The Legal Implications of the Application of the Doctrine of Privity of Contract in Tanzania

By

Rehema Kaunda[1]& Peter Majanjara[2]

Abstract

Privity of contract is one of the cornerstones for the law of contract. A contract creates personal rights and obligations only for the parties to the contract. However, unlike the common law position, a third party in Tanzania is allowed to furnish consideration. This permission raises a question on privity of contract in Tanzania and whether a third party, who furnishes consideration or accrues a benefit can have any rights. The argument is that the doctrine of privity is unfavorable and it should not be preferred in consumer contracts and e-commerce. Privity to contract is unjust, it does not accommodate the interests of third parties even where there are genuine interests that arise in a contract and affect the third party. This paper is a critique of the application of the doctrine of privity of contract in Tanzania. It concludes that the application of the doctrine of privity in Tanzania creates a difficult environment for commercial relations. Therefore, there is a need to amend the Law of Contract Act and allow third parties to, in certain circumstances, enforce a contract to which they are not party to.

Key Words: Contracts, Consideration, Privity to Contract.

1 PhD in Law Candidate (Open University of Tanzania), LL.M in International Trade and Finance Law (Ruaha University College, a constituent College of St. Augustine University of Tanzania), LL.B (Tumaini University Iringa University College). Assistant Lecturer, Faculty of Law, Tumaini University Dar es Salaam College (TUDARCo),. Email: rehemakaunda91@gmail.com and rehemakaunda@yahoo.com.

2 Peter Majanjara, Tutorial Assistant at Tumaini University Dar es Salaam College, LLM. in Procedural Law and International Legal Practice at the University of Dar es Salaam. Email: Petermajanjara@gmail.com.

1. Introduction

Privity to contract requires that it is only the parties who negotiated a contract that should be bound by the terms of the contract and be allowed to enforce them.[3] In common law practice, this principle was neither a settled one nor did it premise a clear stance as to whether a third party can sue under a contract to which he or she is not a party. It was only in the middle of the 19th century that judges reaffirmed the idea of bargain as the foundation of the English contract.[4] Concomitantly, they drew the inference that only parties to the bargaining incur reciprocal obligations and should enjoy reciprocal rights.[5] This gave rise to the doctrine of privity. Following the onset of the doctrine of privity, the rule at common law that consideration must move from the promisee also came into existence.[6]

This paper examines the legal implications of the application of the doctrine of privity of contract in Tanzania. It also makes an analysis on the negative effects that third parties may be exposed to by allowing them to furnish consideration while not being capable of enforcing or suing under such contracts by not being privy to them and other circumstances in which third parties should genuinely be allowed to have rights under a contract, although they were not parties to it.

3 Cheshire G.C and Fifoot C.H.S, 1969 Law of Contract, 7th Edition, Butterworths, London, p.402.
See also the case of *Tweddle vs Atkinson* (1861) QB 57
4 See *Tweddle vs Atkinson* (1861) QB 57.
5 Cheshire & Fifoot (1969), p. 402.
6 See *Dunlop vs Selfridge* [1915] AC 847.

2. Privity to Contract

Privity of contract aims at excluding third parties from contracts. The general rule is that only parties to a contract can incur the rights and obligations under it and that third parties cannot sue or be sued under the contract to which they are not part of. Therefore, only a party to a contract can sue on a contract and only a party to a contract can be sued on a contract. Even where a contract was made for the benefit of a third party, the third party still has no rights under it.[7] It is only reasonable that where an agreement has been entered between and **A** and **B**, **C** should not be allowed to have anything to do with such an agreement as s/he is not privy to it. Christie[8] observed that a contract creates rights and duties, exclusively for the parties to that contract and does not include random third parties. Treitel[9] defines the concept of privity as general rule that a contract should be between two parties to confer rights or impose obligations arising under it and not on any person except the parties to it.

The doctrine of privity rests upon three theories. They include the interest theory, the benefit theory and the consideration theory. The interest theory provides that an action of a beneficiary should be supported by evidence of non-performance of the promise which caused an injury to his interests, as such, he should receive compensation. Here the interests of an individual are equated to his property and thus, he could enforce upon his properties.[10] In *Hadves vs Levit*[11] the bride's father while anticipating the marriage of his child, promised the groom's father that he would pay £200 to the plaintiff's son after the marriage had taken place. The plaintiff also promised the same to the defendant's daughter upon contracting marriage with his son. However, after the marriage had taken place, the defendant failed to pay the money to the plaintiff's son. The court held that the son was the one who was the proper person to bring the suit as he was the one who had more interest in the issue. The father was not the one who had interest as the compensation did not affect him in terms of gains or losses, although he was the one who entered into the agreement, he still did not actually benefit in any way. The son, on the other hand, was the one who felt the actual loss. The line between a party who was interested and one who was not did not depend on whether one was party to the contract, but one who was at loss or gain out of the transaction concluded.[12] This theory therefore allowed third parties to have rights and obligations under a contract only when they had an interest in the same.

The benefit theory was based on the premise that a party to whom the benefit of a promise accrues is allowed to bring an action. It is in connection with the idea that the beneficiary had a claim and thus he could be able to claim.[13] The word 'benefit' is used differently from 'interest' as the former was utilized when it came to gifts. For instance, where a defendant failed to deliver a gift, then the donee was not affected adversely. There was no particular justification for the deliverance of such a gift to him as there was no *quid quo pro*.[14] This theory was shown in operation in *Sprat vs Agar*.[15] In the case, Thomas Lockier was promised that upon Henry Sprat contracting marriage with the daughter of John Agar, the defendant would Henry Sprat with certain lands upon his death. The plaintiff proceeded to marry but later, contrary to the promise and upon the death of John Agar, he devised a will which bequeathed all lands to his wife and none to Henry Sprat. The court awarded the plaintiff damages of £1300. It was reasoned that although Henry Sprat was not the one who entered into the agreement, he was the one benefiting from such agreement and had the right to bring the action. The benefit theory therefore was different but yet similar in some ways to the interest theory as it allowed a third party to lay claims over an agreement which benefited him in respect of gifts.

Lastly, the consideration theory was one which consolidated and engulfed the two former theories discussed above. It was stricter and arose in circumstances where a creditor beneficiary sued a "substitute" debtor who made a promise to pay off the debt of the creditor's original debtor. The actions of the creditor were restricted, whether or not he had the promise of the substitute's promise and whether or not he had provided for the consideration.[16] In *Bourne vs Mason*[17] a creditor was refused an action to sue on a promise after it was ascertained that he had furnished no consideration, that nothing was done by the creditor as he had not done anything which could indicate the benefit for

7 Elliot C., and Quinn F., Contract Law, 2009 7th Edition, Pearson Longman, Essex, p. 274.
8 Christie, R, 2011 The Law of Contract in South Africa, 4th Edition, Lexis Nexis, Durban, p.269.
9 Treitel, The Law of Contract, 10th Edition, Sweet & Maxwell, Lincolnshire, 1999, p.538.
10 Palmer V.V, *The History of Privity – The Formative Period (1500-1680)*, The American Journal of Legal History, 1989, Vol. 33, No.1, p. 6, available at https://www.jstor.org/stable/845785?seq=4#metadata_info_tab_contents, last accessed on 15th May 2020.
11 (1632) Het. 176.
12 Palmer (1989), p. 8.
13 *Ibid*, p.6.
14 *Ibid*, p. 21.
15 *Sprat vs Agar* (1658) 2 Sid 115.
16 Palmer, (1989), p. 7.
17 (1699) 1 Ventris 6.

himself, he was considered as a stranger to the consideration. In *Clypsam vs Morris*[18]an individual volunteered to pay off a debt owed by a third party to the creditor, the creditor agreed. The court refused to grant any remedy arising out of failure to pay such a debt by the defendant as the defendant was not the original debtor and the consideration had not moved from him. Strictly speaking, he was a stranger to such a consideration. This line of reasoning is what was considered as a modern approach to privity due to the rise of commercial transactions. It was applied throughout commercial transaction and it became the benchmark for assessing whether a third party could accrue right of action under a contract. It did bring with its certainty as it gave relief to individuals entering any transaction that no other person could interfere with what they agreed and further, that the agreement becomes specific to them and none other.

Therefore, the doctrine of privity considers that the rights and obligations of parties in a contract are strictly the private matters of contracting parties, and hence, the strangers have no legal access to them.[19] In its strict sense, it is held that he who is not a party to a contract cannot bring an action on the contract.[20] It reinforces the idea that only parties to a contract are legally entitled to enforce it, or be bound by it. While, this doctrine has not been specifically contained in the laws of Tanzania, it has been well established in England.[21]

18 (1699) 2 Keb. 401.
19 Collins, H, 1986 The Law of Contract, Weidnefeld& Nicolson, London, , p. 112.
20 Cheshire & Fifoot, (1969), p.438.
21 Lilienthal, J, *Privity of Contract*, Harvard Law Review Journal, (1887), Vol.1, No. 5, pp.226 – 232.

3. Historical Development of the Doctrine of Privity of Contract

The doctrine of privity of contract owes its origin to the English Common Law Courts. It originated in the period when judges were busy discovering a suitable principle for determining who was entitled to sue for the breach of a promise. However, before 1861, the position as to whether third parties could sue was not clear.

It was *Jordan vs Jordan*[22] where it started existing. The doctrine was, however, not applied in the way that the privity doctrine has crystallized. Thus, it definitely left room for development. Following this ruling, it excluded third parties from enforcing the terms of the promise. In *Lever vs Keys*[23], the court overruled the decision in *Jordan's* case and allowed the strangers to sue and be sued in a contract. Here, the father of a girl promised the father of a boy that if he would be willing to give his consent to the marriage of the boy with the girl and assure £40 to the son, he would pay £200 to the son in marriage. The action was brought by the son upon breaching the promise. It was held that the son was entitled to sue, thereby defeating the precedent that was set in *Jordan's* case that a stranger could not raise any claim in a contract that he is not a part of.

In *Dutton vs Poole*[24], a son promised his father that in return for his father not selling wood, he would pay £1000 to his sister. The father refrained from selling the wood but the son did not pay the money. It was held that the sister could sue on the ground that the consideration and promise to the father may well have extended to her on account of the tie of blood between them. However, there was a disagreement as to whether the daughter could, even though she was a third party. This was the early stage in the development of the privity to contract rule. In this development, a few things can be notably observed. The courts recognized exceptions to the privity rule such as when one is a beneficiary in an agreement entered for his/her benefit.

22 (1594) Cro Eliz 369.
23 *Lever vs Keys* (1598) Cro Eliz 619.
24 (1678) 2 Lev 210.

The doctrine of privity of contract was finally established and cemented in *Tweddle vs Atkinson.*[25]The plaintiff was about to get married. His father and prospective father-in-law made a contract requiring each of them to give a sum of money to the plaintiff upon contracting the marriage. Even though the contract expressly provided the plaintiff was to be entitled to enforce it, the court held that he could not do so. The reason for this state of affair was advanced on the ground that because he was a stranger to the contract, he could not take advantage of it though it was made for his benefit.

A similar development was observed in *Dunlop Pneumatic tires co ltd vs Selfridge co ltd*[26] where the court held that the doctrine of privity requires that it is only the promisor and promisee that have the rights and obligations to enforce a contract. Similarly, in *Beswick vs Beswick,*[27]the court held that due to privity of contract, a wife could not sue in her capacity as such, only in her capacity as the administratix of an estate.

25 [1861] EWHC J57 QB.
26 [1915] AC 847.
27 [1968] AC 58.

A concern was raised that privity to contract was too rigidly applied and as a result, third parties were not able to claim. In *Lloy'ds vs Harper*[28], the court negated privity altogether and provided for an exception where a third party may assert that he is a trustee and be able to sue. Lord Denning opposed the doctrine of privity in *Drive Yourself Hire Co. (London) Ltd vs Strutt*.[29]He provided that before 1861, where a contract was made for the benefit of a third person, it could be enforceable by such a third person despite of him not being part of it.Lord Denning's arguments were positive developments because the strict application of the doctrine of privity to contract led to third parties who had claims over the contracts having their rights diminished. However, in *Woodard Investment Development Ltd vs Wimpey Construction UK Ltd,*[30]the House of Lords disapproved Lord Denning's statement, that damages should not generally be recovered on behalf of a third party. Lord Wilberforce, however, suggested that there are certain categories of contracts which need special treatment. Such facets are to embody where one party contracted for benefit of a group such as family holidays or ordering meals in restaurants for a party. It was also called up that where the opportunity arises, the House of Lords would reconsider *Tweedle's* case and the other cases which stand guard over the unjust rule of privity to contract.[31]

28 [1888] 16 CD 290.
29 [1954] 1 QB 250 CA.
30 [1980] 1 All ER 571.
31 Elliot & Quinn, (2009), p. 275.

4. Application of the Doctrine of Privity of Contract in Tanzania

4.1 Legislation

In Tanzania, the Law of Contract Act[32] does not expressly stipulate on the doctrine of privity to contract. However, reading through the Act[33], an inference can be drawn that it does embody the doctrine within it. When at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing something, such act or abstinence or promise is called a consideration for the promise.[34] The words *any other person* mean that third parties can furnish consideration.[35] As the law is silent on the principle, guidance must be sought from the case of *Tanganyika Auto Garage vs Marcel G. Mafuruki*[36], that when our laws are silent, we fall back to common law. The common law position, however, shows that third parties are not allowed to be involved in contracts. It further provides that whether it is for the purposes of furnishing consideration, suing or being sued, only parties to a contract have rights and liabilities under such a contract. This stance could perhaps be owed to the fact that Tanzania inherited the Indian Law of Contract Act, 1872 which had a similar position.[37] Apart from the Contract Act, there are several other laws which address the issue of privity.

32 Cap 345.
33 Section 2(1) (d) of the Law of Contract Act Cap. 345.
34 *Ibid.*
35 See *Tarlock Singh Nayar and Another vs Sterling Insurance Co. Ltd* [1966] E.A. 144.
36 [1975] L.R.T 23.
37 Nyangarika K, Legal and Evidential Validity to Electronic Transactions in Commerce and Formation of Contract: Tanzania Perspective, LLM Dissertation, Open University of Tanzania, 2013, p. 9, available at http://repository.out.ac.tz/759/1/KASSIM_NYANGARIKA.pdf, last accessed on 16th May 2020. Also see *Kepong Prospecting Ltd vs Schmidt* [1968] A.C. 810.

The Insurance Act[38] recognizes the rights of third parties against insurers. Where under any contract of insurance, the insured is insured against liabilities to third parties which he may incur, then in case the insurer becomes insolvent or bankrupt or makes an arrangement with its creditors, or where the insurer is a company in the event of its winding up, where any liability was incurred by the insured before or after the event, the rights of the insured against the insurer under the contract shall be transferred and vest in the third party to whom the liability was incurred.[39]A similar trend is seen in the Motor Vehicles Insurance Act.[40] As noted earlier, the basic difference concerning privity in Tanzania and the common law position is that generally under the latter, third parties are not allowed to furnish consideration or incur any rights or liability under such a contract. On the contrary, with regard to the former, a third party is allowed to furnish consideration, but cannot incur any rights or liabilities under it.

4.2 Case Law

There are various cases and laws that show the application of the doctrine of privity in Tanzania. *Burns & Blane Ltd. vs United Construction Company Ltd*[41] involved a plaintiff who was a subcontractor to the main contractor (defendant). The plaintiff was suing for goods sold and delivered and services rendered with respect of a construction project. The defendant alleged that the recovery of the plaintiff ought to be deducted from the amount of expenses which the defendant incurred while correcting defects and also by the amount of a settlement which the defendant made with a third party. The amount of settlement consisted of the company for which the building was being constructed because of other defects in materials which the plaintiff had supplied. It was held that there existed no privity of contract between the plaintiff and the third party with which the defendant had made the settlement. There was also no expenditure in relation to corrections of defects in respect of which such a settlement was made. Thus, the amount of settlement had not to be deducted from the plaintiff's claims.

38 Act No. 10 of 2009.
39 Section 58(1).
40 Cap 169 R.E 2009, Section 4 and 15.
41 [1967] H.C.D No. 156.

In *TUICO vs Mbeya Cement Company & N.I.C Ltd*[42]the plaintiff, a branch of TUICO trade union at Mbeya cement company Ltd. filed a suit against the defendants jointly for, among other reliefs, a specific performance of a trust deed. The basis of the suit was the trust deed rules and regulations for Mbeya cement Company Group staff endowed Assurance Scheme. The defendants raised a preliminary objection that the plaintiff had no *locus standi* to institute the suit either for lack of legal status or based on the trust deed. It was decided that although the plaintiff union is capable of suing and being sued, it can only do so if the alleged wrongful acts were committed against it. As such, it is for each of the individual employee to sue the defendants for their rights under the trust deed and group endowment scheme. The trade union, let alone branch of it, has no *locus standi* to sue on behalf of ex-employees of the trust deed and group staff endowment scheme as it was not privy to it.

42 [2005] T.L.R 41.

In *Puma Energy Tanzania Ltd vs Speck-Check Enterprises Ltd*[43], the plaintiff had changed its name from BP Tanzania Ltd to Puma Energy Tanzania Ltd. It later claimed under a distributorship agreement for damages based on the loss of 177,327 litres of diesel and 231,035 litres of heavy fuel which left the tanks from Kilombero sugar factory and Alliance one Deposits without the plaintiff being issued with respective invoices. The point of controversy was based on the doctrine of privity, that the plaintiff had no *locus standi* to sue on the said agreement as it was not a party to it. The agreement contained BP Tanzania Ltd as a party and not Puma Energy Tanzania Ltd. There was also no notice on the change of name. The court upheld the defendant's claims on lack of *locus standi,* basing on the doctrine of privity as the plaintiff did not advance the certificate of change of names in the records of the case file. The plaintiff had the capacity to produce it but did not do so.

In *Civil Loaths Enterprises vs Lindi Municipal Council and F.E.L.O Investment Ltd*[44], the appellant had entered into a 90-day contract for building an abattoir and other associated buildings at NgongoTulieni area within Lindi Municipality to the tune of Tshs 162,924,070/=. However, the contract was not executed as expected due to shortage of funds. The first respondent terminated the contract between her and the second respondent and also detained a car, property of the appellant, a Nissan Navara with Reg. No. T. 864 DEQ on grounds that clause No. 63.1 of the General Conditions of their contract allowed her to do so and the vehicle was used for construction purposes. Hence, the appellant claimed for Tshs 20,000,000/=

43 Commercial Case No. 19 of 2014.
44 Civil Appeal No. 4 of 2019.

as damages due to loss of use of the vehicle, not less than Tshs 20,000,000/= as general damages and the release of the motor vehicle. The trial court dismissed the case against the appellants.

The appellant then appealed on grounds, *inter alia,* that the learned trial Magistrate erred in conceding to the fact that the detainment of the vehicle was appropriate as per clause 63.1 of the general term of the contract. It was the contention of the appellant that such act was wrong because the cause of action was not breach of contract whose parties were the 1st and 2nd respondents and the appellant was not privy to the said contract, and had no legal obligation. The solicitor for the 1st respondent argued that the appellant, not being a party, does not take away the rights and obligations of the contracting parties to such a contract. The court was of the view that detainment of a vehicle which was owned by a company that was not party to the contract, which is not privy to the contract between the two respondents, was contrary to the principles of law of contract and therefore it was determined illegal.

A similar observation on privity of contracts exists in *John Vitalis Ngonyani vs Fanyeje Ally*[45]. Here, the appellant unsuccessfully sued the respondent and one Method Anthony, the two of which were alleged to be husband and wife, in the Ward Tribunal. He appealed to the District Land and Housing Tribunal on grounds that the Ward Tribunal erred after recognizing a Sale Agreement which did not involve the respondent in the current case. The appeal was allowed and the transaction was declared a nullity. The appellant preferred an appeal on grounds, *inter alia,* that the District Land and Housing Tribunal erred by allowing an appeal that had different parties form the original proceedings at the Msigani Ward Tribunal and holding that one Method Anthony and the respondent were spouses and the land in dispute was a matrimonial asset without Method Anthony being a party to that appeal.

The court was of the view that the original parties in the tribunal were John Vitalis Ngonyani*vs* Method Anthony and Fanyeje Ally, who were alleged to be spouses. Method Anthony as evidenced by the Sale Agreement was the seller of the land to the appellant. The respondent was not privy to the Sale Agreement between the appellant and Method Anthony, and there was neither evidence of marriage between the respondent and Method Anthony nor was there presumption of the same. Hence, the land in dispute was not a matrimonial property. The Sale Agreement was binding to those two parties and not any other person. The contractual obligations and rights could not be shifted to the respondent as she was not a party to the contract.

Another relevant example on the application of the doctrine of privity to contract in Tanzania exists in *National Microfinance Bank PLC vs Mary Rwabizi Trading T/A Amuga Enterprises.*[46]The appellant contested the decision of the lower court on grounds, *inter alia,* that the trial judge erred in law and fact by holding that Efam Company Ltd (first appellant in the trial court) had breached the contract but decreeing the 2nd defendant (the current appellant) to pay the purchase price, general and punitive damages. The facts were that the 1st defendant in the trial court was sued jointly with the 2nd defendant for non-payment of Tshs. 140,000,000/=. The 1st defendant was in a contract for supply of 7000 water pipes with the plaintiff (the current respondent), as a result, the money was not paid and the reasons was that the 2nd defendant had acted negligently for closing the account of the 1st defendant. Further, the cheques that were to be payable to the plaintiff were dishonored and thus, occasioned the loss as she closed the account without collecting cheque leaves first.

The court held that the appellant was liable in negligence as failure to ensure that the customer had returned the cheque book and all unused cheque books before closing the account was in breach of duty and constituted to negligence. However, the judgment for payment of Tshs 140,000,000/= was to be entered against the 1st defendant. The appellant was not privy to the contract of supply of the water pipes and there is nothing to show that she could be held liable in contract to which it was not privy to. The trial court erred in ordering the appellant to pay the contractual debt which should have been paid by the 1st defendant alone.

In the *Board of Trustee of Good Neighbors Tanzania vs Doreen Augustine Dominic T/A Dawson's Water Point Drilling*[47] the defendant claimed that the defendant had no capacity to institute the as it was brought against a wrong party. The reason is that the plaintiff in the pleadings suggested that the casue of action was between Ms. Good Neghbors Tanzania and Ms Dawson;s Water Point Drilling Company, however, its only parties to a contract who can sue under it. In this case, the plaintiff and defendant are not privy to the contract since they were not party to it. The court upheld the preliminary objection while reasoning that as per Section 18 of the NGO Act, a registered NGO by virtue of its registration under it can be a body corporate capable of suing and being sued in its name. In this case, the plaintiff is the Board of Trustee of Good Neighbor Tanzania instead of Good Neighbor Tanzania which has been registered under the NGO Act and its certificate of registration attached to the plaint. The plaintiff therefore has no capacity to sue.

In *TANESCO vs Robinson Trader Company and EWURA*[48] the Tribunal provided that the contract between TANESCO and M.S Omary is distinct from the contract between TANESCO and Robisnson Traders. It is elementary that under the doctrine of privity to contract, a person cannot acquire rights or by subject to liabilities arising out of a contract to which he is not a party. Imposing liabilities M.S Omary liabilities on Robinson Traders amounts to unfair business practice which should be condemned. It unfairly imposed the liability of Mr. M.S Omary on Robinson Traders out of despair as there was a customer who did not pay and he was nowhere to be found. This practice is oppressive since it seeks to exploit customers legally connected with electricity only to be disconnected later on the basis of previous customer's liability.

In *Juma Garage vs Co-operative and Rural Development Bank*[49] the respondent owned a motor vehicle insured by the National Insurance Corporation. It was later involved

45 Misc. Land Case Appeal No. 37 of 2017.

46 Civil Appeal no. 296 of 2017.

47 Commercial Case No. 69 of 2019, High Court of Tanzania at Dar es Salaam.

48 Tribunal Appeal No. 4 of 2014.

49 [2003] TLR 429.

in a car accident and made NIC liable to repair it. NIC took the vehicle to the Garage for repairs and later on when the work was delayed, they told the Bank to make follow up over the same. After completion of the work, the Bank sued the Garage for general and exemplary damages as costs of replacing some parts which were missing from the vehicle at the time the respondent took delivery of the motor vehicle. It was argued that there was no privy of contract between the Bank and the Garage and therefore no cause of action could arise. The court held that the contract was between NIC and the Garage, there is nowhere in the Plaint where it was alleged that the Bank was a party to the contract of repair.

In another case *Tanzania Pharmaceutical Industries Limited vs Dr. EpharimNjau (Number 2)*[50], the contention was whether there was a contract between the respondent and the appellant. The respondent contended that he was appointed as the general manager by the appellant's Board of Directors but was later transferred to Keko pharmaceutical Industries Limited by National Chemical Industries Limited, which is the holding corporation of the appellant company. He later challenged the transfer and removal from his present employment and considering it unlawful as it amounted to the breach of contract between him and the appellant company. The court held that the respondent sued a party which had no contractual relationship with him, he should have sued the NCI which appointed him and with which he signed a contract of employment.

50 [2000] TLR 236.

5. The Privity Doctrine in other Jurisdictions

The doctrine of privity to contract has been treated differently in other jurisdictions. In England as noted, there was a tug of war between courts, some supporting the doctrine and some showing intent to give exceptions as the rigid application the same proved to occasion injustice. The movement to relax the doctrine was also present outside courts. The Law Commission of England called for a reform as the doctrine prevents effect being given to the intentions of the contracting parties, it has led to unnecessary complexity and uncertainty in the law, and the technical hurdles which must be overcome if one circumvents the rule will raise many arguments that some requirement has not been satisfied. This is commercially inconvenient and causes injustice.[51]

The Law Commission proposed that there should be a reconsideration of the rule and provided for how legislation could reform the rule and strike a balance between third parties and the contracting parties. As a result, the Contracts (Rights of Third Parties) Act 1999 was introduced in England and Wales. The Act, *inter alia*, provides for the right of third parties to enforce contractual terms.[52] A person not party to the contract may in his own right enforce terms of the contract if the contract expressly provides that he may, or a there is a term in the contract which purports to benefit him.[53] The third party must be expressly identified in the contract.[54]

51 The Law Commission, Privity of Contract: Contracts for the Benefit of Third Parties, Consultation Paper No. 121, 1991, p. 65.
52 Section 1.
53 Section 1(1).
54 Section 1(3).

In Uganda, the rights of third parties are recognized under the Contracts Act.[55] Section 65 provides for the right of third parties to enforce contractual terms. A party who is not party to a contract may in his or her own right enforce a term of the contract where the contract expressly provides that he may do so or where a term of the contract confers a benefit to that person.[56] It also provides that the third party must be expressly identified in the contract[57] and that he shall have any remedies as if he was a party to the contract.[58]This is almost a replica of the English Contracts (Rights of Third Parties) Act 1999. In *Asante Aviation Ltd vs Star of Africa Air Charters Ltd & 3 Others*[59], the court provided that privity of contract is a legal doctrine that confers rights and imposes liabilities only to parties to the agreement. A third party can therefore not sue. However, the position has not changed, it is now possible a person not privy to the contract to sue. Such instances are where the third party is a beneficiary to the agreement between the other two parties, the test lies in the question of whether the two contracting parties intended the third party to derive benefit from their contract.

New Zealand had previously enacted the Contracts (Privity) Act in 1982. This was after the New Zealand Contract and Commercial Law Reform Committee published a report in 1981[60] which requested that there be a change in law as the doctrine of privity was inconsistent with commercial relations and

55 Act No. 7 of 2010.
56 Section 65(1) (2).
57 Section 65(3).
58 Section 65(5).
59 HCCS No. 431 of 2014.
60 The New Zealand Contracts and Commercial Law Reform Committee's Report on Privity of Contract, 1981,

contractual intentions in general.[61]Later, the Act was repealed and re-enacted in the Contract and Commercial Law Act.[62] The Act has specifically included a part to permit a third person to enforce a promise made for the benefit of that person.[63] A "benefit" is any advantage, immunity, or limitation conferred to a third party.[64] Section 12 provides for a contracts for benefit of persons who are not parties, where a third person is conferred any benefit and is designated by name, description or reference to class, such a party can enforce the contract.

6. Criticisms Leveled Against the Doctrine of Privity to Contracts

One of the most apparent defects of the doctrine of privity of contract in Tanzania is the violation of third parties' rights to have access in legal institutions, especially courts and tribunals. The doctrine violates the constitutional rights of third parties to have any disputes that can be resolved by the application of law decided in a fair hearing before the courts or tribunals.[65] There are some aspects in which the doctrine of privity should not be preferred and ought to be relaxed for the benefit of third parties.

There is a wide existence and use of banking services *via* electronic devices. This calls for the need to reform the traditional doctrine of privity to contracts as these services do at times involve more than just two parties. At times, banks tend to exempt themselves from liability such as when the machine fails to dispense money to customers. Strictly embracing the doctrine of privity of

61 *Ibid*, p. 45.
62 No. 5 of 2017.
63 Section 10.
64 Section 11.
65 The Constitution of the United Republic of Tanzania, 1977, Article 13(6)(a).

contracts in this circumstance would mean that a customer cannot institute complaints against the network provider if it was the fault of such a network provider. This is simply because the one who has entered in the contract with the service provider is the bank and not the customer.[66] This shortcoming is more apparent when a bank refuses to sue, a third party cannot force such an institution to do so. As the Law of Contract Act has not yet embraced such a progressive development, third parties cannot sue[67] and in this instance, they stand to be at a detriment. Another area in which the privity of contract raises concerns is in consumer contracts and protection. This has a direct connection with the doctrine of privity to contracts as without a clear distinction of consumers and protection of their rights by the laws, consumers who are not party to the contracts may not be able to seek remedies. It is not always where consumers become parties to the contract and furnishes consideration for services or goods, at times, services and goods may be distributed without even consideration taking place and consumers not being part of the contract.[68]

The Fair Competitions Act[69] defines a consumer to mean any person who purchases or offers to purchase goods or services for purposes other than resale or using them in the production or manufacture of any goods or articles for sale. A customer is defined as a person who purchases or offers to purchase goods or services.[70] These two definitions reflect the aspect of privity as it does not include third parties or any other persons who may have not furnished the consideration but did use the products or services. This shows how the doctrine of privity could injure consumer protection when it occurs that a consumer, who is a third party, has been injured and wants to claim before the court.

The Sale of Goods Act also embraces the privity doctrine as it contains no mention of a third party for purposes of them being able to have rights under any sale agreement, it is only buyers[71] and sellers that are recognized. A buyer is defined as a person who buys or agrees to buy goods.[72] In general, the Act has given effect to the doctrine of privity and affected consumers, whether a beneficiary or a third party such as a child of the buyer could not sue a manufacturer or supplier for any defective product contained in a contract.[73]

It is evident that the doctrine of privity of contracts does not bode in various circumstances. Third parties are rendered helpless when any contract entered into affects them and the law does not afford them an opportunity to claim their rights under the benefit they ought to have received. For instance, one may purchase goods or services to be consumed by the family and thus, legal protection must be afforded to all of them regardless of whether they furnished consideration and are parties to the contract or not. To further show that the doctrine of privity of contracts should not apply here is where producers are required to be given education to consumers without them even having bought any goods or services, something that is beyond normal contractual principles.[74]

7. Conclusion

This article made an assessment of the doctrine of privity of contract as applied in Tanzania. It is noted that the doctrine of privity to contracts originates from common law and thus was adopted by Tanzania. The privity doctrine puts emphasis on legal certainty when it comes to contracts and that only parties to such a contract can accrue rights and duties under it.

In spite of the advantages it has, the doctrine of privity to contracts has some shortcomings especially to third parties. Third parties could have justifiably obtained rights under a contract but they cannot enforce a right basing on contract because of the doctrine of privity. This problem has been mitigated in other jurisdictions by allowing third parties to sue if they fall within exceptions contained in the law. Tanzania is yet to recognize they rights of third parties in its legal framework.

The way forward is to amend the law, especially the Law of Contract Act or through enactment of a specific legislation which recognized rights of third parties to contracts. This will be in line with the current economic situation where one transaction may involve a number of institutions and individuals or where one person may get products and services for the benefit of others.

8. Recommendations

It is high time to develop the doctrine of privity of contract as the strict application of the same without having due regard to the change in the socio-economic aspect becomes harmful to the interests of individuals who have a genuine interest in contract. The existence of the rule has given rise to a complex body of law and to the use of elaborate and often artificial stratagems and structures in order to give third parties enforceable rights.[75] There exists a number of commercial engagements[76] in which third parties may justifiably have an interest because of the loss occasioned or harmed although they are not parties to the agreement. An example of a bank which has engaged in provision of services for with another party for the benefit of a customer currently renders the customer unable to enforce anything out of the agreement between the bank and the other party as the customer is not privy to it. Also, a person whom has been delivered goods by another and he is not considered as a customer cannot lay claims arising out the agreement to purchase such goods.

The Law of Contract Act does not recognize rights of a third party to bring a suit arising out of a contract under any exception and does at times cause injustice. This can be mitigated by amending the Law of Contract Act to accommodate the interests of third parties in a contract. Not only should the Law of Contract Act be amended, but also, consumer protection laws should also be

66 Mukama R., *Electronic Banking and Technological Development in Tanzania: A Legal Analysis*, Ruaha Law Review, 2014, Vol. 2, No. 2, p. 20, available at http://scholar.mzumbe.ac.tz/bitstream/handle/11192/2026/ROSEMARY+MUKAMA+Electronic+Banking+in+Tanzania2.pdf?sequence=1, last accessed on 20th May 2020.
67 Mukama, 2014, p.20.
68 *Ibid*, p. 53.
69 Act No. 8 of 2003.
70 Section 2.
71 See Section 2 of the Act for the definition of a buyer.
72 *Ibid.*
73 Nangela D., 2011 The Adequacy of the Tanzanian Law on E-Commerce and E-contracting: Possible Solutions to be Found in International Models and South African Legislation, PhD Thesis, University of Cape Town,p. 91.
74 *Ibid*, p. 54.
75 Mahmood, A., The Need for Legislative Reform of the Privity Doctrine in Commercial Contracts in Malaysia, PhD Thesis, Queensland University of Technology, 2013, p. 76, available at https://eprints.qut.edu.au/64243/1/Anida_Mahmood_Thesis.pdf, last accessed on 16th May 2020.
76 See *Ibid*, part 5.0.

amended to accommodate protection of third parties.

The jurisdiction from which Tanzania adopted the doctrine from has already progressed over the strict application of this doctrine. The Contracts (Rights of Third Parties) Act[77] was enacted to give third parties the rights to enforce contractual terms. It allows a third party to sue in his own right when the contract expressly provides that he may or where the terms of the contract confer a benefit upon him.[78] This is partly a reversion to the 'benefit theory' where one could sue where a transaction was intended for his benefit. Tanzania should also fall in the same line by relaxing the doctrine of privity to contract through amending of the Law of Contract Act to recognize third party rights. This is especially where it is evident that the doctrine produces perverse and unjust results to third parties who have suffered the loss of the intended benefit and cannot sue, while the person who has suffered no loss can sue.[79]

The technical hurdles which must be overcome if one is to circumvent the rule in individual cases also leads to uncertainty, since it will often be possible for a defendant to raise arguments that a technical requirement has not been fulfilled.[80] Hence, such uncertainty is, in the contemporary era, commercially inconvenient. There is a need therefore, to provide certainty in the commercial arena through relaxing the privity doctrine of contract. The rule itself has been abrogated throughout much of the common law world.[81] The extent of the criticism and reform elsewhere is in itself a strong indication that the doctrine of privity of contract is flawed.

77 1999.
78 See Section 1(1).
79 Collins, (1986), p.112.

80 Pearson, G.D., 1981 Privity *of contract: Proposed Reform in New Zealand*, Otago Law Review, , p. 316.
81 Law Commission, 1991, p. 40.