



## COMPARATIVE ANALYSIS OF PRACTICE OF THE THIRD-PARTY DOCTRINE IN NIGERIA AND TWO OTHER JURISDICTIONS

By

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### Abstract

*The study examined the comparative analysis of the practice of the third-party doctrine, otherwise known as the privity of contract. The focus was in Nigeria, United Republic of Tanzania and the United Kingdom. The paper highlighted on the practice of privity of contract in England. The general principle was elucidated and some exceptions which includes; Covenant running with land, Contract relating to agency, Contract for hire of chattel and Trust concept were considered. Practice and applicability of this principle in the United Republic of Tanzania was also x-rayed, including some few exceptions to the generate rule, which inter alia includes; contract based on insurance, contract relating to law of agency and negotiable instrument. In the same vein, the practice and applicability of the third person rule or doctrine under the Nigeria contract law System was also evaluated. Some exceptions to the rule which includes; interference with contractual rights, covenant running with land and insurance contracts were appraised. Exceptions like, covenant running with land, contract relating to the law of agency and contract based on insurance reappeared in the various jurisdictions. The study also made some few comparisons of what the practice is and/or the similarities in England, United Republic of Tanzania and Nigeria respectively. The paper was summarized with a summary of findings, conclusion and offered some recommendations.*

### 1.0 Introduction

Privity of Contract is a doctrine that is fundamentally a segment of the common law. Privity has been the cornerstone of the English Contract Law for ages. The doctrine originated from the English House of Lords as part of the common law doctrine in the case of *Dunlop Pneumatic Tyre Co. Ltd. v Shelfridge & Co. Ltd.*<sup>1</sup> The doctrine of privity of contract encompasses two propositions, firstly, only a party to a contract can acquire rights under the contract and consequently sue to enforce any right under the said contract. Secondly, for a contract to be enforced by a person, consideration must have been given by him to the promisor or to some other person at the promisor's request.<sup>2</sup> Sagay,<sup>3</sup> emphasizes that under the doctrine,

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<sup>1</sup> (1915) A.C 847.

<sup>2</sup> E E, Aloba, Modern Nigerian Law of Contract (2<sup>nd</sup> edn, Princeton & Associates Publishing Co.Ltd. Lagos, 2012) 272.

<sup>3</sup> I E Sagay, Nigerian Law of Contract (2<sup>nd</sup> edn, Spectrum Law Publishing Ltd. Ibadan, 2000) 368.

a contract cannot confer enforceable rights or impose obligations arising under it on any persons, except parties to it.

Third party doctrine can also be said to be equitable and just in the sense that it does not allow a person who has not sown to reap where he did not sow. To this end, any person who is neither a party to a contract nor has furnished consideration for it, that is, made any financial or other contribution for it under this doctrine referred to as a third party will have no enforceable rights under the contract, since the law does not admit a right vested in a third party.

This article analyzes this common law doctrine, though of English origin, but also practiced in most common law jurisdictions like the United Republic of Tanzania and Nigeria. The rule of the principle became part of the Nigerian contract jurisprudence through the transplantability theory which allowed all the doctrines of the common law of England and statutes of general application that were in force on 1<sup>st</sup> January, 1900, to be in force in Nigeria.<sup>4</sup> It is observed that the transplantability or transposition is that principle wherein a foreign law or legal principle can be borrowed or transferred to another jurisdiction referred to as the recipient jurisdiction or country as the case may be.

No doubt, the practice of this doctrine has impacted on not only the British economy, but other recipient jurisdictions where the principle is applied. This paper interrogates the application of this doctrine in United Kingdom and Tanzania and compares them with the application in Nigeria. That is to say, the research intends to evaluate the similarity or otherwise of the practice and applicability of the doctrine in Nigeria, United Kingdom and United Republic of Tanzania respectively.

## **2.0 Privity of Contract in United Kingdom**

Generally, the doctrine of privity of contract stipulates that, it is only parties to a contract that have right to sue and be sued to enforce the rights and obligations arising from the contract. This means a third party to a contract cannot sustain any claim arising from the contract as the principle does not allow any party who is not privity. The principle was established in the United Kingdom in the case of *Tweddle v. Atkinson*<sup>5</sup>, in that case, party A made a promise to party B to pay a certain sum to B's son C on C's marriage to A's daughter. It was held by the courts that C could not enforce the promise made by A to B<sup>6</sup> because C being a third party to the contract was not a party.

The foregoing presupposes that no legal entitlement is conferred upon the third party to an agreement and a promisee cannot initiate any legal action unless the consideration from the promise moved from him. In other words, only parties to a contract have right to sue and be

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<sup>4</sup> Interpretation Act 1964, Cap. 123 LFN, 2004, s32.

<sup>5</sup> (1861) 1 B. & S. 393; 121 E. R. 762.

<sup>6</sup> *Ibid.*

sued to enforce the contracts rights and obligations, no stranger to a contract can successfully claim a right in the transaction.

The landmark decision on the doctrine was the case of *Dunlop Pneumatic Tyre Co. Ltd v. Selfridge & Co. Ltd*<sup>7</sup>. In this case, the company Dunlop agreed with its dealers, Dew & Co. not to sell the tyres it manufactured below its recommended retail price. It also asked that the dealers get the same undertaken from its retailers (in this particular case it was Selfridge), the House of Lords found that Dunlop could not claim any damages from Selfridge owing to the fact that it had no contractual relationship with Selfridge.

The House of Lords in the case of *Scruttons Ltd. v. Midland Silicones Ltd.*<sup>8</sup>, sought to affirm the doctrine of privity of contract by deciding that a person could not take the benefit of a limitation of liability clause in a contract that he was not a party to. In this case, a drum filled with chemicals and shipped from the US to the UK had a clause on the Bill of Lading which referenced the United States Carriage of Goods by Sea Act 1936 and limited the carrier to \$500 worth of damage. The carrier engaged Stevedores to assist with the unloading of the cargo and while unloading the truck, \$600 worth of damage was caused. The respondents then sued for the loss to which the Stevedores responded with a counter claim... The court sought to consider whether the clause in the contract could be relied on by the Stevedores, whether the Stevedores were a party to the contract between the buyer and seller.

The court held that the United States Carriage of Goods By Sea Act 1936 did not apply to Stevedores and that the Stevedores were not party to the contract either expressly or impliedly.<sup>9</sup>

Similarly, in *Beswick v. Beswick*,<sup>10</sup> an agreement between a deceased and the company which stipulates that the company was to employ the deceased as a consultant, and also that the company should pay him 5 pounds per week if he dies in the cause of carrying out the work of the company. The deceased died without a will and his wife as the administrator of his estate sued the company for specific performance with the company. The doctrine of privity of contract was applied and it was held that as administrator, the wife could not sue for specific performance as she has no cause of action. The combined effects of the judicial decision reiterated above points to the fact that for a person to successfully claim a right in contract transaction, that person must have furnished consideration in that contract as part of the contractual obligation.

## **2.1 Exception to the Doctrine of Privity of Contract in England**

There's a legal principle which states that in every general rule, there is an exception. The doctrine of privity of contract in the United Kingdom is not exempted from that legal norm.

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<sup>7</sup> (1915) A. C 847.

<sup>8</sup> (1961) UKHL 4, [1962] AC 466.

<sup>9</sup> (n 8).

<sup>10</sup> [1966] 3 All E.R. 1 CA.

The general principle provides that a contract cannot confer rights or impose obligation upon any person who is not a party to the contract. Therefore, only parties to contract should be able to sue to enforce their right or claim damages as such. The exceptions *inter alia* include; covenants running with the land, contract of agency, contracts for the hire of a chattel and trust concept.

### **2.1.1 Covenant Running with Land**

This exception was established in the case of *Tulk v. Moxhay*.<sup>11</sup> In this case, the Plaintiff sold Leicester square with the restriction that it be maintained in certain form as a “public pleasure ground”. The deed restriction was covenant for hires and assigns re-querying that the land be maintained as a square garden. The plaintiff continued to own homes and live around the square after its sale. In 1808, the person who originally purchased Leicester square from the plaintiff had notice of the covenant contained in the deed.<sup>12</sup> Forty years later, the property was sold to the defendant Moxhay. Moxhay, sought to build upon the land in the square. The plaintiff approached the court for an injunction against the erection of the building. The court granting the injunction, held per Lord Cottenham that since a covenant is a contract between the vendor and the vendee, it may be enforced against a subsequent purchaser who has notice of the contractual obligation of his vendor even though it does not run with the land.<sup>13</sup> The foregoing therefore, established the fact that a covenant restricting a property for a specific use may be enforced against a subsequent purchaser with the knowledge of the restriction.

Similarly, in *Milee v. Easter*,<sup>14</sup> a 1908 Conveyance contained a covenant made by the purchaser that they would not do anything which might cause a nuisance to the vendor’s land. The Conveyance showed that the vendor retained land in the vicinity, referring as it did to a “foreshore belonging to the vendors” but the deed did not go further in defining the land.<sup>15</sup> It was held by the Court of Appeal that due to the uncertainty as to the land intended to benefit, the plaintiff had failed to show that the benefit of the restrictive covenant made in the 1908 deed vested in them. It concluded that, although the court would readily infer the intention to benefit the other land of the vendor where the existence or situation of such a land are indicated in the Conveyance...<sup>16</sup>

### **2.1.2 Contract Relating to Agency**

Kenna<sup>17</sup>, opines that, the status and vicarious liability issues of an agent also create exceptions to the rule of privity. When an agent negotiates a contract between his principal and a third party, it is generally regarded as being between the principal and the third party. However,

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<sup>11</sup> (1848) 2 ch 774.

<sup>12</sup> (n 11).

<sup>13</sup> *Ibid.*

<sup>14</sup> (1903)2 ch 539.

<sup>15</sup> *Ibid.*

<sup>16</sup> (n 14).

<sup>17</sup> Doctrine of Privity of Contract & Exceptions to the Rule. [2017]Smetoolkit <<https://www.smetoolkit.ng>>accessed 20 December 2022.

there are situations where it is subject to question as to whether or not an agent acted on his own behalf or not. It may even reach new heights of complexity when an agent makes use of a sub-agent, spawning twin questions of whether or not the contract will now be between the principal and the sub-agent or the agent and sub-agent.<sup>18</sup>

It is trite that the principle of agency where the law allows one person to act on behalf of another is no doubt a very key exception to the rule. Under agency, an agent can take a legal action and recover damages for the loss incurred by his principal. In agency, the agent assents or gives consent on behalf his principal although (he is subject to control).

### **2.1.3 Contract for the Hire of Chattel**

According to Sagay,<sup>19</sup> the issue of the enforcement of third-party rights had arisen quite often in contracts for the hire of chattels, particularly charter parties. The problem has usually presented itself in the following manner;

A, the owner of a ship charters it to B for a period say three years. During the currency of charter, party A sells the ship to C ... C attempts to use the ship in a manner contrary to the charter party. Can B obtain an injunction restraining C from doing so?

Thus, in the case of *Lord Strathcona Steamship Co. Ltd. V. Dominion Coal Co. Ltd.*,<sup>20</sup> the owners of a steamship entered into a charter party with Dominion for 10 consecutive St Lawrence Seasons, with an option for continuing for a further period of at least five more seasons. Later, the ship was transferred to various successive owners who all had notice of the terms of the charter agreement and undertook to accept responsibilities. The appellant, Lord Strathcona, who were new owners of the vessel, refused to perform the charter party.... It was held that an injunction could be granted in such circumstances to compel one who obtains a conveyance, or grant sub-conditions, from violating the conditions of his purchase to the prejudice of the original contractors.<sup>21</sup>

### **2.1.4 Privity and Trust Concept**

It is important to evaluate how the concept of trusteeship serves as an exception to the general rule of privity of contract. In the case of *Gregory and Parker v. Williams*,<sup>22</sup> the defendant Williams was the landlord of Parker, one of the plaintiffs, and not only were they in arrears of rent due by Parker to Williams in respect of two farms, Parker was indebted to the defendant to the extent of 539 odd of moneys advanced. On Parker's representing to Williams that he was also indebted to Gregory for which he was in fear of arrest and was about to leave the kingdom,

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<sup>18</sup> (n 17).

<sup>19</sup> I E Sagay, *Nigerian Law of Contract* (2<sup>nd</sup> edn, Spectrum Law Publishing Ltd. Ibadan, 2000) 499.

<sup>20</sup> (1926) AC 108.

<sup>21</sup> *Ibid.*

<sup>22</sup> (1817) 3 mer 582.

Williams undertook that if Parker would give up to him the farms and execute an assignment of his properties, he would pay Gregory's debts in the first instance out of the sale proceeds and after paying off the debts due to himself refund the surplus, if any to Parker. On the basis of this understanding, Parker executed a bill of sale to Williams of his property.<sup>23</sup> On this suit brought by Gregory and Parker against Williams, the agreement was enforced against Williams. A question was raised as to whether Gregory could enforce the agreement to which he was not a party. Sir William Grant, M. R. in this judgment dealt with the point in the following manner.

Now, it may be of doubt whether they could have recovered at all upon this agreement; for the agreement is not made directly to Gregory, it is made to Parker only and the consideration is furnished by Parker, for, it is Parker alone that does the acts which constitutes the consideration for the agreement. Gregory himself furnished no part of the consideration and he is no party to the contract. However, Parker acts as this trustee and Gregory may derive an equitable right through the medium of Parkers agreement . . . .<sup>24</sup>

Charter party provides an important exception to the rule of doctrine of privity. Alobo,<sup>25</sup> reiterates that, the trust device as a way of getting out of the doctrine of privity, has fallen into disuse because of the strict requirements of constituting a trust and most particularly that there should be a specific intention on the part of the person declaring the trust that it should be trust.<sup>26</sup>

### **3.0 Privity of Contract in Tanzania**

Datus<sup>27</sup> reiterates that the position on the principle of the doctrine of privity of contract in England is materially the same in Tanzania, however the Law of Contract Act is silent on the principle of privity of contract. Section 2(1) (d) of the Law of Contract Act,<sup>28</sup> permits a third person to furnish consideration for the promise but does not allow him to sue on the contract on the ground that he furnished consideration.

The foregoing implies that a third party may furnish consideration in a contract for the promise under the Tanzanian Contract Law Act, but does not confer on him the right to sue or claim

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<sup>23</sup>(n 22).

<sup>24</sup> *Ibid.*

<sup>25</sup> E E Alobo, *Modern Nigerian Law of Contract* (2<sup>nd</sup> edn. Princeton & Associates Publishing Co. Ltd. Lagos 2012), 297.

<sup>26</sup> *Ibid.*

<sup>27</sup> D Datus. "The Doctrine of Privity to Contract in Tanzania" (2020) p6<<https://www.rsearchgate.net/publication/343267652>>\_accessed 13 January, 2023.

<sup>28</sup> LCA Cap. 345 of Tanzania, 2019 <[https://www. Tanzanialaws.com/principal-legislation/law-of-contract-act](https://www.Tanzanialaws.com/principal-legislation/law-of-contract-act)> accessed 7th December 2022.



benefit under the contract on the ground that he furnished consideration. The applicability of the doctrine in Tanzanian jurisdiction is evidenced in of judicial authorities.

In this case of *Burns & Blane Limited v. United Construction Company Limited*,<sup>29</sup> the Plaintiff sued for goods sold and delivered and services rendered. The Plaintiff had acted as a subcontractor to the defendant, the main contractor, on a construction project. The Defendant did not deny that it was liable under the contract. However, the defendant alleged that the Plaintiff's recovery should be reduced by the amount of expenses which the defendant had incurred in connecting certain defects and also by the amount of a settlement which the defendant had made with a third party. . .<sup>30</sup> It was held that there was no privity of contract between the Plaintiff and the third party with which the defendant made the settlement, nor did the defendant expend funds to connect those defects in respect of which the settlement was made. Therefore, the amount of settlement should not be deducted from the Plaintiffs.<sup>31</sup> The implication of the above decision points to the fact that a person cannot be liable to a transaction, where he is a stranger, *mutatis mutandis*, cannot also claim legal right in same transaction.

The principle of privity of contract was also tested in Tanzania in the case of *Juma Garage v. Co-Operative and Rural Development Bank*,<sup>32</sup> where the Respondent instructed to act for an insurance corporation, whether such instruction makes the respondent an agent. Agent acting for a principal and whether the agent may sue in his own name. The respondent owned a motor vehicle with Registration Number SU 770, which was insured with the National Insurance Corporation (NIC). The vehicle was involved in an accident, which made NIC liable for repairs and later on, when the appellant delayed to complete the work, NIC instructed the respondent to follow up the matter with the appellant. After completion the respondent sued the appellant for general and exemplary damage.... On appeal, the court held that, the fact that NIC instructed the respondent to follow up the matter with the appellant.... The respondent was not party to the contract with the appellant but merely an agent of NIC. It is further observed that the principle of privity of contract operates with some limitations in Tanzania, as the doctrine is normally not imposed in agreement or contracts that falls under the customary laws.<sup>33</sup>

Still on the established principle of privity of contract where the defendant, a lorry owner, took cassava from the Plaintiff for selling as a customer, on one of the occasions, the Plaintiff refused to deliver the goods demanding for pay of previous and empty cassava bag. The wife of defendant returned 24bags, and promised that everything will be taken care of on the arrival of her husband (the defendant). The Plaintiff received no money as promised and sued. The

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<sup>29</sup> (1967) H.C.D No. 156.

<sup>30</sup> *Ibid.*

<sup>31</sup> *Ibid.*

<sup>32</sup> (Civil Appeal No 58 of 1996).

<sup>33</sup> (n 31).

primary court held that since the transaction leading to the disputes was between Plaintiff and defendant's wife the proper party to sue is the defendant's wife and not the defendant. On appeal, Seaton J, observed that the case involved an issue of privity of contract.<sup>34</sup>

### **3.1. Exceptions to the Doctrine of Privity of Contract in Tanzania**

The position of the law on privity of contract is not new in any common law jurisdiction, including Tanzania. The focus here is to highlight on the exceptions to the age long doctrine of privity of contract. The exceptions to the general rule *inter alia* includes; contract based on insurance, negotiable instrument and contract relating to the law of agency.

#### **3.1.1 Contract Based on Insurance**

This type of contract is normally found under the Road Traffic Act,<sup>35</sup> whereby the third party acquires right to sue. Therefore, the owners of motor vehicle must have compulsory third party insurance in the sense that a person who is not known and foreseeable to the contract may acquire rights and that is the third party. A third party may sue the parties to the insurance contract, whether the owner of motor vehicle or the insurance company or both of them.<sup>36</sup>

#### **3.1.2 Negotiable Instrument**

The Bill of Exchange Act<sup>37</sup> under section 38(a) empowers a holder of a bill to sue on it in his own name. A holder is defined under section 2 of the Bill of Exchange Act as; that "holder" means the payee or endorsee of a bill or note that is in possession of it, or the bearer thereof. A holder may sue any person whose signature appears on bill not necessarily the immediate party. Therefore, by closely observing the above provision it is clear that such provision provides an exception to the general rule of privity of contract.<sup>38</sup>

#### **3.1.3 Contract Relating to the Law of Agency**

An agent can take a legal action and recover damages for the loss endured by his principal. The doctrine of agency gives such rights in a business setting. Agency is a fiduciary relationship ... the principal controls, and the agent manifests assent or otherwise consents so to act.<sup>39</sup> Part Y of the Law of Contract Act<sup>40</sup> deals with contract relating to an agency. There are provisions dealing with the effect of agency on contracts with third persons. Similarly, section 178 of the Law of Contract Act expressly provides that; contract entered into through an agent, and obligations arising from acts done by an agent, maybe enforced in the same manner, and will

<sup>34</sup> *Ephraim Obongo v. Naftael Okeyo* (1968) H.C.D. n. 288.

<sup>35</sup> RTA Cap.168 of Tanzania, 2014 <https://www.tra.go.tz/tax%20laws/ROAD%20TRAFFIC%20ACT.pdf> accessed 7<sup>th</sup> December 2022.

<sup>36</sup> Johnson V, 'The Doctrine of Privity of Contract in Tanzania' [2020] Tanzania web <<https://www.tanzanianweb.co.tz>> accessed December 2022.

<sup>37</sup> BEA Cap.61,45 and 46 vict, 1882<<https://www.legislation.gov.uk/ukpga>> accessed 10<sup>th</sup> December 2022.

<sup>38</sup> (n 36).

<sup>39</sup>(n 36).

<sup>40</sup> (n 28).



have the same legal consequences as if the contracts had been entered into and the acts done by the principal in person.<sup>41</sup>

### 3.1.4 Contract Relating to Trust

Where trust has been created and proved, then the beneficiary third party may sue on the contract in his own name. It must be proved to the satisfaction of the court that trust was created. Once trust has been proved, then the third party can sue the promissory to enforce the contract and becomes, as general entitled to the benefits under the contract. A third party can enforce a contract, if it can be established that the promise intended to create a trust.<sup>42</sup> In Tanzania Union of Industrial and Commercial Workers (TUCO) at *Mbeya Cement Company Ltd v. Mbeya Cement Company Ltd and National Insurance Corporation*,<sup>43</sup> the case action was based on trust deed and the issue was whether plaintiff can sue on trust deed to which he is not party and whether the trust rules is applicable ... it was held that though the plaintiff union is capable of suing and being sued. It can only do so if the alleged wrongful act were committed against it. It is for each individual employee to sue the defendants for their rights under the trust deed and group endorsement scheme.<sup>44</sup>

### 4.0 Privity of Contract in Nigeria

The doctrine and principle of privity of contract is not alien to the Nigeria contract jurisprudence, as section 32 of Interpretation Act provides that the common law of England, the equity and statutes of general application that were in force on 1<sup>st</sup> January, 1900, will be enforced in Nigeria.<sup>45</sup> A contract cannot confer enforcement rights or impose obligations arising under it on any person, except parties to it. Thus, only parties to a contract can sue on it. No doubt, only those who have furnished consideration towards the formation of the contract can bring an action on it.<sup>46</sup> The doctrine of privity of contract first came up for adjudication in the Nigerian courts in the seminal case of *Chuba Ikpeazu v African Continental Bank*<sup>47</sup>

In this case, African Continental Bank entered into an agreement with one of its debtors, William Emordi. under the agreement with Mr Emordi, the bank's solicitor, Chuba Ikpeazu was supposed to take over the control and management of Mr. Emordi's business and pay all the proceeds into the Bank's account until the debt owed to the bank had been paid off. Mr Ikpeazu took control of the business but subsequently entered into another agreement with Mr Emordi wherein he gave Mr

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<sup>41</sup> *Ibid.*

<sup>42</sup> (n 36).

<sup>43</sup> (Civil Case No. 135 of 2000).

<sup>44</sup> (n 43).

<sup>45</sup> Interpretation Act 196, s32.

<sup>46</sup> I E Sagay, Nigeria Law of Contract, (Spectrum Book Limited, Ibadan 2002) 489.

<sup>47</sup> (1965) NWLR PG 347.

Ikpeazu his business without informing the bank. Under this new agreement Mr Ikpeazu was the guarantor of the debt. The terms of the agreement showed that it was between only Mr Ikpeazu and Mr Emordi. The bank then sued Mr Ikpeazu and obtained a judgement against him. On appeal, the Appellate Court held with reference to the Tweddle case: “Generally a contract cannot be enforced by a person who is not a party, even if the contract is made for his benefit and purports to give him right to sue upon it.”<sup>48</sup>

Osunfogun,<sup>49</sup> reiterates that, one of the most pressing problems that parties in commercial transactions have faced for more than a century under the English legal system is non-recognition of third party rights under the doctrine of privity of contract. The principle postulates that only parties to a contract and not strangers can enforce rights and contractual obligations.

In the Nigeria case of *Rebold Industrial Ltd. v. Magreda & Ors.*<sup>50</sup>, John Afolabi Fabiyi JSC, in his lead judgment pronounced as follows:

Privity of contract is defined as that connection or relationship which exists between two or more contracting parties (Black’s Law Dictionary, Sixth Edition Page 1199). At common law, it is an elementary principle of law of contract that as a general rule, a contract cannot confer right or impose obligations on strangers to it. This age-old principle is known as privity of contract. There is no spec of doubt that it has evolved over the years. It appears that it has come to stay.... Per Ademola, CJN, maintained that generally, a contract cannot be enforced by a person who is not a party to same even if made for his benefit. This is in tune with the principle that evolved over the years.<sup>51</sup>

In *Owodunni v. Registered Trustee CCC worldwide*<sup>52</sup>, Ogundare, JSC, had the same frame of mind in respect of the principle of privity of contract. Similarly, in *Makwe v. Nwukor*<sup>53</sup>, the court stated as follows: 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 as a party to the consideration does not entitle him to sue to be sued on the

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<sup>48</sup> (1965) NWLR PG 347.

<sup>49</sup> J A Osuntogun, ‘Privity of Contract and Third Party Right in the Twenty-First Century’ [2018] Vol.9(4) *The Braritas Review of Business and Property Law*.

<sup>50</sup> (2013) LPELR – 24612 (SC).

<sup>51</sup> (2013) LPELR – 24612 (SC).

<sup>52</sup> (2000)10 NWLR (pt. 675) 315.

<sup>53</sup> (2001) FWLR (pt. 63) 1 at 14.

contract. This same opinion was held by the court in *Union Beverages Ltd. v. Pepsi Cola International Ltd. & Ors*<sup>54</sup>. In this case, a plaintiff who has no privity of contract with the defendant will fail to establish a cause of action for breach of contract as he will simply not have a *locus standi* to sue the defendant on the contract.<sup>55</sup>

#### 4.1 Exceptions to the Doctrine of Privity of Contract in Nigeria

In every general rule in law, there is always an exception. The doctrine of privity of contract is not exempted from that legal norm. The general principle is that only parties to a contract shall have the right to claim under the transaction or contractual relationship in case there arise any form of breach. The exceptions to the general rule *inter alia* include, covenants running with the land interference with contractual rights, insurance contracts and agency.

##### 4.1.1 Covenants Running with the Land

According to Aloba,<sup>56</sup> where the covenant runs with the land sold, it is not necessary for the vendor to retain part of the land. A covenant is said to run with the land when either the liability to perform it, or the right to take advantage of it, passed to the assignee of the land. Thus, it is transmitted automatically and perpetually from one assignee to another. Such a covenant must directly touch and concern the land devised and should not be collateral or personal. In Aloa's case, the doctrine of privity does not apply to contract relating to the sale of family land. In customary law, a person can be sued by family members who are not parties to the sale. The plaintiffs in this case successfully maintained an action to set aside the alienation of Agbejobi family land to the 1<sup>st</sup> and 2<sup>nd</sup> defendants, even though they were not parties to the transaction. According to the court, it is a well settled principle of native law and custom that family property belongs to the family.<sup>57</sup>

The implication of the foregoing is that no individual member of the family can successfully dispose of family land as all members of the family are entitled to enjoy the property. This being the case whether members are not parties to the transaction, they can ask for nullity and the court will grant them, irrespective of the fact that they are not privy to the contract.

Similarly, in *Folarim v Ourojaiye*<sup>58</sup>. The court acknowledged the right of family members who are not parties to a deed of alienation to sue under the contract. In essence, all contract relating to the sale of family land in customary law is seen as an exception to the doctrine of privity of contract. It was based on this fact that; Karibi-whyte, JSC., in *Adejumo v. Ayantejbe*<sup>59</sup>, stated thus: communal or family land belongs to all members of the society or family, hence a member

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<sup>54</sup> (1994) 3 NWLR (pt. 330) 1 at 16.

<sup>55</sup> *Ibid.*

<sup>56</sup> E E Aloba, Law of contract (2<sup>nd</sup> edn. Princeton & Associates Publishing Co. Ltd. Lagos 2012) 287.

<sup>57</sup> *Aloa & Anor v. Ajani & Ors* (1989) 4 NWLR (pt. 113) 1.

<sup>58</sup> 1988) NWLR (pt. 70) 351

<sup>59</sup> (1989) 3 NWLR (pt. 110) 417 at 444.

of the family who is co-owner is therefore not a stranger to any purported transaction to have been made in relation thereto.

#### **4.1.2 Interference with Contractual Rights**

According to Alobo,<sup>60</sup> tortious interference with contract rights can occur where the tortfeasor convinces a party to breach the contract against the plaintiff. The classic example of this tort occurs when one party induces another party to breach a contract with a third party. In the case of *Lumley v. Gye*,<sup>61</sup> the plaintiff contracted with one Johanna Wagner in which she later was employed as an opera singer. The defendant, knowing of this contract willfully induced her to refuse to perform it. The defendant was held liable for wrongful interference with contractual right. The effect of the foregoing is that a person can actually successfully take up an action against a third party in a contract who commits tort to cause breach of that contract.

#### **4.1.3 Insurance Contracts**

The doctrine of privity of contract is applicable in insurance generally. Thus, only a party to insurance contract can bring an action or a claim against an insurance company. A person who is a stranger to an insurance contract cannot sue the insurance company no matter the interest .... The law has however intervened to create exceptions to this general rule of insurance contract.<sup>62</sup>

In the unreported case of *Akene v. British American Insurance Co. (Nig.) Ltd*,<sup>63</sup> the court was compelled to resort to the trust concept in equity since the Indian Trust Act 1882. which creates exception to privity was not applicable. The plaintiff was named as beneficiary in a life insurance policy. The assured (the plaintiff father) died as a result of an accident and the plaintiff brought claim for 1,900 pounds, which was the agreed indemnity to be paid to the beneficiary in the event of the assured's death. The plaintiff was angered by the fact that the defendant company offered to pay him only 500 pounds. The defendant reasoning was that there was no privity of contract between them and the plaintiff, so, she later cannot enforce the insurance contract. The court used the trust concept to enforce the right of the plaintiff beneficiary to sue under the contract, holding that the deceased was in the position of trustee for the plaintiff.<sup>64</sup>

### **5.0 Comparison between Practice of the Doctrine of Privity of Contract in Nigeria and Other Jurisdictions**

No doubt, the doctrine of privity of contract has been transplanted into Nigeria as part of its legal principle of contract. It is observed that the rule which governs it are derivable from the

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<sup>60</sup> E E Alobo, *Modern Nigerian Law of Contract*, (2<sup>nd</sup> edn. Princeton & Associates Publishing Co. Ltd. Lagos, 2012) 294.

<sup>61</sup> (1853) 2 E & B 216.

<sup>62</sup> (n 59) 286.

<sup>63</sup> [1972], High Court of Midwestern State, Ugheli Judicial Division, Suit No. UHC/37/71. (Sagay) p504.

<sup>64</sup> (n 62).

proposition of the realist school of legal theories which believes that law is nothing but the prophecy of the court. In essence, the practice of privity of contract in Nigeria is basically rooted on the judicial precedent which is the judge made law. In the main time, there exist, no national or municipal legislation that regulates the principle of privity. It is rather dependent on the received English common and civil law respectively. Its exceptions in Nigeria are also based on the principles developed by the courts in England which expounded and interpreted their own national legislations.

Similarly, in the United Republic of Tanzania, Datus,<sup>65</sup> maintains that the practice of the doctrine of privity of contract is materially the same with what is obtainable in England. However, the Republic of Tanzania has promulgated an Act to regulate matters relating to contract. In Tanzania the Law of Contract Act of 2019, in section 10, provides that “all agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.” Therefore, the privity doctrine in Tanzania is not much different from the practice in Nigeria, except that, section 3 of the Tanzania Contract Act, allows a third party to the contracts to furnish consideration for the promise, but does not allow him to sue on the contract, on the ground that the furnished consideration.<sup>66</sup>

Although, the foundation the principle of privity of contract is based on the common law of England and the UK’s judicial precedent. It has developed its contract laws and principles by promulgating an Act to regulate the contract sector. On the exceptions, the Road Traffic Act 1996,<sup>67</sup> Bill of Exchange Act 2015,<sup>68</sup> and the Contract Law of Act 2019,<sup>69</sup> regulates the various exceptions to the doctrine of privity of contract.

Similarly, in England the doctrine of privity was established in the case of *Tweddle v Atkinson*,<sup>70</sup> where the court first held that a third party could not enforce a promise he is not a party to. The effect of this decision of the court in United Kingdom gave birth to this doctrine which states that only parties to a contract have right to sue and be sued to enforce the rights and obligations in a contract. The implication is that no stranger can successfully claim right in the transaction he is not a party. In the same vain, the landmark decision of the case of *Dunlop Pneumatic Tyre Co. Ltd v. Selfridge & Co. Ltd*<sup>71</sup> was another foundation upon which the doctrine of privity of contract strove in England. In this case, the House of Lords found that Dunlop could not claim

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<sup>65</sup> (n 27).

<sup>66</sup> CAT 2019, s3.

<sup>67</sup>(n 35).

<sup>68</sup> (n 27).

<sup>69</sup> (n 28).

<sup>70</sup> (1861) 123 ER 762.

<sup>71</sup> (1915) A.C 847.

any damages from Selfridge owing to the fact that it had no contractual relationship with Selfridge.

In the United Kingdom there are some exceptions to the general rule under the doctrine of privity of contract which *inter alia* includes; trust concept, hire of chattel, agency contract and that of covenant mining with land. It is also observed that there exist many legislations regulating matters relating to contract which has also created for exceptions to the general principle of privity of contract. Amongst others are Contracts Act 1999, English Contract Act 1990, Sale and Supply of Goods Act of UK 1994, Contract and Commercial Law Act, Trustee Act, 2000 (c29) and the Land and Conveyancing Law Reform Act of 2009 respectively.

## **6.0 Summary of Findings**

The third-party contract is not entirely new to the Nigerian jurisprudence it is part of the received English laws. Some findings have been identified in the course of the study; they include;

- a. Existence of a national legislation on general law of contract. In the United Kingdom, there is the English Contract of 1950, English Contract 1999 and the English Contract 2010. There also exist the Sale and Supply of Goods Act of UK 1994, Unfair Contract Term Act 1997 and the Sale of Goods Act 1979.
- b. Similarly, in the Republic of Tanzania, here exist the Law of Contract Act of Tanzania 2019. This Act is the principal legislation regulating all matters relating to contract in Tanzania.
- c. The United Kingdom also has laws that provides or the exceptions to the third-party doctrine, these includes laws relating to agency, insurance trustee and land conveyancing Acts.

## **7.0 Conclusion**

The principles and the applicability of the subject of study the third-party doctrine, otherwise refrained to as privity of contract cannot be over emphasized. This study examined the general principle of the privity of contract and some of its various exceptions in the three jurisdictions under focus. It established the fact that the principle brought sanity into every contractual relationship that is ensuring that no one person who is not a party to the transaction benefits from it. By the principle of this doctrine all such persons who are not parties to a transaction but wants to benefit in the rights of the bona fide parties are meddlesome interlopers.

It is further observed that in England there exists many national instruments which regulates the applicability of this principle of privity of contract. The same thing manifested under the United Republic of Tanzania, where the Law of Contract Act in Section (2) permits a third party to finish consideration for promise, but does not allow him to sue on the contract on the ground that the furnished consideration. Aside the Law of Contract Act, there is the Road



Traffic Act of Tanzania, dealing with the exception on insurance and the Bill of Exchange Act respectively.

From the foregoing, it is clear that the general principle of privity still remains intact and uncompressing, except for those exceptions recognized by the Law. That being the case, any person who is not a party to a contract transaction or who did not furnish consideration do not and cannot enjoy the legal right due or claim successfully under the contract.

### **8.0 Recommendations**

The paper offers some recommendations arising from the summary of findings and seeks that law makers, policy makers, government authorities and educators should introduce and inculcate into the system for improvements, these recommendations include;

- a) Law makers in Nigeria should enact a law of general contract which would serve as a principal Act to regulate all matters on general contract. This law when enacted will assist in giving statutory definitions and explanation on contractual terms and obligations.
- b) The Nigerian state through its legislative structure, should establish such legal frameworks, nationally and municipally to govern and/or regulate the practice of the principle of the doctrine of privity of contract and its exceptions. By so doing, the laws will be developed in time with the view of the positivist school of legal theory. This school of legal theories opine that law is the command of the sovereign.