



Kinga & 2 others (Sued on Behalf of Nyahururu Unity Self-Help Group as Chairman, Secretary, and Treasurer) v Githui (Civil Appeal 4 of 2023) [2024] KEHC 3440 (KLR) (Civ) (11 April 2024) (Judgment)

Neutral citation: [2024] KEHC 3440 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYANDARUA
CIVIL
CIVIL APPEAL 4 OF 2023
CM KARIUKI, J
APRIL 11, 2024**

BETWEEN

**GEORGE KINGA 1ST APPELLANT
ISAAC MWANGI GACHURU 2ND APPELLANT
JANE WANJIKU THUITA 3RD APPELLANT
SUED ON BEHALF OF NYAHURURU UNITY SELF-HELP GROUP AS
CHAIRMAN, SECRETARY, AND TREASURER**

AND

JOSEPH NJOROGE GITHUI RESPONDENT

(Being an Appeal from the Ruling of Hon. S. Mogute, Senior Principal Magistrate in Nyahururu CMC No. 239 of 2018 delivered on 22nd February 2023)

JUDGMENT

1. The Appellants being aggrieved by the Ruling of Hon. S. Mogute, Senior Principal Magistrate delivered on 22nd February 2023 in Nyahururu CMCC No. 239 of 2018, appealed the same vide their memorandum of appeal dated 21st March 2021 on the following grounds:-
 - i. The learned trial magistrate erred in law and fact by failing to find that the Respondent was lawfully, procedurally and legally expelled from Nyahururu Unity Self Help Group.
 - ii. The learned trial magistrate erred in law and fact by failing to find that the Respondent had breached Nyahururu Unity Self Help Group's constitution and bylaws and thus was subject to expulsion.



- iii. The learned trial magistrate erred in law and fact by holding the defendants personally liable for acts done on behalf of Nyahururu Unity Self Help Group.
 - iv. The learned trial magistrate erred in law and fact by finding that the Respondent had proved his case and thus entitled to the prayers sought in the plaint.
 - v. The learned trial magistrate erred in law and fact by dismissing the defendant's defence and proceeded to determine the case without considering the defence proceeded.
 - vi. The learned trial magistrate erred in law and fact by finding that the Respondent had proved his case on a balance of probabilities.
2. Reasons wherefore the Appellants pray for:-
 3. The appeal be allowed and judgement delivered on 22nd February 2022 in Nyahururu CMC No. 239 of 2018 be set aside.
 4. The Respondent's claim in Nyahururu CMC No. 239 of 2018 be dismissed with costs.
 5. The Respondent be condemned to pay the costs of this appeal.
 6. On the other hand, the Respondent filed the replying affidavit dated 14th November 2023 deponing as follows:-
 - a. That he is opposed to the prayers sought in the notice of motion dated 28/9/2023.
 - b. That the applicants have not attached a decree or the judgment that is the subject of the stay of execution.
 - c. That he had already taken possession of the 2 plots awarded to him by the honourable court on 21/2/2023 and granting the prayer for stay shall lead to his eviction from the land.
 - d. That he has been denied the right of use and occupation of the said plot since the year 2015 and granting a stay shall prolong the injustice meted out to him by the applicants and stop him from enjoying the fruits of the judgment.
 - e. The delay of over 9 months in applying has not been explained.
 - f. The applicants have not demonstrated that they have an appeal with chances of success or that they stand to suffer prejudice if he is allowed to continue utilizing the plots through farming pending the hearing and determination of the appeal.
 - g. He therefore prays for the application to be dismissed with costs.

Appellants' Submissions

7.
8. The Appellants relied on their submissions dated 18th January 2023 that were filed before the lower court.
9. It was stated that the Respondent instituted the lower court suit against the Appellants in their capacity as the officials of Nyahururu Self-Help Group, the Self-Help group herein. It would therefore imply that the group had other members, who would be affected by the Plaintiff's claim. In essence, the Respondent's claim was against the members of the Self-Help group, being the Appellants. The



Appellants were thus sued in their representative capacity and under such circumstances, Order 1 Rule 8 of The Civil Procedure Rules comes into play.

10. That upon instituting the lower court suit, the Respondent ought to have sought leave to serve a notice to all the members of the Self-Help group. That the provisions of Order 1 Rule 8 of The Civil Procedure Rules are couched in mandatory terms and there was no shortcut available to the Respondent to ignore. That he ought to have moved the lower court for the aforesaid leave immediately he instituted the suit. Reliance was placed on *Yiapas Ole Seese & 4 Others vs. Sakita Ole Narok & 2 Others* [2008] eKLR
11. The result of the entire case was that apart from the Respondent herein, the other members of the Self-Help group were condemned unheard as they were not aware of the existence of the suit. The judgment that was eventually issued against the Appellants will as a fact have adverse effects on the interests of other members of the Self-Help group.
12. It was averred that the failure to comply with Order 1 Rule 8 of The Civil Procedure Rules is a point of law that can be raised at any time even on appeal. Reliance was placed on *Republic vs. Public Procurement Administrative Review Board Ex Parte Intertek International Limited; Accounting Officer, Kenya Bureau of Standards & 6 Others (Interested Parties)* [2022] eKLR
13. The Appellants urged the court to find that because of the foregoing, the trial court lacked the jurisdiction to hear the matter before the aforementioned provisions were complied with. That the proceedings were defective in substance and they urged the court to find as such and proceed to set aside the impugned judgment.
14. On the issue of attendance of the Self-Help group, the Appellants relied on Article 6.2 Rule 8 of the Group's Constitution. They invited the court to note that the article does not require a member to miss four consecutive meetings for him/her to be subject to expulsion.
15. The Appellant's case before the trial court was that the Respondent missed the meetings held on the 7th, 14th, 21st and 28th of October 2015. In his evidence, the Respondent admitted that he was given a warning letter dated 9th October 2015 from the Self-Help group notifying him that his meeting attendance was very poor. He went further and stated that in a letter dated 13th November 2015 (after his expulsion) he apologized to the Group for not attending the meetings.
16. It was asserted that in his express admission, the Respondent stated that the reasons why he failed to attend the meetings did not fall under the reasons provided in Article 6.2 Rule 8 of the Group's Constitution. In his evidence, DW1 stated that the Self-Help Group had a meeting on 28th October 2015 whereby a resolution was passed to expel the Respondent. The resolution to expel the Respondent was communicated vide a letter dated 9th November 2015.
17. The Respondent contended that he missed the meetings because he had been transferred to another area outside the meeting venue. If that was the case, the Respondent ought to have complied with the provisions of Article 6.3 (iv) of the Group's Constitution. The Respondent did not demonstrate his compliance with these provisions.
18. It was the Appellants' submission that the Self-Help Group's Constitution took its course while expelling the Respondent. The Respondent had missed four meetings without a recognized reason and as such he was a candidate for expulsion. It is this their submission that the Respondent was legally and lawfully expelled from the Self-Help Group.
19. The Appellants asserted that on 4th November 2015, the members of the Self-Help Group passed a resolution on the Respondent's entitlement owing to his expulsion. That DW1, in his evidence gave



- a tabulation of the said entitlement amounting to Kshs. 78,820/- which the Group was ready to pay the Respondent and intention to pay the same was communicated to him before the lower court suit was filed.
20. Further, the Respondent had a claim for two plots of 50 by 100 which claim was allowed by the trial court. It was their submission that the Group's constitution and bylaws do not have provisions for sharing properties during the existence of the Group. In his evidence, the Respondent admitted that he did not have any member's resolution authorizing the sharing of the Self-Help Group's properties.
 21. That there was no evidence produced before the trial court indicating the dissolution/winding up of the Self-Help Group and as such it was the Appellants' submissions that the trial court erred when it ordered the transfer of the two plots to the Respondent during the existence of the group. Reliance was placed on Article 9.1 of the Self-Help Group's Constitution.
 22. It was averred that the trial court further erred when it declared unlawful the expulsion of the Respondent from the Self-Help Group and further proceeded to order the Appellants to transfer the aforesaid plots. If by any chance the expulsion was declared unlawful then the Respondent was not entitled to the two plots as the Group was not under dissolution or winding up.
 23. In conclusion, the Appellants urged the court to find that the current appeal has merits and proceed to allow the prayers in the memorandum of appeal dated 21st March 2023.

Respondent's Submission

24.
25. The Respondent stated that he wishes to rely on the written submissions filed before the lower court found on pages 154-159 of the record of appeal.
26. It was submitted that the learned trial magistrate was right in finding that the Respondent's expulsion from Nyahururu Unity Self-Help Group was indeed unlawful and illegal. That the court placed heavy reliance on the Appellant's constitution in arriving at the aforesaid decision. The Appellants were bound by *the constitution* to run the affairs of the Self-Help Group.
27. The Appellants' evidence was that the Respondent was expelled from the group following a meeting held on 28/10/2015 at the Florida Hotel. DW1 admitted in his evidence that what was resolved in the meeting was to suspend the Respondent and not to expel him from the group but the letter written to the Respondent communicated his expulsion and not suspension. The expulsion was therefore unlawful as it was not authorized by members of staff of the Self-Help Group in a meeting.
28. It was submitted that the Appellants failed to prove that the Respondent failed to attend 4 consecutive group meetings i.e. 7th, 14th, 21st, and 28th October 2015. DW1 admitted that although the Respondent filed and served a notice to produce the minutes of those particular meetings, the Appellants failed to comply by filing the minutes to prove that the Respondent was indeed absent in the 4 consecutive meetings. DW1 admitted in evidence that he did not have evidence that the Respondent missed four consecutive meetings.
29. The Respondent asserted that DW1 admitted that at the time of the Respondent's unlawful expulsion, his loan repayment period was not due. He admitted that *the constitution* was not followed in terms of a home visit and issuance of notices before the Respondent was expelled and crucial steps provided in *the constitution* were omitted. He further admitted that the Respondent's 2 plots were taken by the group and allocated to other members before his expulsion.



30. It was averred that the Appellants have raised issues to do with the application of Order 1 Rule 8 of the Civil Procedure Rules in the submissions dated 30/1/2024. The issue was not pleaded in the statement of defense nor raised in evidence and the final submissions filed by the Appellant before the lower court. The same issue was not raised anywhere in the memorandum of appeal dated 21/3/2023 and he urged the court to disregard the same as it was purely an afterthought.
31. Lastly, the Respondent submitted that the issues of the Self-Help Group being under dissolution or winding up as raised in the written submissions in the appeal were also not pleaded before the lower court, and the same are new issues being litigated by way of submissions in the appeal. He therefore urged the court to dismiss the appeal with costs.

Analysis and Determination

32.
33. It is now settled law that the first appellate court duty re-evaluates the evidence in the subordinate court both on points of law and facts and come up with its findings and conclusions as was established by the Court of Appeal in the case of *Peters –vs- Sunday Post Limited* [1958] EA 424.
- a. The appropriate standard of review established in cases of appeal is underpinned by the following three principles:-
34. First, on the first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its conclusions;
- i. ii. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and
- ii. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it had been hearing the matter for the first time.
35. I have considered the entire record, the memorandum of appeal, and the submissions by rival parties. I have done so in a bid to do our duty as a first appellate court of rehearing the petition making my independent conclusions and giving our reasons. (See *James Kanyiita Nderitu v Attorney General & Another* [2019] eKLR (Civil Appeal No. 96 of 2013))
36. From the onset, the Appellant's case was that the Respondent was expelled because he had breached *the constitution* of Nyahururu Unity Self Help Group, the group hereinafter, by failing to attend four consecutive meetings and also failing to repay the loan he had taken out. They asserted that he had been lawfully and procedurally expelled from the group, a claim that was disputed by the Respondent. He stated that he was unlawfully expelled and that he was entitled to 2 plots to be excised from L.R. No. Laikipia/Uaso Narok/464. The aforementioned parcel was bought from a loan acquired by members of the group from Equity Bank. The Respondent borrowed Kshs. 100,000/- from the said bank.
37. From the record, a perusal of the minutes of the meeting held on 28th October 2015 indicates that members discussed the Respondent's suspension from the group. It was noted that:-
- “....The members agreed that Njoroge should be suspended from the group. The committee should sit down and Njoroge's monies should be counted the balance should be paid by the group and Njoroge should be suspended from the group.....”



38. In my opinion, the term suspension means temporarily preventing from continuing or being in force or effect. The outcome of suspensions is temporary as opposed to permanent expulsion. When questioned about the Respondent's expulsion from the group minutes, DW1 stated that there were none and further he confirmed to the court that the Respondent's loan repayment period was not over yet by the time he was expelled contrary to what the Appellants were alleging. Therefore, it is clear that the Respondent's loan repayment schedule was not in arrears at the time he was expelled from the group.
39. The Appellants asserted that the Respondent had missed the meetings dated 7th, 14th, 21st, and 28th October 2015 leading to his expulsion. However, they were called upon to produce the minutes of the said meetings to verify their claims which they failed to do. The said minutes were not filed in court as requested by the Plaintiff then. Further, DW1 stated that he did not have evidence to prove that the Respondent had failed to attend four consecutive meetings as required by the constitution of the group.
40. Additionally, I agree with the trial magistrate that the Respondent was not served with a 14 days' notice to pay loan arrears if any as alleged by the Appellants in their expulsion letter dated 09/11/2015. Further, I agree that the officials of the group did not follow the laid down procedure in expelling the Respondent. They did not visit the Respondent's home to assess him to establish the challenges he was undergoing if any and no report was shared with the other members of the group before the expulsion was made.
41. Further, I concur with the trial magistrate that paragraphs 7.3, 7.4, and 7.5 of the group's constitution concerning where a member has defaulted in repaying the loan, were not followed before the Respondent's expulsion. Notably, the Plaintiff was said to be suspended and not to be expelled. I therefore agree with the trial court that the Respondent proved his case on a balance of probabilities.
42. For the foregoing reasons and after re-evaluating the evidence, I find that the appeal lacks merit and thus court makes orders that;
 - i. The appeal is hereby dismissed.
 - ii. Parties bear their costs.

DATED AND DELIVERED AT NYANDARUA THIS 11TH DAY OF APRIL 2024

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CHARLES KARIUKI

JUDGE

