Kega & another v Blue Nile (East Africa) Limited (Environment and Land Appeal E032 of 2022) [2025] KEELC 232 (KLR) (30 January 2025) (Judgment)

Neutral citation: [2025] KEELC 232 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYERI

ENVIRONMENT AND LAND APPEAL E032 OF 2022

JO OLOLA, J

JANUARY 30, 2025

BETWEEN

PETER NDUNGU KEGA ..... 1ST APPELLANT

ISAAC KING'ORI KEGA ..... 2ND APPELLANT

AND

BLUE NILE (EAST AFRICA) LIMITED ..... RESPONDENT

JUDGMENT

1. This is an Appeal arising from the Ruling of the Honorable M.N. Munyendo, PM as delivered on 8th September, 2021 in Othaya PMELC. Case No. E003 of 2021 (OS).

2. By a Notice of Preliminary Objection dated 28th July, 2021 Isaac King'ori Kega and Peter Ndungu Kega (the Appellants herein) had objected to the suit in the Lower Court on three (3) limbs listed as follows:-

    a. The Court lacks jurisdiction to entertain, hear and determine a matter in the nature of an Originating Summons as filed in this case;

    b. Even assuming without admitting the validity and competency of the applicant's claim, it is clear there is no privity of contract to warrant the application and

    c. In any event the orders sought have been caught by lapse of time.

3. Having heard the Objection and in her Ruling delivered on 8th September, 2021, aforesaid the Learned Trial Magistrate proceeded to dismiss the Preliminary Objection with costs to the Respondent – Blue Nile (East Africa) Limited.

4. Aggrieved and dissatisfied by the said determination, the Appellants lodged a Memorandum of Appeal dated 1st December, 2022 asking this court to set aside the decision on the grounds that:

a. The Learned Magistrate erred in fact and in law in construing that a contract of guarantee which was exclusively a matter between two parties was capable of giving rise to rights in favor of the respondent who had no privity of contract with the appellant;

b. The Learned Magistrate of the trial court erred in fact and in law in construing a contract of guarantee as capable of creating a charge as provided under the *Land Registration Act* whereas there was no express term had been made(sic) or even the requisite statutory conditions for such had not been met;

c. The learned trial magistrate erred in fact and in law in failing to appreciate that the agreement executed between the appellant and a 3rd party were ineffective and incapable to transfer an interest in land let alone giving rise to the liability as imposed by the trial court;

d. The learned trial Magistrate erred in failing to appreciate that the terms of the agreement of guarantee were limited in time and there having been no extension the same was null by effluxion of time;

e. The learned trial magistrate erred in law and in fact in failing to fault the respondent for failure to enjoin the principal debtor (third party in the matter) to give accounts to enable the court impose any obligations on the appellant as required under a contract of guarantee;

f. The trial Magistrate erred in holding that the court had the requisite jurisdiction to entertain and try the matter before it when it was clear from the provisions cited that the court did not have procedural and substantive jurisdiction;

g. The court erred in rewriting the contracts for the parties whereas the appellants' contract with the third party was clear and unambiguous.

5. As it were the duty of the first Appellate Court is to re-evaluate the evidence which was adduced in the Subordinate Court both on the facts and the law and to arrive at its own conclusion bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand (see Selle and Another –versus- Associated Motor Boat Co. Ltd. & Others (1968) EA 123).

6. I have accordingly carefully perused and considered the Record of Appeal vis-à-vis the impugned Ruling. I have similarly perused and considered the submissions placed before me by the Learned Advocates representing the parties.

7. By their Preliminary Objection dated 28th July, 2021, the Appellants had objected to the jurisdiction of the Lower Court to hear and determine the Respondent's suit against them on account that the court lacked the jurisdiction to entertain the matter as the same was in the nature of an Originating Summons. The Appellants further objected to the claim on account that there was no privity of contract between them and the Respondents and asserted that in any case the claim had been caught up by lapse of time.

8. In support of their assertion that the court had no jurisdiction, the Appellants in their submissions dated 19th August, 2021 as filed in the Lower Court cited the case of Lucia Muthoni & Another –vs- Betha Wanjiru Muriuki & 2 Others (2016) eKLR, wherein the court had observed as follows:

> " While it is correct as submitted by Counsel of the Respondents that the Civil Jurisdiction of "Magistrate Courts has been enhanced, it is clear from the provisions of Section 38 of the *Limitation of Actions Act* that the jurisdiction to handle cases of adverse possession remains the preserve of this court."

9. On the basis of that observation, the Appellants submitted that the rules provided that an Originating Summons can only be filed before the High Court as the same were only returnable to a Judge in Chambers.

10. Upon considering that issue the Learned Trial Magistrate came to the conclusion that the term "Judge" as provided under Order 37 Rule 4 can be construed to mean a Magistrate and that in view of the fact that the court was duly gazetted to hear environment and land matters, it had the requisite jurisdiction to entertain the suit which related to instruments granting any enforceable interest in land.

11. Having considered the issue, this court was unable to fault the finding by the Learned Trial Magistrate. For a start, the case of Lucia Muthoni (Supra) cited by the Appellants dealt with the question of whether or not Magistrates can deal with matters of adverse possession. The claim herein was not based on adverse possession but concerned a guarantee agreement said to have been entered into by the parties. The citation of that case as authority for the fact that a Magistrate's Court cannot deal with a matter brought by way of an Originating Summons was therefore erroneous and misleading.

12. Secondly and as the Learned Trial Magistrate pronounced in her Ruling, the word "Judge" is defined at Section 2 of the *Civil Procedure Act* to mean "the presiding Officer of a Court". That being the case, I was not persuaded that the provisions of Order 37 Rule 4 of the Civil Procedure Rules which refers to an Originating Summons returnable before the Judge in Chambers exclusively refers to Judges of the High Court or the Environment and Land Court as established under Article 162 of *the Constitution*. The same includes reference to a Magistrate.

13. In regard to the mandate of a Magistrate's Court, Section 9 of the Magistrates Courts Act provides as follows:

    9. A Magistrate's Court Shall –

    a) in the exercise of the Jurisdiction conferred upon it by Section 26 of the *Environment and Land Court Act* (Cap 8D) and subject to the pecuniary limits under Section 7(1) hear and determine claims relating to;

        (i) environment planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

        (ii) Compulsory acquisition of land;

        (iii) Land administration and management;

        (iv) Public, private and community land and contracts, choses in actions or other instrument's granting any enforceable interests in land; and

        (v) Environment and land generally

14. In the matter before the court, the Appellants did not contest the fact that the trial Magistrate was duly gazetted and had the requisite pecuniary jurisdiction to hear and determine the matter and I therefore find and hold that the objection on the basis that the court had no jurisdiction was without any basis in law.

15. The second limb of the objection was the Appellants' assertion that there was no privity of contract to warrant the application made by the Respondents. On this account, the Appellants submitted that the agreement relied upon by the Respondent in support of its case was executed only between the Appellants and two other persons. It was the Appellant's case that a contract cannot offer rights or impose obligations on any person other than the parties to the contract.

16. Having considered the issues, the Learned Trial Magistrate concluded as follows at Paragraph 17 of the ruling:

> " 17 .... It is clear from the agreement that commitments made by the Respondents to the directors of Samson Limited were to ultimately favour the Applicant herein. A reading of Clause 3 (d) reveals that in the event the directors of Samson Limited failed to honour the agreement between them and the supplier, then the title deeds shall be transferred to (the) Applicant and they shall not have a claim against the Applicant. That clause in my view curves the interest of the Applicant in the two titles – the subject of this case. The Applicant supplied goods on the faith of the agreement between the Respondents and the directors of Samson Limited who were the beneficiaries in this transaction....."

17. As it were, the doctrine of privity of contract highlights the legal position that a contract is only binding on the Principal Party thereto and not otherwise unless there is a clear provision therein which alludes to and seeks to provide a clear benefit to and in favour of a third party.

18. From a perusal of the contract dated 18th November, 2015, it was evident that the Appellants herein had executed a contract of guarantee. As the Learned Authors Geraldine Andrews & Richard Millet state in their book 'The Law of Guarantees, 2nd Edition at Pg. 156:

> " A contract of guarantee is an accessory contract, by which the surety undertakes to ensure that the Principal performs the principal's obligations. It has been described as a contract to indemnify the creditor upon the happening of a contingency namely the default of the Principal to perform the Principal obligations. The surety is therefore under a secondary obligation which is dependent upon the default of the Principal and which does not arise until that point."

19. It was clear to me from a casual glance of clauses 1 to 4 of the agreement dated 18th November, 2015 that the Respondent is not a stranger thereto. That agreement was executed in favour of the Respondent. The Appellants as the guarantors were well aware of the relationship between themselves, the beneficiaries and the Respondents.

20. As Lord Steyn stated in Darlington Bourough Council – vs- Witshire Northern Ltd. (1995) 1 WLR 68:

> " The case for recognizing a contract for the benefit of a third party is simple and straight forward. 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 recognizes 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 expresses 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."

21. Arising from the foregoing, it was clear to me that the agreement relied upon by the parties falls under the exception to the rule of privity of contract and the trial Magistrate was again right in her conclusion on the second limb of the objection.

22. The third limb of the Appellant's objection was the Appellants' assertion that the Respondent's claim had been "caught by lapse of time". On this ground it was submitted by the Appellant that if the

guarantee was only valid for 4 months and required an extension which it strictly provided for, then it would be wrong for the court to extend the tenure of such a guarantee without the mutuality of the parties.

23. It was the court's view that the question as to whether the proposal to repay the monies owed by Samson's Ltd translated to an extension of the time was a question of fact that would best be handled at the trial.

24. I was unable to comprehend the basis for the argument that the agreement was limited to a period of 4 months. The reason I state so is because the agreement provided at clause C' as follows:

> " C. Period
>
> The agreement is for a period of four calendar months effective the date of this agreement. Upon request by the beneficiaries there may be an extension for further period to be agreed upon by the parties."

25. It was evident from the material placed before the court that the Appellants had benefited from this clause by applying for an extension. I was unable to discern anything from the same clause which restricted the Respondent from filing a claim to recover whatever was due under the period provided for under the *Limitation of Actions Act*.

26. It follows that I did not find any basis upon which to fault the Ruling delivered on 8th September, 2021. This Appeal lacks merit and I hereby dismiss the same with costs to the Respondent.

JUDGMENT DELIVERED THROUGH THE MICRO – SOFT TEAMS VIRTUAL MEANS SIGNED AND DATED AT MOMBASA THIS 30TH DAY OF JANUARY 2025.

.....

J.O. OLOLA

JUDGE

Judgement delivered in the presence of:

a. Firdaus, the Court Assistant.

b. Mr. Nderi Advocate for the Appellants

c. Mr. Wangira Advocate for the Respondent