



**Apondi v Kenya Women Micro Finance & another (Civil Appeal E048 of 2023) [2024] KEHC 14205 (KLR) (11 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14205 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CIVIL APPEAL E048 OF 2023  
RE ABURILI, J  
NOVEMBER 11, 2024**

**BETWEEN**

**AGAWO PACIFICA APONDI ..... APPELLANT**

**AND**

**KENYA WOMEN MICRO FINANCE ..... 1<sup>ST</sup> RESPONDENT**

**KWFT CSOP TRUST ..... 2<sup>ND</sup> RESPONDENT**

*(An appeal arising out of the Judgement of the Honourable G.C. Serem in the Small Claims Court in Kisumu delivered on the 9th March 2023 in Kisumu SCC No. E236 of 2022)*

**JUDGMENT**

**Introduction**

1. The appellant sued the 1<sup>st</sup> respondent vide a statement of claim dated 21<sup>st</sup> November 2022 claiming Kshs. 76,890 being the equivalent amount of 2,330 share units in the 2<sup>nd</sup> respondent which the 1<sup>st</sup> respondent had refused to pay.
2. It was the appellant's case that sometime in June 2014, she was approached by agents from the 1<sup>st</sup> respondent who encouraged her to buy shares which was effected in July 2014 when she agreed to pay Kshs. 11,000 via m-pesa to the 1<sup>st</sup> respondent not later than the 25<sup>th</sup> of every month which she did from the 20.7.2014 to 24.2.2015. The appellant averred that on the 6.3.2015, she was issued with a certificate as a holder of 2330 units in the 1<sup>st</sup> respondent worth Kshs. 76,890.
3. The appellant averred that due to ill health, she communicated her desire to sell the said shares and that despite filling the Sale Transfer Form in November 2021 and making various visits to the 1<sup>st</sup> respondent's Bondo branch and main branch in Kisumu, she did not receive any help thus necessitating her claim.



4. The 1<sup>st</sup> respondent filed a response to the claim dated 8<sup>th</sup> December 2022 that was later amended on the 20<sup>th</sup> December 2022 denying liability for the appellant's claim. It was the 1<sup>st</sup> respondent's defence that it only acted as an agent of Echo Network Africa Limited, who were at the time the owners of the 2<sup>nd</sup> respondent who was thus liable to settle the appellant's claim.
5. The 2<sup>nd</sup> respondent filed a response dated 25.1.2023 pursuant to the Third-Party Notice discrediting the 1<sup>st</sup> respondent's averments and further stating that it lacked the capacity to sue or be sued in its own name. It urged the Court to dismiss the Third Party Notice and further Contended that the 1<sup>st</sup> respondent was the beneficiary of the shares/units bought by the appellant.
6. In her judgement, the trial magistrate held that the 2<sup>nd</sup> respondent who was enjoined as a third party in the trial court was not a legal person and thus could not sue or be sued and that the appellant had failed to adduce evidence to the effect that she was allowed to cash out her investment in the 2<sup>nd</sup> respondent. The trial magistrate then proceeded to dismiss the appellant's suit without any orders as to costs.
7. Aggrieved by the said decision, the appellant filed a memorandum of appeal dated 22<sup>nd</sup> March 2023 raising the following grounds of appeal:
  - a. The honourable learned adjudicator erred in law and in fact by finding that the appellant failed to prove her claim on a balance of probabilities.
  - b. The honourable learned adjudicator erred in law and in fact on the principles governing a principal-agency relationship and thereby arriving at an erroneous conclusion that there existed an agency relationship between the 1<sup>st</sup> and 2<sup>nd</sup> respondents.
  - c. The honourable learned adjudicator totally misdirected itself in the evaluation and the analysis of the pleadings, evidence and submissions produced before it thereby arriving at wrong conclusions of facts.
  - d. The learned honourable adjudicator erred in law and in fact by failing to find that the 1<sup>st</sup> respondent were the respondents were the beneficiaries of the shares investment by the appellant despite the confession by the 2<sup>nd</sup> respondent.
  - e. The honourable learned adjudicator erred in law and in fact by finding that the appellant had to bring another investor to buy off the shares despite the same not having been pleaded by the 1<sup>st</sup> respondent.
  - f. The learned honourable judge erred in law and in fact by failing to appreciate and consider the pleadings and the evidentiary materials adduced by the appellant thereby arriving at an erroneous conclusion of facts that the appellant did not prove her claim to the requisite standards.
  - g. The honourable learned adjudicator erred in law and in fact in wrongly shifting the burden of proof required of the 1<sup>st</sup> respondent to the appellant.
8. The parties canvassed the appeal via written submissions which are summarised below:

### **The Appellant's Submissions**

9. The appellant submitted that she had proven that she bought shares from the 1<sup>st</sup> respondent acting on the 1<sup>st</sup> respondents counsel and further that she was permitted to trade off her units for their monetary value as entailed in the KWFT CSOP TRUST OTC Holding Rules and in the Handing Over dated 19.8.2019, produced by the 1<sup>st</sup> respondent.



10. It was thus submitted that the 1<sup>st</sup> respondent was the entity charged with facilitating the trading of units amongst market participants who had also admitted in their testimony to provide secretarial and administrative work to the trust.
11. The appellant further submitted that the 1<sup>st</sup> respondent was the one liable to reimburse her the Kshs. 76,890 for the units acquired because, throughout the transaction, the appellant solely dealt with the 1<sup>st</sup> respondent and as such, she cannot be faulted for having the legitimate expectation that when it came to selling the shares, it would have been the 1<sup>st</sup> respondent to facilitate the process and offset the claim.

### **The 1<sup>st</sup> Respondent's Submissions**

12. The 1<sup>st</sup> respondent submitted that this being an appeal from the Small Claims Court, the duty of this Court as prescribed under section 38 of the *Small Claims Court Act* is to defer to the findings of fact of the Adjudicator and analyze the matters for issues of law only.
13. It was submitted that the instant appeal does not raise any issue of law and neither does it show that the Trial Court considered matters it should not have considered or failed to consider matters it should have considered and whose result therefore, is so bad in law that no other reasonable tribunal would come to such a conclusion as was held in the case of *Rugano Books Limited v Mabiria* (Civil Appeal E865 of 2022) [2024] KEHC 6281 (KLR) (Civ) (31 May 2024) (Judgment).
14. The 1<sup>st</sup> respondent submitted that the appeal herein impugns the trial adjudicator's judgement based on the facts and evidences which had been adequately canvassed and determined by the Trial Court and is thus contrary to the confines of Section 38 of the *Small Claims Court Act* and that consequently, this Court should not disturb the said decision but rather proceed to dismiss the instant appeal with costs.

### **Analysis and Determination**

15. This being a first appeal the court relies on a number of principles as set out in *Selle and Another v Associated Motor Boat Company Ltd & others* [1968] 1EA 123:

“...this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence.”

16. I have already highlighted the pleadings by parties in the lower court. The broad issues for determination before this court therefore, are:
  - a. Whether this appeal is incompetent.
  - b. Whether the error in law and fact in arriving at the judgment by the trial court.
17. As to the competence of the appeal, section 38 of the *Small Claims Court Act* provides that:
  - a. A person aggrieved by the decision or an order of the court may appeal against that decision or order to the High Court on matters of law.
  - b. An appeal from any decision or order referred to in subsection (1) shall be final.



18. The grounds of appeal herein clearly fall within the provisions of section 38 of the Act. The appellant has impugned the trial magistrate's decision to hold that the appellant did not prove her case on a balance of probabilities amongst other things including her exercise of her discretion in analyzing the evidence before her. In the circumstances stated herein, this court is not persuaded that the appeal herein is scandalous or vexatious for not raising a fundamental point of law as submitted by the 1<sup>st</sup> respondent.
19. As to whether there was an error in law and fact in arriving at her judgement, the appellant's case was that the 1<sup>st</sup> respondent was liable to settle her claim as it was the one that engaged her to get the shares in the 2<sup>nd</sup> respondent.
20. Conversely, the 1<sup>st</sup> respondent averred that it merely acted on behalf of the 2<sup>nd</sup> respondent who was the entity that was liable to settle the appellant's claim. On its part, the 2<sup>nd</sup> respondent contended that due to the nature in which it was registered, it lacked the capacity to be sued or sue in its own name and further that it was the 1<sup>st</sup> respondent who benefited from the shares subscribed by the appellant.
21. It is trite that he who alleges must prove. In the instant case, it is undisputed that the appellant bought the shares in question based on the 1<sup>st</sup> respondent's counsel. This much was even admitted by the 1<sup>st</sup> respondent's witness in his testimony.
22. The appellant averred and submitted that she was permitted to trade off her units for their monetary value as entailed in the KWFT CSOP Trust OTC Holding Rules and in the Handing Over dated 19.8.2019 produced by the 1<sup>st</sup> respondent. The question is, who between the respondents herein is liable to settle the appellant's claim.
23. The 1<sup>st</sup> Respondent in an effort to pass liability onto the 2<sup>nd</sup> respondent led evidence that upon executing its obligations in KWFT CSOP Trust as agreed, it handed over all the roles, documents, accounts, and even ongoing court cases to Echo Networks Africa. This is evidenced in a handover report dated 5<sup>th</sup> August 2019.
24. From the record, it was the evidence of the 2<sup>nd</sup> respondent that it was established vide a Board resolution dated 19<sup>th</sup> August 2014 to facilitate eligible members acquire shares in the 1<sup>st</sup> respondent and that the 1<sup>st</sup> respondent was to provide secretarial and administrative services to it.
25. Further, examining the Handing Over Report dated 19.8.2019 produced by the 1<sup>st</sup> respondent as exhibit 7 in regard to share trading activity, it is clear that it was the 1<sup>st</sup> respondent that was to facilitate the trading of units amongst market participants. The said provision states:

Share Trading Activity – Unit 7 Region Staff

Customers who intend to dispose and or buy shares forward their intention of sale or purchase to their respective office of all our 235 KWFT offices where the concerned office then floats the said intentions to other members or client who have the willingness to either buy or sell shares.
26. The other question then is, does this make the 1<sup>st</sup> respondent liable to settle any claim arising therein? I do not think so because the situation described above and what the appellant admitted to have initiated is one where a shareholder presents her shares up for sale/trade and the rest is left to the 1<sup>st</sup> respondent to market the shares into the market forces for acquisition by willing buyers. That being the case, it is my finding that the 1<sup>st</sup> respondent would only be liable to settle the appellant's claim in such an instance if the 1<sup>st</sup> respondent decided to acquire the appellant's shares.



27. By deeming the 1<sup>st</sup> respondent liable to settle the appellant's claim as pleaded, this would be tantamount to interfering with the free market.
28. I am not in agreement with the wordings chosen by the trial magistrate in her judgement that the appellant failed to prove anything to show that she should cash out her investment. In my view, the appellant's claim sought to hold the 1<sup>st</sup> respondent liable for settlement of her claim but failed to prove on a balance of probabilities that it was the 1<sup>st</sup> respondent who was liable to settle the said claim. On the other hand, the 2<sup>nd</sup> respondent not having a legal personality was incapable of suing and being sued and therefore the Third-Party Notice was inconsequential.
29. I do reiterate the trial magistrate's finding that it is evident that the appellant does not seem to be well informed in what she was getting into and the consequences therein.
30. In the end, I find and hold that the appeal herein is devoid of any merit. I uphold the judgment of the trial court and dismiss the appeal with an order that each party bear their own costs of the appeal.
31. This file is closed.
32. I so order.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 11<sup>TH</sup> DAY OF NOVEMBER, 2024**

**R.E. ABURILI**

**JUDGE**

