



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO 518 OF 2017

(CORAM: F. GIKONYO J.)

ERNEST NDWIGA HOSEA.....APPELLANT

Versus

NAWIRI SACCO SOCIETY LTD... RESPONDENT

(Appeal from the judgement and decree of the Co-operative Tribunal at Nairobi Delivered on 1<sup>st</sup> September 2017 in Claim No. 218 of 2015)

JUDGMENT

1. This appeal arises from the judgement of the Co-operative tribunal at Nairobi in CTC No. 218 of 2015 which was delivered on 1<sup>st</sup> September 2017 where the tribunal found that the claimant failed to prove his claim on a balance of probabilities and dismissed it with costs. The appellant had filed a claim in the Co-operative Tribunal seeking judgement against the respondent for damages of Kshs. 647,000, loss of income of Kshs. 1,875 per day from 14/11/2014, refund of shares in membership No. 989-01-1576 of Kshs. 151,854.36, payment of dividends from 2004 up to date and a certificate of discharge or waiver of loan balance and release of original title deed to land parcel No. GATURI/KIANJOKOMA/T.149.

2. It was the appellant's case that he was a member of the respondent Sacco as a coffee farmer. He applied for a loan with the respondent on or about 13/12/2003 of Kshs. 120,000 and applied for a top up on 1/9/2004 of Kshs. 450,000 and he received 156,960 after all the deductions were made. He commenced repaying the loan but after some time he experienced financial constraints and was unable to repay the loan. However, on or about 3/2/2011 the government directed the then permanent secretary ministry of Co-operative development and marketing to waive the coffee debts owed to SACCO's by coffee farmers. However, the respondent did not waive the appellant's loan but instead went on to proclaim the appellant's livestock causing him loss and damages.

3. The appellant was aggrieved by the said judgement and filed this appeal vide Memorandum of Appeal filed on 29/9/2017 in which he raised the following grounds of appeal;

- a) That the learned members of the Co-operative Tribunal erred in law and in fact by holding that the appellant had not proved his claim against the respondent
- b) That the learned members of the Co-operative Tribunal erred in law and in fact by holding that the appellant is indebted to the respondent
- c) That the learned members of the Co-operative Tribunal erred in law and in fact by holding that coffee farming does not constitute a business
- d) That the learned members of the Co-operative Tribunal erred in law and in fact by failing to evaluate the evidence presented before them therefore arriving at a wrong decision.
- e) That the learned members of the Co-operative Tribunal erred in law and in fact by holding that by failing to hold that the claimants loan was for the coffee production and not any other business
- f) That the learned members of the Co-operative Tribunal erred in law and in fact by disregarding the provisions of Section 34 of the Co-operative Societies Act
- g) That the learned members of the Co-operative Tribunal erred in law and in fact by failing to hold that the appellants loan was waived by the government.

## Submissions

4. The appellants in their submissions argued that the tribunal failed to correctly evaluate the evidence adduced, as the respondent's witness did in fact testify that the respondent had waived several loans from farmers including that of the appellant's guarantors. It was their submission that in fact the appellant would not have been given the loan had it not been for coffee production. Additionally, coffee farming can be defined as business as it is an occupation that one engages in for livelihood or for gain. Therefore, the "business" indicated in the loan application form could mean coffee farming business. Corroborate came from the claimant's second witness who testified that he did not know of any other business that the appellant was involved in apart from that of coffee farming.

5. He urged that the tribunal's argument that the appellants loan could not be a business loan because the security offered was pension proceeds from the business, tea proceeds and title deed was unfounded. The proceeds from the coffee farming were applied to settle the appellant's loan as was indicated in the appellant's savings passbook.

6. The respondents on the other hand in their submissions argued that the law on specific damages is clear that it must be pleaded and specifically proved by way evidence. Therefore, the specific claim of Kshs. 647,000 should have been proved as such. The appellant herein admitted that he took a loan from the respondent for which he gave his title deed, pension, business and guarantors as security. Additionally, the loan advanced to the appellant was not for the purpose of developing coffee proceeds as the loan application said it was for business and not coffee farming.

## ANALYSIS AND DETERMINATION

7. The first appellate Court should to evaluate afresh by way of a retrial the evidence recorded before the trial court and reach its own independent conclusion. In **Selle and Another v. Associated Motor Boat Company Ltd And Others, [1968] 1 EA 123** it was held that:

**"I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High 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. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hammed Saif –vs- Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)."**

8. Turning back to the matter it is not in dispute that the appellant took out a loan from the respondent. But the major contestation in this appeal seems to be; whether the term "Business" indicated in the loan application as the purpose of the loan included coffee farming. If it did, and the Appellant proves he applied the loan in coffee farming, then he is entitled to a waiver of coffee loan as per the directive of the Government. Section 107(1) of the Evidence Act provides as follows:

**"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of fact which he asserts must prove that those facts exist"**

Under section 109 of the Evidence Act

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

9. The Supreme Court in case of **Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 Others [2014] eKLR** held that:

**"The person who makes such an allegation must lead evidence to prove the fact. She or he bears the initial legal burden of proof which she or he must discharge. The legal burden in this regard is not just a notion behind which any party can hide. It is a vital requirement of the law. On the other hand, the evidential burden is a shifting one, and is a requisite response to an already-discharged initial burden. "The evidential burden is the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue" [Cross and Tapper on Evidence, (Oxford University Press, 12th ed, 2010, page 124)]."**

10. The appellant stated categorically that "business" may include coffee farming. This may be so. However, as it has been insisted upon, each case is determined on its own facts. The facts of this case were quite peculiar. The Appellant claimed that his loan had been waived by the Government of Kenya. From the record, the government waiver was very specific to coffee debts only. The appellant herein had farming business and or other business. But he had the onus of proving; (1) that the loan in question was a coffee loan; (2) that he had coffee farming or coffee production business; and (3) that he utilized the loan money of his coffee farming or coffee production business to qualify for the government waiver. On perusal of the record there is no evidence of coffee farming. I only see evidence of dairy farming which was presented before the tribunal which on its own accord does not meet the criteria of coffee farming. Tea payment was also given as security for the loan. This again does not mean coffee farming.

11. With much trepidation, the above recapitulation of important elements of this case brings me to conclude that the appellant did not prove his case on a balance of probability that the loan he took was coffee loan as to be entitled to a waiver of the loan. On that basis, the Tribunal was right in dismissing his claim. I am not without pity to the Appellant. But in the upshot, I find the appeal not to be meritorious and is dismissed. Given the circumstances of this case, I order each party to bear its own costs. It is so ordered.

**Dated and signed at Meru this 14<sup>th</sup> day of November 2019**

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**F. GIKONYO**

**JUDGE**

**Dated, signed and delivered in open court this 27<sup>th</sup> day of November 2019**

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**L. NJUGUNA**

**JUDGE**