IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: P. KIHARA KARIUKI (PCA), OUKO & J. MOHAMMED, JJ.A)

CIVIL APPEAL NO. 21 OF 2006

BETWEEN

WILLIAM MUTHEE MUTHAMI …… APPELLANT

AND

BANK OF BARODA ……..…….. RESPONDENT

(An appeal from the judgment and decree of the High Court of Kenya at Nairobi (Mary Kasango, J.) dated 25th day of July, 2005

in

CIVIL SUIT NO. 91 OF 2004)

****

JUDGMENT OF THE COURT

This is an appeal against the judgment of the High Court (Kasango, J.) rendered on 25th July 2005 in Nairobi HCCC No. 91 of 2004. In the suit, the appellant, William Muthee Muthami had sought an award of special damages in the sum of Kshs. 57,622,844/=, general damages, costs of the suit and interest.

According to the plaint, the appellant sued Bank of Baroda, the respondent claiming that there was between them a written agreement in which the latter, in exercise of its statutory power of sale, sold to the former a property known as L.R. No. 36/IV/14 (20A) located at Eastleigh, Nairobi at a consideration of Kshs. 15 million. The appellant was subsequently registered as the owner. Unknown to the appellant but known to the respondent, there was a order of the Court of Appeal in Civil Appeal No. 9 of 2001 restraining the respondent either by itself, its agents, assigns or otherwise from disposing the suit property pending the hearing and determination of High Court (Milimani Commercial Courts) Civil Case No. 1857 of 2000, between Margaret Njeri Muiruri, the original registered owner of the suit property and Bank of Baroda.

It would appear that after the appellant was joined in HCCC No. 1857 of 2000, the plaintiff in that suit, Margaret Njeri Muiruri (the administrix of the estate of the late Joseph Muiruri Gachoka) applied that the Registrar of Titles be directed to cancel the conveyance between the appellant and respondent and to revert the title to the position prior to that conveyance. Njagi, J in allowing the application found that

the transfer of the property to the appellant by the respondent was in flagrant disobedience of an order of the Court of Appeal, at the time, the highest court in the land. With that order, the appellant's Kshs. 15 million was refunded by the respondent, the property reverted to the original owner, and the appellant instituted the aforesaid HCCC No. 91 of 2004 claiming loss of finance that would have accrued to him but for the cancellation of the transaction by the court as a result of the respondent's conduct amounting to breach of contract.

The appellant himself did not testify when the suit came up for trial. Instead, his father, David Muthami Muthee gave evidence that as a matter of fact he and not the appellant purchased the property. It is he who learnt of the sale of the property by public auction, placed the highest bid of Kshs. 15 million, negotiated the terms of payment and made the payment. The witness was explicit that the appellant's only role in the transaction was merely to sign the agreement for sale.

The witness explained that the appellant gave him the power of attorney to come to court to explain these facts. Before the respondent could call evidence to controvert the appellant's case, an application was brought to join the witness, David Muthami Muthee as the 2nd plaintiff in those proceedings and to amend the plaint accordingly. The application was dismissed. That dismissal was not challenged and is certainly not the subject of this appeal.

The respondent through their witness, David Ogega Nyamboga, confirmed that the transaction was between the respondent and the appellant, that the appellant made the payments and in his favour the property was finally transferred; that the transfer violated an order of stay issued by the Court of Appeal as a result of which the transfer was revoked, property reconveyed to the original registered owner and the mortgage reinstated. As a consequence thereof, the purchase price was refunded. The witness maintained that David Muthami Muthee was a stranger to the respondent.

In a terse eight-page judgment, turning on the question whether the appellant had proved his claim, the learned Judge said:

> **"The plaintiff did not give evidence in this case but gave general power of attorney to PW1. PW1 in evidence failed to give evidence in support of the plaintiff. He said that he purchased the property but in his son's name, the plaintiff. The plaint however, pleads that:-**
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> ***'The defendant herein agreed to sell and the plaintiff agreed to purchase the subject property. ……'***
>
> **I could continue to show several other examples where the evidence of PW1 did not follow the plaint as pleaded but essentially substituted his name whenever the plaintiff's name appeared in the plaint, but the above suffices."**

Citing the English case of **Jackson V. Horison Holiday Ltd** (1975) 3 ALL ER 93 the learned Judge concluded that although the appellant would have been entitled to damages for loss of bargain, a refund of stamp duty, legal and registration fees, in view of the clear breach by the respondent, he failed to bring relevant evidence; that the appellant's father was a stranger to the transaction and could not enforce it. With that the suit was dismissed thereby precipating this appeal, raising the following 13 grounds-

"1. THAT the learned trial Judge erred in dismissing the plaintiff's claim as set out in plaint dated 13.2.04 whereas there was abundant evidence placed before the trial Judge which warranted the grant of the relief sought in the plaint.

2. **THAT the learned trial Judge failed to properly evaluate all the evidence before the court in support of claim for and against loss of bargain due to cancellation of sale of L.R. No. 36/IV/14/(20) (the suit property), expenses incurred in renovation of the suit property, costs of stamp duty and registration of transfer and legal fees.**

3. **<u>THAT</u> in the analysis of evidence, the learned trial Judge had a distorted view of the evidence adduced.**

4. **<u>THAT</u> the learned trial Judge made wrong findings and conclusions.**

5. **<u>THAT</u> while determining the issue of *locus standi,* the learned trial Judge misdirected her mind on the applicable principles of agency and in particular failed to appreciate the authority under deed (Power of Attorney).**

6. **<u>THAT</u> the learned trial Judge misdirected her mind in holding and/or coming to conclusion that plaintiff witness (PW1), failed to give evidence in support of the plaint.**

7. **<u>THAT</u> the learned trial Judge failed to properly evaluate the evidence of the plaintiff's witness and in particular failed to appreciate that PW1 was all along the one dealing in the transaction in exercise of authority conferred on him by the power of attorney of which fact the defence witness acknowledged in court.**

8. **<u>THAT</u> the learned trial Judge erred in law and fact in holding and/or coming to conclusion that the appellant had failed to sufficiently prove the loss of bargain i.e. Kshs. 29,000,000/- being the difference between the value of the property at the market price (Kshs. 44,000,000/=) and the purchase price (Kshs. 15,000,000/=) whereas the loss was actually incurred on cancellation of the conveyance.**

9. **The learned trial Judge to fairly and objectively evaluate the evidence before the court.**

10. **The learned trial Judge erred in giving weight to the contradicting evidence of the defence witness and failed to appreciate the principles of evidence as outlined under section 120 of the Evidence Act Cap 80 and those of law** (sic) **under section 69 (B) 3 of the Indian Transfer of Property Act, 1882.**

11. **That in addition to the foregoing, the learned trial Judge contradicted her own finding and/or conclusions in failing to hold respondents liable for willingly and knowingly misguiding the Court of Appeal in Civil Appeal No. 9 of 2001 on the existence of a transfer and the appellant on prevailing court order dated 5th December, 2001 barring transfer of the suit property.**

12. **The learned trial Judge misdirected her mind and failed to appreciate evidence before the court in holding and/or coming to conclusion that the appellant had failed to sufficiently prove that he had incurred expenses in repair and renovation of the suit property, costs of registering the transfer and stamp duty fees plus legal charges whereas there was sufficient evidence in court warranting grant of claims.**

13. **That there was sufficient evidence before the court on which strength the court could find and hold the appellant entitled to loss of bargain, expenses incurred in repair and renovation of the suit property, costs of stamp duty, registration and legal charges."**

Mr. Ogegu, learned counsel for the appellant divided and argued these grounds in three clusters. First, he submitted that the learned trial Judge failed to re-evaluate the evidence presented before her in support of the claim thereby arriving at the wrong conclusion; that failure of the appellant to testify was not fatal as he had donated the power of attorney to the witness.

Secondly, on the question of *locus standi,* it was contended that the learned Judge failed to properly apply the principles of agency, by way of a power of attorney in regard to the evidence of David Muthee, a competent witness. In the third and last cluster counsel argued that the learned Judge gave weight to the respondent's contradictory evidence while failing to appreciate the application of **sections 120** of the Evidence Act and 69 (B) (3) of the Indian Transfer of Property Act; that on the one hand, the respondent

denied in evidence that they ever received any payment but on the other hand admitted receipt of payment.

The appeal was opposed by Mr. Muragara, learned counsel for the respondent who submitted that the learned Judge arrived at the correct decision that there was no privity of contract between the respondent and the witness; that the contract was between the respondent and the appellant; that whereas it was in error for the respondent to sell the property to the appellant when there was a court order barring such action for which breach a refund in the sum of Kshs. 15 million was paid, it was incumbent on the appellant to take the stand and prove his claim; that the power of attorney was only for the purpose of giving evidence in court on behalf of the appellant.

This being the first appeal, it is our duty, as directed in **Selle V. Associated Motor Boat Company Ltd & Others** [1968] EA 123 at 126 to,

> **"…..reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect…."** (*Per* Sir Clement De Lestang, V.P.)

As to findings made on matters of fact, this Court will only interfere where the finding is based on no evidence, or on a misapprehension of the evidence or where the learned Judge is demonstrably shown to have acted on wrong principles in reaching the finding – See **Mwanasokoni V. Kenya Bus Services Ltd,** [1985] KLR 931.

We have carefully considered the evidence presented in the High Court, the grounds of appeal, the submissions by both counsel and the law, from which we think only one broad issue for determination arise, namely whether the appellant proved his claim for general and special damages against the respondent.

The suit was brought by the appellant in this appeal, William Muthee Muthami in a plaint dated 13th February 2004. In the plaint he has made averments to the effect that:-

i. There was an agreement dated 29th October 2001 between himself and the respondent in which he agreed to purchase the suit property from the respondent at a consideration of Kshs. 15 million.

ii. The appellant secured funds and paid Kshs. 15 million to the respondent; that he also paid for stamp duty, registration and legal fees together with other outgoings in relation to the sale and transfer of the suit property.

iii. Upon purchase and transfer the property was registered in his name.

iv. The respondent failed to notify the appellant of the existence of a court order restraining it from dealing with the suit property in any manner.

v. Following the setting aside of the sale and cancellation of his title the appellant suffered great financial loss in terms of loss of returns on investment, accrued interest and penalties on unpaid loan, making a total loss of Kshs. 57,622,844/-.

The plaint is verified by an affidavit sworn by the appellant confirming that he himself brought the action and that the averments in the plaint are true. Apart from this deposition, the appellant relied on 45 letters contained in his bundle of documents admitted by the learned Judge at the trial. All the letters make reference to the appellant as the purchaser and/or owner of the suit property. A copy of the cheque representing a refund of payment of purchase price of Kshs. 15 million is in the name of the appellant. It is clear up to this point that the appellant's father, David Muthami Muthee has not played any role in the transaction.

On 1st January 2004, one month after the action was instituted and three years after the sale was

concluded, the appellant nominated his father by a general power of attorney on the strength of which the latter gave testimony in court saying, among other things, the following:-

> **"William Muthee – 1st son. He is now 24 years. I am a businessman dealing as general merchant – Square M. Services Liftronic Company are sole proprietor business name. I purchased a property from defendant in 2001. This property was being auctioned by auctioneers. I attended auction. I was highest bidder, we did not agree on terms so we gave them, I asked them to talk to their client and if our offer was agreed they were to come back to me. The offer was Kshs. 15 million. I did not pay that amount within 30 days so I asked them to talk to bank to give me more time……..**
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> **I completed conveyance was 5th April 2002. The receipt of that payment was 4 months later. …….I had done searches and there was no problem with title. If I had known of Court of Appeal order I would not have proceeded nor would I have made payment to defendant.**
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> **I did not derive any benefit from this property. I did not collect rent. I underwent expenses. Pg. 61 is stamp duty for registration of conveyance. I paid the Kshs. 600,000/= - cheque No. 308206. ……The documents presented for registration was by my advocate. Page 62, Kshs. 250/= was paid for registration……I spent total Kshs. 285,145/=. I paid my advocate too- I paid them Kshs. 278,284/= as fees for conveyance.**
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> **As I bought the property. I saw the property and the auctioneer had valuation report showing income of Kshs. 4.422 million as annual rent. Page 65 – the value of property was Kshs. 35.2 million. I bought it at Kshs. 15 million. I commissioned valuers who did report for me……. We demanded total of Kshs. 57,622,844/=. This amount, we received a cheque of Kshs. 15 million. The payment was on 16.3.2004. I was not satisfied with this payment. It was 21 months from date of our payment of 15 million and our demand. We did not get any interest. I have not received further payment.**
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> **My claim against defendant I want, I hold bank liable because they breached sales agreement because they failed to give me vacant possession, they failed to advise me of Court of Appeal order and they later 2 years later sought court order to remove the transfer in my favour. And before we completed they wanted me to pay before completion date."**

In cross-examination he reiterated that the transaction was entirely for his benefit; that he negotiated and paid for the property with his own resources. He went on:-

> **"…..the agreement is signed by my son. I paid the money for the transaction. He only signed the agreement…..power of attorney, this is to show he gave me power to come to court and talk since I am the one who knows the matter. That is why I said I suffered loss. I am talking on behalf of the plaintiff-my son. I paid for the property myself but the only thing is the name registered. Every other loss is me who suffered….I bought the property in my son's name."**

What was the witness saying? Was he saying that the property was his or was he confirming that he provided funds to his son, the appellant to purchase the property as the latter's own investment?

We are unable to answer the two questions as the witness himself was not sure. Was he a witness or was he a claimant? Perhaps after he testified, he realized that he ought to have been the plaintiff or a co-plaintiff to the appellant. After closing the appellant's case, he (the witness) applied to be joined in the proceedings. That attempt, as we have observed earlier, failed and the decision dismissing that application was not challenged.

The dispute was essentially grounded on the law of contract. The nature of our civil process is that only a

person who has incurred loss as a result of another's action can bring a claim for a legal or equitable remedy. The dispute may involve, as here, private law issues between individuals. In the law of contract, the aggrieved party to an agreement must, in addition, prove that there was offer, acceptance and consideration. It is only when those three elements are available that an innocent party can bring a claim against the party in breach. It is elementary learning, that as a general rule, according to the common law doctrine of privity of contract, rights and obligations under a contract are only conferred or imposed on the parties to that contract. This doctrine was stated as long ago as 1861 by Wightman, J. in **Tweedle V. Afkinson** (1861) EWHCQBJ57 in the following oft-cited words:-

> **"….no stranger to the consideration can take advantage of a contract, although made for his benefit."**

We are further guided by **Halsbury's Laws of England**, 4th Edn. Vol. 9 (1) Para. 749 and this Court's own recent decision in **Aineah Liluyani Njirah V. Aga Khan Health Services** [2013] Civil Application No. 194 of 2009. In the former, the authors explain that:-

> ***"The general rule: the destine of privity of contract is that, as a general rule, at common law a contract cannot confer rights or impose strangers to it. That is, persons who are not parties to it. The parties to a contract are those persons who reach agreement and, whilst it may be clear in a simple case who those parties are, it may not be so obvious where there are several contracts, or several parties, or both, for example in the case of multilateral contracts; collateral contracts, irrevocable credits contracts made on the basis of the memorandum and articles of a company; collective agreements, contracts with unincorporated association; and mortgage surveys and valuation."***

In the latter, this Court observed that:-

> ***"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."***

In the appeal before us, the evidence presented tended to suggest that although the appellant was the party named in the agreement as the purchaser, he was a mere decoy, a pawn for his father. We are unable to accept that suggestion. The contract, we reiterate for the upteempth time, was between the appellate and the respondent. The appellant's father did not bring himself within the well-known exceptions to the doctrine of privity of contract. For example, he did not demonstrate the existence of:

i. a collateral contract to the one in question in which he was a party,

ii. an agency relationship in which the appellant transacted on his behalf,

iii. a trust by which the appellant contracted and held the property in trust for him (the witness),
iv. an express provision or implied term in the agreement made for the benefit of the appellant's father.

For these reasons, the appellant's father was a third party, not known to the respondent. The appellant and his father in law and in fact are separate individuals. The power of attorney did not vest in him any right or obligation drawn from the agreement between the appellant and the respondent.

Confronted with the pleadings filed by the appellant and the evidence presented at the trial, one is left

wondering whether one is dealing with two separate disputes.

It is a firmly established rule of evidence that the evidence to be produced in court to prove a claim must flow from pleadings. See **Galaxy Paints Company Ltd V. Falcon Guards Ltd,** Civil Appeal No. 219 of 1998, where the Court held that:-

> **"The issues for determination in a suit generally flowed from the pleadings and the trial court could only pronounce judgment on the issues arising or such issues as the parties framed for the court's determination."**

We come to the conclusion that the learned Judge properly directed her mind to the pleadings and evidence and arrived at the correct decision. None of the grounds challenging that decision can succeed and are dismissed.

The appeal accordingly fails and is dismissed with costs to the respondent.

Dated and delivered at Nairobi this 23rd day of May 2014.

P. KIHARA KARIUKI, PCA

JUDGE OF APPEAL

W. OUKO

JUDGE OF APPEAL

J. MOHAMMED

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR

/mgkm