



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU

CIVIL APPEAL 7 OF 2011

GABRIEL NYAGA NJOROGE.....APPELLANT

VERSUS

RUKURIRI TEA FARMERS SAVINGS & CREDIT

CO-OPERATIVE SOCIETY.....RESPONDENT/JUDGEMENT CREDITOR

JUDGEMENT

1. This is an appeal against the award of the Co-operative Tribunal sitting at Nairobi dated 16th December 2010. The appeal arises out of development loan and a school fees loan, which were advanced to the appellant by the respondent.

2. It is common ground that the appellant was given a development loan in the sum of Kshs 150,000/-. It is also common ground that the loan has been partly serviced from the appellant's tea payment, bonuses and the guarantors' proceeds. According to the appellant, he had fully discharged his debt obligations to the respondent. The respondent on the other hand has disputed the appellant's claim that the loan has been fully serviced. The origin of the dispute started when the appellant filed a plaint claiming a declaration that he had fully repaid to the respondent the loan of Kshs 150,000/- which was advanced to the appellant by the respondent on 28th January 2003 plus interest. He also sought a permanent restraining order directed against the respondent from deducting and/or recovering the appellant's or from his guarantors tea bonus payments from the Kenya Development Authority and his dividends.

3. The respondent filed a written statement of defence disputing the plaintiff's claim that he has discharged his loan fully and was not indebted to the respondent. The respondent went further and filed a counter-claim seeking a sum of Kshs 279,359/- together with interest and costs from the appellant.

4. During the pendency of the claim and counter-claim, the parties recorded a consent order dated 28th November 2008. The terms of that consent were as follows:

a. An auditor from DCO Embu office to conduct an audit of the claimant's loan account with the respondent and file a report in 60 days.

b. Parties be at liberty to appoint other independent auditors to supervise the exercise.

c. Costs in the cause.

5. The respondent's counsel was granted leave to file a supplementary list of documents within 7 days.

6. The tribunal received the auditor's report from the office of the District Co-operatives Office in respect of the claimant's loan account with the respondent. It also received another auditor's report concerning the same matter from the appellant's auditor. Upon receipt of those two auditors' reports, the tribunal considered the issues and made an award in which they ordered the appellant to pay to the respondent a sum of Kshs 101,140.20 plus costs and interests. And on their own motion, they ordered a stay of execution for 30 days. In making the award, the tribunal stated that:

“We have carefully examined the chamber summons, documents tendered in support of each party's arguments, the expert opinion of Njogu Fundi and associates – certified public accounts and those from B.M. Karanja of the District Co-operative Audit Office – Embu. We find that the loan agreement does not stipulate any applicable rate of interest for the loans. Consequently, the respondent society has applied varying rates for the development loan which changes frequently and freely unlike the school fees loan. This is the point of departure for the opinion expressed by the two auditors”.

7. This is a first appeal. I am required according to the Court of Appeal in ***Peters v Sunday Post Limited (1958) EA 424***. According to that case, I am further required to arrive at my own independent conclusions. I have done so. Furthermore, I remind myself that in terms of ***section 81 of the Co-operative Societies Act (Cap 490) Laws of Kenya*** that I may confirm, set aside or vary the order that is appealed against, amongst other, powers that are vested in this court. I further remind myself that in terms of ***section 81 (3)*** that the decision of this court is final. It is with this principles in mind that I now proceed to consider the appellant's grounds of appeal.

8. The appellant has raised seven grounds of appeal, which I will deal with as follows. I will deal with grounds one and three together since they raise the same issues. In ground one, the appellant has faulted the tribunal for failing in law to accord him an opportunity to prove his case as pleaded in the plaint, which is contrary both to the rules of natural justice and to the provisions of the Constitution. In ground three, the appellant has faulted the tribunal for not giving the appellant an opportunity to prove his case, which is contrary both to the law and the provisions of the Constitution. It is clear that when the parties recorded the consent order they had decided the matter to be disposed off by way of an audited report in respect of the loan account of the appellant together with any additional documents they desired to rely on. And that explains why counsel for the respondent applied for and was given leave to file additional supplementary documents. In doing so, the parties decided to do away with oral evidence.

9. The tribunal also granted the parties permission to appoint their own independent auditors if they so desired. The appellant exercised his right by appointing the firm of M/S Njogu Fundi and Associates who carried out an independent audit and submitted their report to the tribunal. It is clear from the award that the tribunal took into account and considered the reports of the two auditors. After doing so they found that the auditor who was appointed by the tribunal applied varying rates for the development loan which changed frequently and freely unlike the school fees loan. According to the tribunal, this was the point of departure for the opinions expressed by the two auditors.

10. It is clear that the appellant was accorded full opportunity in presenting his case by filing a report of his auditor, which was accepted but rejected only in respect of the interest charged on the development loan. The appellant cannot therefore be heard to complain that he was denied an opportunity to prove his case as pleaded. I find that grounds one and three are without merit and I hereby dismiss them.

11. In ground two, the appellant has faulted the tribunal in making an award that was based on the contents of the chamber summons and in ignoring the pleadings that were filed. In this regard, the tribunal stated that: *“We have carefully examined the chamber summons, documents tendered in support of each party's arguments, the expert opinion of Njogu Fundi and Associates – certified public accounts and those from B.M. Karanja of the District Co-operative Audit Office – Embu”*. It is clear from this passage that the tribunal considered the chamber summons, other documents that were tendered in evidence and the two auditors' reports and the arguments of both parties. It is therefore not correct that the tribunal considered only the chamber summons. In addition to the chamber summons the tribunal considered other documents and the report of the two auditors. **In the circumstances, I find that this**

ground of appeal is without merit and is hereby dismissed.

12. In ground four, the appellant has faulted the tribunal for awarding the respondent Kshs 101,140.20/- without proof of the same or without legal basis as required by the law. The tribunal based the award that is appealed against on the two auditors' reports, the pleadings of the parties and the submissions of both counsel. This ground of appeal is lacking in merit and is hereby dismissed.

13. In ground five, the appellant has faulted the tribunal for admitting into evidence the auditors' reports without the same being produced as required by the law. Additionally, the appellant has stated that the auditors should have been called to give oral evidence. I find that by the terms of their consent order, the parties agreed that their dispute was to be resolved by presentation of the audited reports of the appellant's loan accounts. The appellant appointed his auditor, who similarly filed a report which was accepted in evidence and was partially acted upon. I therefore find that the auditors' reports were properly put in evidence and it was not necessary to call the two auditors as witnesses, because it had been resolved by necessary implication in terms of the consent order, that oral evidence was to be dispensed with.

14. In ground six, the appellant has faulted the tribunal in failing to call the two auditors to support their reports as they had differed in their opinions, which difference of opinions was adjudicated upon by the tribunal. The tribunal was entitled to rely on the report of the auditor, whom the tribunal had appointed. The tribunal gave their reason as to why they did not rely fully on the report of the appellant's auditor. According to the tribunal, the appellant's auditor did not apply varying rates for the development loan, which the tribunal found changed frequently and freely unlike the school fees loan. The tribunal was faced with two conflicting reports of two expert witnesses. The tribunal was not bound to accept any of the two auditors' reports. It was within their discretion to decide as to which of the two conflicting reports was reliable and credible.

15. As a general rule, the evidence of the expert witnesses, being opinion evidence was not binding on the tribunal. The tribunal was at liberty to accept or reject the evidence of the two auditors depending on the facts and circumstances of the case before it. It was the responsibility of the tribunal to come to a decision one way or the other after analyzing all the evidence before it. In the instant case, the evidence of the two auditors was in conflict. The tribunal was to decide one way or the other depending on the credibility of the two expert witnesses. After considering the two reports and the other material placed before it, the tribunal found that the report of the auditor, who was appointed by the tribunal was credible and made their findings based on that report.

16. The award is based on the report of the auditor who was appointed by the tribunal. The tribunal found that the interest rate on the development loan changed frequently and freely unlike the school fees loan. The interest rate charged on the development loan was determined by monetary market forces, which in my view is an objective criterion. In this regard, the appellant's auditor concludes that the interest charged was exorbitant and he applied the rate of interest of 1% per month. He does not state the criterion he used to determine what he called an exorbitant interest. On my own assessment of the evidence of these two expert witnesses I have come to the conclusion as did the tribunal that the report of the auditor, who was appointed by the tribunal is credible and reliable. In view of the foregoing reasons I find that this ground is without merit and is hereby dismissed.

17. In ground seven the appellant has faulted the tribunal's award as being unfair, inequitable, irregular and unconstitutional and therefore was null and void. I have considered this ground of appeal and find that the award was fair and regular, because it gave the two parties full opportunity to prove their cases. The tribunal gave each party an opportunity to appoint its own independent auditors. The appellant exercised that option and appointed its own auditor, whose report was accepted and partially acted upon.

18. I have on my own re-assessed the documentary evidence tendered before the tribunal and the submissions of both parties, as I am required to do in terms of *Peters v Sunday Post Limited, supra*, and I have come to the conclusion that the award of the tribunal is proper and hereby confirm it.

19. The appellant's appeal is hereby dismissed.

20. The respondent will have the costs of this appeal.

JUDGEMENT DELIVERED, DATED and SIGNED in open court at **EMBU** this **26th** day of **JULY, 2016.**

In the presence of Ms Muthoni for the Appellant and Mr. E. Njiru holding brief for Mr. Kathungu for the respondent.

Court clerk Njue

J.M. BWONWONGA

JUDGE

26.07.16