Eastern Produce Kenya Limited v Rongai Workshop & Transporters Limited & another (Civil Appeal 16 of 2018) [2024] KECA 747 (KLR) (21 June 2024) (Judgment)

Neutral citation: [2024] KECA 747 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CIVIL APPEAL 16 OF 2018

FA OCHIENG, PM GACHOKA & WK KORIR, JJA

JUNE 21, 2024

BETWEEN

EASTERN PRODUCE KENYA LIMITED ..... APPELLANT

AND

RONGAI WORKSHOP & TRANSPORTERS LIMITED ..... 1ST RESPONDENT

JUBILEE JUMBO HARDWARE LIMITED ..... 2ND RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Nakuru (J. N. Mulwa, J.) dated 28th February 2017 in H.C.C.C. No. 94 of 2008)

JUDGMENT

1. This appeal originates from the judgment of the High Court in Nakuru, (J.N. Mulwa, J.). The appellant was dissatisfied with the judgment of the court in which the following orders were made:

    a) Judgment was entered in favour of the appellant against the 1st respondent in the sum of Kshs. 30,000/-, being the amount payable for the stolen consignment by the appellant and Kshs. 97,744/- being the loss of the adjudicator's fees; a total of Kshs. 127,000/- with costs and interest at court rates from 27th May 2008.

    b. The appellant's claim against the 2nd respondent was dismissed with costs.

    c. The 1st respondent's claim of indemnity against the 2nd respondent was allowed in its entirety with costs.

    d. The 2nd respondent was to fully indemnify the 1st respondent of the appellant's claim against it for Kshs. 3,096,735/- plus costs and interest at court rates from the date of notice of indemnity, that is 12th September 2008."

2. The appellant in its plaint dated 27th May 2008 sued the respondents seeking Kshs. 3,244,479.90 as compensation for cargo stolen in transit which was being transported by the 2nd respondent. This was in enforcement of clause 2 of the agreement between the respondents under which the 2nd respondent was to assume full liability to the 1st respondent for the goods that were lost while in transit. The appellant also sought costs and interest at the rate of 14% from 5th December 2004 to the date of payment in full.

3. The appellant's case was that through an agreement with the 1st respondent dated 1st January 2003, it contracted the 1st respondent to transport its tea from various factories within Nandi Hills to its warehouses in Mombasa.

4. The 1st respondent subcontracted the 2nd respondent to perform its obligations under the contract through the letters dated 3rd November 2003 and 21st October 2004.

5. The contractual relationship between the appellant and the 1st respondent hit a rough patch when on 5th December 2004, the goods that were to be transported by the 2nd respondent from Kapsumbeiwa to Mombasa were stolen while in transit.

6. The appellant stated that the respondents as bailees and common carriers for reward had a duty to deliver the consignment safely and securely, and failure to do so amounted to a breach of contract.

7. The appellant's insurer's representative informed the court that the appellant had been compensated for its loss and that it had brought the claim against the respondents in the appellant's name in the exercise of its subrogation rights.

8. In its defence dated 17th July 2008, the 1st respondent acknowledged the existence of its transportation contract with the appellant and the subcontract with the 2nd respondent. The 1st respondent also admitted that there was a loss of consignment while in the custody of the 2nd respondent but denied the allegations of negligence leveled against it.

9. The 1st respondent stated that if it was found liable to pay the appellant damages or compensation, the same should be paid by the 2nd respondent as per their agreement.

10. The 1st respondent also filed a notice of claim dated 12th September 2008 against the 2nd respondent seeking indemnity against any finding by the court on its liability. The 1st respondent sought to enforce its undated agreement with the 2nd respondent in which the 2nd respondent had agreed to indemnify the 1st respondent for the loss after the incident.

11. The 2nd respondent in its defence dated 10th July 2008 denied having any contract with the appellant which would entitle a direct claim against it. The 2nd respondent also stated that the appellant was not privy to its contract with the 1st respondent and could not therefore seek to enforce the terms of that agreement.

12. The 2nd respondent urged the court to dismiss the appellant's claim against it as it did not owe a duty of care, but admitted that it was liable to indemnify the 1st respondent against any claim made against it by the Appellant.

13. In the judgment, the learned Judge held that the appellant's claim could only lie with the 1st respondent, and it could only recover part of the value of the consignment because the 1st respondent's liability was qualified and limited.

14. The learned Judge also held that the 2nd respondent could only be compelled to indemnify the 1st respondent against the appellant's claim. The learned Judge held that a contract cannot be enforced either by or against third parties. In the circumstances, there was no privity of contract between the appellant and the 2nd respondent. There was no evidence that the appellant was aware or conceded to the appointment of the 2nd respondent by the 1st respondent or that the parties intended that the 2nd respondent would be liable to the appellant directly.

15. The learned Judge also held that the respondents were not common carriers as they provided transport under private contracts which detailed the scope of duties, terms of engagement, and compensation as opposed to public service vehicles which provided transport services for pre-determined fixed fees. The learned Judge held that the appellant could therefore not enforce clause 3 of the contract between the respondents.

16. The learned Judge further held that the 1st respondent could claim against the 2nd respondent for the entire value of goods that were lost while in transit as per the notice of claim. The 1st respondent could claim indemnity from the 2nd respondent as per clause 3 of their contract.

17. Being dissatisfied with the judgment, the appellant lodged this appeal. Six (6) grounds of appeal have been raised to wit that:

    a) The learned Judge erred in misinterpreting the contractual relationship between the parties.

    b. The learned Judge erred in not finding that the respondents were bailees for reward.

    c. The learned Judge erred in finding that there was no privity of contract between the appellant and the 2nd respondent who was an agent of the 1st respondent, a disclosed principal.

    d. The learned Judge erred in assessing damages at Kshs. 127,000/-against the 1st respondent instead of the damages pleaded in the suit.

    e. The learned Judge erred in not finding that the respondents were negligent and in breach of their duty of care owed to the appellant.

    f. The learned Judge erred in not giving effect to the admission of negligence by the respondents."

    1. When the appeal came up for hearing on 29th January 2024, Mr.Wandago, learned counsel appeared for the appellant, while Mr. Mbiyu learned counsel appeared for the 1st respondent, and Mr. Mwenda learned counsel appeared for the 2nd respondent. Counsel relied on their respective written submissions.

19. The appellant submitted that its case was based on a contract of bailment between the appellant and the 1st respondent with the 2nd respondent acting as an agent of the 1st respondent and the learned Judge erred in holding that there was no privity of contract. In any event, the respondents failed to give a satisfactory explanation of how the consignment got stolen or the measures they had put in place to prevent the theft.

20. The appellant submitted that the learned Judge misconstrued the effect of the exception or the limitation clause in the contract. The Kshs. 30,000/- for any loss did not absolve the 1st respondent from loss due to its negligence. The 1st respondent's witness testified that the 2nd respondent's driver who was carrying the consignment had a record of theft while in transit yet the 2nd respondent failed to do a background check before he was employed. The appellant relied on the case of Swan Carriers Limited v Eastern Produce Limited [2017] eKLR in submitting that the respondents failed to carry

out their duties in accordance with the express or implied terms of the contract and they were therefore liable for negligence and damages.

21. Opposing the appeal, the 1st respondent submitted that the appellant was aware of the subcontract between the respondents and that the contract between the appellant and itself allowed for the subcontract of another transporter as testified by PW1.

22. While relying on the case of Savings & Loan (K) Limited v Kanyenje Karangaita Gakome & Another [2015] eKLR, the 1st respondent submitted that there are exceptions to the doctrine of privity of contract including 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.

23. Opposing the appeal, the 2nd respondent while relying on the case of Dunlop Pneumatic Tyre Company Limited v Selfridge & Company Limited [1915] AC 847 submitted that a contract cannot be enforced either by or against a third party because under the doctrine of privity of contract, a contract cannot confer a right or impose obligations on any person other than the parties to the contract. No document was produced to show that there was a binding contract between the appellant and the 2nd respondent. In the circumstances, the appellant failed to prove privity of contract between itself and the 2nd respondent.

24. The 2nd respondent submitted that the appellant had failed to prove negligence against the 2nd respondent.

25. The 2nd respondent filed a cross-appeal dated 21st March 2018 in which it raised the following grounds to wit:

    a) The learned Judge erred in disregarding the contention that the appellant having been compensated upon the claim, its insurers had not pleaded and proved that the claim was filed by the insurance company under its subrogation rights.

    b. The learned Judge erred in failing to rule on the issue of the failure by the appellant to plead that the claim was by way of subrogation rights.

    c. The learned Judge erred in disregarding that any judgment in favour of the appellant would result in double benefit to the appellant.

    d. The learned Judge erred in allowing the claim of indemnity against the 2nd respondent having dismissed the appellant's claim against the 2nd respondent and also because the claim had not been filed under subrogation rights.

    e. The learned Judge erred in failing to appreciate the indemnity of Kshs. 3,096,735/- was not due or payable without the 1st respondent first being liable in such sum, or having paid the same.

    b. Judgment was arrived at based on the wrong principles of law."

1. The 2nd respondent submitted that subrogation rights must be specifically pleaded and proved. In this instance, the appellant did not plead subrogation in the plaint, or indicate that it had received compensation from the insurance company in its pleadings, but only raised it during the hearing.

2. The 2nd respondent pointed out that the appellant did not produce a valid insurance contract to prove that there existed an insurance policy at the time of filing the suit. This renders the claim defeated under the doctrine of subrogation. The 2nd respondent relied on the cases of Egypt Air Corporation v Suffish International Food Processors (V) Limited & Another [1999] 1 EA

69 and Gabriel Mwashuma v Mohammed Sajjad Milling Glasswork Limited, [2015] eKLR, to buttress this submission.

28. Supporting the cross-appeal, the 1st respondent relied on the case of Egypt Air Corporation v Suffish International Food Processors (V) Limited & Another, (supra), in submitting that subrogation rights must be pleaded and specifically proved. The 1st respondent submitted that the appellant did not produce an insurance contract to prove that there existed an insurance contract between the appellant and its insurers.

29. Opposing the cross-appeal, the appellant submitted that there are conflicting decisions in the High Court on whether or not subrogation ought to be pleaded. In the case of Gabriel Mwashuma v Mohammed Sajjad Milling Glasswork Limited, (supra), the court held that subrogation must be proved and specifically pleaded, while in the case of Joseph Obiero v Stephen Kosgei kwanbai & 4 Others [2019] eKLR the court held that a respondent cannot benefit from the arrangements between the appellants and third parties.

30. The appellant submitted that since subrogation was not pleaded in the 2nd respondent's defence, the learned Judge did not make a finding on the issue. In any event, subrogation cannot be a defence against a negligence claim.

31. This is a first appeal. Rule 31(1)(a) of the Court of Appeal Rules provides that:

    (1) On an appeal from a decision of a superior court acting in the exercise of its original jurisdiction, the Court shall have power— Power to reappraise evidence and to take additional evidence. (a) to re-appraise the evidence and to draw inferences of fact;"

32. It follows therefore that the primary role of this court as a first appellate court is to re-analyze and re-evaluate the evidence that was placed before the learned trial Judge and draw its inferences of fact. However, in doing so, we bear in mind that the trial court had the advantage of seeing and hearing the witnesses and we give allowance for the same. In the case of Peters v Sunday Post Ltd [1958] EA 424, at P 429 O'Connor P. stated thus:

33. We have thoroughly reviewed all the evidence presented, submissions made by the parties, legal precedents, and applicable laws. The key matters to be resolved are whether or not there was privity of contract between the appellant and the respondent; whether or not the 1st respondent was entitled to indemnification by the 2nd respondent against the appellant's claim; and whether or not the appellant was entitled to the reliefs sought. On cross-appeal, we determine whether or not the appellant's insurers had demonstrated their subrogation rights.

34. The 2nd respondent contended that there was no contract between itself and the appellant and therefore, the appellant had no privity of contract. This position was upheld by the trial court and it is supported by the cases of Agricultural Finance Corporation v Lengetia Limited [1985] KLR 765, Kenya National Capital Corporation Limited v Albert Mario Cordeiro & Another, CA NO 274 OF 2003, and *William Muthee Muthami v Bank of Baroda, CA NO 91 OF 2004*, in which courts have held that a contract affects only the parties to it and that it cannot be enforced by or against a third party.

35. However, in recent years, exceptions to the doctrine of privity of contract have emerged enabling beneficiaries of such contracts through third parties, to enforce a contract under which they stood to derive a benefit. In the case of Aineah Liluyani Njirah v Aga Khan Health Services [2013] eKLR, the court held that:

> " Privity of contract is a long-established part of the law of contract. In the earlier part of the last century, it was identified by Viscount Haldane LC as one of the fundamental principles

of the English Contract Law. See Dunlop Pneumonic Tyre v. Selfridge and Co. Ltd.[1]The essence of the privity rule is that only the people who actually negotiated a contract (who are privy to it) are entitled to enforce its terms. Even if a third party is mentioned in the contract, he cannot enforce any of its terms nor have any burdens from that contract enforced against him.[2]."

36. The court went on to state that:

> "More fundamentally, however, when the contracting parties intend to give a right of enforcement to a third party, "it is difficult to see how it can be said that effect is given to that intention by allowing the promise, but not the third party, to sue...where an unjust or illogical result is caused by the privity rule.[8] (Emphasis supplied). It would surely be much simpler and clearer to give effect to the intentions of the contracting parties by allowing the third party to enforce the contract....
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> 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,
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> 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.
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> 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.
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> 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.
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> 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.[14]"

37. In the case of Savings & Loan (K) Limited v Kanyenje Karangaita Gakombe & Another, (supra), Ochieng, J (as he then was) had declined the appellant's application to have the 1st respondent's suit struck out on the ground that there was no privity of contract between the appellant and the 1st respondent, hence the suit did not disclose a reasonable cause of action and was scandalous, frivolous and vexatious. The appellant appealed to this Court against that decision. In dismissing the appeal, this Court held that although the main contract was between the appellant and the 2nd respondent, there was a collateral contract between the appellant and the 1st respondent and the 1st respondent's suit was therefore not idle as it raised triable issues which deserved to be interrogated and determined

only after a full hearing of the suit. In arriving at this conclusion, the Court narrated the exceptions to the doctrine of privity of contract as follows:

> " 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:
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> "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."
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> In this jurisdiction that proposition has been affirmed in a line of decisions of this Court, among them Agricultural Finance Corporation V Lengetia Ltd (supra), Kenya National Capital Corporation Ltd V Albert Mario Cordeiro & Another (supra) and William Muthee Muthami V Bank Of Baroda,
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> (supra).
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> Thus in Agricultural Finance Corporation V Lengetia LTD (supra), quoting with approval from Halsbury's Laws of England, 3rd Edition, Volume 8, paragraph 110, Hancox, JA, as he then was, reiterated:
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> "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."
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> 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
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> [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 contractor 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.
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> 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 Northern Ltd [1995] 1 WLR 68 Lord Steyn eloquently demonstrated the flaw in the proposition in the following terms:
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> "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.

Back to the appeal before us, it is a hotly contested issue whether in addition to the contract between S&L and AA for the benefit of the latter's members, there was also a collateral agreement between S&L and Dr. Gakombe regarding the same subject matter."

38. In the case of Karuri Civil Engineering (K) Limited v Equity Bank Limited [2019] eKLR, the court 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."
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> 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:
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> "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."

39. One of the questions to be answered in this appeal is whether the appellant could benefit from the agreement that was entered between the 1st respondent and the 2nd respondent. In other words, are any of the exceptions to the doctrine of privity of contract applicable to this case. The agreement between the appellant and the respondent was for the transportation of tea from the appellant's tea factories to Mombasa. The 1st respondent went ahead and sub-contracted the work to the 2nd respondent. All along, the 2nd respondent's case has been that there was no privity of contract between it and the appellant. That was the finding of the trial Judge. In that regard, she held that:

> " From my examination of the contracts it emerges that there was no privity of contract between the plaintiff and the 2nd defendant. There was no evidence that the plaintiff was aware and conceded to the appointment of the 2nd defendant by the 1st defendant. The terms of the contract show that in fact the plaintiff did not intend that in case the 1st defendant was

unable to meet the demands of the plaintiff, it could engage a sub-contractor to discharge its obligations...

It was the plaintiff (the company) that retained the right to sub-contract in the event the 1st defendant was unable to transport the entire cargo of the plaintiff, and would in the circumstances be liable to offset any additional charges incurred by the plaintiff as a result. The 2nd defendant was not appointed under the direction of the plaintiff and did not incur any liability from it. In addition, there was no promise from the 2nd defendant to the plaintiff which would lead to the implication that there was an intention to create legal relations with the 2nd defendant. There was also no evidence from the contract to show that the parties intended that the 2nd defendant would be liable to the plaintiff directly. Accordingly, I am unable to find that there was warrant of safety or security from the 2nd defendant to the plaintiff."

40. We find no reason to fault the Judge for so finding. The relationship between the parties was very clear. The appellant signed a transport contract with the 1st respondent. The 1st respondent in turn signed a contract with the 2nd respondent for the transport of the appellant's goods by the 2nd respondent. Although both contracts were for the transport of the appellant's tea, there was no nexus between the two agreements. That there was no contractual relationship between the appellant and the 2nd respondent is confirmed by the record. For instance, a reading of the undated "Indemnity Agreement" entered between the 1st respondent and the 2nd respondent in 2006 shows that the agreement was aimed at unlocking the 2nd respondent's unsettled invoices by the 1st respondent. The fact that the 1st respondent was the one to pay the 2nd respondent for the transportation of the appellant's tea supports the trial Judge's finding that there was no privity of contract between the appellant and the 2nd respondent. The agreement between the 1st respondent and the 2nd respondent was separate and independent from that between the appellant and 1st respondent. Had the 1st respondent declined to pay the 2nd respondent for the work done, a suit by the 2nd respondent against the appellant could not have stood for lack of a contractual relationship between the appellant and the 2nd respondent. Likewise, the attempt by the appellant and the 1st respondent to drag the 2nd respondent into their contract cannot be entertained.

41. The next issue we seek to determine is the apportionment of liability in respect to the loss of the appellant's tea. Although the respondents in their statements of defence denied knowledge of the disappearance of the appellant's goods in transit, they eventually agreed, through the evidence of their witnesses, that the appellant's goods were stolen while in transit and in the custody of the 2nd respondent. The respondents admitted to this and the 2nd respondent also agreed to indemnify the 1st respondent for the said loss. The question that begs to be answered then is, whether the respondents were in breach of contract for the said loss.

42. It is trite that a breach of contract occurs when a party to a contract fails to perform their obligations or offers less than satisfactory performance of their contractual obligations. Although the appellant pleaded both breach of contract and negligence in its claim against the respondents, the claim leans more on the side of a breach of contract and we will proceed on that understanding.

43. In this instance, the 1st respondent had a legal duty to transport the appellant's tea to Mombasa. The tea was stolen before it arrived in Mombasa. Therefore, the 1st respondent failed to perform its part of the contract which required it to safely transport the appellant's tea to its destination. The 1st respondent was therefore in breach of the terms of the agreement.

44. As a result of the breach of the agreement by the 1st respondent, the appellant suffered a loss as its goods were stolen and the said goods were never recovered.

45. In the circumstances, we find that the 1st respondent was in breach of its contract with the appellant. It follows that where a breach of contract has been proved, the party against whom the breach occurred is entitled to some relief. In the present case, the appellant sought compensation. The appellant was compensated by its insurer. The insurer now claim through the appellant special damages of Kshs. 3,244,479.90 which they had paid to the appellant as indemnification for the theft.

46. The trial court awarded the appellant Kshs. 127,000/- as compensation asserting that this was the amount that the appellant was entitled as per the contract. Clause 1(g) of the contract between the appellant and the 1st respondent stated thus:

> " In the event of a vehicle accident or breakdown, the transporter will be allowed to transship the goods at his cost in order to avoid damage or theft of the product. The transporter must immediately advice the company of such transshipment;
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> i. Be responsible for the first Kshs. 30,000/- of any loss, damage or contamination per vehicle transit and to give the company every assistance in processing insurance claims as and when necessary.
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> ii. If the claim is rejected by the insurers on the grounds that the transporter was negligent, then the company will hold the transporter liable."

47. The trial court interpreted this clause to mean that the 1st respondent was only responsible for the first Kshs. 30,000/- of the loss. In the case of Musimba Investments Limited v Nokia Corporation [2019] eKLR, this Court stated that:

> " One of the principles of contractual interpretation is that parties have the freedom to contract; to contract even to resolve their disputes away from the courts; and that courts should not re-write terms of a contract for them.
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> We restate the words of Lord Neuberger, the former President of the Supreme Court of the United Kingdom, in Arnold v Britton [2015] UKSC 36 that:-
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> "When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to 'what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean', to quote Lord Hoffmann in Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38, [2009] 1 AC 1101, para 14. And it does so by focusing on the meaning of the relevant words".

48. In the case of National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & Another [2001] eKLR, the court held as follows:

> "A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved".

49. Our understanding of this clause 1(g) of the contract is that the 1st respondent was responsible, in the first instance, for the first Kshs. 30,000/- of any loss or damage that occurred to the goods immediately after the incident had happened. That did not mean that the 1st respondent was only liable to pay the appellant Kshs. 30,000/-.

50. The appellant's insurer indemnified the appellant for the whole loss, and now seeks to recover the money paid to the appellant from the respondents. This informed the appellant's decision to plead for

special damages as the money had already been remitted by the insurer. It is trite that special damages must be specifically pleaded and proved. In the case of Jivanji v Sanyo Electrical Company Limited [2003] 1 EA, the court held as follows:

> " Coast Bus Service Ltd V Murunga and others (1992) LLR 318(CAK) "....It is now trite law that special damages must first be pleaded and then strictly proved. There is a long line of authorities to that effect and if any were required, we would cite those of Kampala City Council V Nakaye(1972) EA 446, Ouma V Nairobi City council(1976) KLR 304..."

51. In this case, the appellant claimed Kshs. 3,244,479.90 as the amount that had been specifically quantified as the value of the loss it sustained. The amount was specifically pleaded and proved, and it was not in contention. We find that the appellant was entitled to the amount.

52. As regards the cross-appeal, it is common ground that the issue of subrogation was not pleaded before the trial court, as was the issue of the insurer suing through the name of the appellant. The issue of subrogation was raised for the first time in the 2nd respondent's submissions. It is not disputed that the learned Judge did not determine the issue.

53. Before answering the question as to whether a claim under the principle of subrogation must be specifically pleaded, we will first highlight our understanding of this principle. Paragraph 490 of the Halsbury's Laws of England 4th Edition 2003 Reissue Volume 25 sets out the circumstances under which the doctrine of subrogation applies in the following terms:

> "Where the insurer pays for a total loss, either of the whole, or in the case of goods of any apportionable part, of the subject matter insured, he thereupon becomes entitled to take over the interest of the assured in whatever may remain of the subject matter so paid for, and he thereby subrogated to all the rights and remedies of the assured in and in respect of that subject matter as from the time of the casualty causing the loss... in so far as the assured has been indemnified by that payment for the loss."

54. In the case of Kenya Power & Lighting Company Limited versus Julius Wambale & Another [2019] eKLR, the court held that:

> "The parameters within which the principle of subrogation applies are now well settled. The doctrine applies where there is a contract of insurance and following crystallization of the risk insured, the insurer had compensated its insured for financial loss occasioned thereby, usually by a third party. Under this doctrine, the insurer is in law entitled to step into the shoes of the insured and enjoy all the rights, privileges and remedies accruing to the insured including the right to seek indemnity from a third party. The action must however be instituted in the name of the insured with his consent and must relate to the subject of the contract insurance." (Emphasis added).

55. In the case of Octagon Private Investigation Security Services v Lion of Kenya Insurance Co. [1994] eKLR, the doctrine of subrogation was discussed in the text "Insurance Law" by Mac Gillivay & Parkingon at page 471 as follows:

> "The doctrine confers two distinct rights on insurer after payment of a loss. The first is to receive the benefit of all its rights and remedies of the assured against third parties which, if satisfied, extinguish or diminish the ultimate loss sustained. The insurer is thus entitled to exercise, in the name of the assured, whatever rights the assured sasses to seek compensation for the loss from third parties. This right is corollary of two fundamental principles of

the common law. If a person suffers a loss for which he can recover against a third party, and is also insured against such a loss, his insurer cannot avoid liability on the ground the assured has the right to claim against the third party. Conversely, the third party, if sued by the assured, cannot avoid liability on the ground that the assured has been or will be fully indemnified for his loss."

56. Our understanding of the principle of subrogation based on the cited authorities is that the principle allows an insurer to recover from a third party the amount of compensation paid to the insured by the insurer as a result of a loss suffered by the insured as a result of the third party's action or inaction. Such a claim by the insurer against the third party is brought in the name of the insured. The record placed before this Court is clear that the appellant had been compensated by its insurer, ICEA Ltd, and the insurer was pursuing the 1st respondent as it was the insurer's belief that the 1st respondent had caused the loss suffered by the appellant. The 1st respondent was in turn going after the 2nd respondent for the compensation made by ICEA Ltd to the appellant.

57. Much as the respondents have expended a lot of effort on the question as to whether the appellant ought to have specifically pleaded that its claim was brought pursuant to the principle of subrogation, we find that this particular issue is not one for determination in this appeal and neither would its determination change the outcome of this appeal. A perusal of the record clearly shows that prior to the institution of the suit by the appellant through the plaint dated 27th May 2008, the parties had extensively exchanged correspondences on the appellant's claim. All the parties were aware that the claim against the respondents was based on the subrogation principle. The record is littered with evidence of knowledge by each of the respondents of the nature of the claim that was being pursued by the appellant. One of the pieces of evidence which shows that the appellant was forthright about the nature of the claim against the respondents is the letter dated 27th October 2006 from Cunningham Lindsey Kenya Limited to the 1st respondent. In the letter which was copied to ICEA Ltd and the appellant, a demand of Kshs. 3,224,480/- is being made. Of importance is the fact that among the documents attached to that letter is a Subrogation Form confirming compensation for the lost tea by ICEA Ltd to the appellant. That letter confirms that the 1st respondent was aware that the appellant's claim was based on the subrogation principle. Still on the 1st respondent's knowledge of the nature of the appellant's claim, we refer to the letter dated 11th October 2006 by Cunningham Lindsey Kenya Ltd to the 1st respondent in which it is indicated that the appellant's insurer had settled the appellant's claim and the 1st respondent was required to compensate the insurer least action is taken within 14 days. In the circumstances, the 1st respondent cannot be heard to say that the appellant ought to have specifically pleaded that the claim was brought pursuant to the principle of subrogation. In its stand-alone defence of 17th July 2008, the 1st respondent being aware that the appellant had been compensated never hinted that the appellant was seeking double compensation or that the appellant's suit was bad in law as it was based on the principle of subrogation yet the claim had not been specifically pleaded. Even in the joint defence filed earlier on 10th May 2008 with the 2nd respondent, the 1st respondent never alluded to any defect in the appellant's pleadings.

58. Knowledge by the 2nd respondent of the nature of the appellant's claim is found in the letter dated 26th March 2007 addressed to Kenindia Assurance Co. Ltd by L. A. Patel, a director of the 2nd respondent. The letter stated in part that:

> "Please find a copy of a letter received from M/S. Rongai Workshop & Transport Ltd regarding the above, plus a copy of a letter they had received from M/S. Insurance Company of East Africa Ltd, which they have also forwarded to us.

Kindly acknowledge receipt of the same and do the needful."

59. Like the 1st respondent, the 2nd respondent never raised the issue of the defect in the appellant's claim at the time it was responding to the plaint. It cannot be allowed to raise the same issue in submissions having foregone the opportunity of raising the issue in its defence and giving the appellant an opportunity to respond to the issue.

60. The respondents lost the opportunity to challenge the appellant's pleadings when they failed to raise the issue through their statements of defence. The fact that the trial Judge, for reasons that cannot be discerned from the judgment, kept mum about the issue does not at all render her judgment defective. It should be appreciated that there is a general rule that a court ought not to make pronouncements on issues not raised in the pleadings filed by parties. See Independent Electoral and Boundaries Commission & Another v Stephen Mutinda Mule & 3 others [2014] eKLR for that rule.

61. Before will finally leave this issue, we refer to the decision of this Court in East Africa Industries Ltd v. B.R. Nyarangi [2009] eKLR where this Court allowed the appellant's appeal which was pleaded in the manner that the claim of the appellant before us was pleaded.

62. We turn to the other issues in the 2nd respondent's cross-appeal.

In one of these issues, the 2nd respondent faulted the learned Judge for disregarding the fact that any judgment in favour of the appellant would result in double benefit to the appellant. We have dispensed with this issue by finding that the claim was brought by the appellant for the benefit of its insurer. The money awarded was therefore not going to benefit the appellant in any way. This ground of appeal is therefore found to be without merit.

63. There are two other related grounds of appeal raised by the 2nd respondent. It is the 2nd respondent's case that the learned Judge having dismissed the appellant's claim against the 1st respondent erred in allowing the 1st respondent's claim of indemnity against the 2nd respondent. Related to this is the 2nd respondent's assertion that the learned Judge erred in failing to appreciate that the indemnity of Kshs. 3,096,735/- was not due or payable without the 1st respondent first being liable in such sum, or having paid the same. We indeed agree with the 2nd respondent that it was erroneous for the learned Judge to issue an order directing the 2nd respondent to indemnify the 1st respondent in the sum of Kshs. 3,096,735/- considering that she had found that the 1st respondent was only liable to the appellant to the tune of Kshs. 127,744/-. Having said so, the 2nd respondent does not get off the hook as we have found that the 1st respondent was liable to the appellant to the tune of the amount paid by ICEA Ltd to the appellant. According to the plaint, which was eventually supported by the evidence adduced at the trial, the total amount claimed was Kshs. 3,224,480/- which was made up of the sum of Kshs. 3,127,736/- directly paid to the appellant by ICEA Ltd and Kshs. 97,744/- paid by the insurer to the Loss Adjustor as fees.

64. Although the learned Judge never explained the basis of her order directing the 2nd respondent to indemnify the 1st respondent, the foundation of that order is found at paragraph 7 of the judgment where it is stated that:

> " The 1st defendant filed a defence dated 17th July, 2008 ... It filed a notice of claim against the 2nd defendant dated 12th September, 2008 notifying it that it would be seeking indemnity against any finding made by the court regarding its liability to the plaintiff. Further, by an undated agreement made after the incident, the 2nd defendant agreed to fully indemnify the 1st defendant for any loss it incurred. The 1st defendant sought to enforce this agreement."

65. The notice of indemnity issued to the 2nd respondent by the 1st respondent on 12th September 2008 was an actualisation of the 1st respondent's threat at paragraph 10 of its defence dated 17{{^th July 2008 that it "shall hereafter issue a Notice of Claim against the 2nd Defendant for indemnity." The 1st respondent's notice having been issued in 2008, the applicable Civil Procedure Rules are those which were in place before the promulgation of the Civil Procedure Rules, 2010. Rule 21 of Order 1 of the repealed rules allowed a defendant to issue a notice of claim against a co- defendant and this is what the 1st respondent did. In the presence of such a notice, the learned Judge cannot be faulted for issuing an order directing the 2nd respondent to indemnify the 1st respondent against the appellant's claim. In the circumstances of this case, the 1st respondent having issued the relevant notice to the 2nd respondent, and the 1st respondent having been found to be liable to the appellant to the tune of Kshs. 3,224,480/-, the 2nd respondent shall indemnify the 1st respondent in that sum plus all the consequentially expenses arising out of the appellant's claim against the 1st respondent.

66. In the result, the cross-appeal must fail. We hereby dismiss the cross-appeal with costs to the appellant.

67. Consequently, we allow the appeal and enter judgment in favour of the appellant as against the 1st respondent in the sum of Kshs. 3,224,480/- as prayed in the plaint. The appellant shall also have the costs of this appeal and the suit at the trial court plus interest on the decretal amount at court rates from the date of the judgment of the trial court. As already held, the 2nd respondent shall indemnify the 1st respondent in totality against the appellant's claim.

Orders accordingly.

DATED AND DELIVERED AT NAKURU THIS 21ST DAY OF JUNE, 2024.

F. OCHIENG

.....

JUDGE OF APPEAL

M. GACHOKA, C.Arb, FCIArb

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR