



**Genga v APA Insurance Kenya Ltd (Civil Appeal E051 of 2023)
[2024] KEHC 11950 (KLR) (4 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 11950 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E051 OF 2023
RE ABURILI, J
OCTOBER 4, 2024**

BETWEEN

LISTER AWUOR GENGA APPELLANT

AND

APA INSURANCE KENYA LTD RESPONDENT

*(An appeal arising out of the Judgment & Decree of the Honourable
G.C. Serem in the Chief Magistrate's Court at Kisumu delivered
on the 8th March 2023 in Kisumu CMCC No. E023 of 2022)*

JUDGMENT

Introduction

1. The appellant filed suit against the respondent seeking general damages for breach of contract, an order compelling the respondent to comply with the insurance contract and compensate her as well as interest on both at court rates.
2. The appellant pleaded that she was the joint registered owner of motor vehicle registration No. KBM 742F a Toyota Station Wagon together with her spouse one Elijah Owino Ngange, which vehicle was fully covered by the respondent's insurance company under Policy No. AD700/000xxx.
3. She further averred that sometimes on the 23rd July 2019, the said vehicle was stolen and was never recovered and that subsequently, the respondent duly acknowledged the claim under claim number C/70/700/0xxxxx/MK but illegally, wrongfully and without reasonable cause, violated the insurance contract by failing to compensate the appellant for the loss thus exposing her to continual loss.
4. The respondent filed their response to the claim vide their statement of defence dated 26th February 2022 wherein it denied the appellant's claim and further stated that it only entered into a contract of insurance with one Elijah Owino Ngange through Sony Sugar Company Staff Scheme and subsequently



fully compensated him for theft of the said vehicle with a discharge voucher dated 24.3.2020 executed by the insured.

5. In her impugned judgement, the trial court found that there was no privity of contract between the appellant and the respondent and as such, the respondent was not entitled to pay her any compensation. The trial court dismissed the appellant's suit with costs.
6. Aggrieved by the trial court's judgement, the appellant filed this appeal dated 24th March 2023 raising the following grounds of appeal:
 1. That the learned trial magistrate erred in law and fact in failing to evaluate and analyse the evidence tendered by the appellant thus reaching a wrong decision.
 2. The learned trial magistrate erred in law and fact in applying the wrong principle of law governing the privity of contracts thus misdirected herself and reached a wrong decision.
 3. The learned trial magistrate erred in law and fact in failing to find that the appellant had proved her case on a balance of probabilities which is the threshold set by law in such suits.
 4. The learned trial magistrate erred in law and fact in failing to appreciate that there existed an openly and trust relationship between the plaintiff and the said Elijah Owino Ngage who the respondent claimed to have insured.
 5. The learned trial magistrate erred in law and fact in failing to find that under the claim memorandum form, the appellant is listed as the joint owner of the subject motor vehicle thus is entitled to a share of the compensation by virtue of trust relationship that existed between the appellant and the joint owner who executed the contract of insurance for her benefit.
 6. The learned trial magistrate erred in law and fact in treating the evidence presented by the appellant superficially thus reaching a wrong verdict.
 7. The learned trial magistrate erred in law and fact in failing to give reasons for her decision as required by law and merely restating submissions of the respondent literatim thus reaching a wrong decision.
7. The appeal was canvassed by way of written submissions.

The Appellant's Submissions

8. The appellant submitted that the trial magistrate abdicated her statutory duty of evaluating and analysing the evidence and ought to have evaluated the evidence and analysed the same and making a finding as to whether the contract of insurance was between the said South Nyanza Sugar Company or Elijah Owino Ngage and Lister Awuor Ngage as the evidence adduced showed that the contract was between the respondent and the registered owners of the motor vehicle under the scheme they had with the Sugar company.
9. The appellant thus submitted that the trial magistrate wrongly applied the principal that a contract is only binding on the parties to the contract and a non-party cannot claim under contract as was held in the case of Dunlop Pneumatic Tyre Co. Ltd v Selfridge & Co. Ltd (1915) AC 847. She submitted that the contract of insurance in this case was between the respondent and the registered owners of the suit vehicle and thus the issue of privity of contract did not arise in this case.
10. It was further submitted that there are exceptions to the rule under the priority of contracts as in instances where an insurance cover is taken out by one party on behalf of the other e.g. husband and wife. The appellant relied on the case of Cleaver v Mutual Reserve Fund Life Association (1892) 1 QB



147 where it was stated that even if a policy of insurance expressly confers benefits on a third party, the third party has no claim in common law but can claim under equity the residual law.

11. The appellant thus submitted that the equitable doctrine of constructive trust applies in the instant case and that she is thus deemed to have been a party to the contract of insurance and can sue under it. She further submitted that she had demonstrated that she was a joint owner of the motor vehicle and thus entitled to compensation.
12. It was submitted that having established that the motor vehicle was jointly owned, the respondent was owed a duty to the appellant to involve her and notify her on when the compensation was being made and that therefore the actions of the respondent in excluding the appellant during the time of compensation were unconstitutional, illegal and discriminative as the said actions elevated the appellant's husband while diminishing her.

The Respondent's Submissions

13. The respondent submitted that the ownership of the suit motor vehicle was not in issue and that therefore, the fact that the suit vehicle was jointly registered between the appellant and her husband did not make the appellant a beneficiary of the policy of insurance to which she was not a party as she was not a staff of South Nyanza Sugar Company Limited to entitle her to benefit under the policy and that the trial court rightly found so.
14. It was submitted that the appellant was not privy to the contract between the respondent and staff of Sony Sugar Company Limited where Elijah Owino Ngange was the sole claimant. The respondent submitted that the doctrine of privity of contract stipulates that a contract cannot confer rights or impose obligations other than on parties to the contract as was held in the cases of *City Council of Nairobi v Wilfred Kamau Githau* (2016) KLR, *Kenindia Assurance Company Limited v New Nyanza Wholesalers Limited* [2017] eKLR, *Securicor Guards (K) Limited v Mohamed Saleem Malik & Another* [2019] eKLR and *Kenya Women Finance Trust v Bernard Oyugi Jaoko & 2 Others* [2018] eKLR.
15. It was submitted that the appellant's appeal lacked merit.

Analysis and Determination

16. This being a first appeal, this court is under a duty to re-evaluate and re-assess the evidence and make its own conclusions. It must, however, bear in mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. The Court of Appeal in the case of *Mark Oiruri Mose vs. R.* (2013) eKLR held that:

“This Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.”

17. This Court is thus required to review and analyze the entire trial court record and evidence presented before that court and draw its own conclusions, bearing in mind that the benefit of hearing firsthand evidence from the witnesses themselves is lacking. In that regard, an appellate court will only interfere with the judgment of the lower court, if the said decision is founded on wrong legal principles. That



was the holding of the Court of Appeal in *Mkube v Nyamuro* [1983] LLR at 403, where Kneller JA & Hancox Ag JJA held that:

“A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.”

18. I have considered the grounds of appeal and submissions by both parties. In my view, this case turns on the issue of ownership of the suit vehicle motor vehicle registration number KBM 732F and its effect on the contract of insurance between the respondent and the appellant’s husband. This was the argument advanced by the appellant. The appellant who testified as PW1 adopting her witness statement filed on the 26th January 2022 as her evidence in chief basically reiterated the claims made in her plaint. She testified that the vehicle was lost on the 23.7.2019 while in the hands of her co-owner. She testified that she bought the vehicle at Kshs. 850,000 in Mombasa and that her husband bought the insurance. She then added that the insurance was in the name of herself and her husband.
19. The appellant testified that her husband did not know about the insurance and that she found the receipt for payment of the money by the insurance. It was her testimony that the vehicle was for business and since she lost it, her business had gone down.
20. In cross-examination, the appellant testified that from the documents in court, there was no contract of insurance but qualified this statement by stating that she trusted her husband who did all the transactions. She admitted that she did not work for Sony Sugar Company but rather, that it was Elijah Owino Ngange who worked for Sony Sugar Company. It was her testimony in cross-examination that her husband used to pay for the motor vehicle’s insurance and that he used to tell her that he had not been paid for the lost vehicle.
21. In re-examination, the appellant testified that she paid the insurance premiums through her husband at the rate of Kshs. 28,000 per year. She testified that she found the discharge voucher hidden by her husband while she was cleaning the house. She admitted that at the time of filing suit, she did not know that her husband had been paid.
22. The respondent called one Judith Odhiambo, its legal officer who testified as DW1. She adopted her witness statement dated 8th July 2022 as evidence in chief. It was her testimony that the suit vehicle was insured by the respondent under the Sony Sugar Staff Scheme under policy number AD700/0000xxx as per the Renewal Policy Schedule dated 20th June 2019 which policy covered the period between 1.7.2019 to 30.6.2020. She testified that the suit vehicle was registered in the name of Elijah Owino Ngange and his wife the appellant but that it was insured only in the name of Elijah Owino Ngange.
23. DW1 further testified that the respondent settled the claim brought for the theft of the suit vehicle to a sum of Kshs. 520,000. She further testified that the appellant was not privy to the contract of insurance between the respondent and one Elijah Owino Ngange and thus lacked locus standi to claim under the said policy and institute the suit.
24. The issue of ownership was not disputed by either party. It is clear that the car was jointly registered in the names of both the appellant and her husband Elijah Owino Ngange.
25. Section 8 of the *Traffic Act* provides that the person in whose name a motor vehicle is registered is unless the contrary is proved, to be deemed to be the owner of the vehicle. The principle envisaged in this section is that there can be actual, possessory and beneficial ownership of a motor vehicle which exists independently of registration.



26. In *Samuel Mukunya Kamunge v John Mwangi Kamuru, Nyeri H.C. Civil Appeal No. 34 of 2002*, Okwengu J. (as she then was) held that: -

“It is true that a certificate of search from the Registrar of Motor vehicles would have shown who was the registered owner of motor vehicle according to the records. That however, is not conclusive proof of actual ownership of the motor vehicle as section 8 of the *Traffic Act* provides that the contrary can be proved. This is the recognition of the fact that often times motor vehicles change hands but the records are not amended.”

27. On the same issue Ojwang J. (as he then was) in *Nancy Ayemba Ngaira v Abdi Ali, Msa HCCA No. 107 of 2008 (2010) eKLR* held that:

“There is no doubt that the registration certificate obtained from the registrar of motor vehicles will show the name of the registered owner of a motor vehicle. But the indication thus shown on the certificate is not final proof that the sole owner is the person whose name is shown. Section 8 of the *Traffic Act* is fully cognizant of the fact that a different person or different other persons, may be the de facto owners of the motor vehicle – and so the Act has an opening for any evidence in proof of such differing ownership to be given. And in judicial practice, concepts have arisen to describe such alternative forms of ownership: actual ownership; beneficial ownership, possessory ownership. A person who enjoys any of such other categories of ownership, may for practical purposes, be much more relevant than the person whose name appears in the certificate of registration; and in the instant case at the trial level, it had been pleaded that there was such alternative kind of ownership. Indeed, the evidence adduced in the form of the police Abstract, showed on a balance of probabilities, the 1st defendant was one of the owners of the matatu in question.”

28. In *Jared Magwaro Bundi & Another v Primarosa Flowers Limited (2018) eKLR* the Court of Appeal reviewed previous cases on beneficial ownership of motor vehicle and held that:

“It was therefore held in *Muhambi Koja (supra)* that section 8 of the *Traffic Act* recognizes registration book or the Registrar’s extract of the record as prima facie evidence of title to a vehicle and the persons in whose name the vehicle is registered is presumed to be the owner thereof unless the contrary is proved. The burden is discharged if, on a balance of probabilities, it is shown that as a matter of fact the vehicle had been transferred but not yet registered, to a de facto owner, a beneficial owner or a possessory owner. Such an owner though not registered for practical purposes may be more relevant than that in whose name the vehicle is registered.

The position taken by the court in *Jael Muga Opija (supra)* and *Mohamed Koja (supra)* appears to us to accord with modern thinking and jurisprudence where the law is encouraging courts to interpret the law governed more by substance than the technical chains of form, the latter which does not ordinarily look at the justice of a case ...”

29. In the instant case, it is not denied that both the appellant and her husband were the registered owners of the suit vehicle in accordance with the provisions of section 8 of the *Traffic Act*.

30. However, the respondent introduced an exception to section 8, that it entered into a contract of insurance with one Elijah Owino Ngange, the appellant’s husband, through the Sony Sugar Company Staff Scheme under their policy number AD700/000xxx for the suit vehicle. This fact was not



controverted by the appellant who testified in cross-examination that her husband was the one who was insured and that she used to give him money to pay the insurance premiums.

31. In *Benard Muia Kilovoo v Kenya Fresh Produce Exporters* [2020] eKLR it was stated as follows:

“41. The Court of Appeal in these binding decisions is clearly stating: -(i) That the presumption that the person registered as owner of the motor vehicle in the logbook is the actual owner is rebuttable. (ii) Where there exists other compelling evidence to prove otherwise then the court can make a finding of ownership that is different from that contained in the logbook. (iii) Each case must however be considered in its own peculiar facts.”
32. It follows that the provisions of Section 8 of the *Traffic Act* or the National Transport and Safety (NTSA) extract of registration record is only prima facie evidence of ownership and the presumption is rebuttable.
33. In this case, nothing prevented the appellant from being part of the insurance policy contract taken out by her husband and from her own statement, she gave the money to her husband to pay for the insurance policy and that she believed that the cover was in their joint names. She further stated how she later discovered that the cover was in his name only. The appellant's husband, it should be noted, was not a party to the suit in the court below.
34. Accordingly, I am persuaded that the evidence adduced by the respondent before the trial court all point to the appellant not being the beneficial owner of the suit vehicle rather, it was her husband, Elijah Owino Ngange who was the beneficial owner by virtue of the Insurance Policy number AD700/000xxx which was in his sole name and therefore any claims arising following the loss of the said motor vehicle could only be claimed by him. This is so, because it was him who was privy to the insurance contract with the respondent as shall be discussed below.
35. Having ascertained the issue of ownership, I now turn to the issue of whether the appellant was entitled to claim under the contract of insurance covered by Policy number AD700/000xxx.
36. An insurance policy is a contract between parties thereto. The Insurance Policy subject of this suit was signed between the respondent and one Elijah Owino Ngange who at the time was a member of staff at Sony Sugar Company Limited and who had an agreement with the said Sony Sugar Company to offer insurance services for its staff.
37. The appellant herein despite testifying that she gave her husband money to pay the yearly premiums, a fact that remained unproven, was not included in the said insurance cover. In addition, there was no condition in the said insurance policy that in the event of loss of the motor vehicle, the appellant would be entitled to compensation for the loss. Additionally, the appellant did not enjoin her husband to the suit in the court below as he is the person who was compensated for the loss of the vehicle, as the party who was privy to the insurance policy.
38. The doctrine of Privity of Contract is a long established part of the law of contract. It is one of the fundamental principles of the English Contract law. The essence of the Privity rule is that only the parties that actually negotiated a contract (who are privy to it) are entitled to enforce its terms. Basically, the principle advances 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.
39. An exception to the Privity of contract Rule avails where the contracting parties clearly intended to benefit a third party from their agreement and the third party would rely on and or enforce the



agreement if it is not carried out properly. An example is in insurance (third party risks) where an injured person can sue to enforce compensation in their favour where a contract of insurance was between an insured other than the person suing and an insurance company.

40. In *Savings & Loan (K) Limited v Kanyenje Karangaita Gakombe & another* [2015] eKLR, the Court of Appeal relying on its previous decisions in the cases of *Agricultural Finance Corporation v Lengetia Ltd* [1985] KLR 765, *Kenya National Capital Corporation Ltd v Albert Mario Cordeiro & another*, CA NO 274 of 2003 and *William Muthbe Muthami v Bank of Baroda, CA NO 91 of 2004*, reiterated that a contract affects only the parties to it and that it cannot be enforced by or against a non-party.
41. In its classical adaptation, the doctrine of privity of contract hypothesizes 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, except in certain cases only. 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.”
42. In the *Agricultural Finance Corporation v Lengetia Ltd* (supra), citing with approval from Halsbury’s *Laws of England*, 3rd Edition, Volume 8, paragraph 110, Hancox, JA, reiterated that:

“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.”
43. Accordingly, the appellant not being covered by the insurance policy between the respondent and her husband cannot purport to sue upon the said insurance policy. Her suit before the trial court had no merit.
44. In addition, the appellant ought to have sued her husband who was the one who benefited from the compensation and move court for her share of the compensation. She failed to do so.
45. In the end, I find that this appeal lacks merit and I proceed to dismiss it. I however order that each party shall bear their own costs of the appeal.
46. This file is closed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 4TH DAY OF OCTOBER, 2024

R.E. ABURILI

JUDGE

