



REPUBLIC OF KENYA



Wang'ombe & another v Biashara Sacco Society Limited & 2 others (Civil Appeal 52 of 2021) [2024] KEHC 2447 (KLR) (7 March 2024) (Judgment)

Neutral citation: [2024] KEHC 2447 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL APPEAL 52 OF 2021**

**M MUYA, J
MARCH 7, 2024**

BETWEEN

MUGAMBI WANG'OMBE 1ST APPELLANT

VERONICA WANJIRU MUGAMBI 2ND APPELLANT

AND

GEOFFREY MAINA KAGIRI 1ST RESPONDENT

BIASHARA SACCO SOCIETY LIMITED 2ND RESPONDENT

GABRIEL GITHIGA KURIA GITHIGA 3RD RESPONDENT

JUDGMENT

1. Being dissatisfied of the decision of the Co-operative Tribunal in Tribunal Case No. 288 of 2020 the Appellants filed this appeal on the following grounds:-
 1. That the Honourable Tribunal erred in law and in fact in making a finding that the Appellants were members of Biashara Sacco Society Limited, thus proceeding to cloth itself with jurisdiction, that it lacked to determine a dispute between a Co-operative Society and the Appellants who are non-members.
 2. That the Honourable Tribunal erred in law and in fact by its failure to appreciate that the Appellants, merely sought banking facilities from the 1st Respondent but were not members of the said 1st Respondent, and that no membership was disclosed nor were any benefits accruing to the Appellants as members disclosed.
 3. That the Honourable tribunal erred in law and in fact in granting the Respondents the orders of specific performance in respect of LR No. 5104/55, 5104/56, 5104/57, 5104/58 and 5104/59 when that remedy was not the most appropriate one for the following reasons:-



- a). The Respondent had sought the relief of refund of Kshs. 12 million;
 - b). The contract relied upon was not valid and was not enforceable as was not registered and had lapsed;
 - c). The relevant consent to transfer had not been issued by the Commissioner of Lands;
 - d). The Respondents are not in possession of the said properties.
 - e). The Respondent used undue influence upon the appellants by causing them to sell their property at Kshs. 3,000,000/- each while each property was valued at Kshs. 4,000,000/=;
 - f). The Respondents valued the suit properties in preparation for the sale of the same by Public auction but failed to disclose the contents of the valuation to the appellants;
 - g). The Respondents used the insider information while purporting to sell the suit properties by private treaty to the detriment of the Appellants thus breaching their fiduciary duty to the appellants;
 - h). The Appellants are willing and have always been ready to refund the sum of Kshs. 12,000,000/= to the Respondents;
 - i). The Respondents used undue influence;
 - j). Order of Specific Performance will cause the Appellants undue hardship; and
 - k). There is nothing unique that cannot be “equated”, in the suit land. Damages are an adequate remedy.
4. The Honourable Tribunal erred in law by its failure to consider the evidence of the Appellants, thereby rendering a judgment against the weight of the evidence tendered.
 5. The Honourable Tribunal erred by neglecting the Statement of defence and Counter claim without adequate evidence for the finding.
2. The contention by the Appellants is that there was no document on record disclosing the membership number of either Midways communication Limited or the membership numbers of the Appellants who are the directors of Midways Communication Limited.
 3. This position was made as early as 2nd October 2020 vide the response to the claim. At paragraph 2 of the Response they had stated:-

“The Respondents deny the averments in paragraph 5 of the claim and state that they only enjoy the front office service activity (fosa) of the 1st Claimant who is their Financial Institution”

At paragraph 20 of the Response, they averred thus:-

“The jurisdiction of the Honourable Tribunal is denied as the Respondents are not members of the Respondents and the Respondents shall raise a preliminary objection on jurisdiction at the hearing.”

4. That through the Honourable Tribunal found that they were members individually and as a Corporate entity, there was no evidence availed by the Respondents that the Appellants or their company applied



and were admitted as members of the 1st Respondent. There was no evidence adduced to show their membership numbers or the benefits they enjoyed as members.

5. It is further the Appellants' contention that the jurisdiction of the Co-operative Tribunal is created by Section 76 of the *Co-Operative Societies Act* and therefore the Honourable Tribunal lacked jurisdiction to determine a dispute involving non- members.

That the Respondents had sought the following reliefs:-

- i). An order of inhibition against the Respondents on all those properties known as LR No. 5104/55, 5104/56, 5104/57. 5104/58 and 5104/59.
 - ii). An order of specific performance for the transfer of suit properties LR. No. 5104/55. 5104/56, 5104/57, 5104/58 and 5104/59 to the 2nd and 3rd Claimants.
 - iii). In the alternative and without prejudice to prayer 1 and 2, the return of the purchase price of Kshs. 12 million to the claimants inclusive of penalty of 30% as provided in the agreement special conditions clause 6 (xii).
6. The Honourable Tribunal proceeded to make an order for specific performance.
 7. It is the contention by the appellants that the Honourable Tribunal usurped the jurisdiction of the Environment and Land Court in its decision.
 8. That the Respondents themselves had applied for a refund of the money paid to the Appellants, therefore they would have been comfortable with an order for payment of the sum of Kshs. 12 million, interest ant costs.
 9. The Appellants admit receiving Kshs. 12 million. They were ready to refund the said sum.
 10. It is submitted that the appellants' evidence was not considered by the Honourable Tribunal. The 1st Appellant admits that he borrowed money from the 1st Claimant and provided six parcels of land as collaterals. He transferred the existing loan to the personal account of 1st Respondent. He split the loan between the two Respondents. The 2nd Respondent did not have a bank account with the 1st Claimant.
 11. That the Statutory Notice dated 2/4/2019 when issued they requested the 1st Claimant to sell the securities by private treaty.
 12. The 1st Claimant did not give them enough time to sell the securities by private treaty, instead the 1st Claimant indicated that they were interested in purchasing 4 of the securities, they dictated the price and the terms by sale agreement which was in breach of the fiduciary duty and used insider information to the detriment of their customers the Respondents.
 13. That's the Claimant proposed to purchase each plot at Kshs. 3,000,000, whereas the valuation in their custody showed Kshs. 4,000,000/= in a forced sale.

Determination

Issues

1. Whether the Appellants are members of the 1st respondent.
2. Whether orders for specific performance was justified in the circumstance of this case.



Whether the Appellants are members of the 1st Respondent.

14. A member is defined in the *Co-operative Societies Act* to include “a person or a co-operative society joining in the application for registration of a society, and a person or co-operative society admitted to membership after registration in accordance with the by-laws.”
15. Section 76 of the *Co-operative Societies Act* gives jurisdiction to the Co-operative Tribunal as follows:-
 - 1). If any dispute concerning the business of a co-operative society arises:-
 - a). among members, past members and persons claiming through members, past members and deceased members or
 - b). between members, past members or deceased members, and any officer of the society; or
 - c). between the society and any other co-operative society; it shall be referred to the tribunal.
 - 2). A dispute for the purpose of this section shall include:-
 - a). a claim by a co-operative society for any debt or demand due to it from a member or past member or from the nominee or personal representative of a deceased member, whether such a debt or demand is admitted or not, or
 - b). a claim by a member or past member, or from the nominee or personal representative of a deceased member for any debt or demand due from a co-operative society, whether such debt or demand is admitted or not.”
16. When addressing the issue of membership the Honourable Tribunal had this to say “It has been established by the evidence on record that the two Respondents were members of the 1st Claimant as corporate clients that is Midways Communication Limited in which they were directors. The two Respondents decided to take over the loans as individuals and split the loans between themselves. This, therefore clearly confirms that they were members individually and as corporate entity. The obligations of the corporate entity was taken over by the two Respondents individually.”
17. The contention by the Appellants is that no document was produced to show the membership number of either Midways Communication Limited or the membership numbers of the Appellants themselves and this was inspite of their denial in their response to the claim when they deposed that they only enjoyed the front office service activity (FOSA) of the 1st Claimant (Respondent) Biashara Sacco Ltd.
18. It is noted that the Honourable Tribunal was of the view that there was sufficient evidence on record to show that the two Respondents were members of Biashara Sacco. They might have not indicated on record the membership numbers that they had reason to believe that the Respondents were members of the society.
19. I find no good reason to fault their finding. I am satisfied that the Honourable Tribunal had jurisdiction to try and determine the dispute as required under Section 76 of the *Co-operative societies Act*.

Whether an order for specific performance was justifiable in the circumstances of the case.

20. The Honourable Tribunal placed reliance in the case of *Reliable Electrical Engineers Ltd –vs- MantraL LTD (2006) eKLR* where it was held:- “Specific performance like any other equitable remedy is discretionary and the court will only grant it on well laid principles.



21. The jurisdiction of specific performance is based on the existence of a valid enforceable contract. It will not be ordered if the contract suffers from some defect such as failure to comply with the formal requirements or mistakes or illegality, which makes the contract invalid or enforceable. Even when a contract is valid and enforceable, specific performance will however, not be ordered where there is an adequate alternative remedy. In this respect damages are considered to be an adequate alternative remedy where the Claimant can readily get the equivalent of what he contracted from another source. Even when damages are an adequate remedy, specific performance may still be refused on the ground of undue influence or where it will cause severe hardship to the Defendant”
22. In the claim the Respondent were seeking the following reliefs:-
- i). An order of inhibition against the Respondents on all those properties known as LR No. 5104/55, 5104/56, 5104/57, 5104/58 and 5104/59.
 - ii). An order of specific performance for the transfer of suit properties LR No. 5104/55, 5104/56, 5104/57, 5104/58 and 5104/59 to the 2nd and 3rd Claimants.
 - iii). In the alternative and without prejudice to prayer 1 and 2, the return of the purchase price of Kshs. 12,000,000/= to the Claimants inclusive of a penalty of 30% as provided in the agreement special conditions clause 6 (xii) costs and interest.
23. In the case of Reliable Electrical Engineers Ltd –vs- Mantral LTD (2006) eKLR which the Claimant relied on. it was held specifically that:- “Specific performance will however not be ordered where there is an adequate alternative remedy”
24. In the present case there was an adequate alternative remedy of refund of the purchase price and the Claimants themselves were not averse to that remedy as it was in their prayers.
25. There was no sufficient reason to make an order for specific performance in the circumstance of the claim before the Tribunal.
26. The Appellants admit to receiving Kshs. 12,000,000/= and were ready to make a refund.
27. The judgment for specific performance is substituted with an award of Kshs. 12,000,000/= plus costs and interest at court rates from the inception of the suit.

JUDGMENT READ AND DELIVERED IN OPEN COURT THIS 7TH DAY OF MARCH 2024.

In the presence of:-

Ngaya for the Respondent.

Mwaniki for Lucy Mwai for Appellant.

Court assistant: Andrew

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JUSTICE MARTIN MU YA

