REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 700 OF 2012

MANAGEMENT COMMITTEE OF SHALEM

COMMUNITY EDICATORS ..... 1ST APPELLANT

JOSEPHINE MBAYA.....2ND APPELLANT

DAVID MBAYA.....3RD APPELLANT

RUTH G. MBOGORI ..... 4TH APPELLANT

BONIFACE NAUKOT ..... 5TH APPELLANT

STEPHEN KIMATIA ..... 6TH APPELLANT

ROSEMARY MUTUMA ..... 7TH APPELLANT

GLADYS GICHOGA..... 8TH APPELLANT

-V E R S U S –

THE REGISTERED TRUSTEES OF MICRO ENTERPRISES

SUPPORT PROGRAMME TRUST (MESPT).....RESPONDENT

(Being an appeal against the judgment and decree of the Honourable T.W. C. Wamae (Mrs) Chief Magistrate, in the Milimani Nairobi Civil Case No. 2130 of 2009 dated 14th December 2012)

JUDGEMENT

1. On or about 5th August 2006, the respondent herein executed a loan agreement with the 1st appellant in which the respondent advanced to the 1st appellant a sum of ksh.2,500,000/= being the principal loan advanced to micro entrepreneurs and small scale enterprises in Kenya to support their business development. The 2nd – 8th appellants duly executed a letter of guarantee to personally secure a limited sum of ksh.2,500,000/= plus interest, commission, costs and expenses borrowed and incurred by the 1st appellant to pay to the respondent on behalf of the 1st appellant the aforesaid monies on demand. Pursuant to the aforesaid loan agreement and the letter of guarantee, the respondent advanced to the 1st appellant a sum of kshs.2,500,000/= on 22.08.2006 which amount was disbursed by way of a bank transfer from the respondent's bank in Nairobi. The 1st appellant subsequently failed to fully repay the

loan. By 1st February 2009, the 1st respondent had repaid a sum of 1,260,885/= leaving a balance of ksh.2,692,023/=. The respondent was then prompted to call upon the guarantors i.e. the 2nd – 8th appellants to honour their contractual obligations. The respondent was eventually forced to file an action before the Chief Magistrate's Court. The suit was eventually heard and determined in favour of the respondent in the sum of ksh.2,692,023/= with interest at the rate of 12% per annum. The appellants were dissatisfied hence this appeal.

2. On appeal the appellant put forward the following grounds of appeal.

1. The learned magistrate erred in law and fact by finding that the rate of interest was six percent (6%) per month which when computed on an annual basis amounts to interest at the rate of seventy two(72%) per annum which rate of interest is unlawful, illegal, non-cognisable and an abuse of the court process as the Banking Act Cap 488 Laws of Kenya allows interest at 2% above the Central Bank Interest Rate.

2. The learned magistrate while having the knowledge that the letter of offer did provide for an interest of 6% per annum at Clause 6 thereof erred in law and fact by awarding to the plaintiff respondent a non contractual interest in the terms of the letter of offer allegedly in the terms of letter of offer at 6% per month and then back dating the interest to the 1.2.2009.

3. The learned magistrate erred in law and in fact by bringing into account that the sum of kshs.1,539,115/= claimed as the outstanding balance due from the 1st defendant to the plaintiff was computed on the basis of 10% interest rate per month which interest rate the court later came to determine was incorrect and further that the plaintiff could not justify its claim for 10% per month.

4. The learned magistrate erred in law and in fact in finding that the appellants were jointly and severally on the valance of probability to pay kshs.1,539,115/= but did not take into account the evidence duly admitted by the plaintiff respondent in its plaint that the plaintiff had already received from Shelem Community Educators the sum of ksh.1,439,115/= leaving a debt of kshs.1,060,885/=.

5. The learned magistrate erred in law and in fact by failing miserably to follow the findings of the High Court in Misc. Application No. 427 of 2005 annexed to the defendants submissions parties being Simu Vendors Association –vs- The town Clerk City Council of Nairobi and another in which justice Mohammed K. Ibrahim at page 5 thereof held as follows, "..... the law would not permit it as this is not a simple case misjoinder or non joinder of parties. This is a case where the applicant could not in law bring any proceedings in its name the institution of the proceedings was null and void ab initio. The proceedings are a nullity. As a result, no amendment and or joinder or substitution of parties can cure the defect, it is fatal. There can be no joinder or amendment in respect of a suit which in law never existed. Neither is substitution possible.

This is a case where I would have exercised eh court's discretion to correct any defects, irregularity or error. However, the defect here is not a mishonor, misdescription, misjoinder or non-joinder. In this case there is no party to replace or substitute, the purported applicant was never there in the first place and what has taken place todate are nullities....

6. That the learned magistrate erred in law and in fact y failing to take heed to the defendants submission that the account held at the Cooperative Bank Meru was not the 1st defendants Management Committee of Shalem Community Educators but a community based organisation known as Shalem Community Educators which has not been sued.

7. That the learned magistrate erred in law and in fact by finding that the defendant had been stopped by conduct form denying their actions which had an effect on and influenced the plaintiff to advance the loan contemporaneously while having the knowledge and ignoring that

by conduct the plaintiff had caused the 1t defendant by conduct believe the plaintiff's actions that an agency had been created thereby influencing Shelem Community Educators/the 1st defendant to lend the advanced loan to 3rd party beneficiaries.

8. The learned magistrate erred in law and in fact by finding that the letter of offer PEXH4, loan agreement PEXH6 and letter signed by DW1 in which she explains that the 1st defendant had made some repayment on the loan PEXH11 evidently show that the relationship between the parties was a loan agreement and that the defendants were stopped by the rule of Estoppel by deed from denying that which is recorded in the above mentioned documents but totally ignored the purpose of the loan which is contained in PEXH 4 and PEXH6, , to wit, "the proposed facility will be utilized by the borrower to on lend to micro enterprises (MES) adn Small Scale Enterprises (SSEs) in Kenya to support their business development depending on borrowers needs, repayment ability, reliable sources of repayment and other credit related considerations that are associated with prudent lending and Micro Credit best practises" who happen to be the actual beneficiaries to the loan from the plaintiff.

9. The learned magistrate erred in law and in fact by relying on the letter of guarantee PEXH7 as evidence to condemning the 2nd to 8th defendants as jointly and severally liable together with the 1st defendant to repay the outstanding loan together with interest contemporaneously while having the knowledge that it was DW1 unrebutted evidence that she had never appeared before Muchuki Advocate to sign the letter of guarantee PEXH7 and further that the 1st defendant did not have a board of directors and could therefore not make a resolution required by Clause 11(a) in the letter of offer PEXH4. The said sentiments were collaborated by the evidence under oath given by PW1 and DW2 affirming that neither the General Manager nor the Chief Executive Officer of the plaintiff had ever seen the 2, 3, 5, 6, 7 and 8 defendants come to their offices at Westlands to sign any documents nor had they witnessed the said defendants attest to the letter of guarantee and indemnity PEXH7.

3. When the appeal came up for hearing, learned counsels appearing in this appeal recorded a consent order to have the appeal disposed of by written submissions. I have re-evaluated the case that was before the trial court. I have also taken into account the rival written submissions. In grounds 2, 3, 4, 5 and 6, the appellants are basically raising preliminary points of law which can be determined together. It is argued that by the time of entering into the transactions complained of, the 1st appellant was not in existence hence no valid agreement could be executed. It is also argued that the 2nd to 5th appellants had no capacity to guarantee an invalid contract. In my view, the appeal may actually be disposed of by determining the aforesaid preliminary points. What is not in dispute is that money was disbursed to the 1st appellant upon the execution of a loan agreement and letters of guarantee. The learned trial chief magistrate concluded that the 1st appellant provided a detailed description of its functions and composition as a community based organization although it knew that its certificate had not been renewed since 6th November 2005. The learned chief magistrate further opined that the appellants were estopped by the rule of estoppel by deed from denying that which is recorded in the documents and produced in evidence as exhibits. The question which has been posed to this court to determine is whether or not there was a valid loan agreement between the respondent and the 1st appellant. The other question is whether in the circumstances the 2nd to 8th appellants could provide binding letters of guarantee. It is the argument of the appellants that the loan would be disbursed to the 1st appellant upon completion of legal documentation. It is further pointed out that the 1st appellant was first required to be a legal entity. In fact one of the requirements was that the 1st appellant as to avail a certified copy of the certificate of registration to enable the respondent's lawyers to prepare the loan agreement. It is not in dispute that the 1st appellant did not have a certificate of registration hence it was not a legal entity to transact in any business. The respondent on the other hand was of the view that there was credible evidence showing that the 1st appellant existed as an entity capable of suing and being sued. The respondent further argued that the claim that the 1st appellant had not renewed its registration was defeated by the fact that through the appellants' conduct, they went ahead and made an offer of the said loan and accepted the same by

paying the requisite appraisal fees and furthermore the 1st appellant proceeded and distributed the loan to persons within its locality of jurisdiction. The 1st appellant is said to have also made loan payments to the respondent at kshs.119,000/= per month. According to the respondent this conduct estopped the 1st appellant for claiming it was not a going concern with the requisite capacity. In **Simu Vendors Association of Nairobi and Another Misc. Application no. 427 of 2005, Justice Ibrahim**, (as he then was) held *inter alia*

> **"That the applicant being a society and unincorporated, lacked the capacity to institute proceedings. It is not a legal person or corporate body."**

4. In this matter, the 1st appellant is a community based organization with no legal persona hence it does not have the capacity to sue or being sued. The respondent failed to tender evidence to establish its existence as a legal persona and or body corporate. In my humble view the organization being a non legal entity had no capacity to enter into a contract and as such the offer, agreement or guarantee deeds are all void. The 1st appellant's officials were not beneficiaries of the funds which were meant to be loaned to members of public who eventually failed to repay.

5. The other issue is whether the 2nd to 8th appellants would lawfully guarantee a loan given to a non-existent entity. In my humble view since there was no party to be guaranteed then the purported guarantees cannot stand. This is a very peculiar case in that the respondent recklessly disbursed money to a non-existent party before first establishing that it was legally existing in law. In essence, the respondent did not adhere to the clauses in the letter of offer and cannot now use the court to bring legal intervention when the horse has already bolted. The learned chief magistrate therefore misapprehended the application of the doctrine of estoppel. The respondent did not simply apply due diligence in the transaction.

6. On the basis of the preliminary points raised and argued hereinabove, I find the appeal meritorious. Consequently the appeal is allowed. The judgment and decree of the trial court is set aside and is substituted with an order dismissing the suit. In the circumstance of this dispute a fair order on costs is to direct, which I hereby do, that each party meets its own costs of the appeal and the suit.

Dated, Signed and Delivered in open court this 25th day of November, 2016.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent