



National Bank of Kenya Limited v Insurance Experts (K) Ltd (Civil Appeal 226 of 2016) [2022] KECA 141 (KLR) (18 February 2022) (Judgment)

Neutral citation: [2022] KECA 141 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 226 OF 2016
W KARANJA, DK MUSINGA & F SICHALE, JJA
FEBRUARY 18, 2022**

BETWEEN

NATIONAL BANK OF KENYA LIMITED APPELLANT

AND

INSURANCE EXPERTS (K) LTD RESPONDENT

(An appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Sergon, J.) delivered on 27th May 2016 in H.C. Civil Appeal No. 65 of 2006.)

JUDGMENT

1. This is a second appeal from the judgment of A. N. Ongeru, (who was then an Acting Principal Magistrate) delivered on 27th January 2006 in C.M.C.C. No. 10457 of 2002. In that case, the respondent, Insurance Experts (IC) Ltd, had sued the appellant, National Bank of Kenya Limited, for a sum of Kshs.530,000.00 in respect of excess insurance premium allegedly paid by the respondent to United Insurance Company Limited for and on behalf of Kenya Taxi Cab Association (the insured), who had been financed by the appellant to acquire a fleet of motor vehicles that had been used for commercial hire (taxis).
2. The appellant resisted the claim, saying that it is the insured that was responsible for settlement of all insurance premiums; that it was only a financier to the insured; that it had only consented to the respondent being engaged as an insurance broker for the insured; that any payments that the bank remitted to the respondent on account of insurance premiums was for and on behalf of the insured or some individual members of the insured and therefore there was no privity of contract between itself and the respondent.
3. Following a full trial, the trial court agreed with the appellant and dismissed the suit with costs. The respondent was dissatisfied with the judgment and preferred an appeal to the High Court. The respondent faulted the trial court for holding that there was no privity of contract between the



appellant and the respondent and that, therefore, the appellant was not liable to pay the sum of Kshs.530,000.00.

4. The first appeal was disposed of by way of written submissions. In his judgment, Serگون, J. overturned the trial court's judgment stating, inter alia: "the learned trial magistrate erred when she concluded that there was no privity of contract between the appellant and the respondent. The correspondences exchanged between the parties entitled the court to infer that a contract had been created by conduct which was acted upon by the appellant and there was no way the respondent would avoid to meet its contractual obligation to settle the appellant's claim of Kshs.530,000.00."
5. Consequently, the learned judge allowed the appeal, set aside the trial court's judgment, and substituted it with an order entering judgment in favour of the respondent in the sum of Kshs.530,000.00 plus interests at court rates from the date of judgment until payment in full. The respondent was also awarded costs of the appeal and of the suit before the trial court.
6. Upon delivery of the High Court judgment, the respondent filed an application for review of the judgment, urging the court to vary the order regarding interest on the sum of Kshs.530,000.00 so that it runs from 3rd December 1996 when the suit in the Chief Magistrates' Court was filed, instead of 27th May 2016 when the High Court delivered its judgment. That application for review was dismissed on 20th July 2017. The respondent was dissatisfied with that ruling and filed a notice of appeal dated 21st July 2017. The notice of cross-appeal is not against the ruling but the substantive judgment.
7. The appellant was aggrieved by the High Court decision that overturned the trial court's judgment and moved to this Court on a second appeal, filed on 12th October 2016. The Memorandum of Appeal raises four lengthy grounds of appeal that may be summarized as follows: that the learned judge erred in law and in fact: in finding and holding that there existed an express or implied contract of insurance brokerage between the appellant and the respondent; in misconstruing the nature of the relationship of the parties; in failing to consider and hold that the respondent had not suffered any loss and damage directly or indirectly connected with any crystallized obligation of the appellant; and in failing to find that there existed no cause of action between the parties in the absence of any privity of contract.
8. Although initially the appellant was represented by Rachuonyo & Rachuonyo Advocates, who filed the appeal and submissions on behalf of the appellant on 29th July 2019, subsequently M/s Waruhiu, K'Owade & Ng'ang'a Advocates filed a notice of change of advocates for and on behalf of the appellant.
9. On 29th August 2017, the respondent filed a notice of cross-appeal under rule 93 of this Court's Rules, contending that the High Court's decision ought to be varied or reversed on grounds that the learned judge erred in awarding interest on the judgment sum from the date of the judgment rather than from the date of filing of the suit (3rd December 1999); and for ignoring the provisions of section 26 of the *Civil Procedure Act* regarding the award of interest.
10. By way of a notice of motion brought under rules 75, 77, 82, 83 and 84 of this Court's Rules, the appellant sought an order to strike out the respondent's notice of appeal dated 21st July 2017 and the notice of the cross-appeal dated 22nd August 2017 on the grounds that the notice of appeal and cross-appeal are incurably defective, incompetent and constitute a gross abuse of the Court's process.
11. The appellant contended that the notice of appeal was filed out of time and without leave of the Court, and that the respondent having unsuccessfully filed an application for review of the High Court's judgment is by law prohibited from filing an appeal.
12. Both parties filed written submissions in respect of both the appeal and the appellant's application for striking out the notice of appeal as well as the cross-appeal. When the motion and the appeal came up for hearing, there was no attendance for and on behalf of the appellant, though a hearing notice had



been duly served upon both parties. Mr. Keyonzo appeared for the respondent. He told the Court that he would rely entirely on his written submissions, without any oral highlights of the same. He urged the Court to dismiss the appeal with costs and allow the cross-appeal.

13. We have carefully perused the record of appeal and the submissions filed by both parties. This being a second appeal from the decision of a Magistrates' court, the Court's jurisdiction is limited to consideration of matters of law only. *See Maina v Mugiria [1983] KLR 78*. We shall start by considering the application to strike out the notice of appeal and the cross-appeal. Under rule 93(2) of this Court's Rules, a notice of cross-appeal is supposed to be lodged: "not more than 30 days after service on the respondent of the memorandum of appeal and the record of appeal or not less than 30 days before the hearing of the appeal, whichever is later."
14. This appeal was heard on 26th April 2021, whereas the notice of cross-appeal was filed on 22nd August 2017. We do not therefore agree with the appellant that the notice of cross-appeal was filed out of time since the aforesaid rule permits a respondent to file such a notice at least 30 days before the date of the hearing of the appeal. That notwithstanding, we agree with the appellant that under section 80 of the [Civil Procedure Act](#), the respondent having elected to seek a review of the High Court's judgment is by law precluded from instituting an appeal. The cross-appeal is therefore misconceived in law and is for striking out, which we hereby do.
15. We now turn to consider the substantive appeal. The appeal turns on one issue only, that is, whether there was privity of contract between the appellant and the respondent. It is not disputed that the appellant was a financier of a group of London-Look Taxi Operators known as The Kenya Taxi Cab Association (insured). The taxis that were operated by the insured and or its members were insured by United Insurance Company Limited. It was a term of the financing facility between the appellant and the insured that the members of the Association had to maintain an insurance cover for each taxi until the loan was fully repaid.
16. Since the appellant as the financier had an interest in the assets it had financed, it had to approve the insurance broker as well as the insurance company that were to provide cover to the insured vehicles.
17. Before the respondent instituted the suit before the trial court, the respondent's Chief Executive, Mr. P. J. Wishaminy, had, by a letter dated 14th July 1999 demanded payment of the sum of Kshs.530,000.00 from the appellant, arguing that the appellant was responsible for the payment of the excess premium. The respondent alleged that there was an understanding between the insured and the appellant that the bank would pay all insurance premiums, including excess premiums, and debit the individual insured's loan account with the bank. The practice was effective from the onset of the financing arrangement until 14th October 1997 when it was stopped by the appellant, by which time there was an outstanding sum of Kshs.530,000.00. that was due and payable to United Insurance Company Limited. The insurance company recovered the same from the respondent by debiting the respondent's account with the insurance company. The respondent's case was that the appellant was under an obligation to pay it that sum of money for and on behalf of the insured.
18. On its part, the appellant's position was that it was the insured who was responsible for payment of all insurance premiums including excess premium in respect of all claims and not the bank.
19. *Blacks Law Dictionary, 11th Edition* defines "privity of contract" as "the relationship between the parties to a contract, allowing them to sue each other but preventing a third party from doing so." In its submissions, the respondent argued that: "There was privity of contract between the appellant and the respondent and the appellant was bound to pay the debt. It was a joint and several responsibilities between the appellant and the individual taxi operators."



- 20. Having reviewed the correspondences between the appellant and the respondent, it is clear to us that prior to 14th October 1997, the appellant had an arrangement with the insured that enabled the appellant as a financier to pay for and on behalf of the insured and or its members’ insurance premiums. That however, cannot be construed as having given rise to any privity of contract between the appellant and the respondent. In our view, there was no privity of contract between the parties.
- 21. If indeed the respondent was of the view that there was “a joint and several responsibilities between the appellant and the individual taxi operators” to pay to it the excess premiums, then the respondent ought to have joined the insured and/or the individual taxi operators in the suit that was filed before the trial court.
- 22. *Halsbury’s Law of England, 3rd Edition, volume 8 paragraph 110* states:

“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.”

The Court has respectfully adopted that as the correct position of our law in a plethora of its decisions, among them *Agricultural Finance Corporation v Lengetia Limited & Jack Mwangi [1985] eKLR* and *Savings & Loan (K) Limited v Kanyenje Karangaita Gakombe & Another [2015] eKLR*.

- 23. For these reasons, we find that the learned judge erred in law in finding that there was privity of contract between the appellant and the respondent. Consequently, we allow this appeal and award costs of the same as well as the costs in the two courts below to the appellant.

DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF FEBRUARY, 2022.

W. KARANJA

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

