurred. For instance, loss of the use of an article for a specific period of time is a special damage which must be pleaded.

37. In *Catholic Diocese of Kisumu v Sophia Achieng Tete* Civil Appeal no. 284 of 2001 [2004] 2KLR 55 it was reiterated that the assessment of general damages is the discretion of the trial court and the interference by the appellate court can only be where that court applied wrong principles by taking into account irrelevant matters and leaving out relevant ones, or misapprehended the evidence leading to a figure so inordinately high or low to represent an entirely erroneous estimate. The 2nd respondent argues that on the strength of this and he holding in *Jane Chelagat Bor v Andrew Otieno Onduu* [1988-92]2 KAR 288; [1990-1994] EA 47, this court should decline the invitation to interfere with the decision of the subordinate court. That in any event as a general rule general damages are nor recoverable in a cases of alleged breach of contract, damages in such cases are compensation to the aggrieved party and a restitution of what was lost as a result of the breach as was held in *Tourist*

Development Corporation v Sundowner Lodge Limited. It was pointed out to this court that the Court of Appeal set aside an award of general damages in *Kenya Women Microfinance Limited v Martha Wangari Kamau* [2021] eKLR stating that '...the law is that general damages are not awardable for breach of contractual obligations...if breached would lead to compensation for the specific loss suffered as a result of the breach...;

38. I have carefully considered all the evidence on record, the submissions and the authorities cited and it is evident to me that this appeal turns on whether there any contractual relation was established between the 2nd respondent and the appellant. At the outset it is important to point out that the 1st respondent did not defend the suit in its entirety. Judgment was entered against him for the sum of Ksh 900,000. That Judgment was never followed up by the appellant. I do not find any explanation in the record for the same.

39. That stated, the facts were straight forward. The two parties were brothers. Mutua took out an asset financing facility with the bank, the 2nd Respondent. At some point he was unable to pay. It appears that he spoke with his brother Muema and they wrote the letters to the bank where Muema was to take over the payment of the loan. Mutua wrote to the bank to the effect that he had handed over the loan facility and the motor vehicle to Muema. When the time came to transfer the payment account Mutua to Muema, Muema's response was an objection to the transfer of the repayment obligation from his brother to him on the ground that the agreement between him and Mutua was to transfer both the loan and the ownership of the m/v to him. This objection was acknowledged by the 2nd respondent the bank vide its letter of 19th February 2016 to its client Mutua to the effect that following Muema's objection then the obligation to repay the loan facility would remain with him.

40. It is noteworthy other than the correspondence among the three parties, neither the specific agreement between the two respondents nor between the brothers setting out the terms of their obligation was produced as evidence. The only place we can find the terms of the alleged contract between the brothers are the letters. Mutua wrote to the bank about his agreement with his brother. Muema objected to the action the Bank was to take because according to him the terms had changed. In my view it is evident that there was no coming together of minds between Muema and Mutua. It appears that Mutua just wanted his brother to pay the loan as he used the motor vehicle. Muema believed that the payment of the loan would result in the transfer of the ownership of the m/v to him. There is no evidence before me that the Bank was aware, or part of the arrangement to transfer the m/vehicle to the appellant. The instructions were straight forward- that their client had handed over the loan and the m/v to his brother. The bank moved to act on the instructions as they understood them- transfer the loan repayment to Muema with nothing about the transfer of the m/v. Muema raised his objection and that was the end of the agreement. Mutua took the m/v away from Muema.

41. From the record it appears that these two brothers were not in complete agreement on what was to happen when the loan was being repaid. The respondent could only have acted on the instructions of its client and when the appellant raised his objection the bank had no choice but to revert to its client. Hence it is my view that no contractual obligations arose between the bank and the appellant. The agreement was between him and his brother and the same collapsed for misunderstanding of the terms on each side.

42. Following the argument by the appellant in citing Middle Africa Acceptance & Another v Peter Njoka above the 1st respondent did assign his debt to the appellant but because of the appellant's objection he withdrew his consent and the debt reverted to the 1st respondent. And there was no release of the original debtor, the 1st respondent from his obligation.

43. Hence the holding in *Kenya Women Finance Trust v Bernard Oyugi Jaoko & 2 others* above that under the doctrine of privity of contract a contract cannot confer rights or impose obligations on any person other than the parties to the contract applies to this case and therefor the 2nd respondent had no obligations to the appellant who had not become privy to the contract between it and the 1st respondent.

44. Having found that there was no contractual obligation between the appellant and the 2nd respondent, it is evident that there would not have arisen any issue of breach of contract between the two as no contract was established. Evidently the issue of special or general damages against the 2nd respondent would also not arise.

45. Even if there was a contract the appellant did not comply with the requirement that special damages must be pleaded specifically and be proved strictly. It was submitted that the appellant produced receipts during the trial. That is not how it works. He laid a claim of Ksh 900,000 as special damages. He claimed loss of user and loss of business. The same was not proved, neither was it proved as against the 2nd respondent and hence none could have been awarded.

46. The authorities cited clearly demonstrate that the appellant was not entitled to general damages. He did not prove any of the losses alleged to have been incurred due to the alleged breach. For instance loss of business, loss of user of the m/v. The appellant did not place evidence before the subordinate court to establish these claims and the trial court could not have awarded the same, or any nominal damages as claimed in the submissions.

47. What the appellant was entitled to was the refund of the money that the bank continued to deduct from the appellant after the fall out with his brother and after the repossession of the m/vehicle by his brother. This amount was awarded by the learned trial court and I find no reason to interfere with her decision.

48. In the circumstances, I am persuaded that the appeal has no merit. The same is dismissed with costs to the 2nd respondent.

DATED, SIGNED AND DELIVERED VIA EMAIL THIS 11TH DAY OF JANUARY 2024

MUMBUA T MATHEKA

JUDGE