



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 59 OF 2015**

**ASSOCIATED MERCANTILE & SERVICES LIMITED.....1<sup>ST</sup> APPELLANT**

**JOSEPH MUTURI GITAU**

**SAMUEL NDIBA KIHARA**

**MARY WAIRIMU (*sued in their capacity as chairman, secretary & treasurer of***

**SHANGILIA BABA NA MAMA)..... 2<sup>ND</sup> APPELLANT**

**VERSUS**

**ISAAC ONYWERE KABESA..... RESPONDENT**

**JUDGMENT**

1. The appellants herein were the defendants in Milimani CMCC No. 643 of 2009. They had been sued by the respondent who was seeking a refund of a total of KShs.224,000 together with interest at the rate of 18% from 7<sup>th</sup> September 2007 until payment in full together with costs of the suit.
2. In his amended plaint dated 25<sup>th</sup> October 2011, the respondent averred that on or about 1999, he joined the 2<sup>nd</sup> defendant as a member and thereafter paid KShs.26,100 which amount entitled him to allocation of a plot in the 2<sup>nd</sup> defendant's parcel of land known as L. R. Number 2/1198; that when the 2<sup>nd</sup> defendant later converted itself into a limited liability company which is the 1<sup>st</sup> appellant, he paid a further KShs.25,000 towards purchase of the plot under the project known as *Shangilia Baba na Mama*. He was later allocated the plot he had purchased and according to the terms of their agreement, the defendants were required to construct a house for him on the plot which he was to pay for by instalments. Pursuant to that agreement, he paid a deposit of KShs.173,000 but by the time of filing suit, the defendants had not constructed a house on his plot as promised. The total amount paid was then KShs.224,100 but in his prayers, the respondent sought for a refund of only KShs.224,000.
3. In their statement of defence, the appellants denied all the allegations made by the respondent in his plaint and contended that the respondent was not entitled to the refund of any money since according to its investigations, the 2<sup>nd</sup> appellant had discovered that the respondent had deposited the money in question into an account held at Barclays Bank Westlands branch number 0731047294 by Associated Mercantile Services Limited which was a different entity from Associated Mercantile & Allied Services Limited the 1<sup>st</sup> appellant. According to the appellants, the money was not paid to them but to a different company.
4. After a full trial, the learned trial magistrate *Hon. Mrs. Teresia Nguji (SPM)* delivered her judgment on 13<sup>th</sup> December 2015 and entered judgment in favour of the respondent for the sum claimed in the amended plaint together with interest at 18% with effect from 7<sup>th</sup> September 2007 until payment in full. The respondent was also awarded costs of the suit.
5. The appellants were aggrieved by the learned trial magistrate's decision hence this appeal. In their memorandum of appeal dated 20<sup>th</sup> February 2015, the appellants relied on six grounds of appeal in which they basically faulted the trial court's decision on grounds that the learned trial magistrate erred in law and fact in finding that the respondent had proved his case to the required standards which was against the weight of the evidence; that the learned trial magistrate did not consider the appellants' case and submissions and that in arriving at her decision, she considered extraneous materials and facts which were not part of the court record.
6. When the appeal came up for hearing, the parties consented to having it prosecuted by way of written submissions which they duly filed and which I have carefully considered.

7. As the first appellate court, I am enjoined to not only consider the rival submissions filed by the parties in addressing the issues raised in the appeal but to revisit and to re-evaluate the entire evidence presented to the trial court to draw my own independent conclusions bearing in mind that unlike the trial court, I did not have the benefit of seeing and hearing the witnesses as they testified in the course of the trial.

8. I have read and evaluated the evidence adduced before the trial court. The record shows that each of the parties called one witness in support of their respective cases. The respondent testified that people were joining the appellants' organization in groups of five and that he joined the appellants in the group known as Dandora Phase 4; that he made cash payments to the appellants' offices in different instalments against which he was issued with receipts bearing his individual identification number 15017 which was allocated to him as a member of the aforesaid group; that by 7<sup>th</sup> September 2007, he had made payments amounting to KShs.224,100 on the strength of which he was invited to execute a pre-drafted sale agreement which he did on 1<sup>st</sup> October 2007.

9. The sale agreement was executed by the respondent and the 2<sup>nd</sup> appellant or their successors and agents and was in respect of purchase of a two bedroomed house from the 2<sup>nd</sup> appellant. The purchase price was to be paid in monthly instalments of KShs.4,480 after payment of a deposit of KShs.203,000. It was the respondent's case that he was allowed to sign the sale agreement as he had paid KShs.224,100 which was beyond the amount required for the house's deposit; that on subsequently making effort to follow up on the progress of construction of the house, he realized that the appellants never intended to deliver to him the promised house and he opted to sue for recovery of the money he had already paid. He produced receipts and documents as exhibit 1 to substantiate his claims.

10. The appellants' witness *Mr. Samuel Ndiba Kinora* testified as DW1 and in his evidence, he confirmed that the respondent was their member but denied his claim that he had paid the amount claimed to the appellants. He averred that though the respondent had paid the money both in form of cash and cash deposits in a bank account, the money was received by persons then working for the appellants but who later turned out to be fraudsters who had misappropriated the money and did not remit the same to the appellants.

11. After independently re-examining and re-evaluating the evidence on record, I find that the respondent's claim that he joined the 2<sup>nd</sup> appellant as a member in a group registered as Dandora Phase 4 and that he had been issued with his own unique identification number of 15017 was not denied by DW1 who testified on behalf of both appellants; DW1 also admitted that the money shown in the receipts produced collectively alongside other documents as exhibit 1 was actually received by persons who were at the time working for the appellants but according to him, the said employees were not authorized to receive cash from members and members had been so notified by publication of a notice to that effect. However the alleged notice was not exhibited in court and there was therefore no evidence adduced by the appellants to prove that the respondent was aware that the said employees were not authorized to receive cash payments.

12. I have examined the receipts which were exhibited by the respondent before the trial court and I have noted that they were all issued in the letterheads of the second appellant including receipt S/No. 1794 dated 7<sup>th</sup> September 2007 which acknowledged payment of KShs.173,000. The receipts also bear the group the respondent claimed he associated himself with in joining the 2<sup>nd</sup> appellant, namely Dandora Phase 4 and his individual identification number. The appellants claim that this money was not deposited into its bank account as indicated in the receipt but that it was deposited in a different account held by a different entity known as Associated Mercantile Services was correctly dismissed by the learned trial magistrate since it was not backed by or substantiated by any evidence and in any event, the appellants through the aforesaid receipt had as a matter of fact acknowledged that payment.

13. DW1's admission that all payments made by the respondent were received by the appellants' employees amounted to a confirmation that those employees received the said payments as the appellants' agents and that is why they acknowledged payment by issuing receipts on the second appellants' letterheads. What they did thereafter with the money received was between them and their employer and could not in law adversely affect the respondent. Though DW1 claimed in his evidence under cross examination that some of those receipts were forgeries, he did not demonstrate how the said receipts had been forged. He admitted that the appellants did not make any complaint to the police that their receipts had been forged which in my view casts aspersions on the credibility of this claim by the appellants because if it is true that the receipts were forged, one would have expected them to report the matter to the police.

14. From the foregoing analysis, I am satisfied that the learned trial magistrate properly interrogated the evidence presented before her and arrived at the correct conclusion that the respondent had paid KShs.224,100 to the appellants for purchase of a plot on which the appellants were to construct for him a house which they failed to do. He was therefore entitled to a refund of the money he had paid for that purpose.

15. The complaint by the appellants that the learned trial magistrate did not consider their defence is totally unfounded. The trial court's judgment clearly shows that the learned trial magistrate considered the defence offered by the appellants before making her decision. She stated as follows:

***“DW1 confirmed that the said Mr. Kiarie who allegedly received the money was working for the defendant. The issue of the notice not to pay in cash was raised at the defence stage and appears to be an afterthought in any case. The plaintiff employee received the said money and cannot be heard to say that the members ought to have paid through the bank as per the alleged notice. No such notice was produced in evidence. The newspaper advert produced were made after the plaintiff paid the money. The issue of the defendant and its employees cannot be used to deny the plaintiff his rights. These are in house matters that the plaintiff should not be penalized for. That the plaintiff performed his part of the bargain. ....”***

Nothing therefore turns on that ground of appeal.

16. Though it is true that the learned trial magistrate did not consider the appellants' written submissions as she was under the misconception that the same had not been filed while in fact they had been filed on 28<sup>th</sup> November 2014, this omission is not in my view material as given the evidence on record, it cannot affect the outcome of this appeal one way or the other. I also wish to point out that my reading of the trial court's judgment does not show that in making her decision, she considered irrelevant or extraneous matters.

17. For the foregoing reasons, I find that the learned trial magistrate properly found that the respondent had proved his case against the appellants on a balance of probabilities. I however find no basis for the trial court's decision to award the respondent interest at the rate of 18% since it was not based on any evidence.

18. For the foregoing reasons, I do not find merit in this appeal save for the award of interest made by the trial court which is hereby set aside and is substituted with interest at court rates from the date the suit was filed till payment in full. The rest of the appeal is dismissed with costs to the respondent.

It is so ordered.

**DATED, SIGNED and DELIVERED at NAIROBI this 24<sup>th</sup> day of May, 2019.**

**C. W. GITHUA**

**JUDGE**

**In the presence of:**

Ms Mukuna holding brief for Mr. Ovyu for the appellants

Mr. Gaita holding brief for Mr. Mogikoyo for the respondent

Mr. Salach: Court Assistant