



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**CIVIL APPEAL NO. E172 OF 2024**

YETTU SACCO SOCIETY LIMITED.....  
.....APPELLANT

VERSUS

NAOMI GACHERI MBAYA.....RESPONDENT

***(Being an Appeal from the Judgement by Hon. J.M. Njoroge (CM) delivered on 4<sup>th</sup> September, 2024 in Meru Chief Magistrate's Civil Cause No. E035 of 2023)***

**JUDGEMENT**

1. The Respondent in the aforementioned matter instituted a suit in the lower court against the Appellant vide a plaint dated 17<sup>th</sup> February, 2023 seeking for: -
  - a. An order compelling the defendant to unconditionally release the plaintiff's 2 milking Friesian cows and in the

- alternative compensation for the market value of the same.
- b. The defendant to compensate the plaintiff for loss of milk income at an average of 20kgs per day from 6.12.2022 to the date of payment.
  - c. Interests on above.
  - d. Costs of this suit.
  - e. Any other relief this Honourable court deems fit, just and expedient to grant.
2. The respondent pleaded that on or about 6<sup>th</sup> December, 2022, the Appellant through its employees or agents invaded her matrimonial home and forcibly took away her 2 Friesian Cows claiming that they were attaching the same in order to sell and liquidate a financial facility owed by her Husband ANTONY MBAYA MURIUNGI to the Appellant.
  3. She protested that the cows belonged to her and not her husband but the Appellant's agents carted them away and sold them the same day without any notice or redemption notice.

4. The Respondent asserted that she neither guaranteed her husband's loan and neither were her cows used as chattels in security of the loan to warrant attachment and sale of the same.
5. The Appellant vide its defence dated 9<sup>th</sup> May,2023 denied the claim by the Respondent and averred that on several occasion it advanced financial facility(ies) to the Respondent's spouse but the said spouse failed to service the same necessitating recovery thereof.
6. The Appellant further pleaded that the recovery at the Respondent's home was within the legally permitted parameters and it was due to the Respondent's and her spouse own volition that the recovery was undertaken, and that the said attachment was lawful.
7. Upon hearing both parties, the trial court held that the Respondent was a stranger to the loan repayment and was thus not obliged to observe any term and conditions, and that she was not a guarantor and her property was not indicated as one of the securities that were to be attached

by the Appellant in the event of default in the loan repayment by her husband.

8. The court therefore entered judgement in her favour in the following terms: -

a. Value of two cows- Ksh. 165,000/=

b. Compensation for loss of income- Ksh.267,540/=

c. Costs and interest.

9. Aggrieved by the lower court's decision, the appellant has preferred this appeal. In its Memorandum of Appeal dated 26<sup>th</sup> September,2024, the Appellant raises the following grounds of appeal: -

a) That the Learned Magistrate erred in law and fact in failing to find that the sale of two cows was sanctioned or approved by the Respondent thus lawful, regular and legal.

b) That the Learned Magistrate erred in law and fact in awarding special damages for value of two cows and loss

of income when no foundation was laid to proof the sale as invalid or unlawful.

c) That the Learned Magistrate erred in law and fact in failing to consider appropriately the facts as well as evidence tendered by the Appellant hence arriving at a wrong conclusion.

d) That the decision of the Learned Magistrate is bad in law and facts by not taking into account the legal/factual effect of the Appellant's evidence and/or failing to properly evaluate and consider the pleadings, Appellant's submissions, the Applicable law and principles on sale of the two cows.

10. The Appellant thus prayed that the Appeal be allowed, Judgement of the trial court be set aside and/or varied, that this court re-evaluate the law and the evidence and arrive at its own finding and that it be awarded costs of the Appeal and costs of the lower court's suit.

11. Parties took directions to canvass the Appeal via written submissions. Both parties filed their respective submissions.

## **Appellant's Submissions**

12. The Appellant argued that the sale of the two cows was lawful as it was sanctioned by the Respondent through her undertaking to repay the loan and surrender the two cows as evidenced by a letter dated 7.12.2022 that was produced in evidence.
13. To buttress its submissions, the Appellant relied on Section 120 of the Evidence Act and the cases of **Jack Ogola Ogolla v George Onyango Nyamor [2021] eKLR** & **Serah Njeri Mwobi v John Kimani Njoroge (2013) eKLR** on the doctrine of estoppel.
14. The Appellant submitted that the claim for special damages had no basis and should fail for reason that the Respondent did not challenge her letter dated 7/12/2022 committing to pay monthly installments of Kshs. 1,000/= to clear the outstanding loan balance after she had agreed to the sale of the two cows in part settlement of the loan by her husband.

## **Respondent's Submissions**

15. The Respondent submitted that the evidence on record proved that the cows in question belonged to her, that she had never taken any loan facility from the Appellant, guaranteed the same for her husband and that the cows formed part of the loan security, and as such the Appellant ought to have pursued her husband and his guarantors to recover the outstanding loan.
16. The Respondent also argued that due process was not followed in the loan recovery arrears and therefore the said recovery was unlawful.
17. The respondent also argued that contrary to the Appellant's assertion, she never willfully surrendered her two cows and wondered if that was the position then there was no need for the Appellant to issue a redemption notice.

18. The Respondent further submitted that she adduced evidence in support of loss of income claim and urged this court to uphold the lower court's judgement.
19. Ultimately, the respondent argued that the costs follow the event and she urged this court to award her costs in line with section 27 of the Civil Procedure Act.

### **Analysis & Determination**

20. This being a first appeal, this court is conscious of its responsibility as pronounced in the old case of **Selle & Another -vs- Associated Motor Boat Company Ltd & others [1968] IEA** to,

***“Reconsider the evidence evaluate it, and draw its own conclusions. The court though must always bear in its mind that, ‘it has neither seen, nor heard the witnesses and should make due allowance in that respect”.***

21. Having perused the entire record of appeal, I discern the pertinent issues for determination are as follows: -

**a) Whether the Respondent proved her case on a balance of probabilities and whether the doctrine of estoppel is applicable in the facts of this case.**

**b) Whether the trial court properly applied the law in assessing special damages.**

22. On the first issue, it is trite that he who 'alleges must prove'. The Appellant therefore needed to call sufficient evidence to prove her claim against the Respondent as alleged in her plaint. (See Section 107 and 108 of the Evidence Act).

23. In the case of **Evans Nyakwana v Cleophas Bwana Ongaro [2015] eKLR** the court stated as follows: -

**“As a general preposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107(i) of the Evidence Act, Chapter 80 Laws of Kenya. Furthermore, the evidential burden ... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant**

**did not discharge that burden and as Section 108 of the Evidence Act provides the burden lies in that person who would fail if no evidence at all were given as either side.”**

24. The Respondent herein ought to have satisfied the above onerous task of proving her allegations by calling sufficient evidence to prove her case on the required standard of balance of probabilities.
25. Having perused the entire record, it is patent that it is the Respondent's case that the cows belonged to her, she had not taken or guaranteed her husband's loan, and the cows were not loan security. She further contended that the Appellant should have pursued her husband and his guarantors, and that the recovery of her cows was unlawful.
26. On the other hand, the Appellant does not per se deny the Respondent's above position, but it asserts that the Respondent, through her letter dated 7.12.2022 had voluntarily committed to repay her husband's loan and surrendered the two cows. The Appellant argued that by making such a representation, the Respondent was estopped

from denying her undertaking, and that the attachment and sale of the cows were thus lawful, regular and legal.

27. From the loan agreements on record, it is evident that the loan agreement was solely between the Appellant and Antony Mbaya (the Respondent's husband), that the Respondent was neither a party nor a guarantor and the cows were not pledged as security.

28. I have also looked at the letter from Solution Savings and Credit Cooperative Society dated 17<sup>th</sup> January 2023. It shows that the Respondent took a loan of KSh 165,000/- for the specific purpose of purchasing two dairy cows.

29. From the foregoing, it is apparent that the Respondent was not privy to the agreement between the Appellant and her husband, and the cows which were attached belonged to her.

30. It is trite law that a contract affects only the parties to it and that it cannot be enforced by or against a non-party.

31. The Court of Appeal had an opportunity to and deliberated on the doctrine of privity at length in **Savings & Loan (K)**

## **Limited vs. Kanyenje Karangaita Gakombe & Another**

**(2015) eKLR.** The Court rendered itself as under: -

***“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 CAPITAL CORPORATION 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, 3<sup>rd</sup> 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.’***

32. In the instant case, it is not in doubt that the Respondent was not privy to the contract between the Appellant and her husband and neither was she one of the guarantors.

33. The Appellant argues that the Respondent committed to repay the loan via the letter dated 7<sup>th</sup> December 2022, which

was uncontestably produced in evidence. I have looked at that letter. It confirms that the Respondent undertook to pay Ksh 100,000/- per month and to clear the balance through the disposal of two cows.

34. Estoppel arises where a party makes a representation that is relied upon by another to their detriment. The doctrine of estoppel is as provided in the Evidence Act at Section 120, it states:

***“When one person by his declaration, act or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed in any suit or proceedings between himself and such person or his representative to deny the truth of that thing.”***

35. It is this court’s position, that the said letter at best showed a voluntary intention by the Respondent to assist her husband repay the loan and her alleged undertaking did not create any enforceable security or legally recognizable security interest.

36. There was no enforcement mechanism therein and therefore, the Appellant was not entitled to attach and sell the Respondent's cows. I am persuaded by the court's position in the case **Kinyili v Co-operative Bank of Kenya Limited [2025] KEHC 8439 (KLR)** where the court stated inter alia that:-

***“42. Estoppel cannot override explicit statutory or contractual provisions. The Appellant is unable to use estoppel to contest the clear terms of a written loan agreement....”***

37. In view of the foregoing, this court concurs with the trial court finding that the Respondent being a stranger to the loan agreement between the Appellant and her husband was not obliged to observe any terms and conditions therein.

38. Regarding the second issue, I note the Appellant does not challenge the award of special damages but contends that there was no legal basis for it.

39. However, the Appellant's agents, having unlawfully seized and sold the Respondent's cows which were a source of her income, justified the Respondent's claim for compensation.

Her claim for special damages was supported by the milk supply agreement with Morani Limited and the records of milk supplied which were produced in evidence. The award was therefore justified.

40. Pursuant to Section 27 of the Civil Procedure Act, costs follow the event. Since the Respondent has succeeded in this Appeal, she is entitled to costs.

41. In the upshot the Appeal is bereft of merit and I hereby dismiss it with costs to the Respondent.

42. It is so ordered.

**Dated, Signed and Delivered at Meru this 8<sup>th</sup> day of May 2026.**

**H. M. NYAGA,  
JUDGE.**

