



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KITUI**

**CIVIL APPEAL NO. 4 OF 2019**

**PAUL NZIOKA.....APPELLANT**

**-VERSUS-**

**NEWTON F. KIMANTHI.....1<sup>ST</sup> RESPONDENT**

**BENEDICT M. KINUVA.....2<sup>ND</sup> RESPONDENT**

**CHARLES MUNYOKI VIRAH.....3<sup>RD</sup> RESPONDENT**

**BENSON MAKAU MUNYAO.....4<sup>TH</sup> RESPONDENT**

**JOHN MUEMA MUTUNGA.....5<sup>TH</sup> RESPONDENT**

**GABRIEL KYALO WAMBUA.....6<sup>TH</sup> RESPONDENT**

**JOHN KASI.....7<sup>TH</sup> RESPONDENT**

**PAUL MBELENZU.....8<sup>TH</sup> RESPONDENT**

**JUDGEMENT**

1. The respondents herein, by a plaint dated 3<sup>rd</sup> November 2014, filed on the 5<sup>th</sup> November 2014 jointly and severally and in their respective individual capacities, brought the instant suit, against the appellant seeking for the principal sum of Kshs.1,159,400/- plus costs and interest of the suit on account of loans advanced at the respondents request and instance, through their organized informal unregistered Self Help Group known as Ushirika Catholic Act Self Help Group.

2. The appellant in compliance with Order 11 of Civil Procedure Rules 2010 filed list of witnesses, witnesses' statements and list of documents to accompany the filed plaint. The appellant in a written statement of defence dated 8<sup>th</sup> April, 2015, filed on the even date, categorically denied the respondents' claim in total and invited the respondents to strict proof thereof.

3. The appellant in the filed written statement of defence readily admitted that he was one of the members of an informal organized Group known as Ushirika Catholic Act Self Help Group, with the respondents herein and further averred that the cheques he had issued to the said Self Help Group were meant to be his share contribution.

4. And that he had to stop same from being cashed, when he realized that the subject Help Group was not properly managed by the group's administration. He, in compliance of Order 11 of Civil Procedure Rules 2010, equally filed his statement to accompany the filed written statement of defence.

5. After was fully heard the trial court made a judgement in favour of the respondents. The appellant was dissatisfied with the verdict and thus filled instant appeal. He raised 11 grounds which were revolving and/or the complaint that the respondents did not prove their case on balance of probabilities.

6. Parties were directed to canvas appeal via written submissions.

**EVIDENCE ADDUCED:**

7. The respondents through their authorized representatives namely Newton Kimanathi, their Self Help Group Ushirika Catholic Act Self Help Group, PW1, their group chairman Benedict Kinuva (PW2) and Charles Munyoki Virah (PW3) in their respective oral adduced sworn evidence wholly adopted their recorded filed statements and bundle of documents.
8. This was their evidence in chief, in corroboration of their claim against the defendant, notably the subject Self Help Group's Constitution, admitted in evidence as Pexh 1, the appellant's loan application cheques Pexh 3(a), (b) and (c), the subject Self Help Group Account's Bank Statement Pexh 4 and demand notice Pexh 5.
9. It was the respondents' case in their adduced evidence that the appellant who as at the material time in issue was a member of the subject Self Help Group had applied for a loan and was indeed advanced loans at different times and intervals, which advanced loans.
10. They stated were repaid by the appellant through their chairman, Benedict Kinuva deposited into their bank account held at Equity Bank – Mwingi Branch, by issuing chequest in the names of the appellant, business entity known as New Lamu Hardware, which cheques, they reiterated, upon presentation were dishonoured on account of insufficient funds on the drawer's account.
11. They stated that as a result of the dishonoured issued cheques, their account was surcharged penalties and their claim against the appellant was the sum of Kshs.1,159,400/- inclusive of the surcharged penalties.
12. PW1, PW2 and PW3 on cross examination maintained that they had instituted the present suit against the defendant in their individual capacities as members of Ushirika Catholic Self Help Group which group they admitted is an informal unregistered group.
13. They on further cross examination admitted the fact that they have no membership register or any records to show the individuals members contributions or shares deposited into the group's laid accounts and were not in a position to ascertain the appellant's share contributions to the group.
14. They however denied that, the issued bounced cheques by the appellant were not meant to be the appellant's share contributions, which payments they maintained were payments towards the advanced loans.
15. They readily coincided that they had no acknowledgement note executed by the appellant on the advanced amounts but maintained that the issued bounced cheques was an acknowledgement on the advanced loans. They further admitted the fact that they did not have, in the list of filed documents a letter by the appellant requesting for the alleged loans for the loan application from duly executed by applicant.
16. They on re-examination maintained that Ushirika Catholic Self Help Group is an informal organization, whose operations are on mutual understanding by the members. They reiterated that the appellant in acknowledging the loaned amounts, issued cheques, which tallied with the loaned amounts, through his business entity known as New Lamu Hardware.
17. The appellant on his sworn testimony wholly relied on his recorded filed statement herein as his evidence in chief. He, in his examination in chief cross examination and re-examination vehemently denied every owing any monies to the respondents herein, as alleged. He, readily admitted, that he was a member of a Self Help Group, which Self Help Group comprised of ten members, before one of them withdrew.
18. It was his evidence that, he is a businessman running a hardware shop known as Jiwe La Pembeni and was initially the secretary to the subject Self Help Group before he was outed, and replaced by one Newton Kimathi, the 1<sup>st</sup> respondent herein while the 2<sup>nd</sup> respondent Benedict Kinuva was still the chairman of the Self Help Group to the time of institution of the present suit.
19. He, stated that the subject Self Help Group from its inception was not registered in accordance with the Societies Act, but was being registered by the Self Help Group's Constitution, which Self Help Group was a welfare group wherein members had resolved to contribute equal shares to be deposited into the subject group's bank account with no ceiling on a members contribution.
20. He readily admitted the fact that he had made a loan application to the subject group, to be loaned Kshs.300,000/- but not such loans were ever advanced to him.
21. He stated that he had increased his share contributions to the group to the tune of Kshs.700,000/- before it dawned on him, that the subject group was the verge of collapsing due to mismanagement, thereby prompting him, t
22. o instruct the bank management to stop payment of the issued cheques. It was his case that he issued cheques, which were dishonoured issued towards payment of his shares which cheques were issued to the names of New Lamu Hardware.
23. The appellant denied that cheques were dishonoured or bounced due to insufficient funds in his account as alleged by the respondents herein, but he had stopped the payments.
24. He, in buttressing his case, stated that the respondents herein in their adduced evidence and filed documents in support thereof failed to produce in evidence the subject group's meetings suctioning and approved the alleged applied loans, the group's financial statements, the register of the group membership or any documents to show the individual members share contributions or any minutes or acknowledgement note to demonstrate that he indeed received the alleged loaned amounts, nor the group's financial balance sheet to show the subject group's financial status as at the time of filing the present suit.

#### ISSUES, ANALYSIS AND DETERMINATION

25. After going through the proceedings and the submissions on record, I find the issues are; **whether respondent had locus standi? whether the respondents proved his case on balance of probabilities ? what is the order as to costs?**
26. The appellant has raised a total of 11 grounds in his memorandum of appeal. The gist of the grounds is that the decision of the trial magistrate is not supported by law.
27. This being a first appeal, the court is enjoined to examine and re-evaluate the evidence and satisfy itself as to the correctness or otherwise of the trial court's judgement. See the case of *Mwanasokoni vs Kenya Bus Services Ltd*.
28. It is in evidence that the respondents herein brought the suit, in their respective individual capacities as members of an informal Self Help Group known as Ushirika Catholic Action Self Help Group as opposed to the subject group entity and did so, to protect and safeguard their interest in the subject Self Help Group and to that extent find the respondents suit as against the appellant properly before court.
29. The respondents in their adduced evidence as rightly submitted by the defence failed to exhibit documents or records i.e. the subject group's minutes sanctioning and/or approving the appellant's loan application or any acknowledgement by the appellant on the loans amounts, gave for the loan application form admitted herein.
30. The only nexus/link of the respondents' claim as against the defendant was the issued cheques exhibited and admitted in evidence which cheques apparently were dishonoured upon presentation. As evidenced by the loan application form admitted as Pexh 2 had so applied in the name and style of New Lamu Hardware.
31. It is crystal clear from the evidence on record that the subject group as at the material time to the institution of the suit held an account at Equity Bank – Mwingi Branch, in the names of the 2nd respondent Benedict Muimi Kinuva & others.
32. The appellant had indeed issued three cheques of Kshs.365,000/-, Kshs.365,000/- and Kshs.418,000/- respectively which cheques, on the face of the record, on the strength of the subject group's exhibited bank statements admitted herein, upon presentation were dishonoured for insufficient funds as opposed to the appellant's contention that he had stopped the payments hereof.
33. The appellant, did not have any evidence to show and to demonstrate that the issued dishonoured cheques were made and issued towards the increment of his share contributions with the subject group and the only logical conclusion and inference to be made was that the issued bounced cheques were so made and issued towards repayment of monies lent and advanced to him as loans by the subject group.
34. The law relating to issuance, acceptance and payment of cheques is the *Bills of Exchange Act, Cap 27 Laws of Kenya*. A cheque is a bill of exchange within the meaning of section 3 of the Act. Under section 27 of the Act, valuable consideration for a bill may be constituted by any consideration sufficient to support a simple contract or an antecedent debt or liability. It matters not whether the bill is payable on demand or at a future date. In other words, a postdated cheque is deemed a bill of exchange.
35. Section 30 of the Act creates a presumption that a bill of exchange is prima facie proof of value for it and the holder thereof is deemed a holder in due course.
36. In *Odera Obar & Company Advocates vs Catherine Wangari Mburu [2019] eKLR*, it was held that where a cheque was admittedly given, the onus is on the drawer to show some good reason why the payee should not have judgement for the sum set out in the cheque.
37. In this case, there were 3 cheques of Kshs.365,000/-, Kshs.365,000/- and Kshs.418,000/- issued by the appellant to the respondents. The cheques or copies thereof were produced as exhibits 2, 3 and 4 by the respondents.
38. The respondents' statement of bank produced as exhibit 4b shows that the cheques were dishonoured upon presentation for payment on account of insufficient funds in the drawer's account. The respondents who were the payees were penalized a total of Kshs.11,400/- for the dishonoured cheques.
39. In his statement of defence the appellant admitted to have issued the cheques in question. Again, in his testimony, the appellant maintained his admission of having issue the cheques.
40. Having admitted to issuing the dishonoured cheques, the onus was upon the appellant to demonstrate some good reason why the respondents should not have judgment for the figure in the cheques and the penalties charged by the bank on account of the dishonoured cheques.
41. The appellant sought to explain away the dishonouring of the cheques by the drawee bank by stating that he had stopped the payment. In other words he was stating that he revoked the authority of the bank to pay the cheques by countermand of payment as provided for under section 75 of the Bills of Exchange Act.
42. This explanation flies in the face of the clear evidence that the cheques were dishonoured on account of insufficient funds in the drawer's account. There is a difference between a countermand of payment and a dishonour of a cheque on account of insufficient funds in the drawer's account.
43. The former is perfectly legal under the said section 75 of the Bills of Exchange Act whilst the latter is a criminal offence under section

316A of the Penal Code, Cap 63 Laws of Kenya.

44. The trial magistrate who saw and observed the demeanour of the appellant as he testified cannot be faulted for having arrived at the conclusion he did, that the appellant's defence was a mere denial of the respondents' case.

45. The trial court aptly appreciated the applicable law on Bills of Exchange Act especially the onus on the appellant to demonstrate why having issued bad cheques judgment should not be entered for the respondents for the sum contained in the bad cheques.

46. He analysed the evidence especially the explanation offered by the appellant and rightly concluded that it amounted to no explanation at all since it was a most improbable explanation and an outright lie.

47. The trial court was right in holding that the inescapable conclusion was that the appellant was indebted to the respondents for the sum sought being the total of the mounts in the bad cheques and the penalties levied by the bank.

48. The court thus finds no merit in the appeal and makes the following orders;

*i) The appeal is dismissed with costs to the respondents.*

**DATED, SIGNED AND DELIVERED AT KITUI THIS 17<sup>TH</sup> DAY OF JANUARY, 2020.**

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**C. KARIUKI**

**JUDGE**