



**REPUBLIC OF KENYA**

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

**HIGH COURT CIVIL APPEAL NO. 19 OF 2009**

**ROSE SHIKEYI OBIERO.....APPELLANT**

**VERSUS**

**THE CHAIRMAN, SECRETARY, TREASURER & THE EXECUTIVE SECRETARY KNUT  
BUSIA**

**(All on behalf of Busia KNUT Education Scheme.....RESPONDENT**

**(Being An Appeal arising out of the Judgment of E. O. ObagaSRM, in Busia PMCC No. 311 of 2008  
delivered on 16/6/2009).**

**J U D G M E N T**

1. The outcome of this Appeal turns on whether ROSE SHIKENYI OBIERO (The Appellant) proved her claim strictly at Trial. The Appellant (herein also referred as the Plaintiff) had through a Complaint dated 25<sup>th</sup> August 2008 and filed on 15<sup>th</sup> September 2008 sued the Respondent (herein also referred to as the Defendant) for the sum of Kshs. 52,500/- on account of shares contributed by her to the Defendant scheme. She also claimed interest on that amount with effect from June 2006.

2. In a short, four (4) paragraph Statement of Defence, the Defendant denied all the allegations contained in the Complaint and then made this alternative Defence in paragraph 3,

**“ALTERNATIVELY and without prejudice to the above, the defendants contents (sic) that they cannot perform their duties as expected nor carry out their obligation to the plaintiff on account of barring court orders in BUSIA PMCC NO. 205 OF 2005”**

3. At the hearing only the Plaintiff tendered evidence. At the time material to the dispute, the Plaintiff was a school teacher in the employment of the Teachers Service Commission. She joined the Busia KNUT Education Scheme sometime in 1993. That Scheme seems to have changed names over time. At one time it was called KNUT Building Scheme. Anyhow! In her evidence, she told Court that the Scheme ceased deducting monthly contributions from her in July 2006. She showed the Court two monthly slips. One for December 1997 (Pexhibit 2) and another for June 2006 (Pexhibit 3). The two slips were intended to show that, when she joined the Scheme, she started by making monthly contributions of Kshs. 400/- and this was raised to Kshs. 500/-. That the enhanced monthly contribution would be from December 1999 to June 2006.

4. In further support of her claim, the Plaintiff produced a Member's card (Pexhibit 4) with a Head note of Busia Teachers Education Scheme. That card, which looks really like a Statement of Account, was put forward to prove that the Plaintiff had shares of Kshs. 47,500 with the Scheme. Benson Okumu Alweya

(PW2) said more about the Member's card. He was an officer of the scheme from 1997 to the year 2005 as a Secretary. He said that the card was infact a Statement of account and was designed by him. He also told Court that the amount in the Statement was retrieved from the Accounts Clerk. However, on cross examination, he conceded that he was not the author of the Statement. He further conceded that the document had erasures and alterations. He did not know who made those erasures or alterations.

5. In finding that the Plaintiff had only proved contribution of Kshs. 17,500/- the Learned Trial Magistrate observed:-

**“The payslip for December 1997 where the plaintiff made a contribution of 400/- which reduced the amount for 60,000/- target to 59,600/-. As at the time she ceased being a member in 2006 she had reduced that target to 42,500/- as PEXH 3. to get her contribution is therefore to deduct the balance get due as at the time of assertion from the original target on inception of membership which will be 60,000/- less 42,500/- which comes to 17,500/-. This is the amount which she had contributed and she cannot get any other amount unless she shows the contrary which she has not shown”.**

6. Although the Memorandum of Appeal raises 7 grounds, all these grounds read together reveals a single issue, whether or not the Learned Magistrate erred in finding that the Plaintiff had only proved a claim for contribution of Kshs. 17,500/- and legal fees of Kshs. 1000/-. The claim by the Plaintiff being one of special damages she was obliged to provide strict proof thereof.

7. In my evaluation of the evidence, three documents were produced by the Plaintiff to prove her shares. The two payslips (Plaintiff Exhibit 2 and 3) and the Membership Card cum Statement (Pexhibit 4). What if, anything, did these documents prove? The two payslips in my view proved that the Plaintiff made a contribution of Kshs. 400/- in December 1997 and Kshs. 500/- in June 2006.

8. The Membership card was certainly the star Document for the Plaintiff. It was tendered so as to prove that by July, the Plaintiff's shares where in the sum of Kshs. 49,500/-. Yet this crucial document was not without difficulties! In cross examination the Plaintiff says this in respect to that document;

**”This was a statement of my account dated 31.12.2006. The document does not show who approved it. The document has no account number. I agree that there is some deleting. The charges were not countersigned. I am not the one who deleted the figures. I was given the document by the secretary of the chairman of the scheme. The secretary is called Margaret. I have nothing to show that this document is authentic witness referred to P EXH 2”**

9. As for PW2 he says as follows:-

**“The document is in respect of one year. It is the accounts clerk who prepares the statements. I agree with you that there are erasures on the document. The erasure was not counterfeit for Busia KNUT is not an entirety which is registered”.**

10. The two witnesses admit that there are alterations to the key document. There is no evidence as to who either made the entries or the alterations. The maker of the document was not called to produce it. There was no clear evidence that the document was a document of the Defendant. That it bears its name as a headnote is not sufficient. In a word, there was no evidence to prove the authenticity of the document. That would mean that the contents in the document would not be admissible.

11. I would think that the Learned Trial Magistrate was correct in his assessment of the document. He remarked:-

**“It is clear from the evidence adduced that the basis of the plaintiff's claim is plaintiff exhibit 4 which is said to be a member. This document was highly contested by counsel for the defendants. The document was not signed and contains erasures which**

are not countersigned. When asked in cross-examination where she obtained the document the Plaintiff answered that she obtained it from the secretary of the chairman called Margaret and that the document eliminated from accounts section. These however no evidence to show that the document came from accounts section as it is not signed. It cannot therefore be used as a basis of the plaintiff claim. Besides the anomalies in the documents, the amount shown therein is not supported by the evidence of the plaintiff and other documents produced by the Plaintiff”.

12. Having evaluated the evidence placed before the Lower Court as required of me as a Court sitting in first Appeal (**Selle v Associated Motor Boat Company Ltd (1968) EA 123**), I reach a decision that the Learned Trial Magistrate did not misapprehend the facts and the Law. The Appeal cannot succeed. It is hereby dismissed with costs.

**DATED, SIGNED AND DELIVERED AT BUSIA THIS 20<sup>th</sup> DAY OF MAY 2015.**

**F. TUIYOTT**

**J U D G E**

**IN THE PRESENCE OF:**

**OILE.....COURT CLERK**

**N/A.....FOR THE APPELLANT**

**N/A.....FOR THE RESPONDENT**