REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga)

HIGH COURT CIVIL APPEAL NO 194 OF 2011

DANIEL NZIOKI KIANGI.....1ST APPELLANT

MWIKYA KIANGI.....2ND APPELLANT

RUTH KASUSU NZIOKI.....3RD APPELLANT

AND

PRISCILLA MUSILI MULWA, MUTUKU KIMANTHI,

MUENI KIKUSWI (suing on their own behalf and on

behalf of 47 members of MEKA SELF HELP GROUP).....RESPONDENTS

(Being an appeal from the Judgment of N. N. Njagi, Principal Magistrate in Makindu PMCC No. 163 of 2009 delivered on 27th October, 2011)

BETWEEN

PRISCILLA MUSILI MULWA, MUTUKU KIMANTHI,

MUENI KIKUSWI (suing on their own behalf and

on behalf of 47 members of **MEKA SELF HELP GROUP).....PLAINTIFF**

VERSUS

DANIEL NZIOKI KIANGI.....1ST DEFENDANT

MWIKYA KIANGI.....2ND DEFENDANT

RUTH KASUSU NZIOKI.....3RD DEFENDANT

JUDGEMENT

1. The Respondents herein, in their capacity as the Chairperson, Secretary and Treasurer respectively, of Meka Self Help Group (hereinafter referred to as "the Group"), sought judgement against the Appellant herein for the sum of Kshs 282,028/-, costs and interests. In the said suit it was pleaded that the Appellants and the Respondents were members of the Group with the 1st Appellant being in charge of collecting money from water sales amongst other responsibilities. On diverse days in 2006, 2007 and 2008 the 1st Appellant received a total of Kshs 270,206/- on behalf of the Group for the purposes of banking but instead, without any lawful authority or permission, he converted the said sum to his own personal use in blatant disregard of the Respondents' interests. The particulars of the converted sum were pleaded.

2. Upon demand for payment, on 3rd January, 2009, the 1st Appellant admitted liability and entered into a written agreement with the Group under which the 1st Defendant undertook to repay the said sum on or before 10th March 2009 on the strength of guarantees by the 2nd and 3rd Appellants. Pursuant thereto, the 2nd Appellant deposited her title deed to Land Parcel No. Mbitini/Masue/608 as security.

3. It was however pleaded that the 1st Appellant failed to satisfy the terms of the said agreement despite demand made and notice of intention to sue given.

4. In their defence, the Appellants denied having received the said sum on behalf of the Group and denied having converted the same to their personal use. They also denied that a demand was made and denied having entered into an agreement to repay the said sum. They also denied the allegation of guarantee pleaded in the plaint and denied having offered security.

5. The Appellants further pleaded that the Respondents unlawfully and maliciously made false reports to the police in January, 2009 as a result of which the police arrested the Appellants.

6. According to the Appellants, the 1st Appellant was coerced to sign a document committing himself to pay the money and threatened to press criminal charges against him and have him detained in police custody if he did not sign the said document. It was further pleaded that the Respondents misrepresented to them that they were required to sign the documents to have the 1st Appellant released so that they could negotiate the dispute between themselves and the 1st Appellant out of court and that at no time did they know that they were guaranteeing the 1st Appellant hence in their view, there was no valid contract of guarantee between them and the Respondents.

7. According to the 1st Appellant, he utilised his time and energy working for the Group on the express understanding that he would be paid a stipend of Kshs 300/- per day and a further Kshs 200/- per day for use of his bicycle while on duty but the Respondents failed to pay him the said sum which accumulated to over Kshs 300,000/-. It was therefore his view that the Respondents' suit was meant to forestall his claim for the said sum by the use of threats of arrest and the suit. he therefore prayed that the suit be dismissed with costs.

8. In their reply to defence, the Respondents denied the allegations made by the Appellants and insisted that the admission of the liability by the Appellants was voluntary and was duly executed by the parties.

9. In support of their case, the Respondents called one **Alex Mbai**, a Certified Public Accountant as PW1 who was engaged by the Group to audit its books. Pursuant to the said instructions, he did audit the said books and prepared a report dated 12th January, 2009 for the financial years 2006, 2007 and 2008 which he exhibited. From his audit and investigations, based on receipts and payment vouchers, bank statements and print out from the Water Boards, he found that the money given to the 1st Appellant was not banked. Though he never talked to the 1st Appellant, he saw the 1st Appellant's confession in which he agreed to pay. He however admitted that it was within his mandate to contact all those who had been mentioned and chose to call on those who had paid. In his evidence, the total amount lost was Kshs 282,028/- which he recommended be recovered from the 1st Appellant.

10. In cross-examination, he stated that he did not carry out the audit for the year 2008 though his report was for the period 2006 to 24th December, 2008. He admitted that by the time of his report, the 1st Appellant had already made his confession. According to him the money received from one **Mulwa Ngala** was not recorded though he agreed that no receipt was issued. Though it was his evidence that the bills for July, August and September, 2008 were overstated, he had no analysis for the said months and stated that he had a problem with water for the months of August, September and July, 2008. He however denied that his report was based on the confession alone as he interviewed the members of the group and visited the water offices and confirmed the falsified documents.

11. PW2, **Joshua Kasanga Mbutu**, also a Certified Public Accountant, testified that he was a sponsor of the group for which he was working which he was teaching on how to manage their accounts as well as checking its accounts. It was his evidence that he did the accounts for the group between 2008 and beginning of 2009 during which time he found some anomalies between the expenditure and the income. According to him, the money was not being banked and the expenditures were not being captured. According to him the amount that was not banked was Kshs 157,392/- which amount the 1st Appellant admitted he owed voluntarily and agreed to repay to the group in a written document which was signed by the guarantors. He testified that a total of Kshs 270,206/- was not accounted for.

12. In cross-examination, PW2 stated that his report was meant for training the members of the Group. He denied that he was paid to carry out the audit but was to train the Group on maintaining the income and expenditure account. He admitted that he did not capture all the income and expenditure and that though there were several points for sales of water, there were no proper records to show what was sold in various kiosks. He however averred that he visited the water providers and talked to the manager. According to him, he relied on receipts in preparing his report but he had no receipts from Athi River Water Services Board. In his evidence, he could not tell what each member contributed for the bicycle since he had no records of their contributions and was unable to recall who was in charge of the said contributions.

13. PW3, **Andrew Mwau Masila**, a farmer and a member of the Group testified that he was in charge of the Nursery though he was not being paid for it. According to him, the 1st appellant was the one in charge of the finances to whom all sums would be paid. He confirmed that the Group's auditor went to teach them how to keep the accounts and a report was prepared by PW2. It was his evidence that he signed the report and that the 1st appellant was present at the meeting which was peaceful and he did not hear the 1st Appellant complaining of anything and the 1st Appellant agreed to pay the missing money. At the home of the 1st Appellant, title deeds for Land Parcel Nos. Mbitini/Masue/603 and 608 were given to them as security. Upon being advised by their trainer to get an auditor, he gave the sales receipts and bank statements to the auditor. He averred that they had not been paid by the 1st Appellant.

14. In cross-examination, he stated that he was not a committee member of the group though he was in charge of Tree Seedlings and Nursery but he was not receiving any money as he was not a treasurer. He denied that at the meeting which was held at Kiuwani Primary School, the

1st Appellant was threatened with arrest if he did not furnish the title deeds. According to him, the 1st Appellant refused to make good their loss and the 2nd Appellant was his guarantor. In his evidence, the 1st Appellant voluntarily gave the title deed and he never heard anyone being threatened.

15. At the close of the Respondents' case, the 1st Appellant testified as DW1. According to him, the Group had 5 projects; water, goat, tree planting and demonstration far projects. Though he was however just a member of the Group, he was in charge of a water project and kept its records. In his evidence, he would file his returns with **Mutuku Kimanthi**, the Group's Treasurer who used to keep the money received from the sale of water from the 7 water kiosks. It was however the members of the Group who were selling the water which was being metered and his work was simply to read the meter every morning and calculate the water units used on a given day. Though the operator of the kiosk had an allowance, he was not receiving the money from the operator of the kiosk since the money would be taken to the Treasurer of the Group and at no time was he a Treasurer and would only know the expenses by getting the receipts. According to him, the kiosk attendant and the pipe line attendant would be paid Kshs 50/-, per day. It was his evidence that the Secretary would ask him to write down the amount spent. In the audit report, he stated that the water sales and the amount spent or expenses made leaving an outstanding balance of Kshs 132,000/-. However, there were other people involved in banking of the Group's income and he would be given the money to bank by the Treasurer which he would bank. It was therefore his evidence that if there was any loss, it was the Secretary and the Treasurer who ought to have been answerable if any loss occurred.

16. According to DW1 he used to record all receipts in a book which was taken away by the Treasurer. He therefore denied having received the sum itemised by the Respondent and denied that he altered any documents and knew nothing about the loss as nothing was written by him apart from signing as a member of the Group for the dividend which was paid into his account. Since he joined the Group as a member on 17th May, 2006, any activities prior to that date were unknown to him.

17. It was his evidence that he was not receiving any money and was only involved in writing receipts for the record and was neither receiving fines from the members nor was he involved in the farm produce and the tree nursery.

18. According to the 1st Appellant, on 23rd December, 2008 he was called by the 2nd Respondent who asked him to attend an urgent meeting where he was to meet the 3rd Respondent. He proceeded to Kigani Tree Nursery where the issue of non-banking of money was raised and he stated that he had banked all the money. As there was disagreement about the money, he was asked to provide the books which he went and picked and handed over. He was however compelled to sign an agreement on the threat of being taken to the police and his wife and mother were asked to be his guarantors which they did. According to him, when he signed the agreement on 3rd January, 2009, he was under duress. It was his evidence that he was never involved in the audit with the Group's Auditors.

19. Though he was not employed by the Group, the 1st Appellant stated that was meant to get an allowance of Kshs 200/- per day. He therefore sought that the suit be dismissed.

20. In cross-examination, the 1st Appellant stated that he became a member of the Group in 2004 the same year the Group was registered as a self-help group. He admitted that there was a time he would receive money for onward transmission to the Secretary or Treasurer but insisted that as regards the water he would read the meter and keep the records and was in charge of the pipeline and kiosk attendants and would transmit the records to the Group.

21. He testified that he did not complain of any loss and had no duty connecting water. He reiterated that he was asked to either sign the letter dated 3rd January, 2009 or be taken to the police which he did. He however stated that 3rd Respondent was not present but PW2, **Joshua Kasanga Mbutu,** was present. He stated that they met with the said **Joshua** on several occasions at Kiuwani. At Emali on 23rd December, 2008, he was with extension officers and stated that the meeting was not peaceful. He however admitted that he did not report to the police that he had been coerced to sign the documents. He also admitted that he was not taken to the police station before or after signing the said document but insisted that he signed it under coercion. According to him, accompanied with PW3, **Mwau** and **Mutua**, he took the said documents to his mother for signature and the title deed was given before 23rd December, 2009. He however stated that his mother and wife were not threatened before they signed. He admitted that he knew that he was signing for the loss of the money and that he understood the agreement. In his evidence, he did not report the incident to the police because he was waiting for a family meeting.

22. DW2, **Mwikya Kiangi**, the 1st Appellant's mother, admitted that she was a guarantor in this case and that she used her title deed as security. According to her, she was taken by the members of the Group to the meeting where she signed the document though she did not know what it was all about and was not told what was happening. She however testified that she never went back for her title which was still being held by the Group.

23. In cross-examination she stated that she was not a member of the Group and knew nothing about the money. She however admitted that she was aware that her son was selling water for the Group. According to her, 5 members of the Group went to her and she went to their meeting but insisted that she did not know and was not told what she was signing but signed three time on the document she was given by members of the Group. According to her, she gave the title deed because her son lost the money but she was not told that her son had taken the money belonging to the Group. She however did not report the matter to the police.

24. The 3rd Appellant, **Ruth Kasus Nzioka**, the 1st Appellant's wife testified as DW3. According to her, she did not agree to pay the money belonging to the Group that had gotten lost. It was her evidence that on 23rd December, 2008, the 1st Appellant accompanied by 2 other people known to her went and asked her to attend a Group meeting. At the meeting, she found the members of the Group who sought her identity card and a title deed and she was signed a document on the threat that if she failed to do so, the 1st Appellant would be taken to the police station. As a result, she signed the said agreement dated 23rd December, 2008. On 3rd January, 2009 members of the Group went to her home and asked for a title deed and she was forced to sign a document though she was not aware what she was signing the same for. Later, she learnt that the 1st Appellant had lost the Group's money.

25. According to her, she did not know what the 1st Appellant had done to the Group. The said agreement was signed at Syokati Hotel. She however stated in cross-examination that she never heard anybody say that if any of them did not sign they would be taken to the police though a member of the Group threatened to have the 1st Appellant taken to the police.

26. In his judgement, the Learned Trial Magistrate found that from the evidence of PW1, the auditor, a sum of Kshs 282,028/- was lost and could not be accounted for by the 1st Appellant who was in charge of the water project amongst other projects and no satisfactory account was offered by the 1st Appellant. According to the Learned Trial Magistrate, the 1st Appellant in his defence did not avail before the Court evidence that would have proved that he did not receive the money in question or that he did not misappropriate it but his evidence was a bare denial of the allegations made against him explanation. The learned Trial Magistrate also relied on the evidence of PW2 and Exh 4 which revealed that the 1st Appellant admitted that he was responsible for the loss of the money having received the same and spent it for his own use.

27. According to the Court, the 1st Appellant agreed to refund the money lost and even managed to get the 2nd and 3rd Appellants to be his guarantors to ensure that the money lost was repaid back to the plaintiffs. According to the Court there was no evidence to show that the admission (which the Learned Trial Magistrate termed as a confession) was obtained through undue influence or coercion since no complaint was made to the police. Based on the fact that no complaint was lodged by the 1st Appellant to the police, the learned Trial Magistrate found that the said admission was made voluntarily.

28. It was the finding of the trial court that since the 1st Appellant kept all the records of the collection and used to receive all the monies realised from the sale of any produce (sic) sale of trees at their tree nursery, sale of water, fines from members, and money received from the treasurer for payment of bills, the blame on the Treasurer and the Secretary of the Group by the 1st Appellant could not hold. It was the court's finding that the 1st Appellant admitted that he received the money and surrendered it to the treasurer but also admitted that the Treasurer used to give him money to bank pay bills. According to the court if there was any loss occasioned by the treasurer or the secretary, then at the time Exh. 4 was being prepared, he ought to have pointed out the same to PW2 and should have informed PW1 what was lost by any of the officials of the group which he did not. Since he must have understood what he was signing for in Exh. 4, the Court found that it was too late to deny the document.

29. The Court found that both DW2 and DW3 knew that the 1st Appellant was selling water for the Group and they also signed Exh. 4 which they guaranteed through title deeds to ensure that the 1st Appellant who was indebted to the Group paid the loss occasioned by him. From the evidence on record, the Court found that the fact that the said witnesses did not report to the police that they had been coerced, shows that there was nothing wrong with the said document. He therefore found that the Respondents had proved their case on a balance of probability and proceeded to enter judgement in favour of the Respondents in the sum of Kshs 282,082/- costs and interests.

30. Aggrieved by the said decision, the Appellants have lodged this appeal citing the following grounds:

> **1) The learned Magistrate erred in law and in fact in failing to appreciate that the entity known as Meka Self Help Group was not a legal person and therefore the same could not sustain a suit.**
>
> **2) The learned magistrate erred in law and in fact in finding the 1st Defendant liable to pay the sums claimed where there was no proof of the said sums and when there were no proper accounts given in the evidence in proof of the same.**
>
> **3) The learned magistrate erred in law and in fact in finding the 2nd& 3rd Defendants liable to pay the sums claimed when there was no evidence to establish a Contract of guarantee between the parties and when there was no evidence to prove liability on the part of the defendants.**
>
> **4) The learned magistrate erred in law and fact by relying on audit reports prepared by persons who were not authorized in law to do financial audit and in receiving the evidence of against the appellants' evidence was not credible.**
>
> **5) The learned magistrate erred in law and fact in arriving at a decision not supported by evidence and in rejecting the defence of the appellants.**

31. In this appeal, it is submitted on behalf of the Appellants that a Self-help group has been the brain-child of administrators who at times had to come up with a tool to identify specific groups of people that needed assistance, or needed to undertake projects together. They seem to have helped harness resources at community level but are not incorporated bodies and there is no law that recognizes them or incorporates them.

32. According to the Appellants, since time immemorial the Government has not put in place any legal framework under which they can be registered and managed. Such groups, in absence of a legal framework, indeed stand the risk of being declared unlawful societies as held in the **Case of Dennis Ololoigero vs. The Art of Advenures Ltd & 2 others [2006] eKLR.**

33. In the instant case, it was submitted that Meka self-help group was not a legal person and the same could not sustain a suit on its own capacity since a self-help group is not a legal entity separate from its members and additionally does not have perpetual succession as a Company. It was therefore submitted that as it stands Mefa Self group does not exist as the members no longer conduct the business of the group and this has been so for a period of more than 5 years. A self-group like Mefa self-group not having perpetual succession renders the enforcement of such a judgement to be a challenge it raises the question of who is entitled to the amount of Kshs 282,028/ being claimed and at what proportion?

34. It was further submitted that Meka self-help did not have proper Accounts in all the projects it run. The group had several projects which

included the water project, goat project, tree planting and demonstration farm project with the water project being the main point of contention in this matter. It however, did not have proper and effective strategies of running its projects under the leadership of the chairman, secretary and the treasurer and its open bias to blame the 1st Appellant for the mismanagement of funds while overlooking the mistakes of other members of the self-help group from other departments who also lacked proper records. This is evidenced when PW2 during cross examination admits that the water project had several water points and in his reports he found that each water point lacked proper records for the sale of water.

35. Secondly, the Respondents herein were the Chairman, Secretary and Treasurer of the group respectively. It is important to note that the 1stAppellant was not the Treasurer of the group but he, and not the 3rd Respondent, was brought to court for the offences which correlate with the duties of the treasurer. It was submitted that the 3rd respondent was the one bestowed with the above duties and was better placed to aid the court in making a just and fair determination as it was her duty as the Treasurer of the group therefore, she ought to have been one of the key witness. This Court was urged to delve into the question as to who was the person mandated with financial accounting of the group on a day-to-day basis.

36. In addition, there was the lack of proper accounts which is evident from the discrepancies on the total figures lost from Kshs 282,028/ and Kshs 270.208/- which confirms that the Respondents are not sure of the sums missing in the group.

37. It was submitted that the court relied on unofficial accounting documents prepared by PW 2 and marked as MFI 4 (a)(b) (Expenditure report) as evidence to prove the case against the plaintiff. On cross examination by the Advocate Defendant, PW2 categorically admitted that this Report was not the official accounting document but was prepared for mock training of members of Meka self-Group. Therefore, it could not be relied on.

38. According to the Appellants, the 2nd and 3rd Appellants were joined as guarantors of the 1st Appellant for the amount claimed by the Respondents. The 2nd and 3rd Appellant is the mother and the wife of the 1st Appellant respectively. The mother is now deceased due to old age. The Appellants submitted that the respondents misrepresented to them that 1stappellant would be detained unless they sign the documents. The 2nd and 3rd Appellants submitted that the document presented by the respondents was not explained to them and at no time was it brought to their attention that they would be liable for the amount claimed by the Respondents. The 2ndAppellant in cross examination stated that she signed a document which she was not informed what it entailed. According to the Appellants, the Respondents have since the year 2011 denied the 2ndAppellant the right to enjoy her property by taking her title deeds to the property held as security.

39. It was submitted that there must be a conditional promise for the surety to be liable on the default of the principal debtor which was not given by the 2nd and 3rd Appellant. The 2nd and 3rd Appellant signed the said document on the understanding that the 1st Appellant will not be taken to prison and not on the promise of being guarantors for payment of any sum of money. A liability which is incurred independently of a default is not within the definition of guarantee. Support for this principle was sought from ***Taylor v Lee (1911)***.

40. The 2nd and 3rdAppellants further submitted that there was no mutual agreement between themselves to guarantee the 1st Appellant of the monies claimed. It must be noted that, the presence of free consent of the contracting parties is a fundamental requirement in deciding the validity of a contract. Misrepresentation and concealment defy the very element of consent on the side of the surety. Hence, it is justified to declare such contracts of guarantee invalid for the purpose of shielding the surety from any form of exploitation that he may be subject to by purposeful misrepresentation and concealment. It is total exploitation in the above circumstance for the 2nd Appellant to lose her only piece of land for a contract of guarantee she clearly did not understand and was not explained to her considering her old age before her demise.

41. In support of their submissions, the Appellants relied on the case of ***Stone vs. Compton (2012)*** and it was submitted that a contract of guarantee initiated by misrepresentation of any kind, regarding the material facts of the case, is rendered invalid in the eyes of law. The law also takes into account situations where, the creditor has an onus upon himself to keep the surety informed about material facts.

42. According to the Appellants, once, the Courts decide on the extent of the creditor's duty as per the peculiar facts of the case, it is clear that, misrepresentation, whether innocent or intentional will render the contract of guarantee invalid. This Court was urged to find that the Respondents misrepresented the facts.

43. It was further submitted that the Auditors PW1 and PW2 are not qualified to conduct Audit as laid out in the ***Companies Act*** which lays down the condition of a person who wishes to practice as an Auditor. Section 6(1) states that for one to practice as an Auditor in Kenya, the person has to be holder of practicing certificate as awarded by the Registration of Accountants board. To get such a certificate one has to be a member of the institute of Certified Public Accountant of Kenya (I.C.P.A.K) which was formed in 1978 by the law of Kenya under CAP 531 and must have passed the final stage of the Accountant Examination. Secondly, the ***Companies Act*** Section 161(2) on professional conduct of Auditors envisages that an Auditor ought to be independent and not:

a) An officer or servant of an organization. This addresses the fact that an employee of an organization cannot perform his or her own audit.

b) A person who is a partner or business associate of an employee of a institution being audited. This also insists on the professional standard of independence of the Auditor.

44. In this case, it was submitted, PW2 was a member of the Mefa Self Help group and a donor hence was not fit to conduct Audits of the Self-help group as envisaged under the aforesaid provisions. There was a conflict of interest making him unfit to conduct the Audits with an independent mind. Accordingly, PW1 and PW2 were not independent which goes against the professional standard of the Auditors as set under the said section.

45. According to the Appellant, it is confusing that the same Accountant PW2 who conducted the Audits before the year 2008 and found that

no money was misappropriated from the 2006 testifies in court that in the same period money was misappropriated.

46. It was contended that the trial Court failed to consider that it was agreed that Mefa Self-help group will be facilitating his transportation expenses on daily basis making a sum of Kshs 200 per day and an allowance of Kshs 300 to cater for any miscellaneous expenses while on duty which has never been paid to the 1st Defendant. The same was raised in Court but the Court did not consider the same. The Court ought to have considered that the 1st Appellant needed the facilitation for the running of the day-to-day activities of the self-help group. The sums had accumulated to over Kshs 300,000 at the time the plaintiffs were claiming against the 1st Defendant for the sum misappropriated as claimed.

47. According to the Appellants, the allegation of falsification of documents to the tune of Kenya shilling eighty-two thousand could only be proved by Forensic document examiners as expert witness. The forensic document examiners are skilled forensic scientists with a demonstrated expertise in applied questioned document examination. The Appellants submitted that the proof of falsification of documents is not within the purview of the Accountants but of the document expert who would have proved the authenticity of the documents and the author of the document which cannot be proved by the Accountants.

48. It was therefore contended that Self-help groups like Meka self-help group are investment/savings vehicles with the purpose of transforming the lives of its members and though informal they must have a constitution to guide in its internal affairs for smooth operation. Such group should realise that they are jointly liable to account for debts and obligations of the group and not an individual member. This Court was urged to allow the appeal and quash the judgement of the lower Court on the premise that the Respondents were biased against the 1st Appellant who was not the Chairman, Secretary or Treasurer of the group and that the Respondents realized this fact during the filing of their case and amended their plaint to refer the 1st Appellant as an Honorary Treasurer which is not even recognized by Mefa=Self group. Bearing in mind that the accounting anomalies run through the entire group projects which the 1st Appellant was not in charge, it was pointed out that the poor management occurred under the watch of the Respondents herein and they should be equally liable for the amount lost during the 3-year period.

49. In opposing the appeal, the Respondents relied on the case of ***Mirara & 2 Others -vs- Romano K. Mikigu [2013] eKLR,*** where court considered the issue of *locus standi* raised at the trial and observed as follows:

> ***"The law on suits by or against unincorporated bodies is well settled. It was held by Bosire J (as he then was) in Free Pentecostal Fellowship in Kenya -vs- Kenya Commercial Bank (Nairobi HCCC No.5116 of 1992 (O.S) that a suit by or against unincorporated bodies of persons must be brought in the names of, or against all the members of body or bodies".***

50. According to the Respondent, the alternative is for the suit to be instituted by one or more persons in a representative capacity pursuant to the provisions of Order 1 **Rule 8** of the ***Civil Procedure Rules*** **and they relied on *Voi Jua Kali* Association -vs- Sange & Others (2002) 2 KLR 474** and ***Kipsiwo Community Self Help Group -vs- A.G & 6 Others [2013] eKLR,*** where it was held inter alia that:

> ***"Self Help Groups having no legal personality cannot institute proceedings in their own name and that Kipsiwo Self Help Group had no capacity to institute an action in its own name. A person recognized in law had to sue on behalf of members of Kipsiwo Self Help Group and such members had to be named and identified with precision. The person bringing the action has to demonstrate that he has permission to bring the action on behalf of the members of the group or on behalf of the people he seeks to represent if it is a representative suit. The importance of this, is to recognize the persons who seek legal redress and so that orders are not issued in favour or against people who cannot be precisely identified. This may look minor but it is extremely significant. In litigation, rights and duties will be imposed on the litigants. If the court does not know who the litigants are, then it becomes impossible for the court to enforce its own orders, for it will never be clear, who the beneficiary of the order was, or who had the obligations to obey or enforce such order.***

51. **They also relied on Articles 22 and 258(1)** of the **Constitution in support of their submissions** and contended that the above constitutional provisions show that the latitude of *locus standi* has really been expanded by the new constitutional dispensation because even the definition given about a person under **Article 260** shows that a person *"includes a company, association or other body of persons whether incorporated or unincorporated."* What flows from the above constitutional, it was submitted indicates that even Self Help Groups, which are not normally body corporate or incorporated, can bring an action so long as they that their interests or rights have been infringed or about to be infringed. They cannot be faulted for lacking *locus standi* on account of merely not being unincorporated or lacking legal personality.

52. According to the Respondents, the descriptive part of the respondents is not wanting for specificity. The plaint filed with the subordinate court was certain and clear that the chairman, secretary and treasurer of Meka Self Help Group were suing in a representative capacity on behalf of the 47 members of the self help group. To add on PW3 in examination in chief attested to the fact that they were a registered group and a copy of the registration certificate was admitted to court as evidence of registration. It was submitted that it was thus clear who was instituting a suit and to whom the suit was instituted against, that the subordinate court did not have to fumble on whom to redress for damages and that further the question of *locus standi* was not a subject of cross examination by the appellants herein.

53. In the Respondents' submissions, every person has the right to institute court proceedings claiming including unincorporated bodies. The respondents however are members of a registered group who can sue on a representative capacity on behalf of the self help group.

54. The Respondents relied on ***Siegel vs. His Creditors, 95 Cal.409, 414 (Cal.1892)*** and submitted that proper records of account were kept by the Group based on the evidence of PW1 and the documentary evidence whose contents thereof were flagged with forged entries, falsifications and misappropriation.

55. Reliance was placed on "***Paget's Law of Banking***" that:

> **"A guarantee obligation is secondary and accessory to the obligation the performance of which is guaranteed; the guarantor undertakes that the principal debtor will perform his (the principal debtor's) obligation to the creditor and that he the (guarantor) will be liable to the creditor if the principal debtor does not perform. Therefore, the guarantor's liability for the non-performance of the principal debtor's obligation is co-extensive with that obligation. If the principal's debtor's obligation turns out not to exist, or is void, diminished or discharged so is the guarantor's in respect of it.**"

56. According to the Respondents, though the appellants hinged their argument on the latter part, a guarantee contract is an accessory or secondary contract does not mean that it is conditional on the principal contract's validity. It only means that no liability attaches to the guarantor unless and until the principal has failed to perform his obligations. Reliance was placed on **Mwaniki wa Ndegwa vs. National Bank of Kenya Ltd & Another (2016) eKLR, where** the Court of Appeal observed that a guarantor became liable upon default by principal debtor and further remarked that it is not up to the guarantor to see to it that the borrower complies with his contractual obligation but to pay on demand the guaranteed sum. According to the Respondents, the Court further relied on a passage from ***Halsbury's Laws of England* 4th Edition Vol. 20** which put the guarantor's obligation as follows;

> **"On the default of the principal debtor causing loss to the creditor, the guarantor is, apart from special stipulation, immediately liable to the full extent of his obligation, without being entitled to require either notice of the default or previous recourse against the principal...."**

57. In the Respondents' submissions, the 1st appellant herein voluntarily agreed to make payments of monies that had not been banked, being sums that were in discrepancy. That further an agreement was entered on 3.1.09, being an agreement for guarantee in the event the 1st appellant defaulted to pay the sums in discrepancy. On default of the 1st appellant, the 2nd and 3rd appellants are immediately liable to the full extent and do not require either notice of default or previous recourse against the principal. Therefore, the claims that the 2nd and 3rd appellants were forced to sign the agreement on contract of guarantee are untrue and false. It was therefore submitted that the appellants were liable under their contract of guarantee.

58. As regards the qualification of the internal auditors, it was submitted that the auditor was not a member of the self help group as alleged by the appellants, he was only engaged for the purposes of audit, therefore being an independent auditor without any conflict of interest. The appellants also never raised any issue as to his independence on cross examination or object to his evidence being admitted. Further, PW2 is also a certified accountant that worked with the self help group, whose report and conduct of business at the self help group helped discover anomalies between the expenditure and income of the self help group. It's on discovery of such anomalies that they procured an independent auditor to verify the correctness of the errors and/or misappropriation. It is our humble submissions that his evidence was properly on record and that the appellant had an opportunity to cross examine his testimony.

59. According to the Respondents, this court is being invited to engage in sideshows by the appellants as a diversionary mechanism now that the appellants are fully aware that they ought to satisfy the decree of the subordinate court.

60. It was submitted that the decision arrived at by the subordinate court was on evidence prepared and produced by the 1st Appellant herein who admitted to being responsible for the loss of money without coercion and that the monies he had received for transmission and banking thereof was used for his own use and agreed to refund the monies lost and managed to get the 2nd and 3rd appellants to be his guarantors as there was no evidence adduced as to coercion and/or duress whilst signing the agreement.

61. The Respondents contended that it is trite law that he who alleges must proof and it was the finding of the subordinate that the respondents had established a prima facie case and had proofed their case on a balance of probabilities. It was submitted that the appellants' claim is without merit and the issues raised were dealt with exhaustively by the subordinate court, and that the appeal herein is vexatious and a waste of precious judicial time and the same should be dismissed with orders as to cost.

Determination

62. I have considered the submissions of the parties in this appeal.

63. This being a first appellate court, it was held in **Selle vs. Associated Motor Boat Co. [1968] EA 123** that:

> **"The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the 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 the 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 account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."**

64. Therefore, this Court is under a duty to delve at some length into factual details and revisit the facts as presented in the trial Court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering, and giving allowance for it, that the trial Court had the advantage of hearing the parties.

65. However, in **Peters vs. Sunday Post Limited [1958] EA 424,** it was held that:

> **"Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law an appellate court has jurisdiction to review the record of the evidence in order to determine whether the conclusion originally**

reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this really is a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight. This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstances that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to the courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given…Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's conclusion. The appellate court may take the view that, without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence. The appellate court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question…It not infrequently happens that a decision either way may seem equally open and when this is so, then the decision of the trial Judge who has enjoyed the advantages not available to the appellate court, becomes of paramount importance and ought not be disturbed. This is not an abrogation of the powers of a Court of Appeal on questions of fact. The judgement of the trial Judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong."

66. However, in **Ephantus Mwangi and Another vs. Duncan Mwangi Civil Appeal No. 77 of 1982 [1982-1988] 1KAR 278** the Court of Appeal held that:

> **"A member of an appellate court is not bound to accept the learned Judge's findings of fact if it appears either that (a) he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or (b) if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."**

67. Before dealing with the merits of the appeal, it was the appellants' case that Meka self-help group was not a legal person and the same could not sustain a suit on its own capacity since a self-help group is not a legal entity separate from its members and additionally does not have perpetual succession as a Company. The Respondents in their plaint, which was brought by **Priscilla Musili Mulwa, Mutuku Kimanthi** and **Mueni Kikuswi** in their capacity as the Chairperson, Secretary and Treasurer respectively and on their behalf and on behalf of 47 members of Meka Self Help Group. They pleaded that the said Group is a self-help group registered with the Department of Social Services, Kibwezi District under the then Ministry of Home Affairs, Heritage and Sports. This descriptive part was admitted by the Appellants in their defence.

68. It is however submitted on behalf of the appellants that a Self-help group has been the brain-child of administrators who at times had to come up with a tool to identify specific groups of people that needed assistance, or needed to undertake projects together. They seem to have helped harness resources at community level but are not incorporated bodies and there is no law that recognizes them or incorporates them.

69. According to the Appellants, since time immemorial the Government has not put in place any legal framework under which they can be registered and managed. Such groups, in absence of a legal framework, indeed stand the risk of being declared unlawful societies as held in the case of **Dennis Ololoigero vs. The Art of Adventures Ltd & 2 Others [2006] eKLR.**

70. I have considered the above authority as well as related ones. In the said decision, the suit was struck out on the basis that the Plaintiffs had not proved that they came within Order 1 Rules 8 and 10 of the ***Civil Procedure Rules*** since they did not define their legal status in order to meet the requirement that they all had the same interest.

71. In this case however, the respondents filed the suit in their capacity as the officials of the Group. Order 1 Rule 8(1) of the ***Civil Procedure Rules*** provides that:

> ***Where numerous persons have the same interest in any proceedings, the proceedings may be commenced, and unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them.***

72. This provision was dealt with by **Onyango Otieno, J** as he then was in **Voi Jua Kali Association vs. Sange & Others [2002] 2 KLR 474** where he expressed himself as hereunder:

> **"It cannot be in dispute that a society as such cannot sue and cannot be sued in its own name. It can only sue through its officials and can only be sued through its officials…In Kenya, unlike in Uganda, only the defendant needs leave to defend on behalf of the other would-be-defendants but as to the plaintiff, all he needs is to have a notice issued to all other interested parties of his intention to sue on their behalf to enable those of them who want to, comply with order 1 rule 8(3) i.e. apply to court to be made a party in such a suit."**

73. I have no doubt in my mind that officials of unincorporated group may sue and be sued through their officials in a matter concerning their joint interest pursuant to the above provision. In this case, the issue of the Respondents' locus or capacity to sue was never taken up before the trial court. In my view it would not be proper to take up the point for the first time on appeal since that was an issue of mixed law and fact that ought to have been specifically pleaded.

74. In his judgement, the Learned Trial Magistrate found that from the evidence of PW1, the auditor, a sum of Kshs 282,028/- was lost and could not be accounted for by the 1st Appellant who was in charge of the water project amongst other projects and no satisfactory account was offered by the 1st Appellant. In other words, the Learned Trial Magistrate was of the view that the 1st Appellant ought to have challenged the allegations against him at the time of the investigations by PW1. With due respect, the Learned Trial Magistrate was oblivious of the fact that in his evidence, PW1 stated that though it was within his mandate to contact all those who had been mentioned and chose to call on those who had paid, he never talked to the 1st Appellant but saw the 1st Appellant's confession in which he agreed to pay. It would seem that having seen the alleged admissions, he believed it was no longer necessary to hear the 1st Appellant on the issue. It is however clear that the finding by the Learned Trail Magistrate that the 1st Appellant did not explain his position to PW1 and therefore could not contest his liability was a misdirection since the 1st Appellant was never given an opportunity by PW1 to explain himself.

75. It was further found by the trial court that the 1st Appellant in his defence did not avail before the Court evidence that would have proved that he did not receive the money in question or that he did not misappropriate it but his evidence was a bare denial of the allegations made against him explanation. In his evidence, the 1st Appellant's case was that his job was only that of record keeping as opposed to handling revenue. He however admitted that there was a time he would receive money for onward transmission to the Secretary or Treasurer. One wonders what else he was supposed to say or prove apart from stating his position since he was asserting a negative. I appreciate that under Section 107(1) of the ***Evidence Act***, Cap 80 Laws of Kenya, "whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist." I also appreciate the legal maxim that *omnia praesumuntur legitime facta donec probetur in contrarium* (all things are presumed to have been legitimately done, until the contrary is proved). However, as was held by **Seaton, JSC** in the Uganda Case of **J K Patel vs. Spear Motors Ltd SCCA No. 4 of 1991 [1993] VI KALR 85**:

> **"The proving of a negative task is always difficult and often impossible, and would be a most exceptional burden to impose upon a litigant. The burden of proof in any particular case depends on circumstances in which the claim arises. In general, the rule which applies is *ei qui affirmat not ei qui negat incumbit probatio.* It is an ancient rule founded on considerations of good sense and it should not be departed from without strong reasons...As applied to judicial proceedings the phrase "burden of proof" has two distinct and frequently confused meanings, (1) the burden of proof as a matter of law and pleading – the burden, as it has been called, of establishing a case, whether by preponderance of evidence, or beyond reasonable doubt; and (2) the burden of proof in the sense of adducing evidence.... The *onus probandi* rests, before evidence is gone into, upon the party asserting the affirmative of the issue; and it rests, after evidence is gone into, upon the party against whom the tribunal, at the time the question arises, would give judgement if no further evidence were adduced."** See **Constantine Steamship Line Ltd vs. Imperial Smelting Corp [1914] 2 All ER 165 (H.L); Trevor Price vs. Kelsall [1975] EA 752 at 761; *Phippson on Evidence* 12th Ed Para 91; Phippson at Para 95.**

76. Similarly, the Supreme Court of Uganda in **Sheikh Ali Senyonga & 7 Others vs. Shaikh Hussein Rajab Kakooza and 6 Others SCCA NO. 9 of 1990 [1992] V KALR 30** was of the view that the general rule that he who alleges must prove applies and since it was the appellants who were alleging that the fifth appellant was qualified, to hold that the negative must be proved by the respondents would be to impose an unnecessary burden on them.

77. In other words, to justify calling upon the Defendant to answer the allegations made by the Plaintiff some evidence must be laid which if not answered raises the Plaintiff's to the standard of proof on a balance of probabilities before liability can be imputed. If the evidence presented by the Plaintiff does not meet the said threshold the Defendant ought not to be found liable simply because he has not rebutted the Plaintiff's case.

78. It was the finding by the Learned Trial Magistrate that the 1st Appellant agreed to refund the money lost and even managed to get the 2nd and 3rd Appellants to be his guarantors to ensure that the money lost was repaid back to the plaintiffs. According to the Court there was no evidence to show that the admission (which the Learned Trial Magistrate termed as a confession) was obtained through undue influence or coercion since no complaint was made to the police. Based on the fact that no complaint was lodged by the 1st Appellant to the police, the Learned Trial Magistrate found that the said admission was made voluntarily. It is clear that the Learned Trial Magistrate's finding as to the voluntariness of the admission was based merely on the failure by the Appellants to report their complaints to the police. The Learned Trial Magistrate did not evaluate the evidence in order to arrive at the decision whether the said admission was voluntary or not. In **Agnes Nzali Muthoka vs. Insurance Company of East Africa Civil Appeal No. 234 of 2000 [2001] 1 EA 143** the Court of Appeal held that

> **"It is elementary that a judge has to hear parties, record down as fully as possible what they submit on, crystallise the issues, answer them as fully as possible and eventually hand down a decision."**

79. It was further found by the trial court that since the 1st Appellant kept all the records of the collection and used to receive all the monies realised from the sale of any produce (sic) sale of trees at their tree nursery, sale of water, fines from members, and money received from the treasurer for payment of bills, the blame on the Treasurer and the Secretary of the Group by the 1st Appellant could not hold. In my view it was necessary for the trial court to not only make a finding as to whether some money was misappropriated but whether the sum claimed was misappropriated.

80. In his evidence, PW2 admitted that he did not capture all the income and expenditure and that though there were several points for sales of water, there were no proper records to show what was sold in various kiosks. He however averred that he visited the water providers and talked to the manager. According to him, he relied on receipts in preparing his report but he had no receipts from Athi River Water Services Board. In his evidence, he could not tell what each member contributed for the bicycle since he had no records of their contributions and was unable to recall who was in charge of the said contributions. From his evidence, it was clear that there were several sources of revenue for the Group and whereas he found evidence of misappropriation, he could not conclusively determine who was responsible for the loss. As disclosed in the evidence, the group had several projects which included the water project, goat project, tree planting and demonstration farm project with the water project being the main point of contention in this matter. It would however seem that there was a problem with the

Group's bookkeeping system. In my view it was important not only to satisfactorily prove that the Group lost funds at the hands of the 1st Appellant but the exact sum lost as well. In those circumstances, I find that it was unjust to load the loss on the 1st Appellant particularly since the person who was responsible for the Group's finances was never called to testify.

81. Apart from that PW2 testified that his audit was not for the whole period and that his report was not the official accounting document but was prepared for mock training of members of Meka self-Group. The trial court did not make a finding as regards that kind of a report and the weight to attach to it.

82. In his evidence, PW1 stated that by the time of his report the 1st Appellant had already made his admission. If that position is correct then one wonders the basis upon which the 1st Appellant was confronted by the Group to pay the said sum.

83. It was submitted that there must be a conditional promise for the surety to be liable on the default of the principal debtor which was not given by the 2nd and 3rd Appellant who signed the said document on the understanding that the 1st Appellant would not be taken to prison and not on the promise of being guarantors for payment of any sum of money. A liability which is incurred independently of a default is not within the definition of guarantee. It was further submitted that there was no mutual agreement between themselves to guarantee the 1st Appellant of the monies claimed and that the presence of free consent of the contracting parties is a fundamental requirement in deciding the validity of a contract.

84. If I understand the said Appellants correctly, they are contending that there was no consideration between them and the Respondents. The place of a consideration in a contract was discussed in **Namusisi and Others vs. Ntabaazi [2006] 1 EA 247** where it was held by **Tsekooko, JSC** as follows:

> **"Consideration and performance mean two different things. Consideration is crucial at the time the contract is formed and its sufficiency is really not the business of the Courts…Under the English Law of contract which is the applicable law in Uganda, consideration is important and consideration is an act or forbearance of one party, or the promise thereof, is the price for which the promise of the other is bought and the promise thus given for value is enforceable…Thus the doctrine of consideration implies or means reciprocity…The Courts will not inquire into the sufficiency or adequacy of the consideration as long as there is some consideration…A peppercorn does not cease to be good consideration if it is established that the promisee does not like peppercorn and will throw it away."**

85. In **Mohamed Badrudin M Dhanji vs. Lulu & Co. [1960] EA 541, Crawshaw, J** held that:

> **"A promise, or unequivocal acceptance of liability, intended to be binding, intended to be acted upon, and in fact acted on, is binding. Thus a creditor is not allowed to enforce a debt which he has deliberately agreed to waive if the debtor has carried on business or in some other way changed his position in relation to the waiver…Unilateral promises have long been enforced so long as the act of forbearance is done on the faith of the promise and at the request of the promissor, express or implied. The act done is then in itself sufficient consideration for the promise, even though it arises *ex posto facto.*"**

86. In **H M B Kayondo vs. Somani Amirali Kampala HCCS No. 183 of 1994** it was held that:

> **"Since the agreement stated that a representative of the debtor would pay a specified sum to the plaintiff and the representative of the debtor is the defendant, that agreement is legally enforceable contract and the consideration for the contract is the plaintiff's forbearance to stop the auction sale. The fact that the receipt for the cheques was issued by the Court Broker does not change the character of the contract. The plaintiff can maintain an action without requiring a power of attorney."**

87. Similarly, in **Patel Brothers vs. H D Hasmani [1952] 1 EACA 170** it was held that:

> **"The real question of fact in this case, which is not discussed in the judgement, was whether there had been a forbearance to sue the son, Esmail, at the request of the defendant. In law a promise to forbear is a good consideration and....actual forbearance at the request express or implied, of the defendant is also a good consideration."**

88. In **Sameh Textile Industries Limited & Another vs. Delphis Bank Limited Civil Case No. 2186 of 2000** it was held that:

> **"The phrase "valuable consideration" has been defined as some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered or undertaken by the other at his request. It is not necessary that the promisor should benefit by consideration. It is sufficient if the promisee does some act from which a third person benefits, and which he would not have done but for the promise. Thus consideration for a promise may consist in either some benefit conferred on the promisor, or detriment suffered by the promisee, or both. On the other hand, that benefit or detriment can only amount to consideration sufficient to support a binding promise where it is causally linked to that promise."**

89. It is therefore clear that if the 2nd and 3rd Appellants promised to pay the debt due from the 1st Appellant to the Respondents on condition that the Respondents would not take legal action against the 1st Appellant, that would be good consideration. That is so because a new contract would thereby be created between the Respondents and the 2nd and 3rd Appellants and once the Respondents fulfilled their part of the contract, the Appellants would be estopped from reneging on the same and in the event of the failure by the said Appellants to meet their obligations under the terms of the said forbearance, the Respondents could sue the Appellants since forbearance to take legal proceedings on

the promise to pay is a good consideration.

90. In his evidence the said Appellants testified that they did not know the reason why they were signing the document save that it was meant to save the 1st Appellant from being arrested. Unfortunately, no one was called by the Respondents to explain the circumstances under which the said guarantees were entered into.

91. According to page 6 of the PExh. 4, the report was meant to be used for the purposes of drawing an agreement between the 1st Appellant and the Group. It is therefore clear that it was intended by the parties that the report itself would not the final document and that further steps were contemplated in order to conclude the contract. This can clearly be discerned from the fact that the figure disclosed in the said document is not the figure that was being claimed in the amended plaint. In the absence of evidence of a concluded contract, the said exhibit could not be relied upon as being the contractual document.

92. The Respondents contended that once there is a default by the principal debtor, the guarantor's liability crystallises. That position is true where the contract between the principal debtor and the creditor is valid and enforceable. This is so because where the principal debtor is not liable then the guarantor's liability cannot crystallise since the guarantor's liability depends on the liability of the principal debtor. It therefore follows that the liability of the 2nd and the 3rd Appellants to the Respondents depends on whether there existed a valid contract between the 1st Appellant and the Respondent. Having found that there was no evidence of the existence of a concluded contract between the 1st Appellant and the Respondent, it would necessarily follow that even the 2nd and 3rd Appellants would not be liable as guarantors of the 1st Appellant.

93. Having re-evaluated the totality of the evidence placed before the trial court, it is my view that the learned trial magistrate erred in finding that the Appellants were liable to the Respondents as claimed.

94. In the result this appeal succeeds, the judgement entered on 27th October, 2011 in Makindu PMCC No. 163 of 2009 is hereby set aside and substituted with an order dismissing the suit with costs.

95. Since one of the Appellant has been indicated in the submissions to be deceased, there will be no order as to the costs of this appeal

96. It is so ordered.

JUDGEMENT READ, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS 12TH DAY OF APRIL, 2021

G V ODUNGA

JUDGE

Delivered the presence of:

Miss Kui for Mr Mulei for the Respondent

Miss Wekesa for Dr Khaminwa for the Appellant

CA Geoffrey