



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, MARAGA, & M'INOTI, JJ.A.)

CIVIL APPLICATION NO. 194 OF 2009

BETWEEN

AINEAH LIKUYANI NJIRAH.....APPLICANT

AND

AGHA KHAN HEALTH SERVICES.....RESPONDENT

*(Application for extension of time to file the record of appeal out of
time in the intended Appeal from the judgment and decree of the High*

Court of Kenya at Nairobi (Mutungi, J.) dated 22nd July 2008

in

H.C.A. NO. 275 OF 2004)

RULING OF THE COURT

1. In his Notice of Motion dated 2nd July 2009 and brought under **Rule 4** of the **Court of Appeal Rules**, the applicant sought leave of this Court to file the notice and record of appeal out of time. After hearing the application, a single Judge of this Court, Githinji, JA, dismissed it on 17th December, 2009. Thereafter the applicant made a reference to the Court and the same came before us on 23rd May 2013. In the course of presenting his case, the applicant sought to refer to Clause 7 of the policy of insurance between his former employer, the United Nations (UN) and its insurer. As a copy of that policy is not part of the record in this application, we restrained him from making further reference to it. We had at that time, however, got the substratum of the clause. It was to the effect that UN effected the insurance for the benefit of its employees.
2. The disclosure of the fact that UN effected the insurance for the benefit of its employees, including the applicant, has given us considerable anxiety. This is because the applicant was dismissed for allegedly making false claims under that same policy. The applicant's case in the High Court was dismissed on the ground that under that policy, there was no privity of contract between the applicant and the respondent, the contract of insurance having been between UN and the respondent. Justice Githinji also dismissed the applicant's application for leave to file the

notice of appeal out of time on more or less the same ground of privity of contract.

3. If what the applicant told us, before we stopped him from making further reference to that policy, is true that the insurance was effected for the benefit of the UN employees of whom he was one, then we are of the view that he may have had a cause of action under the exemptions to the privity of contract principle.
4. 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 privity 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]
5. Throughout its development, however, this doctrine has provoked much criticism and debate.[3]In the year 2008, the report of the **Law Reform Commission of Ireland on “The Privity of Contract and Third Party Rights”**recommended that, subject to certain limitations, the privity of contract rule should be reformed so that a third party who the contracting parties clearly intended to benefit from their agreement would be able to rely on and enforce the agreement if it is not carried out properly.[4] That Commission confirmed its view, and indeed the view of the majority of the Commissioners, legal consultants[5] and academicians,[6] that the doctrine of privity of Contract is ripe for reform.
6. Before that recommendation was made, the major argument had been that the privity rule “can thwart the intentions of the contracting parties” and run counter to the basic principle of freedom of contract. **Lord Steyn** summarized this criticism of the privity rule as follows:

“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 ... [T]here 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 ... It is, therefore, unjust to deny effectiveness to such a contract...” [7]
(Emphasis supplied).

7. Thus in its central recommendation, that Commission proposed that third parties (subject to being expressly identified) should have the right to enforce contractual provisions where:
 1. **The contracting parties expressly so provide the “first limb” of enforcement, and**
 2. **The contracting parties intend to confer a benefit on the third party the “second limb” of enforceability- provided that the contracting parties do not also intend that the third party beneficiary should not have the right to enforce the contract.**

The Report thus signaled a decisive break from the orthodoxy of the privity doctrine.

8. 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 promisee, 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.
9. In some countries, various pieces of legislations have already been passed with specific exceptions to the Privity rule, because there is recognition that it can cause hardship, especially for consumers. For example the English **Sale of Goods and Supply of Services Act of 1980** provides that:

“Where a consumer buys a car on a financial deal, and the car turns out to be defective (“not fit for purpose”), they have the choice of suing either the dealer or the finance company.”

Depending on the type of finance package, the actual sale might be between the dealer and the finance company, so the consumer might be a third party to the car sale and might not be able to sue, but the Sale of Goods and Supply of Services Act 1980 means that the privity rule is not an obstacle to the consumer to sue either the dealer or the financier.

10. Similar reforms have occurred in other common law jurisdictions, notably in Canada, Australia and New Zealand where in appropriate cases, courts have carved out new exceptions to the rule if not by outright reform.^[9] The courts have achieved this by “*making use of devices such as constructive trusts or estoppel to allow a third party to bring an action in a suitable case.*”^[10]
11. 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, 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.
12. 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.
13. 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.
14. 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]
15. Third party rights have also been long recognized in the United States ^[15] and in civil law jurisdictions such as France ^[16] and Germany,^[17] and, as stated, in recent years the privity rule has been significantly reformed in common law jurisdictions such as England and Wales, ^[18] Singapore,^[19] New Zealand, ^[20] Canada ^[21] and Australia.^[22]
16. **Rule 55(2)** of the **Court of Appeal Rules** restrains us from relying on any additional evidence that was not before the single Judge. However, considering the fact, as we have pointed out, that the applicant was dismissed for allegedly making false claims under the same policy; that his case as well as the application before the single Judge of this Court were dismissed on the ground that under the policy, there was no privity of contract between the applicant and the respondent; and the applicant was and is still unrepresented; in the interest of doing substantial justice to the parties pursuant to **Article 159(2)(a) & (d)** of the **Constitution** and **Sections 3A and 3B** of the Appellate Jurisdiction Act, we are constrained to interfere with the decision of the single Judge. We are satisfied that had the fact that the policy of insurance was for the benefit of UN employees including the applicant been placed before him, the single Judge would most likely have allowed the application for extension of time.

17. We are, however, not granting the extension sought. That would be unfair as the policy of insurance we have referred to is not before us and more importantly, the respondent has not been accorded an opportunity to respond to the point we have raised of the exemptions to the privity of contract principle. We therefore allow this application to enable the applicant, if he so wishes, to file a fresh application for enlargement of time and exhibit the said policy of insurance for consideration afresh by a single Judge of this Court who should not be any of the three of us. We order that each party bears its own costs.

DATED and delivered at Nairobi this 12th day of July, 2013.

R.N. NAMBUYE

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JUDGE OF APPEAL

D.K. MARAGA

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JUDGE OF APPEAL

K. M' INOTI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

awmm

[1] [1915] AC 847, 853;MLR Blackwell Publishers, Modern Law Review 1997, page 238

[2] The Law Reform Commission's Report on The Privity of Contract and Third Party Rights: <http://www.lawreform.ie/2008/report-on-the-privity-of-contract-and-third-party-rights.181.html>. Accessed 8Th April 2013

[3] For the history and development of the doctrine of privity of contract, see Flannigan, "Privity of contract – the end of an era (error)", (1987) 103 L.Q.R.564.

[4] Law Reform Commission, Report on Privity of Contract and Third Party Rights (L.R.C. 88 – 2008), hereafter "Report" or "Commission Report". The Report forms part of the Commission's Second Programme of Law Reform 2000 – 2007, and follows the publication in 2006 of a Consultation Paper Privity of Contract: Third Party Rights (L.R.C. CP 40 – 2006). The Report and Consultation Paper are both available at: www.lawreform.ie.

[5] Privity of Contract: Contracts for their Benefits of Third Parties 9 law Com.No. 242 CM 3329 July 1996(hereinafter the Report)

[6] In Para 2.63 (at note 163) of the Report, the commission cites some 16 examples, starting with **Corbin [1930] 46 LQ 12**. The majority of academics calls for reform to English Law, however lie in the

last ten years (including the initial calls in (1990) 10 Legal studies 12 and (1991) 54 MLR 48.

[7] *Darlington Borough Council v. Wiltshier Northern Ltd* [1995] 1 W.L.R. 68, at 76.

[8] Judicial Studies Institute Journal: Cliona Kelly, Privity of Contract-The Benefits of Reform [2008:1] pg 150

[9] As was arguably the case, for example, in Canada – see *Fraser River Pile & Dredge Ltd v. Can Dive Services Ltd* [1999] 3 S.C.R. 108.

[10] Byrne and Binchy, Annual Review of Irish Law 2006 (Dublin: Round Hall Sweet & Maxwell, 2007), p. 430.

[11] Judicial Studies Institute Journal: Cliona Kelly, Privity of Contract-The Benefits of Reform [2008]

[12] Privity of Contract: Contracts for the Benefit of Third Parties (Law Com. No. 242, 1996) at para. 7.18.

[13] *Prudential Assurance Co Ltd v. Ayres* [2008] E.W.C.A. Civ 52; [2008] All E.R. (D) 90 (Feb), reversing the decision of Lindsay J. in the High Court at [2007] E.W.H.C. 775 (Ch), [2007] All E.R. (D) 43.

[14] In *Prudential Assurance Co Ltd v. Ayres* the surrounding circumstances were reasonably available to the third party, so the issue of what was to happen if they were not so available did not arise. In *Investors Compensation Scheme Ltd v. West Bromwich Building Society* [1998] 1 W.L.R. 896 Lord Hoffman stated that the background which may be taken into account when interpreting a contract includes “absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man” but that this was subject to “the requirement that it should have been reasonably available to the parties”: [1998] 1 W.L.R. 896, at 912. It is unclear however whether or not this includes third parties. See also the views of Saville L.J. in *Saville National Bank of Sharjah v. Dellborg* (Court of Appeal, unreported, Saville L.J., 9 July 1997).

[15] The law in the United States is reflected in s. 304 of the American Law Institute’s Second Restatement of Contracts, which states: “[a] promise in a contract creates a duty in the promisor to any intended beneficiary to perform

the promise, and the intended beneficiary may enforce the duty”. See *Lawrence v. Fox* (1859) 20 N.Y. 268; *Choate, Hall & Stewart v. SCA Services Inc* (1979) 378 Mass. 535.

[16] See Article 1121 of the French Civil Code.

[17] See §328 - 333 of the German Civil Code (Bürgerliches Gesetzbuch).

[18] See the Contracts (Rights of Third Parties) Act, 1999, s. 1, which was enacted following the recommendations of the Law Commission in their 1996 Report Privity of Contract: Contracts for the Benefit of Third Parties (Law Com. No. 242, 1996).

[19] See the Contracts (Rights of Third Parties) Act, 2001.

[20] See the Contracts (Privity) Act, 1982, which was enacted following the New Zealand Contracts and Commercial Law Reform Committee, Report on Privity of Contract (Wellington: Department of Justice, 1981).

[21] In Canada, s. 4 of the New Brunswick Law Reform Act, 1993 and Article 1444 of the Quebec Civil Code provide for third party rights. There has also been a substantial amount of judicial reform of the privity rule: see *Fraser River Pile & Dredge Ltd v. Can Dive Services Ltd*. [1999] 3 S.C.R. 108. However,

legislative reforms have still been advocated by the Law Reform Commission of Nova Scotia in its Final Report on Privity of Contract (Third Party Rights) (Halifax: Law Reform Commission of Nova Scotia, 2004)

[\[22\]](#) See s. 11(2) of the Western Australia Property Law Act, 1969, s. 55 of the Queensland Property Law Act, 1974, and s. 56 of the Northern Territory Law of Property Act, 2000.