



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL NO. 143 OF 2019

JUSTUS GITUMA.....1ST APPELLANT
SIMON KATHURIMA.....2ND APPELLANT
EMMANUEL MURIUNGI.....3RD APPELLANT
MERCY KAGENDO.....4TH APPELLANT
HENRY MURITHI.....5TH APPELLANT
REUBEN GITONGA.....6TH APPELLANT

VERSUS

DANIEL KIMATHI.....1ST RESPONDENT
WILSON KIMATHI.....2ND RESPONDENT
TABITHA KANUGU.....3RD RESPONDENT
K-REP BANK.....INTERESTED PARTY

(Being an appeal from the original Judgment of the Principal Magistrate's Court at Meru

in Meru CMCC Case No. 306 of 2018 delivered on 28th November 2018 by Hon. Maroro PM)

JUDGMENT

Introduction

1. The Appellants and the 1st to 3rd Respondents were once all members of Lucern Self-help Group, hereinafter referred to as 'the borrower.' They obtained a credit facility from the 4th Respondent bank at its Nanyuki Branch. The 1st and 2nd Respondents offered their properties namely Ngusishi Settlement Scheme/884 and Ngusishi Settlement Scheme/1520 respectively as security for the facility. The members of the borrower had however agreed amongst themselves on how to repay the loan by each of them making some contribution.
2. The borrower however defaulted and this prompted the Interested Party Bank to commence the execution process in accordance with the charge entered in its favour over the 1st and 2nd Respondent's properties.
3. On the premise that some of the members of the borrower, including the Appellant had failed to honour their commitment to repay the loan, the Respondents sued the Appellants in Meru CMCC No. 306 of 2013. Vide Judgement delivered on 28th November 2018 Hon. Ndungu, the Appellants were ordered to pay all amounts that had fallen due to the Interested Party Bank.

The Appeal

4. Being dissatisfied with the outcome of the Judgement, the Appellants filed the instant appeal. In their Memorandum of Appeal dated 21st December 2018, they raise the following grounds of appeal: -

i) That the learned chief magistrate erred in law and facts in failing to take into account the details of the evidence tendered by the appellants and the Respondents in respect of the accountability of the moneys contributed by the appellants which was not accounted for by the Respondents and thus came up with the wrong decision.

ii) That the learned chief magistrate erred in law and facts by ignoring and disregarding the appellants evidence which demonstrated the 30 Respondents took a loan from the interested party and failed to utilize the same to the intended purpose and therefore ought to have been ordered to repay the loan without involving the appellants.

iii) That the learned chief magistrate erred in law and facts in failing to find which was a fact that the appellants ought not to pay for a loan which never benefited or utilized in their own interests.

iv) That the learned chief magistrate erred in law and facts by dismissing the counterclaim which sought the Respondents to account for the money received or advanced to the Respondents to determine who should be held liable in payments and therefore came to the wrong conclusion.

v) That the learned chief magistrate erred in law and facts by completely considering irrelevant matters in her decision and ignoring the relevant issues canvassed before her and therefore came to decision/conclusion.

vi) That the learned chief magistrate's decision is against the facts and the wrong evidence presented before her and therefore bad in law.

5. They pray for the appeal to be allowed with costs; for the judgment of the trial court to be set aside and substituted with the orders in accordance with the prayers in the counterclaim.

Appellant's Submissions

6. The Appeal was canvassed by way of written submissions. The Appellant filed submissions dated 7th September 2021. They urge that the Respondents had sued them for a declaration and order that they are bound to continue paying the arrears and loan as and when they fall due. That by their statement of defence and counter-claim filed on 25th October, 2013, they denied the allegations in the plaint and specifically stated that the Plaintiffs (Respondents) being officials of the self-help borrower breached the trust endowed on them by misappropriating the funds for their personal use and benefit, but the trial Court found in favour of the Respondents.

7. They urge that the lower court's finding and conclusion were founded on wrong principles of fact and/or law and further that the trial Court did not take into account particular evidence and particular circumstances of the matter at hand or probabilities.

8. They urge that the trial court failed to take into account the details of the evidence tendered with respect to the accounting of the monies they contributed, which was not accounted for by the Respondents. That from the records, members of the borrower, themselves included, contributed Ksh 735,000/- being membership fees which was to be used to develop a borehole. That the Respondents being officials of the borrower group borrowed Ksh 3,000,000/= from the Interested Party, which amount was meant to be used in the drilling of borehole (Ksh 1,400,000/=); expansion of piping (Ksh 800,000/=) and tank construction (Ksh 800,000/=). That the Respondents only spent Ksh 735,000/= which they (the Appellants) together with other members had contributed to drill the borehole. That no other development was ever undertaken by the Respondents and that to make matters worse, they do not even have access to the said water to date. That it is when they demanded for account from the Respondent that the suit was filed.

9. They urge that the borrower has a membership of 21 persons and it is thus questionable as to why the Respondents only filed a suit against the Appellants only yet there were other members. They urge that this was done to avoid questions on accountability and that they were victimized for asking for accounts. They urge that failure on the part of the Respondents to account for all the monies contributed by the members and those advanced by the Interested Party was a breach of the trust endowed on them by the borrower group.

10. They urge that the trial Court ignored and disregarded their evidence which demonstrated that the Respondents took a loan from the interested party and failed to utilize the same to the intended purpose and therefore ought to have been ordered to repay the loan without involving them.

11. They urge that the 1st Respondent, in his testimony before the trial court stated that they were charged Ksh 1,200,000/= to drill the borehole but he did not produce receipts as evidence of payment or any quotation breaking down how the said amount was utilized. They urge that Ksh 1,200,000/= is a lot of money that cannot just be given out and/or used without any proper documentation. They urge that this notwithstanding no explanation was given on how the balance of Ksh1,800,000/= was expended. They urge that the Respondents failed to utilize the above mentioned monies for the intended purpose and ought to have been ordered to repay the loan for failing to account for all the monies in their possession.

12. They further urge that the Respondents stated that they dug a borehole at a depth of 130M and a hole decimeter of 254MM, a fact which is contrary to the arrangement of the Appellants and the entire membership in which the borehole to be dug was to be 200M. That this is a clear indication that the Respondents failed to carry out the arrangements of the borrower group and should therefore be held accountable.

13. They urge that since the Respondents failed to utilize the amount of Ksh 3,000,000/= advanced to them by the Interested party for the intended purpose, the trial court erred in failing to find that they, (the Appellants) ought not to pay for a loan which never benefited them.

They urge that the trial court erred in dismissing their counter-claim which sought for the Respondents to account for the money received or advanced to the them, so as to determine who should be held liable in payments and therefore came to the wrong conclusion. They urge that the trial court also failed to determine whether the Respondents were negligent the manner handled the loan the by the interested party.

14. They urge that the trial court only addressed issues raised by the Respondents and ignored their case, especially the prayers in the counter-claim. They cite *Apollo Company Limited vs East African Development Bank & Another* [2016] eKLR, where the judgment of the High Court was challenged on grounds that trial Judge failed to resolve all the issues. They further cite *Regina Karimi Mbuchi & 2 Others vs Francis Mbuchi Kithaka* [2018] eKLR where the Court upheld an appeal because the court failed to frame issues for determination and failed to consider the appellants' counter-claim. They urge that it was not in the interest of justice for the trial court to order that them to pay the entire loan amount due, together with interests before the Respondents could account for all monies advanced to them as prayed for in their counter-claim.

15. They urge that it was not in dispute that the borrower through the Respondents and Appellants took 3,000,000/= from the interested party for purposes drilling a borehole. That what was in dispute was that the advanced loan was not utilized in the borrower's arrangements therefore the appellants should not have been compelled to repay the said loan without an account by the Respondents. They urge that the trial court did not take into consideration all the evidence, pleadings, facts and law and delved on irrelevant matters thereby ignoring the relevant issues.

16. They urge that the trial court, in its Judgment, failed to adhere to Order 21 Rule 4 of the Civil Procedure Rules, 2010 in that it did not frame and/or set out issues for determination as required and neither did it make a decision on each issue nor give reasons for such decisions.

17. They urge that the trial court's decision was against the facts and evidence presented and was therefore bad in law. That from the records it is clear that the borrower's account was not being operated and/or managed well by the respondents whom were the group officials. That their claim against the Respondent was for payment of Ksh 2,621,000/= being the amount unspent and unaccounted for which should have been used to repay the loan advanced by the interested party. They urge that by ignoring the evidence and failing to frame issues, the judgment was insufficient and caused them to suffer injustice.

Respondents' Submissions

18. The Respondents filed submissions dated 21st September 2021. They urge that the parties herein formed the self help group (borrower) with the purposes of drilling and equipping a Borehole to supply water to the members. That the members resolved to approach Sidian Bank (then K-Rep Bank) for a loan facility and the Bank advanced the borrower group with a loan facility of Ksh 3,000,000/= for the purposes of drilling and equipping the borehole facility.

19. They urge that the members agreed unanimously that each member would be contributing Ksh 5,000 per month for the purposes of servicing the loan facility and two members (1st and 2nd Respondents) gave out two titles Ngusishi Settlement Scheme/1884 and 1520 to be held as security by the bank. That the other members bound themselves to pay the loan as seen from the resolution of 12th June, 2011 signed by all the Appellants and the minutes of 20th February, 2011 on page 18-22 of the Record of Appeal.

20. Quoting H. G. Beale, W. D. Bishop and M. P. Furnston in the book entitled *Contract Cases and Materials* state that they urge that the law of contract provides that there must be an offer and acceptance for the formation of a legally binding contract.

21. They cite the Court of Appeal in *William Muthee Muthami vs Bank of Baroda* (2014) eKLR for the proposition that a contract consists of three fundamental elements i.e offer, acceptance and consideration.

22. They urge that the members gave the contract to Geoscience Products & Services Ltd under Geoscience Water Programme, and that the drilling supervisor was one J. Kimani. That drilling started from 20th February, 2012 to 4th March 2012. That the costs of drilling the borehole was as follows: -

i) *Drilling Ksh 1,200,000/=*

ii) *Water testing Ksh 80,000/=*

iii) *Interruption of drilling by Loberia Farming through Appeal Court No. 3 (WR) at costs of Ksh 480,000/= at Ksh 30,000 per day for 16 days.*

iv) *Security costs of making sure that there was no progress done waiting for court judgment on the drilling of the borehole by water resources management office (WRM) Ksh 100,000/= all totaling to Ksh 1,860,000/=*

v) *The borehole was dug at a depth of 130 M and a hole decimeter of 254 MM*

23. They urge that being officials of the borrower group, they carried out the works as instructed by the members through the contractor, Geoscience products & services Lad and the borehole was drilled and equipped. That however before supplying the water to the members, they were sued at the Water Appeals Bound Tribunal vide Case No 3 (WR) of 2011, which concluded in their favor, and taxation of costs is still awaiting determination. They urge that the subject matter of the suit was that the group was accused by Loberia Farm Group Lada neighboring farm, for drilling a borehole near their already sunk borehole against the law. That the Appellants' witness affirmed this position as seen in the evidence of Emmanuel Maring Karima, the 3rd Appellant, who testified on behalf of the Appellants/defense in the lower court.

24. They urge that when the suit was filed in the Appeals board, an injunction was issued so that the drilling of the borehole would not continue. That the Tribunal came to the site of the borehole and directed the drilling to continue and get sealed until the case was over. That the appeals tribunal concluded the case on the borehole in the year 2012 and Loberia lost the case.

25. They urge that it was during this period that the Appellants began to fail, refuse and neglect to make good of the monthly repayments agreed of Ksh 5,000/=. Thus when the group's loan started falling into arrears, the interested party issued them with a letter of notification of sale by action through by Orick Merchants Auctioneers.

26. They urge that the defaulters stopped paying the loan in the year 2013 starting from June citing the following reasons for defaulting: -

- i) *Officials could not account for Ksh 735,000/= contributed by 21 members at a rate of Ksh 35,000/= per member.*
- ii) *Officials could not account for Ksh 3,000,000/= the alleged loan advanced by the Interested Party.*
- iii) *Officials could not account for a total of Ksh 356,000/= towards the said loan by the defaulters.*
- iv) *Officials misappropriation and misuse of the group finances since the alleged purpose for the loan was never met and no money was spent on extension of piping work estimated at a cost of Ksh 800,000/=; tank construction of Ksh 800,000/=, and drilling balance of Ksh 665,000/=.*
- v) *Official's misappropriation of the group finance and breach of trust.*

27. They urge that during the hearing of Loberia case proceedings; some of the defaulters stopped paying their share of loan to the Bank and at the same time, the Bank continued paying the defaulted money from the borrower groups account until the advanced funds were depleted. That when the borrower's account was exhausted, the bank started demanding payments from the entire group. That while the matter was still pending in the lower court, the Respondents continued to pay their part of the bargain in order to forestall the auction of their properties.

28. They urge that the work remaining during the time was distributing of water to members after the equipment were installed. They urge that by the time they embarked back to the drilling, the interested party bank had taken away the money that they had been given as the principal sum due to the default by the members. They urge that had the Appellants continued to pay their monthly deposits, there would have been enough money to do the piping and for building the tank since the pump had already been tested.

29. They urge that through Daniel Kimathi, the 1st Respondent, they gave evidence before the trial court as to how their activities were paralyzed by the Water Appeals case and that the sinking of the borehole could not continue due to the injunction that had been issued by the Tribunal.

30. They urge that the 3rd Appellant who testified for the Defense in the lower court testified that they indeed agreed and entered into the loan agreement with the bank and duly signed against the offer and acceptance letter from the bank that they would commit themselves in order to pay the monthly instalments. That they were present during the negotiations with the bank and that they had passed a resolution to take up the loan on 12th June 2011 as seen from page 20 of the record of appeal. Each of the Appellants duly signed the resolution to take up the offer letter and thus were all personally bound by the terms of the contract between themselves and the bank. They were all therefore privy to the contract.

31. They urge that the doctrine of Privity of Contract is that only the parties that actually negotiated a contract (who are privy to it) are entitled to enforce its terms. That a contract cannot confer rights or impose obligations on any person other than the parties to the contract and that accordingly, a contract cannot be enforced either by or against a third party.

32. They cite the Court of Appeal in *William Muthee Muthami* (supra) for the proposition that that under the common law doctrine of privity of contract, rights and obligations under contract are only conferred imposed the parties that contract.

33. They further urge that the borrower group was duly registered under the Ministry of Gender, Children Social Development on 16th April 2009.

34. They highlight the fact that the Appellant testified on behalf the Appellants and confirmed the following: -

- i) *That members agreed take up loan that they committed themselves repaying bank at monthly fee Kshs 5,000 per person per month.*
- ii) *That the bank gave the amount Kshs 3,000,000.*
- iii) *That the Appellant alongside other appellants paid part almost 2 years and stopped thereafter.*
- iv) *That Appellants were aware that indeed they been sued by Loberia for sinking the borehole.*
- v) *That the Appellants were aware of injunction stopping sinking of borehole.*
- vi) *That borehole was sunk and casing was done, pumping of water was tested but only piping and works had been done.*

35. They urge that the Appellants did not bring evidence to prove that money had been misappropriated by Respondents. They urge that the Appellants basically said that they stopped paying money due to misappropriation of funds by Respondents and that on cross-examination on the same, the Appellant said that he did not have prove in court. That either way, their allegation was just an afterthought to find an excuse of why they failed or neglected to their personal obligations in repayment of the loan. They urge that there was no evidence of any form of complaint either through correspondences between the parties or minutes complaining of any misappropriation of the group funds.

36. They urge that members had at first attempted to make their monthly instalments and even after the case was concluded, some members paid their part of the negotiated amounts as seen from page 49 of the record of appeal. That one of the members Jacob Nkunja through his advocate Gikunda Anampiu who represented the parties at the time, wrote to the Respondents advocate indicating that his client had cleared his obligation to the bank by making a lump sum deposit of Ksh 200,000/=. This was done after the judgment in this matter had been delivered.

37. They urge that the doctrine of estoppel in accordance with Section 120 of the Evidence Act applies to this case. They further cite Lord Denman CJ in the English case of *Pickard v Sears* 112 E.R. 179 and the Court of Appeal in *Serah Njeri Mwobi v John Kimani Njoroge* (2013) eKLR, the Court for the applicability of the doctrine of estoppel.

38. They submit that if all the parties had made good their promise to pay Ksh 5,000/= per month, the loan would not have accumulated interest and neither would it have fallen into arrears. They urge that there must have been a procedure to call for a group meeting where it was suspected that the funds were being misappropriated by any party. That at the end of the day the questions that arises are: -

i) *Whether there was a valid contract.*

ii) *Whether there was an offer and acceptance.*

iii) *Whether the parties to the group were bound by the contract.*

iv) *Whether the Appellants ought to be made to pay the loan arrears with interest from the day of default.*

v) *Noting that the Respondents property was auctioned by the interested party, whether execution should issue as against all the Appellants.*

vi) *Whether the Appellants were privy to the contract.*

vii) *Whether the Respondents could enforce the contract as against the Appellants.*

39. They pray that the appeal be dismissed with costs to the Respondents as it lacks merit. They urge that the court ought to consider the unfortunate event that occurred, the bank sold the land in which the borehole had been sunk and that the 2nd to 4th Respondents lost their family home whereas, he had a good intention to benefit the group at large. That at the end of the day, the entire process was a total loss to the members which event would have been avoided were it not for the actions of the Appellants.

Interested Party's Submissions

40. The Interested Party filed submissions dated 21st September 2021. It is urged that the Interested Party is not a Respondent in the appeal and that no orders on appeal are sought against it. That in accordance with the Appellants' counterclaim, the Appellants' grievance is against the Respondents only and does not extend to the Interested Party who was enjoined by way of an undated Amended Complaint filed much later. That the Appellants' counterclaim should, therefore, not have any bearing on rights and interests of the Interested Party.

41. It is urged that the Interested Party would not have bothered with the appeal but for its expansive scope. That the appeal seeks to set aside the entire judgment of the trial court and that the Interested Party's is a beneficiary of that Judgment as the trial Court held that the Interested Party was not a necessary party in the proceedings and that the right of a financier to exercise its powers of sale over charged property is protected under the law. It is urged that if the appeal is successful, the Interested Party's rights under the judgment of the trial court will be upset and as such, they must oppose this appeal. That the grounds in support of the appeal do not in any way demonstrate how the finding of the trial Court with respect to the interested party's right is incorrect. That what is clear is that there is a state of account between the Appellants and the Respondents that should not affect the Interested Party at all. It is urged that the repayment of the loan facility advanced by the Interested Party to both the Appellants and the Respondents, being members and officials of the borrower, was never conditioned upon there being a settled state of account between the appellants and the Respondents. That the loan, when due, was to be repaid. The Interested Party thus ought not to be dragged, and should not have been dragged, into the suit and this appeal.

42. They urge that the Respondents did not prefer an appeal against the order in the Judgment dismissing their suit against the Interested Party. That despite this knowledge, the Respondents irregularly filed an application for injunction and the same was dismissed with costs to the Interested Party in the ruling dated 5th May 2020 which ruling also affirmed the Interested Party's Statutory Power of Sale.

43. The Interested Party prays for the Court to dismiss the Appellants' appeal in so far as it seeks to overturn the order dismissing the suit by the Respondents. The Interested Party seeks its costs in this appeal to be paid by the either the Respondents or the Appellants.

Issues for Determination

44. From the memorandum of appeal and submissions made by parties, the main issues for determination in this appeal include: -

i) Whether the trial Court erred in dismissing the Appellant's counterclaim.

ii) Whether the Respondents misappropriated funds meant for the project.

iii) Whether the misappropriation in ii) above, if any, absolves the Appellants from their loan obligations and/or whether the doctrine of estoppel applies against the Appellants.

iv) Whether the Interested Party is a necessary party to this appeal.

Determination

i) Whether the trial Court erred in dismissing the Appellant's counterclaim.

45. In response to the Respondent's Plaintiff seeking an order for the Appellants to pay the loan arrears, the Appellants filed a Statement of Defence and Counterclaim. In their Counterclaim, they sought to have the Respondent be ordered to render accounts of the borrower group and an order that the Respondents repay the loan amount using the amount of money found due. The Court observes that in their Reply to the Defence and Counterclaim, the Respondents denied the claim of misappropriation but did not account for how the monies were spent.

46. According to the Appellants, the trial Court dismissed their counterclaim which in effect made them to pay for a loan which they did not benefit from. They urge that they should not have been ordered to pay for a loan before the Respondents rendered proper accounts indicating how the group funds had been expended.

47. The trial Court held that this being a group comprising lay persons, strict books of accounts may not have been kept. The trial Court further found that on a balance of probabilities, the Respondents had established that they had carried out works and drilled a borehole, but before the supply of water, the group was sued at the Water Appeals Tribunal and that after this event, the defaulters stopped paying their respective shares.

48. The Court finds that for a proper determination of the matter of misappropriation, accounts ought to have been rendered. The Court also appreciates the validity of the Appellant's arguments made at the trial Court and in the instant appeal, that it would be unfair for them to be made to pay for a loan whereas the intended purpose of the loan had been compromised by the very parties demanding that they repay the loan. The rendering of accounts, therefore, becomes relevant to determine what is truly owed and what the Respondents should pay for if found to have misappropriated funds.

49. The Court also considers that the rendering of accounts was necessary to the extent that the group comprised a total of 21 members as posited by the Appellants and yet the matter herein involves only 9 of the members. This begs the question on whether the other 11 members complied with their obligations and what their positions are with respect to the issue of misappropriation. In this Court's view, the said other 11 members ought to have been enjoined in the proceedings at the trial Court so that the Court could resolve all the issues in contention with the benefit of taking representations from all members.

50. The Court has confirmed from the extract of minutes of the meeting held on 20th February 2011 by the group that the members were in attendance on that day were 16. This proves that the members of the group are more than the 9 members in this matter. The Court observes that in their submissions, the Respondents failed to address this issue. The Respondents used the term 'defaulters' which does not disclose or give any information as to who was liable and to what extent. Furthermore, by the time the suit was being filed, the loan was still being serviced, therefore a determination on the matter at the time, could be interpreted as inconclusive, for purposes of accounting for the entire loan. This Court finds that there was need to have a complete record showing the amounts paid by each of the 21 members and the amounts due by each of the members. This Court, therefore, finds that to the extent that the trial Court's decision was made without the benefit of a proper account of the group's finances, the trial Court erred in dismissing the Appellants' counterclaim.

51. The Court also finds that at the time the defaulters stopped paying the arrears, had prompt action been taken by the officials, a solution may have been reached. The Respondents were therefore, not entirely innocent. Their duty as officials with a fiduciary duty to the entire group made it necessary for them to act in the best interests of the group. The Court, in finding so, considers that the group was established as some sort of special purpose entity with the sole mission of drilling a borehole and providing access to water to its members. They thus appear to have failed in their duty as officials.

ii) Whether the Respondents misappropriated funds meant for the project.

52. According to the Appellants, the Respondent misappropriated the funds meant for the project. The Respondents on the other hand deny any misappropriation on their part. Parties appear to be in agreement on how the monies were initially supposed to be spent.

53. The Ksh 3,000,000/= which was borrowed from the bank was supposed to be spent as follows: -

i) Ksh 1,400,000/= was to be used for drilling of borehole.

ii) Ksh 800,000/= was to be used for expansion of piping.

iii) Ksh 800,000/= was to be used for tank construction.

54. According to the Appellants, out of the entire Ksh 3,000,000 nothing was spent in the project. That the only monies spent in the project

was a total of Ksh 735,000/= which had been the membership fees contributed by members of the group.

55. The Respondents on the other hand claim that out of the Ksh 3,000,000/=, they spent Ksh 1,200,000/= in drilling a borehole, Ksh 480,000/= as project stalling costs during hearing at Tribunal, Ksh 100,000/= as security costs and Ksh 80,000/= as water testing costs all totaling to Ksh 1,860,000/=. They claim that the project was frustrated by the case at the Tribunal and thereafter by members who did not service the loan.

56. The above reveals that according to the Appellants, only a total of Ksh 735,000/= was spent and according to the Respondent, a total of Ksh 1,860,000/= was expended towards the project. This was a difference of Ksh 1,125,000/=.

57. The Court further observes that the Respondents did not avail any receipts in the trial Court to confirm that the Ksh 1,860,000/= was expended for the services claimed. While appreciating that keeping books of account may require a technical accounting role as held by the trial Court, this Court considers that the preservation of receipts does not require any expertise and at the very least, there should have been some correspondence or bank RTGS forms to confirm that the monies were spent for the stated purposes.

58. With the scarcity of information as revealed above, this Court is not able to determine the question of whether there was misappropriation.

iii) Whether the misappropriation in ii) above, if any, absolves the Appellants from their loan obligations.

59. The Court has not determined whether there was misappropriation of funds by the Respondents. This Court, however, finds it necessary to determine whether any such misappropriation by the Respondents, if any, would absolve the Appellants from their obligation in payment of the loan. This Court considers that the loan agreement was between the bank and the self help group. The bank, therefore, expected to have the loan plus interests as agreed repaid by the self help group as a whole.

60. Although the borrower in this case was a self help group and not a company, this Court finds value in making reference to the 'Indoor Management Rule' otherwise known as the Turquand's Rule as established by the Court of Exchequer of the United Kingdom in **Royal British Bank v Turquand** (1856) 6 E & B 327 (Lord Jervis CJ, Pollock CB, Alderson B, Cresswell J, Crowder J and Bramwell B). The Court held that persons contracting with a company and dealing in good faith have always been entitled to assume that acts within its constitution and powers have been properly and duly performed, and were never bound to inquire whether acts of internal management have been regular. Although this rule is applicable in company law, the Court finds that the same principle applies herein and in the circumstances, the Interested Party Bank was entitled to repayment of its loan by the group as a whole, regardless of the issues of misappropriation.

61. The Appellants cannot, therefore, claim to have been absolved from their obligation to repay the loan by virtue of their internal disagreements. The misappropriations, if any, was an issue that could be dealt with between the Appellants and the Respondents without affecting the Interested Party Bank's rights as chargee.

62. The Respondents have urged that the doctrine of estoppel applies against the Appellants. The Court, however, finds that it is not necessary to go into estoppel because the Court has already found that the Appellants are not absolved from their obligations to repay the loan.

63. What this Court must add, is that at the point of dismissing the Respondents' case against the Appellants, the Interested Party was already protected. Indeed, as subsequent proceedings revealed, the Interested Party realized its security and recovered its dues, at least partially, if not wholly. This Court finds that after the dismissal, the trial Court ought to have gone a step further to interrogate the question of misappropriation as a matter between the Appellants and the Respondents.

iv) Whether the Interested Party is a necessary party to this appeal.

64. This Court accepts that the rights of the Interested Party, an innocent financier, to recover its dues, should not be defeated. Indeed, the Interested Party's rights were secured by the order dismissing the Respondents' suit against it. The Appellant's Memorandum of Appeal does not touch on the question of the dismissal of the suit against the Interested Party. If anything, such appeal against this dismissal order would have been lodged by the Respondents and not the Appellants.

65. The Court also considers that the Interested Party's interests are covered by the charge which was registered in its favour. This Court also observes that in a previous application for stay, the Interested Party confirmed that it had already exercised its statutory power of sale under the Land Act and recovered its arrears.

66. This Court does not, therefore, find that the Interested Party is a necessary Party to these proceedings.

Conclusion

67. The Appellants have prayed for the Court to set aside the Judgment of the trial Court and to allow the counterclaim. This Court has already found that the trial Court erred in dismissing the counterclaim. The counterclaim raised important issues between the Appellants and Respondents which affected their rights and obligations as members of the self help group. Before allowing the counterclaim, however, the issues raised therein would have to be retried and properly ventilated.

68. This Court finds that the ideal situation would have required the members of the self help group to repay the loan before the properties were sold. The properties were however already sold. The Court is also aware that in execution of the Judgment of the trial Court, the Appellant's properties were also sold. A determination of who was to pay the loan (now already repaid) and therefore, who now owes the

other party how much, would require the rendering of proper accounts to determine liability.

69. This Court is thus inclined to allow the prayer for setting aside of the order of the trial Court dismissing the counterclaim and to order for a retrial on the same.

70. As the appeal did not affect the Interested Party and neither were any orders sought against it, this Court shall not make any orders directed to the Interested Party.

ORDERS

71. Accordingly, for the reasons set out above, this Court makes the following orders: -

i) The Appellants' appeal succeeds to the extent that the Judgment of the trial Court allowing the Respondents' claim against the Appellants and dismissing the Appellants' counterclaim is hereby set aside.

ii) The Court orders that there shall, pursuant to Section 78 (1) (e) of the Civil Procedure Act, a new trial on the Appellants' counterclaim, for determination.

iii) The funds due to either party after the determination in ii) above shall be paid by the party found liable, after factoring in the values of the properties sold, at the time of the sale, either in execution of the Judgment of the trial Court or in realization of the securities, as applicable.

iv) Each party shall bear their own costs.

Order accordingly.

DATED AND DELIVERED THIS 18TH DAY OF NOVEMBER 2021.

EDWARD M. MURIITHI

JUDGE

Appearances

MAITAI RIMITA & CO. ADVOCATES FOR THE APPELLANTS

CHARLES KARIUKI & KIOME ASSOCIATES ADVOCATES FOR THE RESPONDENTS

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