



**Mbungu v Bingwa Sacco Limited (Civil Appeal E801 of 2021)
[2023] KEHC 26052 (KLR) (Civ) (30 November 2023) (Judgment)**

Neutral citation: [2023] KEHC 26052 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E801 OF 2021

DAS MAJANJA, J

NOVEMBER 30, 2023

BETWEEN

FAITH RUGURU MBUNGI APPELLANT

AND

BINGWA SACCO LIMITED RESPONDENT

*(Being an appeal from the Judgment and Decree of the Co-operative Tribunal
at Nairobi dated 4th November 2021 in Tribunal Case No. 113 of 2018)*

JUDGMENT

Introduction and Background

1. Before the Court for determination is an appeal against the judgment of the Co-operative Tribunal (“the Tribunal”) delivered on 04.11.2021 which dismissed the Appellant’s claim. The Appellant anchors her appeal on 26 grounds as set out in the Memorandum of Appeal dated 03.12.2021 which appeal has been canvassed by way of written submissions filed by both parties.
2. Before delving into the appeal, a brief background of the facts presented before the Tribunal is apposite. The Appellant is a daughter to Siphora Muthoni Mbungi (“the Deceased”) who passed away on 06.01.2015. The Deceased was a member of the Respondent holding account number 014*****322 in which her tea proceeds payouts were and are still deposited. The Deceased registered the Appellant as her nominee. When the Deceased passed away, the Respondent gave the Appellant Kshs. 15,000.00 as benevolence and contribution towards the Deceased’s funeral expenses. It also gave the Appellant, the Deceased’s account where she expected to receive the Deceased’s shares and tea proceeds. According to the Appellant, the Respondent did not credit anything into the account as the Deceased had outstanding loans with the Respondent amounting to Kshs. 523,094.4. The Respondent could not write-off this amount as it was long overdue and there was no provision for writing-off under the



Respondent's By-laws and loaning policy. As such, the Respondent deducted earnings received under the Appellant's account to service the outstanding loans.

3. Aggrieved by the Respondent's actions, the Appellant filed a claim with the Tribunal claiming that that the Respondent had, without any lawful justification or authorization from the Appellant, deducted all the money received by the Appellant in the account earned from picking tea.
4. The Appellant complained that the Respondent failed to provide her with any copies of loan agreements or any kind of evidence to prove the existence of the alleged loans. She stated that she was forced to seek redress from the Sacco Societies Regulatory Authority (SASRA) which demanded that the Respondent provide the Deceased's account records. That it is only after SASRA's demand that the Respondent furnished the documents. The Appellant claimed that the documents presented to her by the Respondent were doctored, tempered with and did not have sufficient information to prove that the alleged loans actually existed or that any amount was outstanding. She averred that the loan documents provided by the Respondent had been fraudulently fabricated so as to illegally justify the Respondent's action of levying false charges and deductions on her account. On account of the fraud and breach of contract, the Appellant prayed that the Respondent cease any deductions from her account, transfer the value of the Deceased's shares, dividends, earning to her, issue her with a formal clearance to enable her join another Sacco, close the Deceased's account, refund the Appellant's deposits, special damages totalling Kshs. 1,577,262.00 incurred from 06.01.2015 and general damages.
5. The Respondent denied the Appellant's claim. It stated that the Deceased was advanced a Development Loan of Kshs. 240,000.00 on 01.01.2013 payable in two years from the bonus payout. That by the time of her death, the loan amounting to Kshs. 56,205.15 was in arrears and could not be recovered from insurance due to the lapse of time hence not written off. That on 31.12.2013, the Respondent advanced the Deceased a Kshs. 90,000.00 Emergency Loan payable in one year with bonus payment but that at the time of the Deceased's death, a year had lapsed and the loan was not cleared and could not be written off. Further, that as at 06.01.2014, the Deceased had a "Special Stl" of Kshs. 297,094.30 which was advanced to her on different dates based on her tea proceeds and recoverable from bonus payouts. The Respondent avers that since the loan was not insured, could not be written off.
6. The Respondent stated that under its By-laws, the only loans that are insured are Development Loans, School Fees Loans and Emergency Loans and that these loans are granted/advanced based on the bonus payouts and should not exceed 3 times of the deposits raised by the member. That Normal Stl and Special Stl are granted against the customer's tea payout and these loans are not insured for they are pegged on tea proceeds which continues despite the member's death. According to the Respondent, these loans could not be written off since they were long overdue and there is no provision in the By-laws and loaning policy to them off.
7. The Respondent claims that it called the Deceased family members to its office upon the Deceased's death and explained to them about the outstanding loan balances and the Respondent's loan policy. Thereafter they agreed to clear the loan and they deposited a cheque of Kshs. 158,220.00 to settle part of the loan and promised to continue paying the balance in cash together with tea payouts. The Respondent therefore stated that according to its By-laws and loan policy, the beneficiaries ought to pay the balances and interest amounting to Kshs. 320,570.40 as per the statement before subdivision of the tea stems held by the Deceased.
8. The Respondent prayed that the Appellant's claim be dismissed and that she pays the outstanding loan amount of Kshs. 523,131.45 as at 03.06.2016 together with interest of Kshs. 320,570.40 all totaling to Kshs. 843,701.85



9. The matter was set down for hearing where the Appellant testified on her own behalf and the Respondent called its Chief Executive Officer, Jane Mugo. Thereafter, the Tribunal delivered a judgment on 04.11.2021. The Tribunal found that the Appellant was a nominee of the Deceased in respect of the account she held with the Respondent. That Clause 19 of the Respondent's By-laws under which a nominee takes over the benefits and liabilities of a deceased member applies to this case. The Tribunal further held that the Appellant had not established any fraud or illegalities in the operation of the Deceased's account and that the Respondent and the Appellant's family had agreed on the outstanding balances and that the family had paid Kshs. 158,220.00 as a part payment. The Tribunal also found that the Appellant declined an initial offer by the Respondent to write off the loan after deductions of the deposits but she instead sought Kshs. 10,000,000.00 in the suit before the Tribunal.
10. The Tribunal concluded that the Appellant had not established any wrongdoing on the part of the Respondent since all the actions taken by the Respondent were in consultation with the Appellant and the Deceased's family. The Tribunal found it peculiar that none of the Appellant's siblings supported the Appellant's claim. It dismissed the claim with costs.
11. As stated, it is this decision by the Tribunal that is the subject of the present appeal and since the submissions of the parties regurgitate the parties' positions I have already summarised above, I do not find it necessary to highlight the same but I will only make relevant references in my analysis and determination below.

Analysis and Determination

12. In determining this appeal, I am cognizant that the court derives its appellate jurisdiction from section 81 of the *Co-operative Societies Act* (Chapter 490 of the Laws of Kenya). Since there is no limitation on the court's appellate jurisdiction, this court exercises its ordinary jurisdiction under the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya). As this is a first appeal, the primary role of the first appellate court is to re-evaluate, re-assess and re-analyse the evidence record and then determine whether the conclusions reached by the Tribunal are to stand or are to be disturbed and give reasons explaining why it has arrived at a particular conclusion (see *Kenya Ports Authority v Kuston (Kenya) Limited* (2009) 2EA 212 and *Peter Mwangi Chege & 13 others v Joseph Wanyoike & 7 others* ML HCCA No.8 of 2011 [2018] eKLR)
13. The grounds raised by the Appellant impeach on the Tribunal's conclusions of fact and the court is ultimately being called to determine whether it arrived at a conclusion that was based on the evidence on record. Whereas it is common ground that the Appellant was the Deceased's nominee, she denies that she was the one to shoulder the Deceased's loan liabilities and that in any case, the said loans were illegal and mired in fraud. As stated, the Tribunal found no evidence of any fraud or illegalities as claimed by the Appellant and further found that as per Clause 19 of the Respondent's By-laws, the Appellant, as a nominee, took up the Deceased's liabilities. The Tribunal found that indeed, the Appellant and family had indeed paid Kshs. 158,220.00 towards part-payment of the outstanding arrears.



14. The nature and extent of a nominee's benefits and liabilities is a matter of construction of the Respondent's By-Laws. Clause 19 of the By-laws relied on by the Tribunal and the Respondent provides that:

Where not admitted to membership, the nominees shall be paid the value of the deceased member's shares or interest, less any sums due to the society, as soon as possible. [Emphasis mine]

15. The above provision only states what will be due to a non-member nominee upon the demise of a member. It does not state that the nominee will take up responsibility of the liabilities of the deceased member. The Respondent has also relied on its By-laws' definition of a 'nominee' as 'a person who is/are nominated by a member to inherit the shares and other interests like dividends, bonus etc when the member dies.' The Respondent emphasizes on the abbreviation 'etc' and its meaning as, "and other things" to infer that the same also includes the liabilities of the Deceased. In my view anything which comprises the 'etc' must be read ejusdem generis to shares, dividends and bonus which imply an asset or benefit. When read with clause Clause 19, it means that the deceased's liabilities are deducted from monies paid out to the nominee but that the nominee does not assume all liabilities but only those, "sums due to the society" which are deducted from the members shares or interest.
16. In any case, the issue of liability of deceased members of a Co-operative Society is specifically dealt with by section 38 of the Co-operatives Act which provides as follows:

38. Liability of deceased members

The estate of a deceased member shall be liable for the debts of the co-operative society as they existed at the time of his death, and proceedings in respect thereof may be commenced within one year of the death:

Provided that—

- i. in the case of a co-operative society with limited liability, if the first audit of the accounts of the society after the death discloses a credit balance in favour of the society, the financial liability of the estate shall cease forthwith; and
- ii. a personal representative shall not be liable except in respect of assets in his possession or under his control.

17. The aforementioned provision is clear that the liabilities of the Deceased to the Respondent fell on her estate and not her nominee. The said provision goes on to state that a personal representative shall not be liable except in respect of assets in their possession or under their control. It is not disputed that the Appellant is the personal representative of the Deceased and that she now has control and possession of the Deceased's account with the Respondent. This makes the Appellant liable for the Deceased's outstanding loan arrears with the Respondent. Even though the Appellant claims that she sought a different account rather than that of the Deceased, no proof was tendered to confirm this. I agree with the Respondent that the Appellant bore the burden of proving this averment by dint of section 112 of the *Evidence Act* (Chapter 80 of the Laws of Kenya) which provides that 'In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.' Going through the record, the Appellant never challenged that she was assigned the same account as the Deceased but rather that the Respondent was deducting sums from the said account. It is thus for the reasons that the Appellant is a personal representative of the Deceased's estate and that she has control of her account with the Respondent that I find that she is indeed liable for the Deceased's outstanding debts due to the Respondent.



18. On whether the outstanding debt was as a result of fraudulent schemes and actions by the Respondent, I am inclined to agree with the Tribunal that there was no evidence of such actions. As fraud is a serious allegation, the law as stated in *Vijay Morjaria v Nansingh Madhusingh Darbar & Another* [2000] eKLR by Tunoi, JA., is as follows:

It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.

19. The Appellant's submission that there were alterations and cancellations to the loan agreements is not evidence of fraud or illegality. There is nothing that stopped the Respondent from making such alterations or cancellations so as to capture the true position of the parties in respect of the loan agreements. It was thus incumbent upon the Appellant to demonstrate that the said alterations did not capture the true position of the parties and that she was to offer alternative positions if at all she disputed those taken by the Respondent. This she did not do, meaning that the Appellant's contention as to the outstanding debt and the loan agreements remained uncontroverted.
20. The Appellant has also contended that the issue of payment of Kshs. 158,220.00 was not part of the pleadings by the parties and that the Tribunal erred in referring to it. However, a perusal of the record indicates that the same was specifically pleaded by the Respondent in her witness statement and the same was responded to in evidence by the Appellant. She expressly stated that she paid the Kshs. 158,220.00 to offset the loan as per the statement of account before realizing that some loans were allegedly fraudulent. Thus, it is incorrect for the Appellant to claim that the issue of the Kshs. 158,220.00 payment was never pleaded and that she was 'so surprised' when the Tribunal relied on this evidence. This payment demonstrated that the Appellant was aware that the Deceased was indebted to the Respondent and having failed to prove that the loans were fraudulent, the Tribunal could not be faulted to conclude that the Appellant had admitted the existence of the loan arrears.
21. On the ground that the Tribunal overlooked the guarantors to the Deceased's loan thus suggesting that the Respondent ought to have gone for them rather than the Appellant, I will only reiterate what this court has stated severally that 'A creditor is free to choose from which debtor and what method to use to recover the debt. The debtor has no luxury nor right of choosing for the creditor who amongst the debtors, to pursue...' (see *Ecobank Kenya Limited v Francis Tole Mwakideli* [2018]eKLR). There was no obligation or requirement for the Respondent recover the debt from the guarantors first before going for the Appellant. That decision was solely at the Respondent's discretion.
22. The Appellant complains that the Respondent ignored instructions by SASRA to clear the Appellant and that the Tribunal overlooked this. The record does not indicate that SASRA issued such a letter. At any rate, the Tribunal was not bound by the directions of SASRA as it has ultimate authority to determine any dispute between a Co-operative Society and its members. The jurisdiction of the Tribunal is underpinned by section 67(3) of the *Sacco Societies Act*, 2008 which states that 'All disputes arising out of Sacco business under this Act shall be referred to the Tribunal.'
23. From the foregoing, the issues raised by the Appellant lack merit.

Disposition

24. The appeal is dismissed. The Appellant shall pay the Respondent costs assessed at Kshs. 60,000.00.

DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF NOVEMBER 2023.



D.S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango

Mr Wanyanga instructed by Akolo Wanyanga and Company Advocates for the Appellant.

Ms Karanja instructed by Magee Law LLP Advocates for the Respondent

