Muriuki v Muriithi & 3 others (Environment and Land Appeal 10 of 2019) [2025] KEELC 729 (KLR) (20 February 2025) (Judgment)

Neutral citation: [2025] KEELC 729 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ENVIRONMENT AND LAND APPEAL 10 OF 2019

JM MUTUNGI, J

FEBRUARY 20, 2025

BETWEEN

ANDREW MURIMI MURIUKI ..... APPELLANT

AND

DANIEL MWANGI MURIITHI ..... 1ST RESPONDENT

MARGARET WANJIKU NYAMU ..... 2ND RESPONDENT

SIMON MUTHIKE GITHOGONDO ..... 3RD RESPONDENT

CAROLINE NJERI MUTHIKE ..... 4TH RESPONDENT

(Being an Appeal from the Judgment of the Chief Magistrate's Court at Kerugoya Mr. S.M.S Soita delivered on 14th April, 2019 in Kerugoya C.M. CC No. 47 of 2015)

JUDGMENT

1. This Appeal is against the Judgment delivered on 14th April 2019 by Hon. S.M.S Soita Chief Magistrate in Kerugoya CMCC No. 47 of 2015. By the Judgment the Learned Chief Magistrate entered Judgment in favour of the 1st Respondent who was the Plaintiff before the Lower Court for Kshs 160,000/- with interest at Court rates as against the Appellant who was Defendant before the Lower Court and the 3rd Respondent who was the 2nd Third Party before the Lower Court. The suit against the 2nd Respondent and 4th Respondent who were the 1st and 3rd Third parties respectively before the Lower Court was dismissed with costs.

2. Before the Lower Court the 1st Respondent had sued the Appellant claiming refund and damages arising from a sale agreement of a portion of land with one Simon Muthike Githogondo as vendor dated 24/4/2012 which failed to be completed as the vendor identified some other buyers who apparently offered a higher price. The Appellant, a land broker agent himself, entered the fray vide an agreement dated 7th June 2014 with the 1st Respondent where he undertook to refund to the

1st Respondent Kshs 160,000/- that he had paid to the vendor upon the successful sale of land parcel Mwerua/Kiandai/1720, a subdivision out of land parcel Mwerua/Kiandai/160 to the 1st and 3rd Respondents who had been identified as the new purchasers.

3. The 1st Respondent further pleaded that the Appellant failed to honour his agreement to make the refund of Kshs 160,000/- as per the agreement and consequently claimed he was entitled to payment of the liquidated damages of Kshs 20,000/; penal interest at the rate of 40% per annum from 24th April 2012 and further interested at 30% per month from 30th September 2014 as per the agreement dated 7th June 2014. The 1st Respondent as per the Plaint thus prayed for:-

    a. Special damages of Kshs 950,576 on account of the refund, liquidated damages and the penal interest together with interest at Court rates;

    b. General damages for breach of contract.

    c. Costs of the suit with interest thereon at Court rates.

    d. Any other relief as the Court may deem fit to grant.

4. The Appellant filed a defence dated 9th March 2015 where he denied he was party to any agreement between the 1st Respondent and the said Simon Muthike Githugodo, who was the vendor. The Appellant agreed that he showed the 2nd and 4th Respondents the land and they expressed an interest to purchase land parcel Mwerua/Kiandai/1720 and that the money they paid was to be utilised to refund money to all the previous buyers including the 1st Respondent with whom the vendor had entered into sale agreements. The Appellant averred that he acted on behalf of the 2nd and 4th Respondents in the transaction. He further averred that the transaction was frustrated as it turned out land parcel Mwerua/Kiandia/1720 was non existent on the ground as it was not located where the 2nd and 4th Respondents had been shown.

5. The Appellant applied and was granted leave to issue Third Party notices on 2nd, 3rd and 4th Respondents who were subsequently joined in the suit as the 1st, 2nd and 3rd Third Parties. The 1st and 3rd Third Parties (now 2nd and 4th Respondents) responded to the Third Party Notice and denied being privy to the agreement between the 1st Respondent and the Appellant where the Appellant undertook to refund to the 1st Respondent the sum of Kshs 160,000/- that he had paid to the 2nd Respondent as deposit towards the purchase price. The 2nd Respondent did not make any response to the Third Party Notice.

6. The suit was heard before the Chief Magistrate, where the 1st Respondent testified in support of his case the Appellant testified in support of his defence while the 2nd Respondent testified on behalf of the 1st and 3rd Third parties (2nd and 4th Respondents). The Learned Trial Magistrate upon evaluating and analysing the evidence inter alia held that the 2nd and 4th Respondents (1st and 3rd Third Parties) were not privy to the agreement for the refund that the Appellant entered into with the 1st Respondent and impliedly the contract could not be enforced against them. On the issue of the penal interest of 30% per month, the Learned Trial Magistrate relying on the case of Anjeline Akinyi Otieno –vs- Malaba Malakisi Farmers Co-op Union Ltd (1998) eKLR and Danson Muriuki Kibara –vs- Amos Kathua Katungo (2012) eKLR held that the interest charged was harsh and unconscionable and was exorbitant as to be unreasonable and oppressive and declined to allow it. The Learned Trial Magistrate consequently allowed the 1st Respondent's case as against the Appellant and the 3rd Respondent (2nd Third Party) jointly and severally for payment of Kshs 160,000/- with interest at Court rates from the date of filing the suit until payment in full.

7. The Appellant being dissatisfied and aggrieved by the said Judgment has appealed to this Court on 8 grounds as set out in the Memorandum of Appeal dated 30th April 2019 as hereunder:-

    1. The Learned Magistrate erred in fact and in law in dismissing the Appellants case against the 2nd and 4th Respondents.

    2. The Learned Magistrate erred in fact and in law in failing to note that the Appellant only played the role of a witness in the sale agreement dated 4th June 2014 between the 1st, 2nd and 4th Respondent.

    3. The Learned Magistrate erred in fact and in law in ordering the Appellant to pay a debt that had not been given to him and failing to appreciate that the 1st Respondents refund was not to be paid from the Appellants pocket and he stepped on behalf of the 2nd and 4th Respondents.

    4. The Learned Magistrate erred in fact and in failing to note that he 2nd and 4th Respondent did not prove that they had paid the 3rd Respondent his balance of Kshs 200,000/- which was to be transmitted to the 1st Defendant.

    5. The Learned Magistrate erred in fact and in law in disregarding the 2nd Respondents admission in her testimony that the balance of Kshs 200,000/- was payable to the 3rd Defendant when the issue of the problem that was on the ground was resolved which had not been resolved by the time of the hearing of this case.

    6. The Learned Magistrate erred in fact and in law in failing to hold that the agreement dated 7th June 2014 absolved the Appellant from liability an entering Judgment against him instead of against the 2nd, 3rd & 4th Respondent.

    7. The Learned Magistrate erred in fact and in law in failing to order the 2nd, 3rd and 4th Respondents to settle the 1st Respondents claim.

    8. The Learned Magistrate erred in entering Judgment against the Defendant and Third Respondent jointly and severally.

8. The Appeal was canvassed by way of written submissions. The Appellant's submissions dated 31st August 2023 were filed on 4th September 2023. The 1st Respondent filed his submissions dated 4th March 2024 while the 2nd and 4th Respondents filed their submissions dated 2nd October 2024.

9. The Appellant in his submissions contended that even though the 2nd and 4th Respondents had not signed the agreement dated 7th June 2014 it was clear and evident that the money to refund to the 1st Respondent was to be from the purchase price the 2nd and 4th Respondents were to pay for the purchase of the land from the 3rd Respondent. The Appellant argued it was never in doubt where the money to make the refund to the 1st Respondent was to come from as the 2nd and 4th Respondents were to pay a sum of Kshs 200,000/- through the Firm of I. W. Muchiri Advocates out of which a sum of Kshs 160,000/- was to be refunded to the 1st Respondent. The Appellant further contended that the 2nd Respondent in her evidence admitted that it was a pre condition that the 3rd Respondent transfers the land to them (2nd and 4th Respondents) before they could release the money to I. W. Muchiri Advocate for transmission to the 1st Respondent through the Appellant. The Appellant thus submitted the Learned Trial Magistrate erred in his evaluation of the evidence in failing to consider that it was the intention of the parties that it was the 2nd and 4th Respondents that were to avail the funds to make the refund to the 1st Respondent. In support of his submissions the Appellant placed reliance on the Case of Musimba Investments Ltd –vs- Nokia Corporation (2019) eKLR. Aineah

Gikunyani Njirah vs Aga Khan Health Services (2013) eKLR and Mark Otanga Otiende –vs- Dennis Oduor Aduol (2021)eKLR.

10. Counsel for the 1st Respondent submitted that the Appellant was bound by the terms of the contract he entered into with the 1st Respondent on 7th June 2014. Counsel argued the Appellant voluntarily agreed to step in for the vendor and was therefore obligated to fulfil his part of the contract. In support of the submission the 1st Respondent relied on the case of Kibugi Farmers Coop Society –vs- Philip Mungai t/a Mungai Electrical Ventures (2018) eKLR where the Court cited with approval the Case of Total Kenya Ltd –vs- Joseph Ojiem (Nairobi HCCC No. 1243 of 1999) where the Court held:-

> " Parties to a contract that they have entered into voluntarily are bound by its terms and conditions ---"

11. The 1st Respondent further submitted that the terms of the agreement entered into between the Appellant and the 1st Respondent were clear and devoid of any ambiguity and did not require any extrinsic evidence to ascertain what the terms provided. In support of the submission the 1st Respondent relied on the Case of National Bank of Kenya Ltd –vs- Pipleplastic Samkolit (k) Ltd & Another (2002) EA 503 and the Case of Universal Education Trust Fund –vs- Monica Chopeta (2012) eKLR where the Court in the National Bank Case (supra) held:-

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

12. The 1st Respondent in concluding his submissions stated that the Learned Trial Magistrate correctly found and held the Appellant was in breach of the agreement dated 7th June 2014 and properly awarded special damages as pleaded and proved at the trial.

13. The 2nd and 3rd Respondents in their submissions reiterated that they were not party to the agreement dated 7th June 2014 between the Appellant and the 1st Respondent where the Appellant agreed to pay the 1st Respondent Kshs 160,000/-. They submitted that having not been parties to the agreement they could not be made liable for any non compliance of the terms of the agreement by the parties bound by the same. The 2nd and 4th Respondents contend that the Trial Court rightly evaluated and analysed the evidence and was justified in dismissing the claim AS against the 2nd and 4th Respondents.

14. In support of their submission that a contract affects only the parties privy to the same, the 2nd and 4th Respondents relied on the Case of Mark Otanga Otiendo –vs- Dennis Oduor Aduol (2021) eKLR where R.E Aburili, J considered the application of the doctrine of privity of contract and made reference to various Judicial decisions namely Savings & Lean(k) Ltd –vs- Kanjenje Karungaita & Another (2015) eKLR; Agricultural Finance Corporation –vs- Lengetia Ltd (1985) KLR 765; Kenya National Capital Corporation Ltd –vs- Albert Mario Cordeiro & Another, *CA No. 274 of 2003* and *William Muthee Muthomi –vs- Bank of Baroda, CA No. 91 of 2004* all Court of Appeal cases where the Court reiterated that "a contract affects only parties to it and that it cannot be enforced by or against a non-party."

15. In the Case of Agricultural Finance Corporation –vs- Lengelia Ltd (supra) Hancox, JA quoting with approval from Halsbury Laws of England, 3rd Edition Volume 8, Paragraph 110, reiterated that:-

> " As a general rule a contract affects only 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 a 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."

16. The 2nd and 4th Respondents thus contended, they having not been party to the agreement dated 7th June, 2014, the terms thereof cannot be enforced against them and urged that the appeal as against them be dismissed with costs as it had no merit.

17. I have set out albeit in brief the Appellant's and the Respondents cases before the Lower Court and I have in outline set out the parties submissions before this Court in support of and in opposition to the appeal. This being an Appellate Court of first instance it has a duty and indeed an obligation to consider and evaluate the evidence adduced before the Trial Court afresh before drawing any conclusions. This is in accord with the principle established in the case of Selle & Another –vs- Associated Motor Boat Co. Ltd & Others (1968) EA 123 where the Court of Appeal stated as follows:-

> ----- An Appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well known. Briefly put, they are that this Court must 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 this respect. In particular, this Court is not bound to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to the account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hammed Saif –vs- Ali Mohamed Sholan (1955) 22 EACA 270.

18. The 1st Respondent's suit before the Lower Court was predicated on the written agreement between the 1st Respondent and the Appellant dated 7th June 2014. It was not disputed that the 1st Respondent prior to the 7th June 2014 had entered into an agreement with one Simon Muthike Githogondo (the 3rd Respondent) to purchase a portion measuring half an acre out of LR No. Mwerua/Kiandai/160 at the consideration of Kshs 270,000/- and had paid to the vendor a sum of Kshs 160,000/-) as deposit. The sale was not completed and for reasons that were not expressed in the agreement, the Appellant vide the agreement dated 7th June 2014 undertook to refund to the Appellant the sum of Kshs 160,000/- that the Appellant had paid to the vendor. The agreement acknowledged that the 1st Respondent had paid Kshs 160,000/- to Simon Muthike Githongondo pursuant to a past agreement of sale. The Appellant agreed to take up the responsibility to pay the debt of Kshs 160,000/- owed to the 1st Respondent by the vendor. The express terms of the agreement were as follows:-

    1. That the Debtor has taken over responsibility for the debt of Kshs 160,000/- owed to the Creditor by Simon Muthike Githogondo and has agreed to clear the same.

    2. That the said debt shall be paid on or before 30th September, 2014.

    3. If the Debtor fails to clear the whole debt on the due date the same shall start attracting interest at the rate of 30% per month until payment in full provided that the above mentioned parcel of land shall have been transferred into the name of Margaret Wanjiku Nyamu ID/No. 13334666 and Caroline Njeri Muthike ID. 28625682.

    4. Legal fees for this agreement shall be borne by the Debtor.

19. The agreement was duly executed by the Appellant and the 1st Respondent. The 3rd Respondent signed the agreement as a witness among other witnesses. The 2nd and 4th Respondents were not parties to the agreement and though clause 4 of the agreement impliedly, made transfer of some unspecified land to

the 2nd and 4th Respondents a condition precedent, there was no indication that the funds the Appellant was to utilise to make the refund was to come from the 2nd and 4th Respondents. The terms upon which the transfer of any land was to be made to the 2nd and 4th Respondent were not made explicit in the agreement dated 7th June 2014.

20. As submitted by the 1st Respondent's Counsel and the Counsel for the 2nd and 4th Respondents parties are bound by the terms of the agreement that they have freely and voluntarily entered into and a Court will not interfere with and or re-write a contract that parties have freely entered into unless it is shown there was fraud, coercion and/or undue influence at the time the contract was entered into. In the instant case it has not been suggested there was any fraud coercion or undue influence exerted on any of the parties at the time the agreement dated 7th June, 2014 was entered into.

21. The Appellant in his evidence endeavoured to explain that notwithstanding the agreement he had entered into with the 1st Respondent, the money to pay the 1st Respondent was to come from the 2nd and 4th Respondents after they paid the balance of the purchase price to the vendor. These were matters that were not captured in the agreement and constitute extrinsic evidence to bolster the agreement. The 2nd and 4th Respondents have in their evidence given reasons as to why they may not have paid any balance of the purchase price which was a matter between them and the vendor and had nothing to do with the Appellant and the 1st Respondent.

22. The Case of Mark Otanga Otiende –vs- Dennis Oduor Aduol(2021) eKLR cited and relied upon by the Appellant and the 2nd and 4th Respondents equally placed reliance on, in my view cannot come to the aid of the Appellant. In the Case, the Court while upholding the principle that only a party to a contract can sue or be sued on it acknowledged where a contract is made and intended for the benefit of a Third party such party can enforce the contract. Thus there is exception to the privity doctrine where a contract is made for the benefit of a Third Party. In such case, the Third Party for whose benefit the agreement was entered into can seek to have the contract enforced.

23. In the Case of Aineah Likuyani Njirah –vs- Aga Khan Health Services (2013) eKLR the Court of Appeal held there were exceptions to the privity rule doctrine and stated that:-

> "----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 bonds".

In the Case of Darlington Bourough Council –vs- Witshire Northen Ltd (1995) 1 WLR 68 cited by the Judge in the Mark Otanga Otiende Case (suora) Lord Steyn stated thus:-

> "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 requires that a burden should not be imposed on a Third Party without his consent. But there is no doctrinal, Logic 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, organise their affairs on the faith of the contract. It is therefore unjust to deny effectiveness to such a contract."

24. In the present case the agreement entered into between the Appellant and the 1st Respondent was not for the benefit of the 2nd and 4th Respondents. The 2nd and 4th Respondents had entered their own sale agreement dated 4th June 2014 with the vendor which was not subject to the subsequent

agreement between the Appellant and the 1st Respondent dated 7th June 2014. In the circumstances the exception to the privity rule as concerns the contract was not applicable as the agreement of 7th June 2014 was not entered into for the benefit of the 2nd and 4th Respondents. The 3rd Respondent who entered into the sale agreement dated 4th June 2014 with the 2nd and 4th Respondents has not disputed its performance. The 2nd and 4th Respondents had no obligations to fulfil the agreement entered into between the Appellant and the 1st Respondent and therefore no liability arising from that agreement can attach to them.

25. Having come to the conclusion and finding that there was no privity of contract to bind the 2nd and 4th Respondent to the contested agreement dated 7th June 2014, I am satisfied the Learned Trial Magistrate did not err in his evaluation and appraisal of the evidence and the applicable Law. The Appeal lacks any merit and is dismissed with costs to the 1st, 2nd and 4th Respondents.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 20TH DAY OF FEBRUARY 2025.

J. M. MUTUNGI

ELC - JUDGE