



**REPUBLIC OF KENYA**

**High Court at Mombasa**

**Civil Suit 159 of 2012**

EAGLE SELF HELP GROUP.....PLAINTIFF

VERSUS

1. THE TRUSTEES AFRICA INLAND CHURCH

2. BISHOP JOHN BUTI.....DEFENDANTS

**RULING**

The plaintiff herein **EAGLE SELF HELP GROUP** filed this suit dated 29<sup>th</sup> August, 2012 against the defendants being **THE TRUSTEES AFRICA INLAND CHURCH** seeking the following orders:

- “(a) A declaration that the defendant is truly indebted to the plaintiff.**
- (b) Payment of the balance of the contract.**
- (c) Damages for breaching contract and specific performance thereof.**
- (d) Costs and incidentals to this suit.**
- (e) Interest as per the agreement.**
- (f) Any other relief that this honourable court may deem fit to grant.”**

The defendants despite having been properly served with notice of this suit vide the affidavit of service filed in court on 2<sup>nd</sup> November, 2012, failed to enter any appearance and failed to file a defence to the suit. Following an application by the plaintiff dated 16<sup>th</sup> October, 2012, judgment in default was entered for the plaintiff and against the defendants on 8<sup>th</sup> November, 2012. The matter thus came up for formal proof before this court on 5<sup>th</sup> December, 2012.

**PW1 ZACHARY MAINA MWANGI** gave evidence on behalf of the plaintiff. He told the court that the plaintiff, a registered Self Help Group entered into a contract with the defendants to set up 56 stalls located at Kongowea market in Mombasa. The defendants sought from the plaintiff a loan of Kshs. 1.0 million for this purpose. Since the defendants had no ready cash to refund the plaintiff, it was agreed that they (the defendants) would lease the stalls in order to raise money to repay the loan. The plaintiff advanced the defendants this amount of Kshs. 1.0 million and the stalls were built. The parties further

entered into a Lease Agreement dated 28<sup>th</sup> November, 2011 by which it was agreed that the defendants would collect the rent from the 56 stalls and would remit to the plaintiff the sum of Kshs. 100,000/= from such rental collected for a period of 36 months. This would amount to a total sum of Kshs. 3.6 million.

Upon expiry of 36 months the defendants agreed (per the lease agreement) to refund to the plaintiff a sum of Kshs. 200,000/= for a period of seven (7) months. This would be equivalent to a sum of Kshs. 1.4 million. In essence therefore from the Kshs. 1.0 million loaned to the defendants, the plaintiff would after a period of 43 months recover a sum of Kshs. 5.0 million.

The Lease Agreement was duly signed by both parties. However, the defendants failed to make the first payment as agreed on 18<sup>th</sup> February, 2012 citing financial constraints. **PW1** told the court that to date the defendants have only paid the plaintiff a sum of Kshs. 327,500/=. This is made up of only three (3) monthly payments of Kshs. 100,000/= and a sum of Kshs. 27,500/= representing the defendants agreed contribution towards legal fees. Despite several letters and/or reminders to the defendants the balance of Kshs. 4.7 million remained unpaid hence this suit by the plaintiffs to recover what is due to them.

As stated earlier, the defendants despite having been given adequate notice failed to file any defence to the suit. The plaintiffs abandoned their prayer for specific performance of the contract. From these facts as given by **PW1**, the following issues arise for determination:

- (1) Are the defendants truly indebted to the plaintiff?
- (2) Is the plaintiff entitled to be paid the balance as claimed?
- (3) Is the plaintiff entitled to damages?
- (4) Costs for the suit.

I will now proceed to consider each point individually.

**(1) Are the defendants truly indebted to the plaintiff?**

The fact that the plaintiff is a registered Self Help Group is not in any doubt. **PW1** produced as an exhibit the group's certificate of registration serial No. 206117 dated 14<sup>th</sup> June, 2011 issued by the Ministry of Gender, Children and Social Development **Pexb1**. As such the group existed with a clear mandate to act for the benefit of its members e.g. by giving out loans to be repaid with interest. The fact that the plaintiff entered into an agreement with the defendants is also no in any doubt. A copy of the lease agreement dated 28<sup>th</sup> November, 2011 and duly executed by **BISHOP JOHN BUTI** on behalf of the defendant was also exhibited in court **Pexb3**. Clause 2(b) of the said agreement clearly provided that the lessor being Africa Inland Church (Kenya) Trustee:

**“(b) To pay to the lessee [being Eagle Self Help Group], the sum of Kshs. 100,000/= for a running period of thirty six (36) months on or before the 10<sup>th</sup> day of every month and on expiry of the said 36 months, commencing 10<sup>th</sup> February, 2012 and further to be paying Kshs. 200,000/= to the lessee for a further running period of seven (7) months.”**

This was an express term of the agreement signed between the parties. **PW1** told the court that despite entering into this agreement, the defendant has declined and/or failed to make payments as specified in clause 2(b).

An acknowledgement of the lease agreement as well as their indebtedness to the plaintiff is provided by the defendants' actions in making at least three of the payments due. By a letter dated 10<sup>th</sup> February, 2012 the defendants wrote to **Fadhili & Company Advocates**, the plaintiff's lawyers committing themselves to pay back the loan as agreed **Pexb4**. The defendant proceeded to make a cash payment of Kshs. 100,000/= on 9<sup>th</sup> March, 2012 into the plaintiff's bank account held at Equity Bank Kengeleni Branch. A

copy of the credit slip **Pexb6** is proof of this payment. Subsequently the defendants made a further payment of Kshs. 100,000/= on 5<sup>th</sup> April, 2012 **Pexb7** and a final payment of Kshs. 127,500/= on 8<sup>th</sup> June, 2012. If the defendants did not give the plaintiff any monies then they would not be making any payments into the plaintiff's account. The part-payment of the sum owed in line with the agreement is sufficient proof of the defendants' indebtedness. As such, I do hereby make a declaration that the defendants are well and truly indebted to the plaintiff.

(2) **Is the plaintiff entitled to be paid the balance claimed?**

The plaintiff claims from the defendant the balance due to themselves of Kshs. 4.7 million. Here again the lease agreement duly executed by the defendants provides the basis for this computation. The plaintiff loaned to the defendants the sum of Kshs. 1.0 million. As stated earlier the defendants filed no defence. This coupled with the fact that some repayments were made proves that this loan was in fact received by the defendants. The terms of repayment and the amounts to be repaid are clearly captured in clause 2(b) of the loan agreement. By executing the agreement the defendants bound itself to the terms and conditions of repayment. If the defendant had any problem with the amount to be repaid or the terms thereof, then I have no doubt that they would **not** have signed the agreement. The plaintiff has adduced evidence of payment of Kshs. 327,500/= to date. The defendants do not claim to have made any other payment. The total amount due to the plaintiff was Kshs. 5.0 million less this sum of Kshs. 300,000, a balance of Kshs. 4.7 million due and owing to the plaintiff. **PW1** produced a copy of a demand letter dated 27<sup>th</sup> July, 2012 written by **E.N. Waithira & Company Advocates**. The demand letter elicited no response hence the plaintiff's decision to move to court. There have been several correspondences between the parties over this issue. At no time has the defendant denied owing the plaintiff money nor has the defendant disputed the amount owed. I am satisfied that the plaintiff have proved their claim for Kshs. **4,700,000/=** and find that the plaintiffs are fully entitled to be paid this amount.

(3) **Is the plaintiff entitled to any damages?**

The plaintiff has made a prayer for damages for breach of contract. I note that at all times there has been engagement between the parties over the outstanding debt. Whilst it is true that the defendant delayed in making payments, it is also true that the plaintiff at least initially were willing to accommodate the defendants to some extent. I am not persuaded that an award damages are not called so moreso since the defendants have never denied the debt. I therefore decline to make any award for damages.

(4) **Costs**

In view of the fact that the plaintiffs were forced to seek legal redress due to failure and/or delay on the defendants' part in complying with the terms of their agreement, I find that the plaintiffs are entitled to the costs of the suit.

Finally, I do enter judgment for the plaintiff against the defendant in the sum of Kshs. 4,700,000/=. I award costs of this suit to the plaintiff plus interest on the above at court rates from the date of filing of the suit until payment in full.

**Dated and delivered in Mombasa this 16<sup>th</sup> day of April, 2013.**

**M. ODERO**

**JUDGE**

In the presence of:  
No appearance by either party  
Court Clerk Mutisya

