



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYAMIRA**

**CIVIL APPEAL NO. 37 OF 2017**

**NYAMETA NYANCHOKA.....APPELLANT**

**=VRS=**

**1. YUNES KERUBO ATANDI (CHAIRMAN).....1<sup>ST</sup> RESPONDENT**

**2. PHILIP NYAMETA ONGUTI (TREASURER).....2<sup>ND</sup> RESPONDENT**

**3. JAMES OIGO MITEMA (SECRETARY).....3<sup>RD</sup> RESPONDENT**

**T/A MAERI SELF HELP GROUP (ORIGINALLY MAERI TRADING CO.)**

**{Being an Appeal from the Judgement and Decree of Hon. E. K. Nyutu – PM**

**dated and delivered on the 28<sup>th</sup> day of November 2017 in the original**

**Nyamira Principal Magistrate’s Court Civil Case No. 21 of 2012}**

**JUDGEMENT**

1. By the Amended Plaintiff dated 8<sup>th</sup> October 2013 the appellant herein sued the Defendants and sought prayers that: -

**“(a) An order do issue compelling the Defendants to pay the 2<sup>nd</sup> plaintiff (now appellant) dividends due to him.**

**(b) Costs.”**

2. At the hearing the appellant testified that way back in the year 1972 he together with the defendants and other members formed a business which they initiated named Maeri Trading Company. They later changed its name to Maeri Self Help Group. He stated that the members contributed Kshs. 8,000/= each and opened a hotel whose income enabled them to purchase a plot LR West Mugirango/Bonyamatuta/847 upon which they constructed permanent residential house and a bar and lodging. They subsequently purchased another plot LR West Mugirango/Siamani/2212. This property was leased to a Church at Kshs. 30,000/= per month. He stated that the Kebirigo plot brings in a monthly rental income of Kshs. 78,000/= and that there was a resolution that members were to earn a dividend of Kshs. 2,000/= per month. However, since 1986 he has never been paid. He claimed dividends at the rate of Kshs. 24,000/= per year for thirty years. He also stated that whereas he was the chairman of the group from 1972 to 1986 at the time of filing this suit the office bearers were the respondents in this case. He urged this court to award him the costs of the suit.

3. James Oigo who was described as the Secretary in the plaintiff testified and stated that the plaintiff had not proved any of the allegations in the plaintiff and urged that the suit be dismissed with costs. However, in cross examination he admitted that the group existed and that he was its current chairman. He also admitted that the group was instituted many years ago and that it has buildings in Kebirigo which it has let out. He also admitted that the group owns West Mugirango/Bonyamatuta/947 and disclosed that on it stands a building with ten houses leased to tenants. He also disclosed that the group collects a sum of Kshs. 45,000/= per month from those houses. He further stated that the group has another plot in Nyamira which it has leased to a Church at an annual rent of Kshs. 12,000/=. He however disputed that there was a resolution to pay each member a dividend of Kshs. 2,000/= per month and contended that the appellant embezzled a lot of money belonging to the group during his tenure as chairman.

4. After considering the evidence and submissions by both sides the trial magistrate found that the appellant had not proved his case on a balance of probabilities and dismissed it for the following reasons: -

- That Maeri Self-Help Group exists. There was no record to prove this fact.
- That he and the defendants herein were members of the Maeri Self Help Group. There was no record to prove this fact.
- That the defendants were officials of the said Maeri Self Help Group. There were no minutes of a meeting appointing them as such.
- That Maeri Self Help Group purchased land parcels West Mugirango/Bonyamatuta/947 and West Mugirango/Siamani/2212. No title documents were produced to prove this fact.
- That the members constructed buildings which have been earning them a rental income. No proof was adduced of this fact.
- That members used to earn a monthly dividend of Kshs. 2,000/=. No proof in the form of a resolution of the meeting of the group was adduced.
- That the 2<sup>nd</sup> plaintiff used to earn a monthly dividend of Kshs. 2,000/= from the date of inception of the group until 1986. There is no proof of this fact.

5. The grounds of appeal are that: -

**“(a) The learned trial magistrate erred and misdirected herself in holding that there was no evidence that Maeri Self Help group did not exist whereas even the respondents themselves admitted the same and in any case it was not an issue in controversy between the parties.**

**(b) The learned trial magistrate also erred in misdirecting herself in holding that the defendants were not officers in self help group an issue that was also not in controversy.**

**(c) The learned trial magistrate erred in matters of fact and on overwhelming evidence on record that the self help group did purchase two properties, that they constructed some buildings on the said properties and that each of the members including the appellant was earning Kshs. 2,000/= per month and that the appellant had failed to prove his case on a balance of probabilities.**

**(d) The learned trial magistrate decided the case against the weight of evidence.”**

By this appeal the appellant seeks that the decision of the lower court be set aside and the costs of this appeal and in the lower court be awarded to him.

6. The appeal was canvassed by way of written submissions.

7. Counsel for the appellant submitted that the trial magistrate misdirected herself in holding that there was no evidence to prove that Maeri Self Help Group did not exist when that was admitted by the 1<sup>st</sup> respondent. Counsel submitted that the trial magistrate also misdirected herself in stating that no evidence was adduced to prove that the group owned West Mugirango/Bonyamatuta/947 and West Mugirango/Siamani/2212 or that the group had constructed rental houses on the same and were earning income therefrom. Counsel contended that the respondent did not dispute that he and the other members were themselves receiving dividends. Counsel states that the respondent did not produce any minutes or resolutions that the group was to stop paying dividends. He contended that the trial magistrate decided the case against the weight of evidence and the appeal should be allowed with costs.

8. The Advocate for the respondent on the other hand submitted that the appellant did not prove any of the averments in his plaint and there was no misdirection in the findings of the trial court. Counsel submitted that it was not enough for the appellant to allege he was entitled to dividends without allowing to the source of the dividends how they were declared, the ratios of the dividends and why those dividends would be earned every month yet ordinarily dividends are declared annually. Counsel urged this court to dismiss the appeal with costs to the respondents.

9. After reconsidering and evaluating the evidence in the lower court it is my finding that the trial magistrate misdirected herself for dismissing the appellant’s case for the reasons in her judgement. There was evidence that Maeri Self Help Group exists and that fact was also admitted by the respondent’s witness when he stated in cross examination: -

**“...We are all members of Maeri Self Help Group. I am the current chairman of Maeri Self Help Group...”**

The testimony of the 1<sup>st</sup> respondent apart from admitting that the group exists also admitted that the respondents were members and officials of the group. During cross examination the 1<sup>st</sup> respondent admitted that the group owned the two parcels of land adverted to by the appellant and also that it had constructed rental houses on those properties and were earning an income from it. The only fact that the appellant did not prove was that there was a resolution for payment of a dividend of Kshs. 2,000/= to members per month. That fact needed to be proved for the suit against the respondents to succeed. Additionally, the claim being one for an amount of money which could be ascertained and therefore a liquidated claim the sum claimed ought to have been specifically pleaded. This is in accordance with **Order 4 Rule 2 (1) of the Civil Procedure Rules** which states: -

***“2. (1) Where the plaintiff seeks the recovery of money the plaint shall state the precise amount claimed, except where the plaintiff sues for mesne profits or for an account which will be found due to him on taking unsettled accounts between him and the defendant.”***

The appellant was clear on what he claimed from the respondents but chose not to specify that in his plaint and for that reason his claim could not succeed. In **Hahn V Singh [1985] KLR 716 at 717** the Court of Appeal held: -

10. The upshot is that this appeal must also fail and it is dismissed.

11. Be that as it may the 1<sup>st</sup> respondent who is an official of the Maeri Self Help Group admitted that the appellant is also their member. The excuse for not paying him his benefits was that as chairman the appellant embezzled a lot of the group's money. That is not material because if it was the respondents would have filed a counterclaim. No wrong should go without a remedy. In this case this court hereby directs that the dispute shall be sent to the County District Social Services Officer responsible for Self Help Groups for arbitration and if it shall be found that the appellant is entitled to any payment the same shall be paid to him.

12. Costs follow the event but the circumstances of this case commend themselves to an order that each party shall bear its own costs.

It is so ordered.

**Signed, dated and delivered in Nyamira this 29<sup>th</sup> day of March 2019.**

**E. N. MAINA**

**JUDGE**