



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Appeal 22 of 2002

MUGO MUKUNYA and WINNIE WAMBUI MUKUNYA

sued as officials of

JOMO KENYATTA AIRPORT RESORTS CLUB.....1ST APPELLANT

MUGO MUKUNYA.....2ND APPELLANT

RESORTS LIMITED.....3RD APPELLANT

AND

EURO BANK LIMITED.....RESPONDENT

(Appeal from the Judgment and the Decree of the High Court Milimani Commercial Court Nairobi, of Honourable Commissioner of Assize Phillip J. Ransley delivered on 4th October 2001

in

HCCC No. 161 of 1999)

JUDGMENT OF THE COURT

1. This is an appeal arising from a judgment delivered in the High Court in favour of the respondent (plaintiff in the High Court) by the learned Commissioner of Assize **Philip J. Ransely** (as he then was). The Judgment was entered against the second appellant as an official of the first appellant in the sum of Kshs. 8 million and against the second and third appellants in the sum of Kshs. 3 million. The sums awarded were to carry interests at court rates to be charged by way of simple interest.

2. A plaint was filed by the respondent on 16th February 1999 and subsequently amended on the 22nd day of September 1999 seeking as against the appellant through two of its officials (defendants in the High Court) the sum of Kshs. 27, 923, 946. 30 plus interest thereon at the rate of 47% p.a., from 30th November 1998, until payment in full. The respondent's claim was that following an agreement in May, 1994, the respondent agreed to extend financial facilities to the first appellant, and the first appellant

agreed to repay all sums thereof plus interest at rates determined by the respondent; that the said loan facilities were to be secured by a mortgage dated 23rd May, 1994, over title I.R. 61861 L.R. No. 1160/580 for Kshs. 3,000,000.00; a debenture by the first appellant dated 3rd June, 1997, for Kshs. 5,000,000.00; and two guarantees dated 23rd May, 1994, by the second and third appellants not exceeding Kshs. 3,000,000.00.

3. Each appellant filed a statement of defence denying being indebted to the respondent in the alleged sum of Kshs. 27, 923, 946. 30. The gist of the defences was that the first appellant applied for a bridging loan from the respondent in the sum of Kshs. 2, 739, 726. 30. This loan was to be secured by an equitable mortgage to be registered against the title L. R. No. 1160/580 owned by the third appellant, and a personal guarantee from the second appellant. The mortgage was never registered because of a prior caveat registered against the title L. R. No. 1160/580 by the Official Receiver. Upon total failure to register the equitable mortgage, negotiations for the loans were terminated and the second and third appellants were duly discharged from any obligations. The first and second appellants averred that following the above events, the first appellant entered into fresh negotiations with the respondent. As a result, the respondent agreed to give the first appellant unsecured loans, first for the sum of Kshs. 2, 739, 726. 30, and later in March and May 1997 further sums amounting to Kshs. 3, 000, 000. 00.

4. Only two witnesses were heard on behalf of the parties, **Josephat Kisilu Ndambuki (PW1)**, a credit manager gave evidence for the respondent, and **Mugo Mukunya**; the second appellant, (**DW1**) gave evidence for the appellants. Thereafter parties made their submissions. The gist of the respondent's submission was that the second and third appellants should be held liable for the monies due and owing from the first appellant; that the second appellant was liable on account of being an official of the first appellant, as reflected in the first appellant's constitution and from his actions of holding himself out as having authority to carry out transactions on behalf of the first appellant; that both the second and third appellants were liable on account of being guarantors; that by virtue of clause five of the guarantee agreements, the liability of the second and third appellants as guarantors was not affected by the failure to register the equitable charge. In opposition, the appellants submitted that the monies lent to the first appellant could not be recovered for several reasons: first, that the money was lent to a non-legal entity; second, that the borrowing by this entity was *ultra vires* its constitution; and third, that the borrowing was not in line with the first appellant's objects. The appellants also asserted that since the original loans were null and void by virtue of failure to register the equitable charge, the second and third appellants could not be held liable as guarantors.

5. In his judgment, the learned Commissioner of Assize found that monies were indeed borrowed by the first appellant from the respondent, which at the end of October, 1997 amounted to Kshs. 8 million; that the second and third appellants executed guarantees in 1994 in respect of a maximum sum of Kshs. 3 million each, to secure an amount of Kshs. 3 million that had been lent to the first appellant; that having been registered as a society, the first appellant was not a legal body having corporate existence and as a result could only be sued through its officials; that the decision by the respondent to only sue the second appellant as an official of the first appellant, could not be used as a defence or excuse to stop the respondent from recovering its monies. The Commissioner of Assize drew an analogy between a registered society and a business partnership, in terms of holding officials of the registered society liable and found the second appellant liable as an official of the first appellant, given the fact that he was the one who actually entered into all borrowing arrangements on behalf of the first appellant. The second and third appellants were held liable as guarantors by virtue of clause five in the respective guarantee agreements, which clause upheld their liability, inspite of the failure to register the underlying equitable charge.

6. The appellants were aggrieved by the judgment entered by the Commissioner of Assize and filed this appeal citing 13 grounds of appeal contending that the Commissioner erred in entering judgment against the appellants even after admitting that the evidence adduced by the respondent was unsatisfactory; they object to the finding that officials of the first appellant are liable; they are dissatisfied with the learned Commissioner of Assize's failure to find that all borrowings by the first appellant were unrecoverable as they were *ultra vires* its constitution, making all transactions there under null and void. The appellants contend that the Commissioner erred in not finding that the guarantees by the second and

third appellants were unenforceable and erred in finding the second appellant liable for the sum of Kshs. 8 million and both the second and third appellants liable for the sum of Kshs. 3 million each under the guarantee. That the learned Commissioner of Assize failed to take into account the appellants credible evidence, and misdirected himself on substantial facts and points of law.

7. At the hearing of the appeal, the appellants' advocate **Mr. Njuguna J.K.** restated the appellants' grounds of appeal. He cited various pages in the judgment where the Commissioner had expressed doubt as to the sufficiency of the evidence proving how much money had been lent to the first appellant by the respondent. On the question of liability of the guarantors, the advocate made reference to a letter dated 19th March, 1997, from the respondent to the appellants, which approved a loan facility of Kshs. 11 million. **Mr Njuguna** cited the paragraph in the letter that referred to 'Complete Agreement', arguing that by virtue of the terms therein any other agreements, which to him included the guarantee agreements, entered into prior to the date of the letter were set aside and therefore not enforceable. On account of this, **Mr. Njuguna** argued that the second and third appellants had been discharged from any further liability arising from the guarantees that were signed on 23rd May, 1994.

8. On the question of recovering any money lent to the first appellant, learned counsel, **Mr. Njuguna**, submitted that since the borrowing of the money was *ultra vires* the constitution of the the first appellant, all the money lent to the first appellant could not be recovered and the guarantees thereunder were null and void.

9. In response, **Mr. Gitonga** for the respondent argued that the Kshs. 8 million that the court awarded against the first appellant was based on a letter of admission by the second appellant dated 11th September, 1997, therefore, it was properly awarded. Learned counsel Mr. Gitonga agreed with the analogy drawn, between a registered society and a business partnership, in finding the officials of the registered society liable. In support, he stated that the respondent was all along dealing with the officials of the the first appellant and they should be held liable. He was in agreement with the second respondent being held liable as an official of the first appellant, since he was actually the official who negotiated for all the transactions on behalf of the first appellant, and signed all documents in relation thereto. Counsel supported liability of the guarantors as established by the court.

10. We have considered the rival submissions and perused through the record of appeal analyzing the evidence submitted by the parties in the High Court. First, on the issue of whether any money was due and recoverable, we agree with the court's finding that Kshs. 8 million was due and owing from the first appellant to the respondent. Since the respondent did not satisfactorily prove its claim of Kshs. 27, 923, 946. 30 in the plaint, the Commissioner of Assize rightly settled for a sum that the second appellant had confirmed and admitted as due and owing, through the letter from the second appellant dated 11th September, 1997.

11. The other issue is who should be held liable for the 1st appellant's indebtedness given that the money borrowed was *ultra vires* its constitution and the first appellant is only registered as a society with no corporate status. The High Court did not expressly address the issue of the first appellant having acted *ultra vires its constitution* in its borrowing, but it is apparent that this issue did not act as an impediment to finding the respondent was entitled to recover the money it had loaned to the first appellant. The respondent, while submitting on the *ultra vires* limb in the High Court relied on several cases, which mainly referred to the prohibition of a limited company from acting beyond its expressly stipulated objects. We find that those cases are distinguishable from the case at hand, given that the first appellant (the borrower) is not a limited liability company but a registered society. It is clear from the evidence on record that at the time the parties were entering into the various loan facility agreements both sides had no information in respect to the respondent's incapacity, and this information in fact only came to the parties knowledge way after the suit had been instituted. This lack of capacity is not even pleaded in their statement of defences and was only relied upon by the appellants during the time of submissions.

12. It would in our view be unconscionable to let the appellants benefit from such a circumstance, which was never the intention of the parties. We are inclined in this instance to use the doctrine of

estoppel. We would like to rely on a commentary on estoppel cited in *Muti v Kenya Finance Corporation and another*, [2004] 2 EA (HCK) 182 at p. 186, in *English and Empire Digest* Volume 21 at 288, which reads: “**If a man, either in express terms or by conduct, makes a representation to another of the existence of a certain state of facts which he intends to be acted upon in that way, in the belief of such a state of facts, to the damage of him who so believes and acts, the first person is estopped from denying the existence of such a state of facts**”. See also Section 120 of the Evidence Act Cap 80 of the Laws of Kenya. We therefore find that the appellants are estopped from relying on the *ultra vires* doctrine, the more so having received and benefited from the loan advanced.

13. On the issue of holding the second appellant liable for the sum of Kshs. 8 million by virtue of being an official of the first appellant, we are inclined to agree with the learned Commissioner of Assize. An unincorporated body lacks the capacity to institute proceedings or be sued in its own name. In such instances, the practice of the courts has been to allow such bodies to sue or be sued in the name of its members, see *Simu Vendors Association v The Town Clerk, City Council of Nairobi & another* [2005] eKLR, Misc. Application No. 427 of 2005, citing Bosire J. in *Free Pentecostal Fellowship in Kenya vs Kenya Commercial Bank*, HCCC No. 5116 of 1992 (OS)- where he stated in part, “**The position at common law is that a suit by or against unincorporated bodies of persons must be brought in the names of or against all the members of the body or bodies. Where there are numerous members the suit must be instituted by or against one or more such persons in a representative capacity...**”. In the instance where such a body is registered under the Society’s Act, it is permitted to sue or be sued in the name of its office bearers, see *Abdinoor Dima Jillo (suing as the secretary for and on behalf of DAMESA ASSOCIATION) vs County Council of Isiolo & 4 Ors* [2008] eKLR, High Court at Nrb. Civil Case no. 764 of 2007. Thus the High Court was right in finding the second appellant liable as an official of the first appellant, and the failure to include other officials cannot be used as a defence. The learned Commissioner of Assize was correct to infer that the second appellant can lay claim against the other officials who were not included.

14. The appellants contest the liability of the second and third appellants as guarantors on account of lack of capacity of the first appellant to borrow the monies it did, and on account of failing to register the equitable charge. The issue of lack of capacity has already been dealt with above leaving the issue of effect of failure to register the equitable charge. The appellants mainly restate the position previously canvassed in the High Court, asserting that the obligation of sureties is an obligation accessory to that of the principal debtor, consequently, if the principal debtor is not obliged, neither is the surety. In our view, this argument must also fail by virtue of clause 5 of the guarantees executed by the second and third appellants in relation to the respective charge. The clause specifically stated:

This Guarantee shall not be affected by any failure of the Bank to take any security or by any defect in or invalidity of any security given or to be given to the Bank by the Principal or by any co-surety or by any disability incapacity or lack of or limitation on the borrowing or other powers of the Principal or by want of authority of any agent director officer or other person appearing to be acting for the Principal in respect of the Principal’s liabilities and where by reason of any such matter moneys advanced by the Bank to or for the benefit of the Principal are not recoverable from the Principal they shall nevertheless be recoverable from the Guarantor as sole or principal debtor and shall be repaid by the Guarantor on demand in writing.

15. This is clearly the clause relied on by the learned Commissioner of Assize in dismissing the defence of the guarantors. The appellants’ advocate has in his submission also relied on the Banking Facility agreement of 19th March, 1997, which purported to supersede all previous correspondence or agreements between the first appellant and the respondent. We note that this agreement referred to a loan facility amounting to 11 million and not the previous amount of Kshs. 3 million to which the guarantees were applicable. The same can therefore not be used as a basis of discharging the guarantors liability.

For the various reasons stated above, we dismiss the appeal with costs to the respondent.

Dated and delivered at Nairobi this 12th day of April 2013.

R.N. NAMBUYE

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is a
true copy of the original.

DEPUTY REGISTRAR