



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

APPEAL NO 72 OF 2019

OBED ONCHANGU MAKINI.....APPELLANT

VERSUS

GUSII MWALIMU SACCO.....RESPONDENT

(Appeal from the judgment and Order of the Kisumu

Co-operative Tribunal Case No 39 of 2015 by Hon B.M

Kimunya dated 15th May 2019 consolidated with case Nos. 40-47 of 2015)

JUDGMENT

1. This is an appeal against the judgment of the Co-operative Tribunal dated 15th May 2015 which dismissed the appellant's claim against the respondent.

2. A brief background leading to the claim is that the appellant was employed by the respondent at Gusii Mwalimu Hotel Limited and became a member of the respondent by opening an account. The appellant deposited Kshs 1,000/- per month towards his investment on shares until September 2012 when his employment was terminated. The appellant claimed that the Respondent refused to pay him dividends on his shares. The appellant further claimed for payments of dividends from the year 2012-2015 and a refund of the share contribution amounting to Kshs 113,000/-.

3. The claim was opposed by the respondent who denied the appellants claim. The respondent on the other hand alleged that it did not terminate the appellant's services but rather the appellant ran down the business and chose to leave on his own volition with all his benefits. It was also alleged that the appellant took a loan with the respondent which was to be settled by deducting his shares. It was advanced that the appellant's claim was *res judicata* as the same subject of contention had been before *Nairobi Industrial Cause No 2040 of 2012*.

4. After conducting a full trial the Cooperative Tribunal dismissed the appellant's claim occasioning the appellant to file this instant appeal on the following grounds:

1. That the honourable tribunal erred in law and in fact in finding that the Claimant had not proved his case on a balance of probabilities.

2. That the honourable tribunal erred in law and in fact in dismissing the Claimant's claim despite overwhelming evidence to the contrary.

3. That the honourable tribunal erred in fact and in law in finding that there were no shares due to the Appellant's when they had not withdrawn as members of the Respondent.

4. That the honourable tribunal erred in law and in fact in failing to find that the respondent was entitled to payment of the loan balance from the benefits first before obtaining the same from the shares.

5. That the honourable tribunal erred in law and in fact in holding that the respondent acted lawfully in utilizing the deposits savings to pay off the outstanding loans.

6. That the honourable tribunal erred in law and in fact I failing to find that the terminal benefits from which the respondents deducted the outstanding loan balances were different from the shares contributed by the claimant.

7. That the honourable tribunal erred in law and in fact in failing to distinguish the extent of its jurisdiction concerning the issue of terminal benefits.

5. The appellant in his written submissions advanced that the respondent erroneously calculated his terminal benefits by failing to include severance pay as provided at clause 39 of the Terms and Condition of the service for Hotel employment. He advanced that the terminal benefits were sufficient to repay the outstanding loan as his terminal benefits were Kshs 246,000/- while the liabilities stood at Kshs 139,380/-. He submitted that members of the Teachers service Commission (TSC) upon termination of employment with the TSC authorized the respondent to deduct the loan balance from terminal benefits and the shares owned. The respondent contends that he was not a member of the TSC and thus the provision could not apply to him. He submitted that the respondent did not follow due process in withdrawing his shares as termination of his employment did not mean he ceased being a member. It was submitted that the appellant having made his contribution to the SACCO and having not withdrawn his membership, he continued to be a member and was therefore entitled to his shares as a member.

6. The respondent in his submissions advanced that the appellant secured a loan of Kshs 180,000/- and the security was his shares and salary and once that was exhausted, then the guarantors would be affected. The liabilities that the appellant had with the respondent were tabulated and deducted from the total benefits due to the claimant. The respondent legally deducted the loan balance from the shares which had been given as security. They advanced that the prayer for refund of share contributions is baseless and not tangible. The respondent was discharged by the appellant from any liabilities after signing the discharge voucher voluntarily without force, coercion, intimidation or fraud. It was argued that the respondent was not entitled to dividends because the services of the appellant had been terminated on 1st October 2012 and the shares used to offset the loan.

7. This being a first appellate court, it is my duty to subject the whole of the evidence to a fresh and exhaustive scrutiny and make my own conclusions, bearing in mind that I did not have the opportunity of seeing and hearing the witnesses first hand. This duty was well stated in *Selle & Another v Associated Motor Boat Co. Ltd. & Others (1968) EA 123* in the following terms:

“I accept counsel for the respondent’s proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that 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 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 (Abdul Hammed Saif v Ali Mohamed Sholan (1955), 22 E.A.C.A. 270).

8. The issues for determination in this case are threefold, firstly, whether the appellant was entitled to severance pay; secondly, whether the appellant is entitled to his share contributions; and thirdly, whether there was an accrual of dividends.

9. On the first issue on severance pay which the appellant claims was due to him from his employer Gusii Mwalimu Hotel Limited is a matter that falls within the ambit of the Employment and Labour Relations Court by virtue of **section 12 (1) (a) of the Industrial Court Act, 2011**. **Section 12** of the said Act states as follows: -

Jurisdiction of the Court

12. (1) *The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of the Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including –*

(a) disputes relating to or arising out of employment between an employer and an employee;

10. The jurisdiction of the Cooperative Tribunal has been clearly spelt under **section 76 of the Cooperative Societies Act** which reads as follows:

“(1) If any dispute concerning the business of a co-operative society arises—

(a) among members, past members and persons claiming through members, past members and deceased members; or

(b) between members, past members or deceased members, and the society, its Committee or any officer of the society; or

(c) between the society and any other co-operative society, it shall be referred to the Tribunal.

(2) A dispute for the purpose of this section shall include—

(a) a claim by a co-operative society for any debt or demand due to it from a member or past member, or from the nominee or personal representative of a deceased member, whether such debt or demand is admitted or not; or

(b) a claim by a member, past member or the nominee or personal representative of a deceased member for any debt or demand due from a co-operative society, whether such debt or demand is admitted or not;

(c) a claim by a Sacco society against a refusal to grant or a revocation of licence or any other due, from the Authority.”

11. It is on the basis of **section 76 of the Cooperative Societies Act** that this court will now proceed to determine the second and third issues, that is, whether the appellant is entitled to the payment of his share contribution and whether he is further entitled to dividends.

12. It is not in dispute that the appellant was a member of the respondent and that he had made monthly contributions towards shares in the respondent. It is also not contested that the appellant had taken a loan with the respondent.

13. Obed Makini Onchango (Cw1) testified that he contributed Kshs 1,000/- towards his shares and when he stopped contributing in 2012 he demanded to be paid his shares and the dividends that had accrued overtime. On cross-examination Cw1 testified that he took a loan with the Sacco and it was recovered from his benefits. He also testified that the industrial court ordered the respondent to pay their benefits and the same was paid.

14. Having considered the evidence on record, I note that the appellant had liabilities with the respondent amounting to Kshs 217,690 (made up of Normal loan balance, FOSA loan, Guarantor Loan and Staff Salary Advance). He had a Gumswa loan of Kshs 21,630/-, tax deduction of Kshs 8,476, NHIF & NSSF deductions amounting to Kshs 1,200/-. It therefore meant that the respondent was entitled to deduct a total of Kshs 248,996/- from the appellant. The appellant's terminal benefits were Kshs 248,063, share capital of Kshs 1,000/- and share deposit of Kshs 99,000/- all totaling to Kshs 348,063. The difference between what was owing to the respondent leaves the appellant with a balance of Kshs 99,067/-. The appellant signed a discharge acknowledging receipt of Kshs 99,067/- and discharged the respondent from any liability. The respondent in tabulating the terminal benefits due to the appellant consolidated the appellants benefit due to termination of employment together with the amounts due to the appellant from his membership with the respondent. The appellant undertook *'to discharge the institution from any liability due ...having received ...terminal benefits...'*.

15. However, Mr. Bosire counsel for the appellant strongly argued that the documents in the respondent's list of documents were not produced before the tribunal and the same are not admissible.

16. The respondent relied on the evidence of Stephen Onserio Obiro (Rw1) who was the human resource manager at the respondent. Rw1 testified that the appellant got a loan from the respondent of Kshs 180,000/- and the security for the loan was his shares. On termination the appellant had Kshs 100,000/- share deposits and had loans in the sum of Kshs 217,690/-. He testified that they deducted the shares to recover the loan and the net payable to the appellant was Kshs 99,067/-. He testified that the appellant signed a discharge voucher and an indemnity. He explained that the appellant's shares were used to reduce his liabilities.

17. I agree with the submissions of Mr Bosire that the respondent's witness, Stephen Onserio Obiro did not produce the defendant's documents and the tribunal erred in arriving at its decision on account of the documents.

18. It is also my finding that termination of employment ought not to have led to an automatic termination of the appellant's membership with the respondent.

19. However, having carefully considered both the evidence of Cw1 and Rw1, it was clear that the appellant signed a document discharging the respondent from liability. Cw1 during cross examination acknowledged that he signed a discharge. The Court of appeal in **Coastal Bottlers Limited v Kimathi Mithika [2018] eKLR** held as follows;

*“21. In our minds, it is clear that the parties had agreed that payment of the amount stated in the settlement agreement would absolve the appellant from any further claims under the contract of employment and even in relation to the respondent's termination. It is instructive to note that the respondent never denied signing the said agreement or questioned the veracity of the agreement. Further, from the record, we do not discern any misrepresentation on the import of the said agreement or incapacity on the respondent's part at the time he executed the same. It did not matter that the amount thereunder would be deemed as inadequate. As it stood, the agreement was a binding contract between the parties. In **Trinity Prime Investment Limited vs. Lion of Kenya Insurance Company Limited [2015] eKLR** this Court, while discussing the import of a discharge voucher which is more or less similar as the agreement in question observed:*

“The execution of the discharge voucher, we agree with the learned judge, constituted a complete contract. Even if payment by it was less than the total loss sum, the appellant accepted it because he wanted payment quickly and execution of the voucher was free of misrepresentation, fraud or other. The appellant was thus fully discharged.”

22. All the ELRC was required to do was to give effect to the intention of the parties as discerned from the settlement agreement.”

20. While it is clear that the appellant was entitled to dividends for the period up to the withdrawal from the respondent, the appellant having signed the discharge voucher absolved the respondent from any further claims. Even if I was to consider the claim for dividends, the appellant did not tender any evidence of how much dividends he was owed.

21. In the end, I find that the appeal is devoid of merit and is hereby dismissed. The respondent shall have the cost of this appeal.

DATED, SIGNED AND DELIVERED AT KISII THIS 15TH DAY OF JULY 2021.

R.E OUGO

JUDGE

In the presence of:

Mr. Bosire for the Appellant

Mr. Wesonga for the Respondent

Orwasa Court Assistant