REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 220 OF 2016

YEHUDA SULAMI.....1ST PLAINTIFF

BLUERIDGE CAPITAL LIMITED.....2ND PLAINTIFF

-VERSUS-

ZALAREEDS LIMITED.....1ST DEFENDANT

DUNCAN ODUOR OTIENO.....2ND DEFENDANT

CAROLINE ACHIENG TUJU.....3RD DEFENDANT

KARIRA THUO NDEBU.....4TH DEFENDANT

J U D G M E N T

1. In this case I am called upon to determine whether or not there was breach of contract by any party hereof whether or not the 2nd Plaintiff was in privity of contract with the Defendants and what remedies, if any, should be awarded.

SUMMARY OF BACKGROUND

2. **Yehuda Sulami** (Yehuda) is a Director/Shareholder of **Bluebridge Capital Limited** (Bluebridge). Yehuda and Bluebridge are the 1st and 2nd Plaintiffs respectfully.

3. Bluebridge imported into this country an assortment of secondhand clothes and shoes. An agreement was entered into by Yehuda and **Zalareeds Limited** (Zalareeds) whereby Zalareeds agreed to buy and Yehuda agreed to sell an assortment of second hand clothes and shoes for the price of Kshs. 40 million. Zalareeds paid an amount of Kshs. 2 million and undertook to pay the balance of Kshs. 38 million within 6 months. That balance of Kshs. 38 million was, according to the agreement, to be paid regularly into the bank account of Bluebridge.

4. The debt of Zalareeds of Kshs. 38 million, was guaranteed by its Directors, namely Duncan Oduor Otieno (Duncan) and Caroline Achieng Tuju (Caroline). It was further guaranteed by deposit of a title being **L.R. No. KIAMBAA/RUAKA/3348** (the property). The property was registered in the name of Karira Thuo Ndebu. Those guarantors are the 2nd to the 4th defendants respectfully in this case.

5. It was submitted in evidence by Yehuda, which was not denied, that Karira Thuo Ndebu was deceased at the time when the title document was presented as a guarantee for the debt of Zalareeds. That security of the debt therefore failed and cannot be acted upon.

6. The case of Yehuda and Bluebridge is that the Zalareeds, Duncan and Caroline are indebted to it for the balance of the purchase price and the valuation charges, the legal fees and miscellaneous totaling Kshs. 715,600.

7. The case of Zalareeds, Duncan and Caroline is that Yehuda breached the contract by failing to deliver goods according to contract. It is also their case that Bluebridge has no *locus standi* in this matter.

ANALYSIS

8. Yehuda gave evidence on his own behalf and behalf of Bluebridge where he is a Director/Shareholder. Bluebridge imported an assortment of secondhand clothes and shoes. Yehuda was approached by Duncan, who was introduced to him by someone called Vincent Oyugi.

Duncan viewed the merchandise of second hand clothes and shoes. After bargaining a price of Kshs. 40 million was agreed for the same. Duncan paid a down payment of Kshs. 2 million. According to Yehuda the items were at his hotel in Kikambala Mombasa, on the 2 nd floor. Because Yehuda is disabled; he was on a wheelchair when he testified; he requested Duncan to go where the items where and to see the items. Once Duncan viewed the merchandise and paid the down payment of Kshs. 2 million he, Duncan, padlocked the room where the items were stored and retained the key.

9. Karira Thuo Ndebu (although now it is known was deceased) deposited is title with Yeuda's Advocate.

10. An agreement of sale was entered into between Yehuda, Duncan and Caroline for the sale of the merchandise. In that agreement the purchase of the mechandise was by Zalareeds. The merchandise is described, in that agreement as "stock of assortment of clothes and shoes."

11. The balance of purchase price, Kshs. 38 million, was payable within 6 months into the bank account of Bluebridge. As security Karira Thuo Ndebu deposited the title of the property with the Advocate of Yehuda with the condition, which was in the sale agreement, that if the purchaser, Zalareeds, did not pay the balance of the purchase price the title would be transferred into Yehuda's name or his nominee.

12. Duncan and Caroline indemnified Yehuda by undertaking to ensure Yehuda is paid the balance of the purchase price.

13. Yehuda in evidence stated that it later transpired that the title deposited with his Advocate belonged to a deceased person and not the person who so deposited. That matter is presently the subject of a criminal trial.

14. Yehuda once demand was made to release the title document (in view of that fraud) made a demand for the payment of the balance of the purchase price from Duncan and Caroline. It was not paid and hence why this case was filed.

15. The evidence for the 1st to the 3rd defendants (Zalareed, Duncan and Caroline) was adduced by Duncan.

16. Duncan denied that the defendant dealt with Bluebridge. He however confirmed that he was introduced to Yehuda by Vincent Oyugi a Director of Flamingo Holding. Vincent was a business partner of Yehuda. Duncan however confirmed on being cross-examined that it was Vincent Oyugi who told him that he was a partner with Yehuda.

17. Duncan confirmed in evidence that he inspected the Merchandise and then he signed the sale agreement. On being cross-examined he stated:

> ***"I accepted the terms of the agreement that is why I signed."***

18. In his evidence-in-chief Duncan stated that although Bluebridge had imported two 40 foot containers he however noted that the merchandise he obtained from Yehuda was one container.

19. Duncan also stated in evidence that when the merchandise was received by him he stored it in Vincent Oyugi's warehouse where some of it was stolen.

20. In his words Duncan stated that the transaction hereof was "devised from the beginning and he fell into the trap set for him".

ISSUES

21. The issues for determination are:

a. *Whether the Bluebridge was in privity of contract.*

b. *Which party is in breach of the contract.*

c. *What remedy does the innocent party have.*

d. *Who bears the costs.*

DETERMINATION 1ST ISSUE: WHETHER BLUEBRIDGE HAS PRIVITY OF CONTRACT

22. The agreement of sale of the merchandise is dated 19th November 2015. It is between Yehuda Zalareed and Karira Thuo Ndebu. Under clause (b)(2)(b) it provided that the balance of the purchase price would be paid into Bluebridge bank account.

23. The law on privity of contract has developed and now there are exceptions to the rule as was stated in the case **AGRICULTURAL FINANCE CORPORATION V LENGETIA LIMITED & JACK MWANGI (1985) eKLR** where the Court stated:

> *"As it stated in **Halsbury's Laws of England, 3rd Edition, Volume 8** at paragraph 110:*
>
> ***"As a general rule a contract affects only the parties to it, and 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."

24. The law in this area is on the move and is changing. This is evident in the Court of Appeal decision **AINEAH LILUYANI NJIRAH V AGA KHAN HEALTH SERVICES [2013] EKLR** where the Court of Appeal examined the report of the Law Reform Commission of Ireland on "The Privy of Contract and Third Party Rights." Having done so the Court of Appeal quoted, with approval, the following passage from the report thus:

Lord Steyn *summarized this criticism of the privity rule as follows:*

"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 ... [T]here 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 ... It is, therefore, unjust to deny effectiveness to such a contract..."[7] *(Emphasis supplied).*

The Court of Appeal continued to state:

"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"

25. A close examination of the Agreement will show that the intention of the parties was that Kshs. 38 million was to be paid by Zalareeds into Bluebridge bank account. It is also evident from the documents before Court that the merchandise the subject of the agreement was imported into the country by Bluebridge. Further when the merchandise was released to Zalareeds's appointed agent, Christopher Otieno, the acknowledgment recipient (page 84 of Plaintiff's documents) is under the letter-head of Bluebridge.

26. In a Canadian case, namely **FORVEST TRUST S.A. V THE DEVINE ENTERTAINMENT FILM LIBRARY LTD.** the Court discussed the extention of benefit of contractual provision to third party and stated:

"In Brown, Cronk J.A. reviewed the "principled exception to the privity rule" (Brown, at para. 95). Cronk J.A. reviewed case law from the Supreme Court and held that the "threshold requirement" to invoke the principled exception to the privity rule is that there must be evidence that the contracting parties intended to extend the benefit in question to the third party seeking to rely upon the contractual provision. Cronk J.A. held (Brown, at paras. 99-100):

The principled exception to the privity rule introduced in London Drugs was again considered and applied, this time unanimously, by the Supreme Court in Fraser River. In that case, at paras. 28-29 and 32, ***the Court clarified that satisfaction of the first branch of the London Drugs test is a threshold requirement: to invoke the exception, there must be a showing that the contracting parties intended to extend the benefit in question to the third party seeking to rely on the contractual provision****. Further, under the second branch of the test, the intention to extend the benefit of the contractual provision to the actions of a third-party beneficiary is irrelevant unless the actions of the third party come within the scope of the contract in general, or the provision in particular, between the initial contracting parties.*

The Supreme Court emphasized in Fraser River, at para. 32, as did the majority of the Court in London Drugs, at p. 449, that ***the extension of the principled approach to create a new exception to the doctrine of privity of contract, "first and foremost must be dependent upon the intention of the contracting parties****". Finally, the application of the principled approach is not confined to situations involving only employer-employee relationships or limited liability: see Fraser River, at para. 31; Madison, at para. 30. [Emphasis added.]"*

27. It is clear from the sale agreement that the contracting parties intended to extend benefit to Bluebridge when they agreed that the balance of the purchase price would be deposited by Zalareeds into Bluebridge's bank account. It follows that Bluebridge has a standing to sustain a case for recovery of that balance of the purchase price. It was in privity of contract. It has *locus standi*.

28. The first issue is found of favour of the Plaintiffs.

2ND ISSUE: Which party was in breach of the contract.

29. All parties acknowledge the validity of the agreement dated 19th November 2015. That agreement provided for the sale by Yehuda to Zalareeds of merchandise described as "stock of assortment of clothes and shoes.

30. Yehuda in evidence stated that Duncan, when he went to his hotel to view the merchandise, locked the room where the merchandise was with his own padlock. Yehuda stated that Duncan sent his brother/agent Christopher Otieno who collected the merchandise and in that regard signed an acknowledgment of receipt of the merchandise. He acknowledged receipt on behalf of Zalareeds.

31. It is pertinent to note that Duncan on behalf of Zalareeds did not deny Otieno was their agent or that he did not deliver the merchandise. There is no evidence before Court showing that Duncan put Yehuda or Bluebridge on notice about the "deficiency" (as he called it) of the merchandise. Although Duncan said he wrote complaining about that deficient, no such correspondence was brought before curt. More importantly, if indeed the merchandise was "deficient" the defendant failed to counterclaim in this suit.

32. My finding is that Zalareeds accepted the merchandise the moment Duncan locked the room where they were, with his own padlock, and later sent his agent Otieno to collect it. He has retained those merchandised. Undoubtedly that acceptance of the merchandise and retention is in consonant with the provisions of **Section 36 of the Sale of Goods Act Cap 31,** which provides:

> ***"Acceptance***
>
> ***The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them."***

33. Duncan, for that matter Zalareeds erred to submit that the merchandise supplied was not for the value contracted.

34. The contract provided for sale of assortment of clothes and shoes. The purchase price was Kshs. 40 million. The contract provided that the sale of the merchandise was "on the basis of is as is". The contract further provided that that terminology did not guarantee "both quality or quantity."

35. Yehuda testified that Duncan viewed the merchandise on 2nd floor of his hotel and thereafter locked the room with his own padlock. Yeluda was cross-examined by the learned Advocate for the defendants. On that issue and he reiterated that Duncan padlocked that room until the merchandise was collected.

36. In consideration of the terms of the agreement and the evidence adduced before Court it is clear that it is Zalareeds that is in breach of that agreement. It has failed to pay the balance of the purchase price in accordance with the agreement.

37. The second issue, therefore is in favour of the Plaintiffs.

3RD ISSUE: What remedy does the innocent party have.

38. Yehuda and Bluebridge are the innocent parties, in as far as the breach of contract is concerned.

39. The innocent parties are entitled to claim for the balance of the purchase price, Kshs. 38 million and consequential loss for the breach of Kshs. 2,840, which is the only amount proved by receipts.

40. The Plaintiffs claim interest at commercial rate. The evidence before Court is that Yehuda/Bluebridge imported the merchandise in order to sell it for profit. The agreement hereof was a commercial transaction. No doubt if Zalareed had paid the amount as contracted the Plaintiffs may have put that money to further commercial use for further profit. The Plaintiff will therefore be awarded interest at commercial rate.

41. Duncan and Caroline gave indemnity for Zalareed's debt to Yehuda and Bluebridge. Indemnity in the Black's Law Dictionary is defined as:

> ***"A duty to make good any loss, damages or liability incurred by another."***

42. Duncan and Caroline having signed the indemnity have a duty to make good the debt owned by Zalareeds to Yehuda and Bluebridge. Their indemnity is in the following terms:

> ***"We the Directors of ZALAREEDS LIMITED do hereby undertake to personality indemnify Mr. YEHUDA SULAMI and we shall ensure that the funds reflected in Clause BZ above is paid on time. Further in the event of default we undertake to personally pay the outstanding amount to the full."***

ISSUE NO. 4: Who bears the costs.

43. The Plaintiffs have largely succeeded in their claim. They are therefore entitled to the costs of the suit. There is no evidence to disentitle them to the costs.

44. Before concluding this discussion I confirm that I have read the parties submissions. I did find that the learned Advocates in those submissions referred to evidence not adduced at trial. I have therefore not considered it.

CONCLUSION

45. In the end there shall be judgment for the Plaintiffs against the 1st 2nd and 3rd defendants, jointly and severally for:

> **a. Kshs. 38,002,840 plus interest at commercial rate from the date of filing suit until payment in full.**

b. The costs of the suit against the 1st, 2nd and 3rd defendants.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 4TH DAY OF OCTOBER, 2019.

MARY KASANGO

JUDGE

Judgment Read *and* ***Delivered*** *in* ***Open Court*** *in the presence of:*

Sophie..... **COURT ASSISTANT**

.....**FOR THE 1ST PLAINTIFF**

..... **FOR THE 2ND PLAINTIFF**

……....FOR THE 1ST DEFENDANT

……FOR THE 2ND DEFENDANT

……..FOR THE 3RD DEFENDANT

…….. FOR THE 4TH DEFENDANT