



REPUBLIC OF KENYA



KENYA LAW
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**Mutungi v Muia (Civil Appeal 134 of 2019)
[2023] KEHC 2634 (KLR) (28 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2634 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL 134 OF 2019**

MW MUIGAI, J

MARCH 28, 2023

BETWEEN

TABITHA LOKO MUTUNGI APPELLANT

AND

**KOLA KING'ANG'ANI WOMEN GROUP (SUING THROUGH THE
CHAIRLADY) ESTHER MBEKE MUIA RESPONDENT**

*(Being an Appeal from the judgment and orders of the Senior
Principal Magistrate C.A. Ocharo delivered on 1st October 2019 in
the Chief Magistrate's Court at Machakos Civil Suit No 795 of 2014)*

JUDGMENT

Plaint

1. Vide a Complaint dated 25th September the respondent claimed against the appellant a the sum of Kshs. 179,305/= being a friendly loan advanced to the appellant sometimes in the year 2008 which loan the appellant failed or neglected to refund. The appellant herein was a member of the respondent's self-help group and was still a member therein. That despite demand and notice of intention to sue having been made the appellant flatly neglected, ignored, failed and refused to make good the respondent's claim. The respondent therefore prayed for the following orders;
 - a. A sum of Kshs.179,305/-
 - b. Costs of the suit
 - c. Interest on (a) and (b) above at court rate.
 - d. Any other and or further relief this court may deem fit and just to grant.



Statement Of Defence

2. In response, the appellant/defendant herein filed a statement of defence dated October 14, 2014 denying the contents of the plaint. The appellant denied obtaining a friendly loan from the respondent of Kshs. 179,305/- and stated that to the contrary the appellant had a saving of Kshs 14,875/- to the respondent and under the education booster the appellant had Kshs 1500/- which amount the respondent refused to surrender saying that the said amount offsets the money owed to them (respondent). The appellant averred that if there was money owed to the respondent, (which is denied) the same was paid through the Chief of Kola Location. The appellant further stated that the purported loan agreement is dated May 22, 2008 and the suit was filed on September 25, 2014 after a period of over six (6) years and therefore was time barred claiming that the appellant would raise an objection in the first instance. The appellant denied ever signing any purported loan agreement or any advance forms with the respondent and that the said loan agreement and advance forms are forgeries. The appellant denied any demand or intention being issued. She prayed that the suit be dismissed with cost.

Court Proceedings

3. The parties called one (1) witness each in support of their case. The Plaintiff was represented by Mr. J. N. Kimeu Advocate while the Defendant was represented by Mr. Mutinda Kimeu Advocate.

Plaintiff's Case

4. Pw.1 Esther Mbeke Muia testified that she was the chairlady of the Kola King'ang'ani Women Group whereby members had been contributing Kshs.100/- as savings and a members then borrow loan based on the savings. The appellant was a member of the group until the appellant took a loan in 2008 and started absenting herself and not paying the loan. That the appellant took the 1st loan of Kshs 20,000/- on 22/5/2008 of which she was to pay Kshs 1.200/= monthly for a period of 24 months and signed the document together with her ID No. Pw.1 further told the Court that on 18/12/2008, the appellant took a short term loan of Kshs 40,000/= which she was to pay at an interest of 10 % within the month she signed and acknowledged by putting her ID No. The appellant stopped coming to the meeting and was reported to the chief who summoned her but, she failed to show up. That a demand letter was made seeking Kshs 179,305. The amount accrued plus the interest. Respondent is not aware that a counterclaim for her funds was made which is Kshs 14,000/-. That there is no problem refunding the money provided she pays what she owes the group.
5. On cross examination by Mr. Mutinda Kimeu for the Defendant, Pw.1 stated that she does not have a certificate of appointment as a chairlady; they have the loan agreement forms and that the respondent started as a NGO Village Women Organization and that there is a certificate of registration for the said NGO. She stated that she sued on 25/6/ 14 and the loan was in 2008 and that six years had expired and that she is not aware as whether the advocate sought leave to file the suit out of time. She stated that 10% interest is in their Constitution not in the forms. *The Constitution* was not availed in court. She stated that the appellant owed the respondent money.
6. On re- examination Pw.1 stated that the Village Women Organization Kenya trained them how to manage a group and they were advised to register a group which they did in 2006. That the appellant took a loan through the respondent where she is a member. The respondent testified that they delayed filing the suit because the appellant was still attending the meetings and she was being reminded.



Defendant's Case

7. Dw.1 Tabitha Loko Mutungi stated that she was not given any money by King'ang'ani. She adopted her statement as evidence in chief. She denied the knowledge of the loan agreement that a passbook was given to King'ang'ani members that showed savings and booster fund for school fees which she produced stating that she did not have any loan .
8. On cross- examination by Mr. J. N. Kimeu Advocate for the Respondent, the Appellant acknowledged being a member of the respondents' Self Help Group claiming that the group has her money. She however did not counterclaim any sum and did not pay any money before the Chief because no money was given to her by the group. The appellant did not respond the issue of forgery to the police and that Exhibits 1 and 2 bore her signature which is a form from VIWO not King'ang'ani
9. On re-examination the appellant stated that they formed King'ang'ani which was under VIWO and that VIWO came first; VIWO did not sue.

Trial Court Judgment

10. In its Judgment delivered on October 1, 2019, the trial court rendered judgment in favor of the Respondent against the Appellant as follows:-
 - a. A sum of Kshs 179,305/- plus interest from the date of filing suit.
 - b. There being no proof that the appellant received the demand letter dated 27/6/2011 each party shall bear their own costs
 - c. Respondent shall have 30 days stay of execution.

The Appeal

11. Aggrieved by this judgment, the appellant herein filed a Memorandum of Appeal dated October 25, 2019 against the entire decision on the following grounds.
 - 1) The Trial Magistrate erred in law and in fact in finding that Kola King'ang'ani Women Group is a group formed under village women group (VIWO) which is an umbrella organization when there was no evidence to prove the fact.
 - 2) The Trial Magistrate erred in law and in fact in finding VIWO was the first group in existence followed by the respondent when there was no evidence to prove the fact.
 - 3) The Trial Magistrate erred in law and in fact in failing to find that Kola King'ang'ani Women Group and Village Women Group (VIWO) were two different groups under different management and membership.
 - 4) The Trial Magistrate erred in finding that the respondent owes the appellant money which was advanced by village women organization (VIWO) despite finding that exhibit 1 and 2 were signed by VIWO and not the respondent.
 - 5) The Trial Magistrate erred in failing to find that the respondent claim with regard to long term loan of 20,000 advanced on 22/5/2008 is statute barred having been brought after six years.



- 6) The Trial Magistrate erred in finding that appellant admitted to have been aware of VIWO and how the respondent came into existence and failed to find that the existence of VIWO was not enough to order loan advanced by VIWO to be paid to the respondent.
- 7) The Trial Magistrate erred in finding that the appellant should pay the loan to the respondent despite finding that the respondent was advanced loans by VIWO in 2008 and not Kola King'ang'ani Women Group (respondent).
- 8) The Trial Magistrate erred in failing to find that village women organization (VIWO) was not party to the suit and therefore the respondent had no locus to ask for the debt on behalf of VIWO.
- 9) The Trial Magistrate erred in finding that the appellant should pay Kshs179,305/- despite there being no evidence of how the amount was arrived at.
- 10) The decision of the said magistrate was against the weight of the evidence adduced.
- 11) The learned magistrate erred in failing to appreciate and hold that there was no evidence by the respondent to prove her allegations that the appellant was indebted to the respondent.
- 12) The Appellant sought the following prayers;-
 - i. The Appeal be allowed and judgment and decree of the Trial Court set aside
 - ii. The Respondent suit before the Chief Magistrate Court Machakos be dismissed
 - iii. The cost of appeal and those in the case before Chief Magistrate Court Machakos be borne by the respondent.

Appellant Submissions Dated 5th July 2022

13. The Appellant filed submissions dated July 5, 2022 submitting that the Appellant did not enter into any loan agreement and therefore had no locus standi to file the suit.
14. Reliance is made in the case of *Charles Njibia Ndung'u v Mercy Wamaitba Kaburi* [2018] eKLR and *Aneab Liluyani Njirah v Agah Khan Health Services* [2013]. The Appellant submitted that she was a stranger to the loan agreements and therefore should not benefit from them. She prayed that the appeal be allowed as the respondent was not privy the loan agreement.
15. On the issue of the Trial Court failing to find that the respondent claim with regard to the long term loan of 20,000 advanced on 22/5/2008 is statute barred having been brought after six years, the appellant submitted the suit was filed on 25/9/2014, the first loan agreement showed that the loan agreement is dated 22/5/2008 and the other loan agreement is dated 18/12/2008, therefore the loan agreement dated 22/5/2008 for Kshs 20,000 is time barred by virtue of section 4 (1) of the *Limitation of Actions Act*.
16. The Appellants submitted that the respondents cause of actions arose on 22/5/2008, this is because the respondent did not prove any requirement of section 23(3) of the act which provides that where a right of action has accrued to recover a debt or other liquidated preliminary claim or a claim to movable property of a deceased person and the person liable or accountable therefore, acknowledge the claim or makes payment in respect of it, the right accrues on and before the date of the acknowledgement or the last payment, provided that payment of a part of the rent or interest due at any time does not



extend the period not extend the period for claiming the reminder then due, but payment of interest is treated as a payment in respect of the principal debt.

17. The appellant submitted that there was no acknowledgment that she was indebted to the respondent therefore requirement of section 24(1) of the Act was not met hence the respondent claim on the agreement dated 22/5/2008 is statute barred and ought to be dismissed.
18. In support of this the appellant relied on case of *Charles Njibia Ndungu v Mercy Wamaitba Kaburi* [2018] EKLRL, where court held that

It would appear from the documents and evidence on record that the claim is statute barred by dint of section 4 (1) of the Limitations of Actions Act which states that actions founded on the contract may not be brought after six years. The contract of sale was entered into in 2009 no evidence has been tendered before this court to support extension of time. It is claimed in the evidence that the said Francis Muhia died in 2001. No letters of administration of the said deceased had been obtained according to the evidence on record.

19. On the issue that the appellant should pay Kshs.179,305/- despite there being no evidence of how the amount was arrived at and that the trial Court decision was against the weight of the evidence adduced, the appellants submitted the issue of Kshs 179,305 in the plaint during the hearing was not proved by the respondent. There was no evidence to prove how Kshs 179,305/- was arrived at. The loan agreement dated 22/5/2008 was produced as exhibit 1 and was Kshs 20,000 payable within 24 months by installments of Kshs 1,200 per month that it was the respondent evidence that on 18/12/2008 there was a short term loan of Kshs 40,000 payable with interest of 10% per month.
20. The only amount proved was Kshs 60,000/- The respondent gave evidence that they retained Kshs 14,000 of the appellant which they should deduct from the said loan in which the remainder should be Kshs 46,000/- The appellant submitted that this facts were not taken into consideration by the Trial Court and therefore the decision of the trial court was against the weight of the evidence adduced at the trial court by ordering the appellant to pay Kshs 179,305/- when no evidence supported that amount and how it was arrived at.
21. The appellant relied on case of *Raphael N. Kiburi v Hussein Adendere* [2013] eKLR and *Mwangi v Wambugu* [1984] KLR 453 where the court stated that;

“A Court of Appeal will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence or the judge is shown demonstrably to have acted on wrong principle in reaching the finding; and an appellate court is not bound to accept the trial judge’s finding of fact if it appears either that he has clearly failed on some material point to take account of particular circumstances or probabilities material to an estimate of the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

Respondents Submissions Dated 12Th August, 2022

22. On behalf of the respondents the respondent asked this court to re-evaluate, re-asses and reanalyze the following 3 issues;
 1. Whether the appellant was indebted to the respondent?
 2. Whether the respondent has capacity to follow up money on money owed to the Village Women Group viwo?



3. Whether the suit is statute barred?
23. On the issue of whether the appellant was indebted to the respondent it is submitted that at the trial court the respondent adduced loan agreement forms as evidence showing that the appellant had taken two loans on diverse dates. First loan of Kshs 20,000 dated 22/05/2008 and was to be paid at a monthly installments of Kshs 1,200 for a period of 24 months the second loan was taken by the appellant dated 18/12/2008 of Kshs 40,000 which attracted 10% interest. The respondent relied on section 107 (1) Evidence Act cap 80 of The Law of Kenya which provides;
- 107.
- (1) whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.....”
24. it is trite that the failure by one party to adduce evidence leaves the other party’s evidence uncorroborated. In the case of Rosemary Wanjiku Murithi v George Ndinwa NYR Civil Appeal No. 9 of 2014 [2014]eKLR the court held that
- “Proof of fraud involves questions of fact. Simply raising the issue of fraud in a statement of Defence and counterclaim is not proof of fraud.
25. On the issue of whether the respondent has capacity to follow up on the money owed to Village Women Group (VIWO) respondents submitted that appellant does not contest the fact that she was advanced a sum of Kshs 179,305 by VIWO. The appellant admitted that there is a relationship between respondent and VIWO hence this fact was not contested by either parties. That general principle of the law of contract that only parties to the contract acquire rights and liabilities under it has an exception which is agency hence the respondent herein is an agent of VIWO and had been mandated to handle all the financial dealings of VIWO. Reliance was placed in the case of Mark Otanga Otiende v Dennis Oduor Aduol [2021].
26. It is further submitted that the respondent herein by virtue of being an agent or subsidiary of VIWO mandated to deal with financial issues had the locus standi to institute suits on behalf of VIWO even if it was privy to the agreement. It is trite law that an agent can sue on behalf of a principal, provided the suit is in the interest of the principal. Further reliance was placed in the case of University of Pennsylvania Law Review and American Law Register article titled ‘Right to sue upon the Contracts’ stated that,
- “The first place it may be noticed that the power of the agent to sue is not necessarily confined to the cases in which the agent was originally a party to the contract. If the principal, having contract rights assign the contract to the agent in such a way as to vest in him the legal title, in a state wherein the assignee of a chose in action may sue in his own name; or if the principal, having bonds or notes or other negotiable instruments, endorse and deliver them to the agent so as to vest in him the legal title, the agent may sue in his own name. the fact that the agent’s action, since most of the statutes contain exceptions which would cover such a case.”
27. As to whether the suit is statute barred the respondent submitted section 4 (1) of the Limitations Act.
28. It is submitted that the appellant took the first loan of Kshs 20,000 on 22/5/2008 and was paying a monthly installment of Kshs 1,200 for a period of 24 months and took a short term loan of Kshs 40,0000 which attracted 10% interest on 18/12/2008 these two loans were to be read together not in isolation from each other.



29. Reliance was made in the case of *South Nyanza Sugar Company Limited v Paul Nlila* [2014] eKLR. It is submitted further that the respondent did not take immediate action against the appellant because the appellant always attended meetings if summoned and always promised to pay. The respondent despite the breach of terms of payment by the appellant was accommodative and tried to resolve the matter amicably without going to court hence, occasioned the purported delay.
30. The respondent further submitted that the honorable court will prevent the Respondent from accessing justice simply because the it was accommodative and tried to solve the matters out of court as enshrined in article 159 (2) (c) of the *Constitution* of Kenya, reliance was placed in the case of *Forum for Restoration of Democracy-Kenya and 4 others v Crispinus Barasa* (2022) eKLR.
31. It is finally submitted that the Respondent herein should not be punished for being accommodative hence court should endeavor to ensure that justice is done to all parties that bring their grievances for adjudication so that the law is interpreted to serve the interests of justice and not subvert the justice by mere technicalities.

Determination

32. The court considered the trial court record and Record of Appeal and submissions by parties through respective Counsel. The issues that emerge for determination as raised in the memorandum of appeal are condensed as follows;
 - a) Whether Kola King'ang'ani Women group is a group formed under Village Women Group (VIWO) or not; whether VIWO was the 1st Group and thereafter the plaintiff Group; whether Kola King'ang'ani Women group and Village Women Group (VIWO) were 2 different Groups or not and VIWO was not party to the proceedings,
 - b) Whether the appellant owed money to the plaintiff which was advanced by Village Women Organization (VIWO) despite Exhibit 1 & 2 signed by VIWO.
 - c) The plaintiff's claim with regard to long term loan of Ksh 20,000/- advanced on 22/5/2008 is statute barred after the suit was filed 6 years later and the Appellant was advanced a 2nd Loan in 2008 by VIWO,
 - d) The plaintiff's claim of Ksh 179,305 was not substantiated and evidence to prove the claim was not adduced.

This is 1st appellate court, as aptly stated in the case of *Selle & another v Associated Motor Boat Co Ltd & others* [1968] EA 123 should evaluate and/or assess the evidence on record as follows: -

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”

Statute Barred Suit

33. Section 4 (1) of *Limitation of Actions Act* provides;

The following actions may not be brought after the end of six years from the date on which the cause of action accrued—



- (a) actions founded on contract;
 - (b) actions to enforce a recognizance;
 - (c) actions to enforce an award;
 - (d) actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture;
 - (e) actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.
34. The cause of action ascribed by Plaintiff filed on 25/9/2014 is that the defendant/appellant was a member of Kola King'ang'ani Women Group who through Chairlady Esther Mbeke Muia sued the defendant for a friendly loan advanced in 2008 and the defendant failed neglected to pay refund the amount. in the prayers, the plaintiff Group sought Ksh 179,305/- with interest and costs of the suit.
35. The List of Documents annexed to the Plaintiff also filed on 25/9/2014 are;
- a) Village Women Organization (VIWO) Kenya Short Term Advances Form that shows Member No 22 Tabitha Loko was advanced Ksh 40,000/- at 10%
 - b) Village Womens Organization Loan Agreement of 22/5/2008 where the Defendant Tabitha Loko of King'ang'ani Group was advanced Ksh 20,000/- to pay at Ksh 1,200/- per month for 24 months and any amount in default shall attract 10% penalty of the monthly instalment.
36. The evidence on record confirms the cause of action arose upon default of payment of any of the instalments upto the elapse of 24 months as contracted and therefore the cause of action upon default of payment of loans was in 2010. The suit was not statute barred.

Privity of Contract

37. The appellant took issue with the fact that the plaintiff is Kola King'ang'ani Women Group and /not Village Women Organization (VIWO) Kenya as pleaded yet the Loan Forms are in the name of Village Women Organization (VIWO) Kenya which is not privity to the loan contract between the Plaintiff Kola King'ang'ani Women Group and defendant. Secondly, no evidence/Documents were produced before the Trial Court to prove the connection /relationship between the 2 women Groups.
38. Pw1 Esther Mbeke Muia testified on 12/3/2019 and in cross examination stated that the Women Group began with Village Women Organization (VIWO) Kenya and after Kola King'ang'ani Women Group was formed it was under Village Women Organization (VIWO) Kenya and used the same Loan Forms.
39. This court looked/perused both Loan Forms and each of these Forms have the Letter head 'Village Women Organization (VIWO) Kenya' and Group name 'King'ang'ani'. This inclusion fortifies the Plaintiff's claim.
40. In *City Council of Nairobi v Wilfred Kamau Githua t/a Githua Associates & another* [2016] eKLR on the issue of privity of contract the Court of Appeal relied on *Halsbury's Laws of England* 4th Edn Vol 9(1) Para 748 as follows;

The doctrine of privity of contract is that, as a general rule, at Common law a contract cannot confer rights or impose obligations on strangers to it; that is, persons who are not party to it. The parties to a contract are those persons who reach Agreement and, whilst it



may be clear in a simple case who those parties are, it may not be so obvious where there are several contracts, or several parties, or both for example in the case of multi lateral contracts, collateral contracts, irrevocable credits,

41. Privity of contract can/may include the parties who may claim interest/rights under the contract. In the instant case the Loan Forms subject of the Loan Agreements between the plaintiff and defendant are in the Letterhead of 'Village Women Organization (VIWO) Kenya' the umbrella Women Group that includes 'King'ang'ani' and hence the Plaintiff had locust standi to sue as the group that loaned funds to its member the Defendant although the Agreement is on the umbrella body letterheads.
42. The defendant's defence and testimony is that she did not obtain any loan from Kola King'ang'ani Women Group but admitted she is a member of the Group. She also stated the Group had her savings of Ksh 14,875/- that is also due and owing. She asserted that the details of the loans in the Loan Agreement Forms are a forgery/fraud.
43. The burden of proof is on the Claimant to prove his case. section 107 (1), 109 and 112 of the Evidence Act, cap 80 Laws of Kenya provide that:

107(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of the fact shall lie on any particular person.

112. in civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving the fact is upon him.

44. In the case of Martin Maina Ndegwa v Charles Thiongo Kanyoro & 3 others Succession Cause No. H.C. 121 of 2010, Hon Mativo J (as he then was) stated of fraud as follows;

'E. A. Francis in his book discussing fraud observes inter-alia as follows:-

- i. No definition is given, either by statute or judicial decision of what constitutes fraud, nor, it seems, is any such decision possible.
- ii. Fraud, for the purposes of these provisions, must be actual and not constructive or equitable fraud.
- iii. Fraud must involve an element of dishonesty or moral Turpitude.

In the case of *Assets Co Ltd v Mere Roihi*, Lord Lindley stated as follows: ".....that by fraud in these Acts is meant actual fraud, i.e., dishonesty of some sort, not what is called constructive or equitable fraud-an unfortunate expression and one very apt misled, but often used, for want of a better term, to denote transactions having consequences in equity similar to those which flow from fraud."

45. Therefore, 'he who alleges must prove', the burden of proof of fraud and/or forgery is on the Appellant and standard of proof beyond reasonable doubt. Apart from asserting fraud/forgery the defendant did not tender any evidence to prove the claim and it cannot be upheld in the absence of proof.
46. As to the calculation of what/how the amount came to Ksh 179,305/-

This court finds that the Loan Agreements spelt 10% per month penalty in default. However, from the Trial Court the amount of Ksh 14,000/- held by the Plaintiff from/for the defendant is/was admitted.



Disposition

47.

- a) This court finds the pleadings and evidence adduced during trial disclosed/proved the plaintiff's claim against the defendant.
- b) The trial court judgment of 1/10/2019 is upheld and appeal is dismissed with Costs to the respondent save for;
- c) The deduction of admitted appellants funds held by the plaintiff of Ksh 14,875 to be deducted from Ksh 179,305/-

**DELIVERED SIGNED & DATED IN OPEN COURT IN MACHAKOS ON 28TH MARCH 2023.
(PHYSICAL/VIRTUAL CONFERENCE)**

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF:

MUSYIMI FOR KIMEU - FOR THE APPELLANT

LANGALANGA - FOR THE RESPONDENTS

GEOFFREY/PATRICK - COURT ASSISTANT(S)

