



REPUBLIC OF KENYA



**Menya Services Sacco Limited v Muthuri (Civil Appeal E085 of 2021)  
[2023] KEHC 412 (KLR) (30 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 412 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CIVIL APPEAL E085 OF 2021  
EM MURIITHI, J  
JANUARY 30, 2023**

**BETWEEN**

**MENYA SERVICES SACCO LIMITED ..... APPELLANT**

**AND**

**SOLOMON MUTHURI ..... RESPONDENT**

*(An Appeal from the judgment of Hon. B. Kimemia Chairperson, Hon. J. Mwatsama Deputy Chairperson, Mr. P. Gichuki member, in Nairobi Co-operative Tribunal Case No. 397 of 2016 delivered on 3/6/2021)*

**JUDGMENT**

1. The respondent herein, (the claimant in the tribunal), sued the appellant herein, (the respondent in the tribunal), *vide* a plaint dated July 14, 2016 seeking refund of a total sum of Ksh 797,595/=, damages for loss of income and profit from the Matatu business, cost plus interest and any other relief the tribunal deemed fit to grant.
2. The crux of the claim was that the respondent, the owner of motor vehicle registration Nos KAS 184 G and KBB 060L toyota matatu plying Meru-Maua route, was a member of the appellant. During the subsistence of the said membership, the respondent made comprehensive savings with the appellant and participated in various development projects in acquisition of various properties. He also held various shares with the appellant which shares have been earning dividends but the appellant has been withholding the same up to date together with his savings and money contributed in purchase of various property after his expulsion from the society.
3. He avers that the appellant maliciously and being actuated by ill will ejected him from the membership of the society and even barred his motor vehicles from picking passengers both at Meru and Maua stage terminus occasioning him loss and damage. He avers that he was barred from engaging in the matatu



business by the appellant, despite being a member of the society since 2008 and having complied with its by laws, rules and regulations governing the operations of the said sacco.

4. As a result of the matters aforesaid, he lost income and daily profit which he claims from the appellant at the rate of Ksh 150,000/- per month until payment in full from July 2013 up to date.
5. The appellant denied the claim by its statement of defence dated December 20, 2016.
6. After the conclusion of the trial, the honorable tribunal found that the respondent was entitled to a refund of Ksh 500,000 together with costs and interest at court rates.

### **The Appeal**

7. On appeal, the appellant filed its memorandum of appeal on July 2, 2021 listing 8 grounds as follows:
  1. The honourable tribunal erred in law and fact in disregarding the by-laws of the appellant which govern the appellant.
  2. The honourable tribunal erred in law and fact by holding that the respondent was entitled to his savings without considering the fact that the respondent had loans with the appellant and also the respondent had guaranteed other members loans who had since defaulted. The loans were yet to be paid.
  3. The honourable tribunal erred in law and fact in holding that the respondent owed the appellant Kshs 100,000/- in terms of loan when the appellant had produced enough evidence showing that the respondent owed the appellant outstanding loans of Kshs 231,991/- which had by then escalated (due to interest) to Kshs 289,356.01 in normal and Kshs 649,210.38 in emergency loans.
  4. The honourable tribunal erred in law and fact in disregarding the weighty evidence raised by the appellant both in their pleadings, their evidence including documentary evidence and in their submissions.
  5. The honourable tribunal erred in law and fact in holding that the respondent was entitled to a refund of Kshs 500,000/- without any basis on how the figure of Kshs 500,000/- was arrived at and which was against the evidence on record.
  6. The honourable tribunal erred in law and fact in failing to properly analyse the evidence on record and therefore came to the wrong finding and judgment.
  7. The entire finding and judgment of the honourable tribunal is contradictory, ambiguous and has not answered all the issues raised by the parties. For instance it is silent on the issue on the persons who the respondent had guaranteed loans and which loans are still unpaid.
  8. The entire finding and judgment of the honourable tribunal is bad and is against the law and against the evidence on record.

### **Duty Of The Court**

8. This being a first appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. In doing so, the court must bear in mind that it did not have the advantage of seeing the witnesses testify. (See *Selle v Associated Motor Boat Co & others* [1968] EA 123).



## The Evidence

9. PW1 Solomon Muthuri, the respondent herein and a business man in the matatu industry adopted his witness statement dated July 14, 2016 as his evidence in chief together with the list of documents filed therewith. He testified that:

“I used to operate as a member of the respondent. I had two motor vehicles KAS 184 G and KBB 060 L. I was expelled from the sacco. I was not given any reason for expulsion. I was expelled in July, 2012. I want the tribunal to compel the respondent to refund me my shares amounting Kshs 650,000/=. I want to be paid dividends amounting to Kshs 98,000/=. This for 2013. I also want to be refunded Kshs 41,000/= I paid towards purchase of a plot. I also want to be paid loss of earnings for a period of one (1) year 2013. I had taken loan with the Respondent but I cleared the same. The loan statement confirms this. Its documents No 11 in exhibit 1. The loan balance as per the statement is Ksh 2,473/=. This was at November, 31, 2012. The statement show investment savings to be Kshs 41,000/=. I have gone to claim for a refund of the shares to no avail. The statement of account dated November 31, 2012 I had 2473/15 in my account. I issued a resignation letter dated November 19, 2013. They were to refund my money within 90 days. We were to buy a motor vehicle and I contributed 10 shares that is Kshs 10,000/= and they did not give me anything after the sale of the motor vehicle. I pray for my saving shares, loss of earning based on my daily statement.”

10. On cross examination, he stated that:

“I was a member, I left in 2013. I know the sacco has by-laws, if you have a loan or have guaranteed others, you had to furnish the liability. The last loan was November 27, 2012 Kshs 112,000/= I paid in full. statement of account for November 30, 2012. I wrote a letter and told them to deduct from my shares and to refund the rest. I had not guaranteed people. List of respondent documents. I am a guarantor. I know that he paid. Peter Mutwiri I do not know him but he paid. Letter from advocate of claimant in the list of documents saying I have left. Letter dated June 18, 2013 (respondent list of documents dated October 4, 2017. paragraph 2). I had no issues with the sacco. There is a plot I contributed for purchase of petrol station -schedule of payments - I have not checked to see the arrears. I have not seen the paid dividends.”

11. On re-examination, he said:

“By - laws – rule 5. No member will be allowed to guarantee more than 3 members. Gichuru Igweta – statement of account not dated loan rejected. Mercy Naitore statement of account for loan undated rejected. Letter of G G Mugambi for withdrawal dated July 3, 2013. On July 1, 2013 the services of motor vehicle has been suspended till the owner clears the dues to the office. Emergency loan maximum Kshs 80,000/=”

12. DW1 Abraham Kareithi, the manager of the appellant testified that:

“I know the claimant our member number 24 to date. According to the documents filed, he has our loan balances and pending guarantor’s loans. Loan balance Kshs 243,482/= before accrued interest. Emergency Kshs 158,344/= several loan balances. Normal Kshs 73,647/25. After accrued interest from November 2013 – Kshs 951,765/75 total loan todate inclusive accrued interest. Since 2013, there was interest Kshs 65,393/90, 2015 -7198/20. 2016 –



180,997/20 the dividends were used to offset part of the loan. I have filed statement of account. 31/11.2012 balance 2473 loan balance – additional loan was taken on November 27, 2012 that is Kshs 100,000/= plus interest Kshs 112,000/=. He had not paid it in full and its captured in that statement of account loan disbursed on November 27, 2012. The statement of account was at his request before taking the loan. He had guaranteed 5 people, 2 people had paid Benson Gitonga, Gichuru, Mercy and Peter total Kshs 11024553/95 there are loan forms. Timothy Nduba has paid fully. He could not get a refund. Gichuru Igweta a loan may be rejected then approved after fulfilment of the conditions. Loan form with no date in the applicant’s part but on the appraisal there is a date. There are 3 pending, the others had guaranteed. Maximum Kshs 80,000/= emergency loans there were several loans by the claimant. The policy is not to borrow more than Kshs 80,000/=. List of documents dated October 4, 2017 1-12 bundle 1 produced further list of documents dated January 7, 2021 bundle 2 produced. Internal memo KAS 184 G members have several motor vehicle and ownership has to be proved and that was the essence. Motor vehicle KBB was also operating. The claimant is still a member who pioneered the sacco and we have no problem with him. On the plot instalment, its by members so the investment is not refundable. We are still servicing the loan and the shares can only be transferred. By – laws page 7 – number 14 notice subject to no liability on other members guarantee. Letter by claimant advocate dated June 18, 2013. We have not suspended claimant, he did not prove ownership of KAS. He took KBB to another sacco and he is still a member.”

13. On cross examination, he stated that:

“He had guaranteed 5 people. Loan Gichuru Igweta. Section C, G – the signature of the chairman is for the document. After fulfilment of the condition, the applicant does not need to fill another form, he added guarantors. Mercy’s form “Solomon over guaranteed” reason for rejection of loan. How does the court tell who he guaranteed among the 5? No answer. Statement of account November 30, 2013 generated by the data clerk. Last loan 2012 – Kshs 100,000/= prayed for Kshs 600,000/= approved Kshs 100,000/=. Letter dated November 19, 2013 – 90 days is taken to check the account on liabilities and amount owed.”

14. On re-examination, he stated that:

“We shall process the refund according to the procedures letter of November 19, 2013. He did not qualify for a refund after the procedures. The application form are properly executed with cheque numbers. The one of Kshs 100,000/= has cheque number part C-E done by appraiser, so I signed part E. Kshs 100,000/= loan Kshs 600,000/= applied Kshs. 450,000/= approved but the amount issued by Management Committee was Kshs 100,000/= cheque 001273 disbursed on November 27, 2012. There is no discrepancy on the form. Mercy’s form “overguaranteed” the loanee is told to add guarantors and the original remain as a guarantor.”

## Submissions

15. The appellant urges that it was clear from the by-laws that the respondent was not eligible to either withdraw his membership from the appellant or a refund of his shares/contribution before he had settled all his liabilities. It faults the tribunal for holding that the respondent was entitled to a refund of his shares when he had outstanding liabilities in form of guarantees to other members. It faults the tribunal for holding that the respondent owed it Kshs 100,000 in terms of loans, without giving any explanation how it had arrived at that conclusion, and utterly disregarded the evidence it had tendered,



and cites *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others* (2014) eKLR. It faults the tribunal for failing to appreciate the dispute before it thus ultimately arriving at an erroneous decision, and pray for the appeal to be allowed with costs. In its view, the tribunal erred in not stating what it had considered before arriving at the sum of Kshs 500,000. It faults the tribunal for failing to determine the loan amount in default by the members that the respondent had guaranteed. It urges that the respondent was not entitled to any refund because after deducting his loan of Ksh 874,972.02 from his total shares contributed of Kshs 631,520, a balance of Ksh 243,452.02 was still outstanding. It accuses the tribunal of failing to determine all issues that had been raised by the parties before pronouncing itself on the matter.

16. The respondent refutes the allegation that he had acted as a guarantor for 5 members who later defaulted in repayment of their loan, and in any case, the appellant would not have allowed him to be a guarantor for the alleged 5 members. He prays for the dismissal of the appeal with costs and urges that parties are bound by their pleadings as was established by the Malawi Court of Appeal in *Malawi Railways Ltd v Nyasulu* (1998) MWSC 3.

### **Analysis And Determination**

17. From the grounds of appeal as framed, the issues for determination are whether the respondent was entitled to a refund of his savings; and whether the appellant's pleadings, evidence and submissions were considered.

### **Refund Of Savings**

18. Rule 14 of the by-laws provides for membership withdrawal as follows: "a member may at any time withdraw from the society by giving written notice of 60 days, subject to the member not having pledged his shares as a guarantee for other member's loans." The respondent wrote a resignation letter dated November 19, 2013 expressing his intention to withdraw from the sacco. The respondent applied for an emergency loan of Ksh 35,000 on October 19, 2011. He also applied for another emergency loan of Ksh 50,000 on April 4, 2011. On January 17, 2011, he applied for another emergency loan of Ksh 50,000. On May 7, 2012, he applied for a loan of Ksh 600,000 and on October 19, 2009, he applied for another loan of Ksh 200,000. On October 23, 2010, he applied for a loan of Ksh 400,000 and on January 18, 2010, he applied for an emergency loan of Ksh 30,000. It is not clear how the respondent had applied for emergency loans totaling to Ksh 165,000 yet the limit for an emergency loan was capped at Ksh 80,000.
19. The respondent acknowledged that although he had taken a loan with the appellant, he had since cleared it in full. He also admitted that he had acted as a guarantor for some members, who had repaid their loans fully. He stated that he wanted a refund of his shares amounting to Ksh 650,000, dividends of Ksh 98,000, refund of Ksh 41,000 he had paid towards the purchase of a plot and refund of Ksh 10,000 he had contributed towards the purchase of a motor vehicle. When he was re-examined, he stated that:

"By - laws – rule 5. No member will be allowed to guarantee more than 3 members. Gichuru Igweta – statement of account not dated loan rejected. Mercy Naitore statement of account for loan undated rejected. Emergency loan maximum Kshs 80,000/=."

20. DW1 testified that:

"2016 – 180,997/20 the dividends were used to offset part of the loan...balance 2473 loan balance – additional loan was taken on November 27, 2012 that is Kshs 100,000/= plus



interest Kshs 112,000/=. He had not paid it in full and its captured in that statement of account loan disbursed on November 27, 2012...He had guaranteed 5 people, 2 people had paid Benson Gitonga, Gichuru, Mercy and Peter total Kshs 11024553/95 there are loan forms. Timothy Nduba has paid fully. He could not get a refund. Gichuru Igweta a loan may be rejected then approved after fulfilment of the conditions. Loan form with no date in the applicant's part but on the appraisal there is a date. There are 3 pending, the others had guaranteed. Maximum Kshs 80,000/= emergency loans there were several loans by the claimant. The policy is not to borrow more than Kshs 80,000/=...On the plot instalment, its by members so the investment is not refundable." On cross examination, he stated that, "He had guaranteed 5 people. loan Gichuru Igweta...Mercy's form "Solomon over guaranteed" reason for rejection of loan...Last loan 2012 – Kshs 100,000/= prayed for Kshs 600,000/= approved Kshs 100,000/=."

21. When he was asked by the court who among the 5 members the respondent had guaranteed, the witness did not respond.

### **Consideration Of The Appellant's Pleadings, Evidence And Submissions**

22. The honourable tribunal dully considered the appellant's pleadings, evidence and submissions when it stated that:

"The claimant's dividends were used to offset part of the loan as per the respondent's evidence. He stated claimant had guaranteed 5 people and there were 3 pending loans from those he had guaranteed. On the plot entitlement - RW1 stated that many members contributed and respondent is still servicing the loan and shares can only be transferred but not refunded. The respondent filed their submissions dated February 22, 2021 and filed on March 2, 2021 which have been taken into consideration."

### **Verdict**

23. This court finds that the respondent proved that he was entitled to a refund of his shares after his resignation from the appellant. It came out clearly from the appellant's testimony that the respondent's dividends were used to offset part of the respondent's loan.
24. There is no dispute that the loan forms for some of the members allegedly guaranteed by the respondent had been rejected by the appellant.
25. Whereas it is true that the respondent acted as a guarantor for some members, there is no evidence that the said members defaulted in the repayment of the said loans.
26. This court finds that the honourable tribunal did not misapply the law when it found that the respondent was entitled to a refund of his shares.

### **Orders**

27. Accordingly, for the reasons set out above, this court finds the appellant's appeal is without merit and it is dismissed. There shall be an order for costs to be paid to the respondent by the applicant.

Order accordingly.

**DATED AND DELIVERED ON THIS 30<sup>TH</sup> DAY OF JANUARY, 2023.**

**EDWARD M. MURIITHI**



## **JUDGE**

### **Appearances**

Ms. Gachohi, Advocate for the Appellant.

Ms. Kiyuki for Mr. kaaria, Advocate for the Respondents.

