



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CIVIL APPEAL NO. 164 OF 2007

(Being an appeal from the Judgment and decree in SRMCC No. 356 of 2003 of the SRM's court at Keroka – Wahome, SRM)

BETWEEN

SAMWEL BOSIRE
CHAIRMAN, KEROKA RIVERSIDE
SELF HELP GROUP APPELLANT

VERSUS

GLADYS MONYANGI OMOA 1ST RESPONDENT
PATRICK OMWOYO MAGATI 2ND RESPONDENT

JUDGMENT

Keroka riverside Self Help Group through its Chairman lent to the 1st respondent a sum of **Kshs. 20,000/=** on 31st May, 2001. According to the lending agreement the principal sum was to attract interest of **10% per month** and in the event that the principal sum together with interest was not paid in a month's time, the borrower was to pay a further **penalty fees** amounting to **50%** thereof. The aforesaid loan was guaranteed by the 2nd respondent. The 1st respondent serviced the aforesaid loan for some time but as at 17th October, 2002 there was an outstanding balance of Kshs. 45,000/=.

On 2nd December, 2003 the appellant filed a suit against the respondents claiming a sum of Kshs. 45,000/= with interest at 10% per month totaling to **Kshs.146,354/=** together with interest at 10% per month until payment in full.

The respondents filed a statement of defence and stated that the appellant had no legal capacity to institute the suit in his own name or in a representative capacity. The 1st respondent denied having borrowed any money from the appellant and the 2nd respondent denied having guaranteed any loan between the appellant and the 1st respondent. In the alternative, the respondents contended that if any loan was advanced to the 1st respondent, it was not on the terms and conditions as alleged by the appellant. In the event that the said terms and conditions were applicable then they were void **ab initio** and therefore not enforceable. The 1st respondent added that whatever money she had borrowed from the appellant had been fully repaid.

The appellant told the trial court that the core function of Keroka Riverside Self Help Group is to provide financial assistance to its members. The said group was registered by the Ministry of Home Affairs, National Heritage, Culture and Social Services on 23rd March, 2001. The appellant further testified that on 31st May, 2001 the 1st respondent was advanced a loan of Kshs. 20,000/= on the terms as aforesaid. On 30th November, 2001, she renewed the contract and the repayment period was extended. The 2nd respondent was her guarantor. On 1st December, 2001, the agreement was again renewed. The same was done again on 1st March, 2002. On 17th February 2002, she was advanced another loan of Kshs. 25,000/=. As at the time of filing this suit the outstanding sum inclusive of interest was Kshs. 146,354/= and the same was to still accruing interest at the rate of 10% per month.

In cross examination, the appellant stated that according to its constitution it had power to lend money. However, the constitution was not produced as an exhibit. He added that the self help group was lending money to both members and non-members. He said that the group was lawfully lending money and charging interest in accordance with its constitution.

The 1st respondent agreed that she borrowed a sum of Kshs. 45,000/= from Keroka Self Help Group. She had repaid a sum of Kshs. 46,200/= and no other money was due and owing. She added that the interest that was being charged was illegal and therefore unpayable. She contended that the self help group was not a licensed financial institution and it was not authorized to lend money with interest.

The 2nd respondent agreed that he had guaranteed the 1st respondent when she borrowed a total of Kshs. 45,000/= from the appellant. Later on he realized that the appellant was not lawfully charging interest on the funds which it was lending out.

The learned trial magistrate held that the appellant was conducting its business in violation of the express provisions of **section 3 (1) (a)** of the **Banking Act Cap 488** which provides as hereunder:

“3(1) No person shall in Kenya –

(a) Transact any banking business or financial business or the business of a mortgage finance company unless it is an institution which holds a valid licence.”

He further held that the appellant was not entitled to charge interest because it was not a bank or a financial institution that was duly licensed. That kind of business was illegal and an illegal contract is not enforceable in law. He noted that the 1st respondent had repaid a sum of Kshs. 46,200/= which sum the appellant deemed as part of the accrued interest. He therefore dismissed the appellant’s suit and ordered each party to bear its own costs.

The appellant was aggrieved by the said judgment and preferred an appeal to this court. The grounds of appeal were stated as hereunder:

- 1. “ The learned trial magistrate erred in law in failing to itemize and analyse all the issues raised vide the pleadings and canvassed in the submissions of the respective advocates, more particularly, the submissions of the appellant.**
- 2. The learned trial magistrate misinterpreted, misconstrued and misapplied the provisions of section 3 (1) of the Banking Act Chapter 488 Laws of Kenya in the proceedings before him and thus arrived at an erroneous conclusion by treating the appellant herein in the context of a bank and/or financial institution.**
- 3. The learned trial magistrate erred in law in relying on the Banking Act Chapter 488 of Laws of Kenya whereas the provisions of the said Act were irrelevant and inapplicable to self help groups in the nature of the appellant.**
- 4. The learned trial magistrate misconstrued and/or misconceived the nature of the contract and/or agreement before him and thus erred in law in dismissing the appellant’s case.**
- 5. The judgment of the learned trial magistrate was/is perfunctory, passionate, unbalanced and contrary to the mandatory provisions of order XX rule 20 (sic) of the Civil Procedure Rules. Consequently, the judgment and decree appealed against are manifestly unsafe.**
- 6. That the learned trial magistrate failed to properly analyse and/or evaluate the evidence on record and the circumstances attendant to the contract. Consequently, the decision of the learned trial magistrate was contrary to the weight of the evidence on record.”**

The appellant urged the court to allow the appeal and set aside the trial court’s judgment and substitute therefor an order allowing the respondent’s suit before the trial court.

The advocates for the parties filed their respective submissions which I have carefully perused.

The main thrust of this appeal is whether a Self Help Group can lawfully lend out money and charge astronomical rates of interest amounting to 10% per month which translates to 120% per annum. On top of such rates of interest the appellant was also imposing a penalty of 50% of the outstanding sum if its repayment was not made at the end of the month.

I am in agreement with the learned trial magistrate that the appellant was conducting an illegal business. The provisions of the **Banking Act** that were cited by the trial court clearly prohibit any unlicensed person or institution from engaging in any banking or financial business. The Act defines

financial business to include employment of money held on deposit by lending at the risk of the person so employing the money. Members of a self help group cannot lawfully pool together their resources for the core purpose of lending the same to members of the public at exorbitant rates of interest, even way beyond the rates charged by banks and other licensed financial institutions. Loans made by moneylenders in contravention of statutory provisions are irrecoverable.

In respect of ground 4 of the appellant's memorandum of appeal, the appellant's advocate submitted that the parties freely and voluntarily entered into a binding agreement and the learned magistrate's decision contravened the established principles touching on the sanctity of a contract. He cited the Court of Appeal decision in **FINA BANK LIMITED –VS- SPARES AND INDUSTRIES LIMITED**, Civil appeal No. 51 of 2000 at Nairobi. In that appeal it was held, *inter alia*, that parties are bound by the terms of their contract and it is not normally the business of the court to spell out a contract other than the one in issue unless there are circumstances that warrant rescission of the contract.

While that is the general position in law, in the same decision the court appreciated that there are special cases where equity might be prepared to relieve a party from a bad bargain. In any event, in the aforesaid appeal it was not contended that the parties had entered into an illegal lending contract. Fina Bank Limited is a duly licensed bank. In the instant case, the appellant is a self help group and it is not licensed to engage in banking or financial services. I may also add that apart from engaging in an illegal business the appellant was charging unconscionable rates of interests of upto 120% per year. Even in instances where parties have entered into a lawful contract, the contract may be varied or rescinded where it is demonstrated that it was entered into fraudulently or was contrary to public policy or where there exists such circumstances as would make it proper for equity to intervene.

Even a licensed bank cannot charge interest at the rate of 10% per month and a further 50% in form of penalty where there is default in payment.

All in all, I find no merit in this appeal and dismiss the same with costs to the respondents.

DATED, SIGNED AND DELIVERED AT KISII THIS 29TH DAY OF JULY, 2010.

D. MUSINGA

JUDGE.

29/7/2010

Before D. Musinga, J.

Mobisa – cc

Mr. Oguttu for the Appellant

N/A for the Respondent

Court: Judgment delivered on 29th July, 2010 in open court.

D. MUSINGA

JUDGE.