Musenya & 2 others v Naiyoma (Civil Appeal E001 of 2022)
[2023] KEHC 19583 (KLR) (3 July 2023) (Judgment)

Neutral citation: [2023] KEHC 19583 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KILGORIS

CIVIL APPEAL E001 OF 2022

F GIKONYO, J

JULY 3, 2023

BETWEEN

CHARLES MUSENYA ..... 1ST APPELLANT

GLADYS SIPARO ..... 2ND APPELLANT

JULIUS MEIRABIE KISAKA ..... 3RD APPELLANT

AND

JACKSON LEKAKENY NAIYOMA ..... RESPONDENT

(Being an appeal from the judgment and decree of Hon. Kitur (S.R.M) delivered on 14/12/2021 in Kilgoris PMCC No. 2 of 2020)

JUDGMENT

1. The memorandum of appeal dated 13/01/2022 cited the following 11 grounds of appeal;
    i. That the learned trial magistrate erred in law and in fact by awarding the respondent a sum of Ksh. 50,000 /- and interest despite there being no evidence that the said sum was lent out to the appellants or the organization which they lead, namely Enoosaen Farmers Rural Sacco Society Limited.
    ii. The learned trial magistrate erred in law by entering judgement for the plaintiff in total contravention of S.3 of the *Law of Contract Act* which stipulate that no suit shall be brought against any person on a contract which is not in writing and signed by parties.
    iii. The learned trial magistrate erred in law by awarding interest which is not regulated by the *Civil Procedure Act* chapter 21 laws of Kenya.
    iv. The learned trial magistrate erred in law by awarding interest which is not regulated by the Central Bank of Kenya hence promoting loan shirking and shylocking contrary to the law.

v. The learned trial magistrate erred in law by presiding over a matter that fell squarely within the ambit of the co-operatives Tribunal.

vi. The learned trial magistrate erred in law by presiding over a matter that was barred by limitation time under the *limitation of Actions Act*.

vii. The learned trial magistrate erred in law and fact by awarding the claim to the respondent despite the fact that the same was not sufficiently proven to the required standard.

viii. The learned trial magistrate erred in law by ignoring and failing to consider the evidence, submissions and the authorities supplied by the appellants for no sufficient cause hence going against the doctrine of precedents.

ix. The learned trial magistrate erred in law and fact by entering judgment against the defendant despite the respondent having failed to prove his case on a balance of probability.

x. The learned trial magistrate erred in law and fact by delivering a judgment contrary to the weight of evidence.

xi. The learned trial magistrate erred in law by awarding the respondent costs.

Directions of the court.

2. The appeal was canvassed by way of written submissions. Both parties have filed submissions.

Appellants' submissions

3. The appellants submitted that the respondent did not produce any contract entered between the parties herein. The court cannot entertain a suit founded on an oral contract. Such suit is a nullity and/ or a non- starter. That the contract purported by the respondent does not contain any elements of a valid contract as envisaged under section 7 of the *Law of Contract*. Therefore, the trial magistrate ought to have dismissed the suit.

4. The appellants submitted that they ought to have been sued as officials for and on behalf of Enoosaen Farmers Rural Sacco Ltd and not in their individual capacities if indeed they were representing the said self-help group.

5. The appellants submitted that the entity Enoosaen Farmers Rural Sacco Ltd is not known in law.

6. The appellants submitted that the respondent produced a transaction receipt for co- operative bank dated 19/11/2015 where the said respondent deposited Kshs. 50,000 in the account of Transmara Sugar Cane Farmers. Therefore, the appellants contend the said amount was never deposited in their bank accounts neither do they trade in the name of Transmara Sugarcane Farmers.

7. The appellants submitted that the issue herein concerns Saccos/cooperative societies and should not be entertained by the court at first instance but by cooperative tribunal. Therefore, the court lacked jurisdiction to entertain the suit herein.

8. The appellants submitted that the respondent did not produce evidence of membership to the Sacco to be able to deposit money to the Sacco.

9. The appellants submitted that the trial court was wrong to order interest be given to the respondent. They argued that the Saccos, co-operative societies and or self-help groups do not have authority to charge interest against the principal sum.

10. In the end, the appellants urged this court to allow the appeal, set aside the judgment and decree of 14/12/2021 and substitute the same with an order dismissing the case with costs and that costs of this appeal and costs incurred in the magistrate court be borne by the respondent.

11. The appellants have relied on the following authorities;

    i. Section 3(1)(2) and (3) of the *Law of Contract Act*.

    ii. *Leo Investment Ltd v Estuarine Estate Ltd* [2017] eKLR.

    iii. *Makutano Makumba Self Help Group v Abdul Wahab Majid* [2020] eKLR.

    iv. *Senti Kumi Community Self Help v Kenya Maritime Authority & another* [2019] eKLR.

    v. *Kipsiwo Community Self Help Group v Attorney General & 6 others* [2013] eKLR.

    vi. *Trustees of Maximum Miracle Centre v Equity Bank (K) Ltd* (Civil Case E055 of 2021) [2021] KEHC 237 (KLR) (Commercial and Tax) (11 November 2021) (Ruling).

    vii. Section 44 of the *Banking Act*.

Respondent's submissions

12. The respondent submitted that the cause of action arose sometime in November 2015 and the suit was filed before the trial court on 13/01/2020.

    Therefore, the suit was brought before expiry of the period provided for claims arising out of contracts.

13. The respondent submitted that he entered into an oral agreement with the appellants to deposit Kshs. 50,000 to the appellants' self-help group with a promise to earn Kshs. 10,000 per month. The respondent argued that all agreements will be deemed duly formed and binding where consideration is present and accepted having been offered. That section 3(1) of the *law of contract Act* does not make all contracts void and unenforceable if they are not reduced into writing.

14. The respondent submitted that the trial magistrate sufficiently applied the evidence by the parties and the relevant law to come to the findings that the parties entered into an agreement and that the appellants breached the said agreement. That the respondent as a registered member performed his end of the bargain by depositing the agreed sum. The appellants failed to produce clear records showing the list of members who were duly registered and signed by the outgoing officers since the year 2015. They only brought a list that shows members registered in 2017. That the by-laws produced as D Exh 3 are not dated and do not belong to Enoosaen Farmers Rural Sacco Ltd. From the headline they belong to a ministry of co-operative development and marketing.

15. The respondent submitted that he proved his case on a preponderance of probability. That the cause of action was proved in accordance with the provisions of the law. He argued that he discharged his burden of proof by testifying during hearing adopting his statement dated 13/01/2020 as part of his evidence and producing a copy of deposit slip as his exhibit.

16. The respondent submitted that this court has jurisdiction to hear and determine this case. He argued that if the appellants had any issues with jurisdiction, they should have raised a preliminary objection at the trial court before the matter was set for main hearing.

17. The respondent submitted that he is entitled to compensation arising from the breach of contract by the appellants in nature of special damages.

18. The respondent submitted that costs follow the event and he qualifies for costs as he has high chance of success. He therefore prayed for dismissal of the appeal with costs to the respondent.

19. The respondent relied on the following authorities;

    i. *Mwanasokoni v Kenya Bus Service Ltd* [1982-85] 1 KAR 278 and *Kiruga v Kiruga & another* [1988] KLR 348.

    ii. *Nkube v Nyamiro* [1983] KLR 403.

    iii. Section 4 of *Limitation of Actions Act*.

    iv. *William Muthee Muthami v Bank of Barod* (2014) eKLR.

    v. Section 107,108 and 109 of the *Evidence Act*.

    vi. *Consolata Anyango Ouma v South Nyanza Sugar Co. Ltd* [2015] eKLR.

    vii. *Fosket v Mckrown* [2001].

    viii. *Standard Bank Limited v Intercom Services Ltd & others* NRB CA Civil Appeal No. 37/2003 [2004] eKLR.

    ix. *Anson's Law of Contract*, 28th Edition at page 580 and 590.

Analysis and Determination

Duty of court

20. The first appellate court should re-evaluate the evidence and make its own conclusions, albeit it must bear in mind that it did not have the opportunity of seeing or hearing the witnesses firsthand. (section 78(2) of the *Civil Procedure Act* and *Selle & anor v Associate Motor Boat Co. Ltd* 1968 EA 123).

Issues

21. The court has carefully considered the grounds of appeal, the evidence adduced before the learned trial magistrate as well as the parties' rival written submissions. The core questions the court has been asked to answer are:

    i. Whether the suit herein is statute barred under *Limitation of Actions Act*.

    ii. Whether the appellants and the respondent entered into an agreement.

    iii. Whether the agreement was breached by the appellants.

    iv. Whether the suit offends the doctrine of exhaustion of remedies?

    v. Whether the respondent is entitled to the reliefs granted by the trial court?

    vi. Who is liable to pay costs of this appeal?

22. Some of the issues are inextricably connected whilst there are those which may be determined as stand-alone. But, one of the issues is of great preliminary significance, that; this dispute falls within the jurisdiction of the Cooperatives Tribunal at the first instance. The latter will be determined first.

Jurisdiction: the doctrine of exhaustion

23. The rule of the thumb is that; a court of law should always satisfy itself of jurisdiction to adjudicate upon the dispute before it. The appellants have fastened a quarrel on the jurisdiction of court on the basis of the doctrine of exhaustion of remedies.

24. On the one hand, the appellants submitted that the dispute herein concerns Saccos/cooperative societies and should not be entertained by the court at first instance but by cooperative tribunal. According to them, therefore, the trial court lacked jurisdiction to entertain the suit herein. This extends to this court too should it find that to be the case.

25. But, on the other hand, the appellants submitted that the entity Enoosaen Farmers Rural Sacco Ltd is not known in law. Further that, there was no deposit made into the account of the said Sacco by the respondent and that there was no relationship whatsoever between the said Sacco and the respondent.

26. The court finds the appellants to be talking at cross purposes on this issue without giving much consideration of its purport.

27. Nevertheless, a digging into the evidence reveals that, although parties referred to Enoosaen Farmers Rural Sacco Ltd or its membership, its direct relevance to the cause of action herein has not been established.

28. The evidence by the appellants on this Sacco completely dispels any possibility that the dispute herein concerns the said Sacco. DW1, Chareles Ole Musekenya a secretary of Enoosaen Farmers Rural

    Sacco Ltd, testified that they have 60 members. He produced a list of members, a certificate of registration and their by-laws as D Exh 1, 2 and 3. DW2, Gladys Siparo testified that she was a treasurer of the Sacco. DW3, Julius Kisaka stated that he was a chairman of the Sacco.DW2 and DW3 denied ever receiving any monies from the respondent.

29. The list of members (D Exh1) is titled Enoosaen Farmers Rural Sacco Members as at 13th May 2017. The certificate of registration (D Exh2) indicates the group name as Enoosaen Farmers Rural Sacco Limited was registered on 07/12/2015.

30. Without doubt, the said Sacco was registered after the transaction herein, thus, not relevant to the cause of action herein whatsoever.

31. There is also nothing which shows that Transmara Sugarcane Farmers Association was a Sacco or a cooperative society under the *Sacco Act* or *Cooperative Societies Act*, respectively, or an entity of corporate personality. It is loosely referred to as a self-help group- which portend liability of members could be individual rather than of corporate personality.

32. Similarly, the dispute herein has not been shown to be one between a member, past member or deceased member of the society, or against a society under the *Sacco Act* or *Cooperative Societies Act*. The court hesitates to find that the dispute falls under the *Cooperative Act* or *Sacco Act.*

33. The court is aware that the expression 'business of the society" in section 76 of the Cooperative Societies Act has been broadly interpreted by courts, and '...is not confined to the internal management of the society but covers every activity of the Society within the ambit of its bylaws and rule...' (*Gatanga Coffee GrowersCo-operative Society Ltd v Gitau* [1970] EA 361 citing the Ugandan case of *Wakiro and another v Committee of Bugisu Co-operative Union* [1968] EA 523 at p 527).

34. But, despite the broad interpretation, not even unbridled extravagance can support a proposition that this dispute arise out of 'the business of the society' under section 76 of the *Co-operative Societies Act* given the evidence presented and the circumstances of this case.

35. In any case, the Enoosaen Farmers Rural Sacco Limited was registered on 07/12/2015 after the transaction herein and the appellants have stated emphatically that the dispute does not relate to the Sacco.

36. Accordingly, there is no legal or factual basis on which to anchor the argument that the cooperatives tribunal has jurisdiction over the dispute herein. The court is saying these things with tremendous deference to the doctrine of exhaustion.

37. The objection on jurisdiction is, therefore, a complete red-herring.

38. The objection fails. The trial court as well as this court has jurisdiction over this dispute.

Limitation of actions

39. According to section 4 (1)(a) of the *Limitation of Actions Act*: 'actions founded on contract' 'may not be brought after the end of six years from the date on which the cause of action accrued...'

40. Limitation of actions is nonetheless, a matter for trial and is determined on the basis of the facts and evidence adduced thereto.

41. The appellants submitted that the suit was statute barred for it was brought after expiry of the prescribed time.

42. The respondent stated that the suit was filed in the trial court on January 27, 2020. And that it relates to a cause of action that arose sometime on November 19, 2015.

43. On the basis of the facts disclosed by the respondent and supported in evidence, it has been established, that, the suit; i) is an action founded on contract entered into on November 19, 2015; and ii) was filed in court on January 27, 2020. These facts have not been disproved by the appellants. Therefore, the suit was filed in court before expiry of 6 years prescribed in law. Consequently, the court finds that the suit is not time barred. Accordingly, the court dismisses the argument on limitation of actions.

Existence of a contract between the appellants and the respondent.

44. Quite a preponderant emphasis was laid by the appellants that, for a contract to be valid and enforceable, it must be in writing in accordance with section 3 of the *Law of Contract Act*.

45. In reference to this argument, '...a contract can exist where no words have been used but where it can be inferred from the conduct of the parties that a contract has been concluded.' (The Court of Appeal in *Ali Abid Mohammed v Kenya Shell & Company Limited* [2017] eKLR.

46. First insight: a contract may be oral or inferred from the conduct of the parties.

47. On valid and enforcement of contracts; 'In the law of contract, the aggrieved party to an agreement must, in

addition, prove that	there was	offer, acceptance and
consideration.' (The	court of	Appeal in William
Muthee Muthami eKLR.)	v Bank	of Baroda (2014)

48. See also the case of *Charles Mwirigi Miriti v Thananga Tea Growers Sacco Limited and another* [2014] eKLR.

49. Thus, the significant insight here is that; subject to exceptions known in law, a contract is valid and enforceable in the law, where there was offer, acceptance and consideration.

50. The evidence by the respondent was that he entered into an oral agreement with the appellants to deposit Kshs. 50,000 to the appellants' self-help group with a promise to earn Kshs. 10,000 per month. He deposited Kshs. 50,000/= into account number 01134479597000 of Transmara Sugarcane Farmers Association on 19/11/2015 as agreed. He produced a deposit slip as P Exh 1.

51. The appellants on the one hand, seems to deny existence of Enoosaen Farmers Rural Sacco Ltd.

And, on the other hand, they argued that they ought to have been sued as officials for and on behalf of Enoosaen Farmers Rural Sacco Ltd and not in their individual capacities if indeed they were representing the said self-help group. And that the entity Enoosaen Farmers Rural Sacco Ltd is not known in law.

52. The appellants also pointed out that the receipt provided by the respondent is a transaction receipt for co- operative bank dated 19/11/2015 where the said respondent deposited Kshs. 50,000 in the account of Transmara Sugar Cane Farmers. According to the appellants, the said deposit was not into their bank accounts neither do they trade in the name of Transmara Sugarcane Farmers.

53. The court has already made a finding that Enoosaen Farmers Rural Sacco Ltd or its membership is not quite relevant in these proceedings and that this is not a dispute between a Sacco and its members or among its members.

54. The respondent contended that in the month of November 2015 he entered into a contract with the appellants. They agreed that the respondent would deposit Kshs. 50,000 to the appellants' self-help group with a promise to earn Kshs. 10,000 every month. The respondent deposited the said amount at Cooperative bank account number 01134479597000 at Kilgoris branch on 19/11/2015.

55. The appellants were expected to pay Kshs. 10,000 as interest in the month of December 2015. According to the respondent, the appellants failed to pay as agreed, and instead became evasive and stopped further communication with the respondent. The respondent stated that despite numerous demands, the appellants refused to pay him Kshs. 560,000. For that reason the respondent filed the suit before the magistrate's court.

56. Upon consideration of the two streams of the evidence, there was a verbal agreement entered into between the parties herein that the respondent deposits a sum of Kshs. 50,000 into the account of the appellants' self-help group. The respondent deposited the money as agreed. Membership in or in respect of Transmara Sugarcane Farmers Association is not the issue here. The issue is whether there was an agreement between the parties herein that the respondent deposits a sum of Kshs. 50,000

into the account of the appellants' self-help group which the respondent did. It also emerged through evidence the appellants were engaged in the business of sugarcane.

57. Taking into account the foregoing, the court is satisfied that the respondent established that he transacted with the appellants in respect of the deposit he made herein on terms agreed between them. In such matters, the party making the deposit may not know the description or identity of the beneficiaries of the account to which a deposit is to be made. They place trust in the other contracting party. The transactions and the arrangement that resulted into the deposit only gives rise to more questions than answers as to why the appellants would ask the respondent to make a deposit in an account of their self-help group- which after the deposit, turned out to be Transmara Sugarcane Farmers Association (see the deposit slip)- only to renounce it later in most casual manner. The prima facie evidence raised by the respondent shifted evidential burden to the appellants to rebut the evidence by the respondent in a more specific manner and perhaps seek to establish that they are not connected to the self-help group to which a deposit was made pursuant to their agreement with the respondent. None of these things was done, thereby, leaving the evidence by the respondent totally uncontroverted.

58. Consequently, the court finds that the circumstances giving rise to the deposit made herein of Kshs. 50,000 was the oral agreement between the parties, and failing satisfactory evidence to the contrary, the stage is set for the court to infer upon the evidence adduced, that, the transaction can only have been procured by the appellants for reasons known only to them. So, the evidential burden on the appellants was not discharged.

59. The evidence also show that the parties agreed that the appellants shall pay monthly sum of Kshs. 10,000 in interest.

60. The overall impression is that the respondent proved his case on a balance of probabilities against the appellants.

61. The question nonetheless, is whether that kind of interest agreed upon is permissible in law or constitutes an unconscionable bargain?

Of unconscionable bargain

62. The appellants claim that interest should not have been awarded in a matter falling under cooperative societies or Saccos. They also seem to suggest the interest was unreasonable.

63. Courts would ordinarily not attempt to re-write a contract for parties. However, where the contract terms are inter alia, unduly harsh, commercially unreasonable, and grossly unfair given the existing circumstances of the case, a court of law would intervene in order to avert an injustice to one of the

contracting parties. Put simply, a contract that is usurious or unconscionable bargain; or, one that a reasonable person may not put to another; creates a basis for the court to interfere with a contract or contractual term.

64. Interest of Kshs. 10,000 per month on a loan of Kshs. 50,000 is not only unconscionable but one that no reasonable person could ever propose to another.

65. Although the appellants breached the said agreement, it would be unconscionable to ask the appellants to pay the interest as agreed. The court should therefore, intervene and make appropriate orders. The trial court considered this and made an order for interest on the deposit from the date of the deposit.

Conclusion and Orders.

66. The respondent entered into an oral agreement with the appellants. He deposited Kshs. 50,000/= into account number 01134479597000 of Transmara Sugarcane Farmers Association on 19/11/2015. He produced a deposit slip as P Exh 1.

67. The appellants breached the said contract. For the avoidance of doubt, the appellants shall refund the sum of Kshs. 50,000 with interest at court rates from the date of the agreement, that is November 19, 2015, until payment in full. Judgment accordingly.

68. In the upshot, the appeal is dismissed with costs to the respondent. The respondent will also have costs for the suit. Orders accordingly.

DATED, SIGNED AND DELIVERED AT KILGORIS THROUGH MICROSOFT ONLINE TEAMS APPLICATION, THIS 3RD DAY OF JULY 2023.

F. GIKONYO M. JUDGE

In the Presence of:

1. CA – Leken

2. Tesott H/B for Respondent

3. Ochwangi for Appellants - absent