



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYAMIRA**

**CIVIL APPEAL NO. 06 OF 2017**

1. PAUL MATONGO OKIBO.....1<sup>ST</sup> APPELLANT

2. NYAKI INVESTMENT SELF HELP GROUP.....2<sup>ND</sup> APPELLANT

=VRS=

1. SAMWEL ONSARE MAKORI.....1<sup>ST</sup> RESPONDENT

2. CLEMENCIAL KEMUNTO ONSINYO.....2<sup>ND</sup> RESPONDENT

3. DOMINIC MOMANYI MOSE.....3<sup>RD</sup> RESPONDENT

**{Being an Appeal from the Judgement and Decree of Hon. N. KAHARA – RM dated and delivered on the 15<sup>th</sup> day of March 2017 in the original Keroka Principal Magistrate’s Court Civil Case No. 230 of 2013}**

**JUDGEMENT**

The respondents in this appeal sued the appellants seeking a refund of Kshs. 80,000/= which they had paid to the appellants upon a promise that the appellants would sell to them land which promise did not materialize and despite several promises to refund the money the appellants did not do so. After considering evidence from both sides the trial magistrate found in favour of the respondents and ordered the appellants to refund the money. The appellants were also condemned to the costs of the suit.

The thrust of the appeal is that being members of the 2<sup>nd</sup> Appellant Self Help Group, the respondents ought not to have sued it but should have claimed the money as provided under the group’s by-laws, a copy of which was annexed to the statement of defence.

The appeal is opposed mainly on the ground that the by-laws were not produced in evidence. Counsel for the respondents submitted that the trial magistrate rightly found merit in the suit and also rightly established that the appellants did not produce the by-laws which seemed to form the bedrock of their defence.

An appeal is in the nature of a retrial and this court is therefore enjoined to appraise itself of the evidence in the court below so as to arrive at its own conclusion while bearing in mind that it did not hear or see the witnesses give evidence – **Selle Vs. Associated Motor Boat Company Ltd [1968] EA 123.**

The appellants and the respondents admit that they were members of Nyaki Investment Self Help Group. As per the Certificate of Registration annexed to the defendants’ written statement of defence, the group was registered under the Ministry of Gender, Children and Social Development. Its membership is contained in a register which was also filed as part of the defendants’ list of documents which I believe was duly served upon the Advocate for the respondents. Unlike Co-Operative Societies which are governed under Co-operative Societies Act and the rules thereunder, Self Help Groups are governed by their own constitutions or by-laws. Whereas Counsel for the respondents has submitted that this group did not have and did not produce their by-laws the same were indeed exhibited and were part of the appellants’ list of documents. The same are contained in minutes of the General Meeting of 3<sup>rd</sup> January 2011. I have looked at the register of members and it is evident that the respondents were all members of the group by then. At **Clause 4 (f), the By-laws provide the procedure that a party wishing to exit the group should follow.** The objectives of the group are also set out in the By-laws and contrary to the assertion that the group collected their money to sell them land, the objectives as spelt out were: -

**“To pull resources and start projects that will alleviate poverty which include: -**

- **Buying land to start farming of various kinds like:**

- Dairy farming.
- Poultry farming.
- Horticultural farming by use of Green houses.
- Merry-go-round among members.”

The by-laws once approved at the AGM became binding on the parties and as such they cannot be contradicted by oral evidence – see **Section 98 of the Evidence Act**. In the minutes of the meeting held on 5<sup>th</sup> January 2012 the respondents were listed among the 7 people/members who had indicated a wish to exit the group. The procedure to withdraw as set out in the By-laws was to be followed and was the only condition but the general meeting resolved they were free to leave. According to **By-law 4 (f)** what was required of a member(s) wishing to withdraw was to **write to the executive (most probably being the executive committee) stating the reasons for withdrawal, fill a withdrawal form and return it to the chairman and await the decision of the general meeting. A member’s shares would then be refunded to the member within 90 days but less 30% which would remain in the group.** This is the procedure the respondents should have followed to exit the group instead of filing a suit. No explanation was given for not doing so. It is my finding that the trial magistrate misdirected herself on a point of law by finding that the group did not have by-laws. Whether it was a constitution or they called it by-laws it was binding on the parties. Be that as it may it would be futile to turn back the respondents and direct that they go back to that procedure. My finding is that the Self Help Group having provided that members were at liberty to leave at their will should honour that by-law by refunding the shares of the respondents of course less the 30% agreed reduction so that the sum due to the respondents from the appellants shall be Kshs. 56,000/= instead of the Kshs. 80,000/= decreed by the lower court. The appeal shall succeed to that extent and accordingly the judgement for the respondents against the appellants shall be for a sum of Kshs. 56,000/= with interest at court rates from the date of filing suit. However, given that the appellant has succeeded only minimally and given the nature and circumstances of the dispute between the parties I shall order that each party bears its own costs of this appeal.

It is so ordered.

**Signed, dated and delivered in Nyamira this 28<sup>th</sup> day of March 2019.**

**E. N. MAINA**

**JUDGE**