



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

CIVIL APPEAL NO. E013 OF 2021

MARK OTANGA OTIENDE.....APPELLANT

VERSUS

DENNIS ODUOR ADUOL.....RESPONDENT

(Appeal from the judgment and decree of Hon P. Nandi, Principal Magistrate in Bondo PM Civil Suit No 31 of 2019 delivered on 30th April, 2021)

JUDGMENT

1. This is an appeal against the judgment and decree of Hon. P. Nandi delivered on the 30.4.2021 in Bondo Principal Magistrates Court Civil Case No. 31 of 2019. The Appellant **MARK OTANGA OTIENDE** filed his memorandum of appeal dated 12.5.2021 on the 13/5/2021, which memorandum sets out the following grounds of appeal:

1. The learned trial Magistrate erred in law and fact in allowing the counter claim without sufficient proof.
2. That the learned trial Magistrate erred in law and fact in failing to find that the Appellant had proved his case against the Respondent on a balance of probability.
3. That the learned trial Magistrate erred in law and in fact by making a finding that the counter claim was opposed or defended.
4. That the learned trial Magistrate misdirected himself by failing to appreciate that the Respondent did not perform his contractual obligation as per the contract dated 17th November 2018.
5. That the learned trial Magistrate erred in law and fact by failing to appreciate that the Respondent failed to produce evidence of purchase of the water pump and the accessories thereof.
6. That the learned trial Magistrate erred in law and fact by failing to consider the plaintiff's submissions.
7. That the learned trial Magistrate erred in law and fact by failing to appreciate that the Respondent breached the terms of the agreement dated 17.11.2018 by failing to produce a hydrological survey report, payment of NEMA levies, WARMA, and pump testing costs as per the contract agreement dated 17.11.2018.
8. That the learned trial Magistrate erred in law and fact by failing to determine the case on the basis of the law and the available facts before him.

2. The appeal was admitted to hearing on 30/6/2021 and directions on its disposal were given on 10/8/2021. Parties Counsel agreed to canvass the appeal by way of written submissions, which submissions I will highlight before reassessing the material evidence adduced before the trial court.

The Appellant's Submissions

3. On behalf of the Appellant, two issues were highlighted for determination firstly, whether the Respondent performed the contract to its full as per the contract for drilling of the borehole and secondly, whether the learned trial magistrate erred in law and fact by awarding a counter-claim that was, according to the Appellant, not proved by the Respondent.

4. The Appellant's counsel submitted that during cross examination, the Respondent admitted that he failed to adduce any evidence by way of receipt to prove the purchase of the alleged pump and installation services which led to the claim on the counter-claim. Further, that the Respondent did not provide any proof on the alleged delivery of the pump and other accessories to the Appellant and therefore it was clear that the learned magistrate misdirected himself by failing to take into account the evidence and the Appellant's written submissions in arriving at his decision.

5. The Appellant submitted that the defendant did not complete the drilling works as agreed and in accordance with the terms of the contract produced as exhibit 4 where the plaintiff/Appellant was to pay a 70% deposit, which he did, and the balance of 30% was to be paid upon completion.

6. It was further submitted on behalf of the Appellant that the trial magistrate erred in law and fact by failing to appreciate that the Respondent was in breach of the contract and hence ought to be compelled to make good the same as the Respondent only did the drilling works half way and left the site without completing the drilling and further that the Respondent neither provided a hydrological survey report nor was there a completion certificate and/or any handing over to show that the Respondent had completed the drilling works. Further submission was that the Respondent admitted that they did not complete their work because the Appellant owed them some balance yet it was in the agreement that the remaining balance was to be paid upon completion of the works.

7. According to the Appellant, the trial magistrate failed to take into account the evidence adduced before arriving at his decision and therefore awarded a counterclaim that was not proved in any way as there was no evidence that the Appellant entered into a contract with the Respondent over the alleged supply of pump and accessories and further that there was no evidence that the alleged pump and accessories were actually procured and delivered to the Appellant and further, that there was no proof that the Respondent completed the works to warrant payment of the full contract fees.

The Respondents' Submissions

8. On behalf of the Respondent, it was submitted that the Appellant did not adduce any proof of the drilling being incomplete as no material was placed before the trial court to enable it conclude as such. Relying on the case of **Evans Otieno Nyakwana v Cleophas Bwana Ongaro [2015] eKLR** and Section 107 (1) of the Evidence Act, the Respondent submitted that it was trite that he who alleges must prove. Further submission was that the Respondent had demonstrated that he completed his part of the contract unlike the Appellant who had not fulfilled his part of the contract. Reliance was placed on the case of **Jiwaji v Jiwaji [1968] E.A. 547** where the Court held that *in cases where there is no ambiguity in an agreement it must be construed according to the clear words used by the parties*. Further reliance was placed on the case of **Curtis v Chemical Cleaning & Dyeing Co. Ltd [1951] ALL ER 631** where Lord Denning stated *inter alia* that *where a party signs a contract, that signature is evidence of his assent to the whole contract, including exception clauses, unless the signature is shown to be obtained by fraud or misrepresentation*.

9. The Respondent's counsel submitted that the issue of completion certificate as claimed by the Appellant was not a term of the contract and therefore the intention of the parties was to exclude the same and that if that position changed at any one time, the parties should have entered into an agreement on the same. Reliance was placed on the case of **Bakshish Singh & Brothers v Panafric Hotels Limited [1986] KLR** where the Court of Appeal stated that *in order for there to be a good contract, there must be a concluded bargain, and a concluded contract agreement between the parties*.

10. The Respondent's counsel submitted that there was no proof that he had breached the contract between him and the Appellant and that there was no evidence of incompleteness of drilling of the borehole nor any witness called to corroborate the plaintiff's assertions.

11. The Respondent's Counsel urged this Court to uphold the trial court's decision that granted the counterclaim in the sum of Kshs. 125,000 as per the invoice dated 29.1.2019 together with Kshs. 494,500 for installation and Kshs. 47,000 for the generator.

12. Finally, it was submitted on behalf of the Respondent that this Court should adhere to the terms of the contract between the Appellant and Respondent and dismiss the Appellant's case with costs.

Analysis

13. This being a first appeal, this court has a duty to review the evidence afresh, both on points of law and facts, reassess and reconsider it and make its own conclusion on it bearing in mind that it did not see the witnesses testify before the trial court and give allowance for this as was held in the case of **Selle & Another v Associated Motor Boat Co. Ltd & Another (1968) EA 123** and reiterated by the Court of Appeal in the case of **Five Forty Aviation Limited v Erwan Lanoe [2019] eKLR**.

14. The background to this matter is that the Appellant filed suit against the Respondent on behalf of Magak Physically Impaired Youth Development Group vide a plaint dated 1.4.2019 in which he claimed that he entered into an agreement dated 17.11.2018 with the Respondent for water borehole drilling at Nyang'oma. He further averred in his plaint that the defendant agreed to drill a 120 deep water bore hole for the Appellant as per the quotation given by the Respondent. The Appellant further stated that he duly paid the money to the Respondent as agreed but that the Respondent left the site on 23.11.2018 without completing the work and as such there has been no water in the drilled borehole up to date.

15. The Respondent filed a defence and counterclaim dated 15.5.2019 in which he stated that he entered into a contract with the Appellant and not Magak Physically Impaired Youth Development Group and further that he finished the work as agreed in the contract, handed over to the Appellant who used the borehole for a period of time before tampering with the pump. The Respondent further averred that the Appellant had not completed paying for the work done and still owed him money.

16. In his counterclaim, the Respondent averred that he bought a pump and other accessories totalling to Kshs. 560,000 which the Appellant

had not paid for and that further to this, the Appellant had not paid the full amount for the work done as he still owed the Respondent Kshs. 682, 250.

17. In his testimony in chief, the Appellant adopted his written statement as evidence in chief, reiterating the averments contained in the plaint. The Appellant produced certificate of registration, quotation for drilling, payment receipts and the agreement between him and Multiplex Enterprises Ltd as exhibits 1 to 4 respectively.

18. In cross-examination, the Appellant stated that he was the one who entered into an agreement with the Respondent and that he did not indicate that he was entering into the agreement on behalf of a group, which group consisted of 15 members. In cross-examination the Appellant stated that the cost of drilling was Kshs. 1,294,500 and that he did not complete paying this cost. He further admitted that he did not have the receipt for payment of Kshs. 125,000 and that he only had a receipt dated 17.11.2018 for Kshs. 700,000 and a balance of Kshs. 682,500. The Appellant further stated that he did not have any other receipt showing the payment including the balance. It was his testimony that the borehole was left at 85 metres deep although he did not have any receipt to show the same.

19. In re-examination, the Appellant stated that the invoice dated 29.1.2019 showed that the final balance was Kshs. 125,000 whereas the total amount was Kshs. 1,294,500. He further stated that the contractor was to pay Kshs. 60,000 for the site survey which was not done. He further reiterated that he was given the authority by the chairman and treasurer of the group which had 15 members and he was the patron.

20. In defence, the Respondent adopted his written statement dated 15.5.2019 and testified that he met the Appellant in 2018, who suggested that he wanted to drill a borehole in his home. The Respondent further testified that the quotation for drilling only given to the Appellant was Kshs. 1,382,500 which reduced to Kshs. 1,294,500 after he granted the Appellant a discount. He testified that after paying a deposit of Kshs. 700,000, the Appellant was issued with a receipt and they entered into an agreement dated 17.11.2018.

21. It was the Respondent's testimony that the Appellant promised to clear the balance of Kshs. 594,500 upon getting water. The Respondent testified that the following day, they drilled half way and managed to get enough water at which point the Appellant promised to complete the balance of the money if the Respondent installed the pump. He further testified that he installed the pump which cost Kshs. 560,000 and bought a generator worth Kshs. 217,000 from Davis. It was his testimony that the Appellant used the water for three months without paying the balance and installation charges and then returned to the Respondent after the pump spoiled and paid Kshs. 435,000 leaving a balance of Kshs. 125,000 of the drilling charges.

22. The Respondent testified that he then took the pump for repair, returned it and fixed it then issued the receipt dated 17.11.2018 and invoice dated 29.1.2019. He testified that the Appellant used the pump again and damaged it before returning to the Respondent to repair the pump which the Respondent refused as the Appellant had not cleared the outstanding balance of Kshs. 719,500 which comprised Kshs. 594,500 plus Kshs. 125,000 for drilling and installation respectively. The Respondent stated that he entered into the agreement with the Appellant and not a group.

23. In cross-examination, the Respondent stated that he knew the Appellant in Kisauni in the year 2018 and that they entered into an agreement to drill water, which he completed and the Appellant started using the water. He further stated that he did not have the receipt of Kshs. 560,000 for the pump and that they did not hand over the completion certificate as the Appellant had not completed payment. It was his testimony in cross-examination that the Appellant owed him Kshs. 594,500 for drilling and Kshs. 125,000 for the supply of the pump and installation.

24. In re-examination, the Respondent stated that the invoice dated 29.1.2019 was for the balance of Kshs. 125,000. He further reiterated that they do not issue certificates of completion as the Appellant had not paid the balance.

25. The trial court after considering the evidence adduced by the plaintiff and the defendant found that the Appellant had not proved his case against the Respondent on a balance of probabilities. He dismissed the Appellant's claim against the Respondent but allowed the Respondent's counterclaim for Kshs 719,500 together with costs. This judgment is what gave rise to this appeal.

Determination

26. I have considered the pleadings before the trial court, the evidence adduced by both parties to the suit, the judgment of the trial court, grounds of appeal and the submissions by both parties' counsel to this appeal. The main issue for determination is whether the plaintiff proved his case against the defendant on a balance of probabilities and whether the defendant proved his counter claim on a balance of probabilities. Besides this issue, the big question that I must resolve is on point of law and fact, arising from the pleadings and evidence is whether there was a contract between the plaintiff and the defendant as pleaded, upon which the trial court found for the defendant in his counterclaim against the plaintiff. I will however, in the first instance, discuss the position of the parties to this litigation before determining whether there was a suit capable of being resolved in the manner that the trial court resolved the dispute.

27. Firstly, the position in law with regard to the binding nature of a contract executed willingly by the parties is now well settled. In **National Bank of Kenya Ltd v Pipe Plastic Samkolit (K) Ltd & another [2001] eKLR**, the Court of Appeal stated that:

“It was clear beyond para adventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity's function to allow a party to escape from a bad bargain.

28. More recently, the Court of Appeal in **Pius Kimaiyo Langat v Co-operative Bank of Kenya Ltd [2017] eKLR**, after reviewing case law on the subject reiterated that it was **“alive to the hallowed legal maxim that it is not the business of Courts to rewrite contracts between parties as the said parties were bound by the terms of their contracts, unless coercion, Fraud or undue influence are pleaded and proved.”**

29. I have perused the contract dated 17.11.2018 produced as exhibit 4 by the plaintiff and observe that the same was strictly between the Appellant and Multiplex Enterprises Ltd. The said contract states:

“A CONTRACT AGREEMENT made this 17th day of Nov 2018 BETWEEN MARK OTANGA OTIENDE of ID No. 24838560 of P.O. Box 37-40601 Bondo in the aforesaid Republic {hereinafter called the client which expression shall where the context so admits include their personal representative, heirs and assigns of on part and MULTIPLEX ENTERPRISES LTD and of P.O. Box 28763-00200 Nairobi....”

30. It is therefore crystal clear that the contract was strictly between the Appellant and another and not with the Respondent. The Appellant in the said contract was however not representing any group and did not indicate to the contractor to be a representative of any group prior to signing of the aforementioned contract. This was further admitted by the Appellant in his testimony in cross-examination. The only document that mentions the Magak Physically Impaired Group is a quotation dated 28/09/2018. A quotation is not a contract, although it could be a document for negotiation but once a contract is signed, then the contract supersedes the quotation made prior to the contract.

31. The contract further provided that the client, in this case the Appellant, was to pay 70% of the contract sum to the contractors and 30% upon completion. It is this provision upon which the Appellant grounds his appeal specifically grounds (d) and (g) to state that the Respondent was in breach of his contractual obligations.

32. The Appellant testified that they had agreed that the Respondent would drill a 120-metre-deep borehole, based on his quotation but on the 23.11.2018, the Respondent left the site without completing the work and that there has been no water to date and as such the trial magistrate erred in law and fact by failing to appreciate that the Respondent was in breach of the contract.

33. On his part, the Respondent testified that they drilled half way and managed to get enough water at which point the Appellant promised to complete the balance of the money if the Respondent installed the pump. This evidence was not controverted by the Appellant either in cross-examination or in his submissions in this appeal. The evidence on record by the uncontroverted testimony of the Respondent shows that in deed the Appellant used the water as drilled until the pump installed got spoiled.

34. It follows that by his conduct of accepting to use the borehole, at half the depth agreed, the Appellant waived his right to later on allege that the Respondent was in breach of the contract for not drilling the borehole to the agreed 120 metres. Indeed, it is clear from the record that the suit before the trial court was instituted once the Respondent failed to repair the pump which had been spoiled for the second time in its use by the Appellant. There is no indication that prior to institution of suit, the Appellant ever claimed that the Respondent had breached the contract by failing to drill the borehole to the agreed depth. No such demand was exhibited before the trial court.

35. In *Sita Steel Rolling Mills Ltd v Jubilee Insurance Company Ltd [2007] eKLR*, Maraga, J. (as he then was) stated:

“A waiver may arise where a person has pursued such a course of conduct as to evince an intention to waive his right or where his conduct is inconsistent with any other intention than to waive it. It may be inferred from conduct or acts putting one off one's guard and leading one to believe that the other has waived his right.”

36. Further, in *John Mburu v Consolidated Bank of Kenya [2018] eKLR* the Court of Appeal cited the case of *D & C Builders vs Sidney Rees (1966) 2 QB 617* where Lord Denning, M.R. stated:

“It is the first principle upon which all courts of equity proceed, that if parties, who have entered into definite and distinct terms involving certain legal results, afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or be kept in suspense, or held in any event, the person who otherwise might have enforced those rights will not be allowed to enforce them when it would be inequitable having regard to the dealings which have taken place between the parties.”

37. In this case, I am persuaded that based on the evidence adduced, the Respondent did not breach the contract dated 17.11.2018. The Appellant, having allowed the Respondent to install a pump and started using the borehole as dug at the depth that it had reached and not at the agreed depth of 120 meters, was obligated to settle the full amount for drilling the borehole as he did not seek to vary the contract before allowing the installation of the pump.

38. The other grounds of the Appellant's appeal relate to whether the trial magistrate erred in granting the Respondent his counter-claim. The Respondent's counterclaim before the trial court was that he bought a pump and other accessories totalling Kshs. 560,000 that the Appellant had not paid for, and further that the Appellant had not paid the full amount for the work done as he still owed him Kshs. 682,500.

39. It is trite law that whoever alleges must prove. Section 107 of the Evidence Act puts to rest the issue of where the burden of proof lies and provides that:

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

40. In this case, the Respondent did not produce any documents in support of its case, however exhibit 3 produced by the Appellant indicated on the receipt dated 17.11.2018 for the part payment of Kshs. 700,000 for drilling leaving a balance of Kshs. 682,500. This amount is similar

to the amount claimed by the Respondent in his counterclaim.

41. Exhibit 3 produced by the Appellant also shows an invoice dated 29.1.2019 for final balance for Kopolo drilling.

42. In **SYT v TA [2019] eKLR** the Court of Appeal stated that where a party fails to call evidence in support of his case, that party's pleadings remain mere unsubstantiated statements of fact, and conversely the evidence adduced by the other side therefore remains uncontroverted.

43. In this case, the Respondent testified that they had agreed on Kshs. 1,294,500 as the price for the drilling works with the Appellant. He testified that after the Appellant had paid a deposit of Kshs. 700,000, the Appellant still owed him Kshs. 682,500. It was his testimony, that, once the Appellant's pump got spoilt, the Appellant paid Kshs. 435,000 leaving a balance of Kshs. 125,000. The Respondent further testified that when the pump got spoilt again, he asked the Appellant to complete the balance he owed him prior to him repairing the pump which the Appellant refused.

44. The Respondent further stated that he fitted a pump which cost Kshs. 560,000 and bought a generator worth Kshs. 217,000 from Davis which monies the Appellant had not refunded him. However, there was no evidence adduced to prove any expenditure for these sums of money towards the purchase of the stated equipment or items by the Respondent.

45. Based on the authorities relied on above, it is my opinion that the Respondent, assuming he was a party to the contract in issue, only managed to prove a counter claim to the tune of Kshs. 125,000 which was supported by the invoice dated 29/1/2018 showing **final balance for Kopolo drilling and installation works**. This is the only amount which the Appellant was billed as the final balance and if that were not to be the case, then there is no reason why there was no demand for any other balance out of the 1294500 million Kenya shillings contractual sum. The Respondent did not prove any monies spent for purchase of any equipment including a water pump and generator. Proof of such purchase would have been by way of receipts or acknowledgment by the plaintiff/ appellant herein. The burden of proof lies on he who alleges and that burden does not shift and even where the party's case is not defended, the court must be satisfied that there is evidence to establish the claim, especially now that a party files a suit with primary documents that they intent to rely on at the hearing.

46. In The court of Appeal in the case of **Sumer Singh Bachu v Nicholas Wainaina Kago Waweru [1976] eKLR** stated that:

“When the suit was heard ex parte, the plaintiff was under a legal duty to prove his case against both defendants. This he failed to do in respect of the second defendant. In my view, the fact that the proceedings were described or referred to as “formal proof” did not lessen the plaintiff’s burden of proof required in a civil case. It was not sufficient to expect the court to act on the allegations in the plaint when the evidence adduced indicated clearly that the second defendant was not connected with the accident. In my judgment, the judge was justified on the material before him to dismiss the suit against the second defendant and also to dismiss the application to review his judgment.”

47. On the basis of the above facts and evidence, the Respondent's claim, assuming he was privy to the subject contract, would be partially successful to the extent that the trial court should have awarded him kshs 125,000. I find no evidence to support the Appellant's claim. I would therefore agree with the finding and holding by the trial court dismissing the Appellant's claim. This appeal too, would be partially successful to the extent stated above.

48. However, I must determine a very weighty question posed above of whether there was any contract between the Appellant herein and the Respondent, the basis upon which the suit was founded, to warrant the judgment by the trial court.

49. As stated above, both parties to this appeal claim that they entered into a contract where the Respondent was to drill a 120 deep meter borehole for the Appellant at an agreed sum of money. I have perused the documents relied on by both the Appellant and the Respondent and which formed the basis of the suit before the trial court hence this appeal.

50. I observe that the contract for drilling of a borehole dated 17th November 2018 was between the plaintiff/Appellant herein Mr. Mark Otanga Otiende and Multiplex Enterprises Limited. The person of the defendant and therefore the Respondent herein, Mr. Denis Oduor Aduol was never a party to the said contract. I further observe that in the plaintiff's plaint dated 1st April, 2019 and filed in court on 3rd April, 2019, the plaintiff described the defendant as a male Kenyan residing and or working for gain in Kisumu and being **sued as the director of Multiplex Enterprises Ltd.**

51. The question that I must resolve, following these observations is whether the defendant/ Respondent herein was privy to the contract dated 17th November, 2019 and therefore whether he could be sued or sue in the enforcement of the contract in question.

52. The Respondent was sued in his capacity as director of the Multiplex Enterprises Limited. Although there is no further description of who Multiplex Enterprises Ltd is by the Appellant, from the description of the Respondent as director of Multiplex Enterprises Ltd, it is clear that Multiplex Enterprises Ltd is a limited liability company and hence, the directorship by the defendant/ Respondent herein. The defendant/ Respondent in his defence and counterclaim admitted the description given to him by the plaintiff/Appellant herein.

53. The issue therefore, which I find was ignored by the trial court, and which this court on appeal cannot ignore, for reasons that the Court is deemed to know the law is whether the defendant/ Respondent was privy to the contract entered into on 17th November, 2018 between the plaintiff/ Appellant herein and the Multiplex Enterprises Ltd for the drilling of a borehole. A discussion on this issue still takes me back to the provisions of section 78 of the Civil Procedure Act and as interpreted in many decisions including **Racheal Wambui Nganga & Another v Rahab Wairimu Kamau (2020) eKLR**, that a first appellate Court has a duty imposed on it under the law and it must perform that duty with fidelity. The Court held that:

“As a first appellate court, this Court has the duty to examine matters of both law and facts and subject the whole of the evidence to a fresh and exhaustive scrutiny, before drawing conclusion from that analysis. This duty is captured by Section 78 of the Civil Procedure Act which espouses the role of a first appellate Court which is to “.....re-evaluate, reassess and reanalyze the extracts of the record and draw its own conclusions.”[emphasis added]

54. In **Peter M. Kariuki v Attorney General [2014] eKLR** it was held that:

“We have also, as we are duty bound to do as a first appellate court, to reconsider the evidence adduced before the trial court and reevaluate it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence. See NGUI V REPUBLIC, (1984) KLR 729 and SUSAN MUNYI V KESHAR SHIANI, Civil Appeal No. 38 of 2002 (unreported).”

55. In the classic case of **Selle & Another v Associated Motor Boat Co. Ltd. & Others (1968) EA 123** the Court of Appeal stated as follows on the power of the first appellate court:

“I accept counsel for the Respondent’s proposition that this court is not bound necessarily to accept the findings of fact by the court below. 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 settled. 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 necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hammed Saif v Ali Mohamed Sholan (1955), 22 E.A.C.A. 270).[emphasis added]

56. Earlier on, the Court of Appeal for Eastern Africa in **Peters v Sunday Post Limited [1958] EA 424** stated as follows:

“It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion. I take as a guide to the exercise of this jurisdiction the following extracts from the opinion of their Lordships in the House of Lords in Watt v Thomas (1), [1947] A.C. 484. [emphasis added]

“My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given.”

57. From the above cited cases, the appropriate standard of evaluation of the trial court record can simply stated be: that on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions; that in reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before it; and that it is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

58. The above authorities give this court the mandate to determine the question whether the Respondent who was not a party to the agreement dated 17th November 2018 and therefore not privy to a contract relied on to found a cause of action could be sued to enforce the said contract and conversely, whether the said defendant/ Respondent could therefore counterclaim on the said contract.

59. In **Savings & Loan (K) Limited v Kanyenje Karangaita Gakombe & another [2015] eKLR**, the Court of Appeal relying on its previous decisions in the cases of **Agricultural Finance Corporation v Lengetia Ltd [1985] KLR 765**, **Kenya National Capital Corporation Ltd v Albert Mario Cordeiro & another, CA NO 274 of 2003** and **William Muthee Muthami v Bank of Baroda, CA NO 91 of 2004**, reiterated that ***a contract affects only the parties to it and that it cannot be enforced by or against a non-party.***

60. In its classical adaptation, the doctrine of privity of contract hypothesizes that a contract cannot confer rights or impose obligations on any person other than the parties to the contract. Accordingly, a contract cannot be enforced either by or against a third party, except in certain cases only. In **Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd [1915] AC 847**, Lord Haldane, LC rendered the principle thus:

“My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it.”

61. In the *Agricultural Finance Corporation v Lengetia Ltd* (supra), quoting with approval from *Halsbury’s Laws of England*, 3rd Edition, Volume 8, paragraph 110, Hancox, JA, reiterated that:

“As a general rule a contract affects only the 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 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.”

62. Over time, some exceptions to the doctrine of privity of contract have been recognized and accepted. Among these exceptions is where a contract between two parties is accompanied by a collateral contract between one of them and a third party relating to the same subject matter. In *Shanklin Pier V Detel Products Ltd* [1951] 2 KB 854, for example, the plaintiff owned a pier, which it wished to be repainted. After the defendant represented to the plaintiff that some particular paint was fit for the purpose, the plaintiff directed its contractor to use that paint. The contractor purchased the paint from the defendant, which proved unfit for the purpose. Upon a suit by the plaintiff against the defendant, the court found for the plaintiff notwithstanding the fact that there was no privity of contract between the plaintiff and the defendant, as far as the contract for the sale of the paint was concerned.

63. While the proposition that a contract cannot impose liabilities on a non-party has been widely embraced and accepted as rational and well founded, the proposition that a contract cannot confer a benefit other than to a party to it has not been readily accepted and has in fact been the subject of much criticism. In *Darlington Bourough Council v Witshire Northern Ltd* [1995] 1 WLR 68 Lord Steyn articulately demonstrated the flaw in the proposition 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. Principle certainly requires 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 expressed 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.”

64. In some jurisdictions, in a bid to introduce reforms and ameliorate the harshness of the rule, they have resorted to legislative intervention. The best examples are the United Kingdom and Singapore where the *Contracts (Rights of Third Parties) Act, 1999* and the *Contract (Rights of Third Parties) Act, 2001* have respectively been enacted.

65. In *Kenya Women Finance Trust v Bernard Oyugi Jaoko & 2 others* [2018] eKLR, the Court of Appeal deliberated on the doctrine of privity of contract at length and in *Savings & Loan (K) Limited v Kanyenje Karangaita Gakombe & Another* (supra) the Court rendered itself that:

“In its classical rendering, the doctrine of privity of contract postulates that a contract cannot confer rights or impose obligations on any person other than the parties to the contract. Accordingly a contract cannot be enforced either by or against a third party. In DUNLOP PNEUMATIC TYRE CO LTD v SELFRIDGE & CO LTD [1915] AC 847, Lord Haldane, LC rendered the principles thus: “My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it.””

66. The doctrine of Privity of Contract is a long established part of the law of contract. It is one of the fundamental principles of the English Contract law. The essence of the Privity rule is that only the parties that actually negotiated a contract (who are privy to it) are entitled to enforce its terms. Basically, it advances that a contract cannot confer rights or impose obligations on any person other than the parties to the contract. Accordingly, a contract cannot be enforced either by or against a third party.

67. An exception to the Privity Rule suffices where the contracting parties clearly intended to benefit a third party from their agreement and the third party would be able to rely on and or enforce the agreement if it is not carried out properly. An example is in insurance (third party risks) where an injured person can sue to enforce compensation in their favour where a contract of insurance was between an insured other than the person suing and an insurance company.

68. In the instant appeal and case before the lower court, the defendant/Respondent was not privy to the contract entered into by the plaintiff/Appellant since the doctrine of privity entails that a contract cannot confer rights or impose obligations on any person other than the parties to the contract. Accordingly, this contract cannot be enforced against or in any way affect the defendant/ Respondent.

69. Furthermore, the current issue does not fall under the exception to the Privity Rule as Multiplex Enterprises Ltd and Appellant (contracting parties) did not intend to benefit a third party (Respondent herein as director of the Limited liability Company), from their contract as exhibited hence the defendant/ Respondent is not bound by the rights and obligations emanating from it. The law is clear that a company is a separate legal entity or person from its owners unless there has been the lifting of a veil through the established procedure, which is not the case in these proceedings. In *Multichoice Kenya Ltd v Mainkam Ltd & Anor.* (2013) eKLR Mabeja J stated:

“I agree that directors are generally not personally liable on contracts purporting to bind their company. If the directors have authority to make a contract, then only the company is liable on it. To my mind, there is no doubt that ever since famous case of *Salomon v Salomon* (1897) A.C. 22 Courts have applied the principle of corporate personality strictly. But

exceptions to the principle have also been made where it is too flagrantly oppose to justice or convenience. Other instances include when a fraudulent and improper design by scheming directors or shareholders is imputed. In such exceptional cases, the law either goes behind the corporate personality to the individual members or regards the subsidiary and its holding company as one entity.”

70. In *Kolaba Enterprise Ltd v Shamsudin Hussein Varvani & Anor.*(2014) eKLR Gikonyo J observed that:

“It should be appreciated that the separate corporate personality is the best legal innovation ever in company law. See the famous case of *SALOMON & CO LTD v SALOMON* [1897] A.C. 22 H.L that a company is different person altogether from its subscribers and directors. Although it is a fiction of the law, it still is as important for all purposes and intents in any proceedings where a company is involved. Needless to say, that separate legal personality of a company can never be departed from except in instances where the statute or the law provides for the lifting of piercing of the corporate veil, say when the directors or members of the company are using the company as a vehicle to commit fraud or other criminal activities. And that development has been informed by the realization by the courts that over time, promoters and members of companies have formulated and executed fraudulent and mischievous schemes using the corporate vehicle. And that has impelled the courts, in the interest of justice or in public interest to identify and punish the persons who misuse the medium of corporate personality. ”

9. In *China Wu Yi Company Ltd v Edermann Property Ltd & 2 Ors* (2013) eKLR it was stated as follows:

“Further, the 2nd and 3rd Defendants maintained that in accordance with the principles expounded in the well-known case of *Saloman v Saloman & Co Ltd* (1897) A C 22 HL the veil of incorporation could not be lifted as against them unless there were allegations of fraud brought by the Plaintiff. To this end, the Court’s attention was drawn to the finding of Ringera J (as he then was) in *Corporate Insurance Co. Ltd v Savemax Insurance Brokers Ltd & Anor.* HCCC No. 125 of 2002 (unreported) when he stated:

‘The veil of incorporation is not to be lifted merely because the company has no assets or it is unable to pay its debts and is thus insolvent. In such a situation, the law provides for remedies other than the director of the company being saddled with the debts of the company.’[emphasis added]

71. Here is no evidence that the proceedings were for the lifting of the corporate veil of the Multiplex Enterprises Ltd, the party to the suit contract, as envisaged under the law. Therefore, the plaintiff could not purport to sue and enforce a contract against the Respondent herein, a party who was never a party to a contract and neither could the defendant/ Respondent herein be sued and or counter claim on a contract which he was never party to.

72. I reiterate that the doctrine of [privity](#) of [contract](#) provides that, a [contract](#) cannot confer rights or impose obligations upon any person who is not a party to the contract. The premise is that, only parties to contracts should be able to sue to enforce their rights or claim damages as such. It therefore follows that, only the parties to the contract of provisions of the subject services, can sue and be sued on it.

73. In *Midlands Gem Limited & Another v Airspace Forwarders Limited & Another* [2016] eKLR the court considered other decisions including *Agricultural Finance Corporation v Lengetia Ltd* (*supra*) where the court held that a third party has no locus standi to sue on a contract and on the basis of an older decision in *Kenindia Assurance Company Ltd v Otiende* [1991] KLR 38 it was stated that where a party purports to enforce a contract by way of a suit, as the Appellants did in the instant case, the court is divested of jurisdiction to deal with the matter.

74. It is therefore clear that no court of law can rewrite a contract for parties and imply parties that were never privy to a contract. The law is flawless that necessary parties before the court are the ones that confer jurisdiction to the courts to determine a dispute and when proper parties are not before the court, the court lacks jurisdiction to hear and determine a dispute. See *Football Kenya Federation v Kenya Premier League Ltd* [2015] eKLR. Proper parties before a court of law are those to whom rights and obligations accrue as may be decided by the court. The above rule of law, though breeding hardships and inconveniences remain unmitigated. It has been so uniformly pronounced that despite its logical imperfection and actual inconvenience, this court is not about to disturb it with a view to upsetting the status quo as it has not been moved to do so, with sufficient material, in light of its universal application by the courts globally. In other words, there must be a suable party before a court, as it is that suable party who is essential to the jurisdiction whether by compulsory or by voluntary submission (See *Baskins v United Mine Workers* [1921] 150 ARK,398,406,234 S.W. 464,461 quoted in 33 *Yale Law Journal* 383[1924].

75. It is for the above reasons that I find and hold that the trial magistrate erred in law in failing to find that the Respondent herein had no locus standi in the suit and that there was no privity of contract between the Appellant and the Respondent to warrant an award of the claim in the counterclaim. The trial court should have struck out the suit in the first instance as the party sued was not privy to the contract which the Appellant was seeking to enforce.

76. In *Chidhya (Kenya) Limited v Africa Equipment & Engineering Power S.A (AEE Power S.A)* [2020] eKLR the court cited the *Principles of the Law of Contract* pg 61 as defined by Kibaya Imaana Laibuta where the author defines privity as:

“A relationship that exists between people as a result of their participation in some transaction or event. The obligations imposed by, rights or benefits accruing from, their relationships do not affect 3rd parties not privy to the contract. Only parties to a contract can sue or be sued on it; it can neither confer rights not impose liabilities on others not privy thereto. No one may be entitled to or bound by the terms of a contract to which he is not an original party.

77. In *Civil Appeal 206 of 2008 City Council of Nairobi & Wilfred Kamau Githua T/A Githua Associates v Nairobi City Water & Sewerage Co Ltd* (supra) on privity of contract and contractual assignment it was stated:

“The doctrine of privity of contract is that, as a general rule, at Common Law, a contract cannot confer rights or impose obligations on strangers to it that is persons who are not parties to it. The parties to a contract are those persons who reach an agreement and, whilst it may be clear in a simple case who these 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 memorandum & articles of a Company; collective agreements, contracts with unincorporated association and mortgages, surveys and valuations.....”[emphasis added]

87. In the *City Council of Nairobi vs Wilfred Kamau Githua & anor* (supra) the court further found that:

“In the circumstances of this case, the 2nd Respondent was a 3rd Party to the contract. The Appellant and 1st Respondent failed to identify any agreement or contract by which the 2nd Respondent, undertook to take over the Appellant’s liabilities. We therefore find there is no privity of contract between 1st Respondent & 2nd Respondent.”

79. The Court found no privity of contract between the Plaintiff and the Defendant, and that therefore no work or services was provided by Plaintiff to Defendant, no goods supplied, no evidence of contractual relations. In *David Kamau Njoroge (Deceased) v Savings and Loan (K) Ltd [2006]e KLR*, the Court held:-

“It is now trite law that a suit instituted by a person who has no capacity or locus to institute it, is a non-suit such a suit is null and void from the beginning”.

80. From the foregoing, it is clear that the trial Court was in serious error of omission when it failed to first inquire into the locus standi of the Respondent to sue and be sued on a contract which he was not party to. Being the other contracting party to that contract, the Multiplex Enterprises Ltd and not its director the Respondent herein would be the party with a legal standing to sue or be sued on the contract dated 17th November, 2018.

81. In *Philmark Systems Co. Ltd v Andermore Enterprises [2018] e KLR* where the Respondent relied on section 35 of the Companies Act, 2015 to argue that an agreement made by a representative of the Appellant was binding on the appellant in that case, which section provides that:

(1) A contract may be made—

(a) by a company, in writing under its common seal; or

(b) on behalf of a company, by a person acting under its authority, express or implied.

(2)Any formalities required by law for a contract made by a natural person also apply; unless a contrary intention appears, to a contract made by or on behalf of a company, the court posed the question whether Respondent can enforce the contract between Appellant and Andermore Timber and held, Citing *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd [1915] AC 847, Lord Haldane, LC* and *Agricultural Finance Corporation v Lengetia Limited & Jack Mwangi* that the doctrine of privity requires that only a party to a contract can sue.

82. Further in *Kenindia Assurance Company Limited v New Nyanza Wholesalers Limited [2017] eKLR* the court cited the case of *William Muthee Muthami* (supra) where the Court of Appeal stated:

“The nature of 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 Atkinson* (1861) EWHCQB 57 in the following oft-cited words:-

“... no stranger to the consideration can take advantage of a contract, although made for his benefit.”[Emphasis added]

83. The Court, however, pointed out that there are exceptions to the doctrine of privity of contract. The Court outlined those exceptions in the following words: -

“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."

84. Earlier in the decision in **Aineah Likuyani Njirah v Aga Khan Health Services [2013] eKLR**, the Court of Appeal had discussed in detail the privity of contract rule and the steps that have been made in England to reform it. The Court defined the privity of contract rule thus:

"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 Pneumatic Tyre Co. Ltd v Selfridge & Co. Ltd. The essence of the privity rule is that only the people who actually negotiated a contract (who are privy 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."

85. In **Pancras T. Swai v Kenya Breweries Limited [2014] eKLR** the Court observed that:

"The High Court is presumed to know the law. That is why the Constitution has conferred on the High Court in Article 165(3)(a) unlimited original jurisdiction in Civil and Criminal matters and in Article 20 (3)(a) jurisdiction to develop the law and in Article 20 (3) (b) the mandate to interpret the Bill of Rights. It was expected that counsel, in getting up on the brief would come up with the law and authorities including the Treaty and the case-law. But he failed to do so. It was the duty of the Court to have before it the relevant law and to apply it correctly. ..."

86. From the above lengthy exposition, it is clear that there was no cause of action before the trial court, for determination as the Respondent was and is still a stranger to the contract dated 17/11/2018 and therefore he had no locus standi to sue or be sued on the said contract. The trial court therefore erred in law in proceeding to hear and determine the appellant's suit and Respondent's Counterclaim as if the Respondent was a party to the contract.

87. In the end, I find that the appropriate order to make is to set aside the judgment of the trial magistrate, dismiss the plaintiff's claim against the defendant and in equal measure, set aside the order allowing the defendant's counterclaim against the plaintiff and dismiss it. This appeal is therefore a non-starter as the Respondent was and is non-suited. It must fail. I proceed to dismiss this appeal with an order that each party shall bear their own costs of the lower court and of this appeal.

88. I so order and close this file.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 7TH DAY OF DECEMBER, 2021

R.E. ABURILI

JUDGE