



REPUBLIC OF KENYA

IN THE MICRO AND SMALL ENTERPRISES TRIBUNAL AT KISII

CLAIM NUMBER 20 OF 2019

1. JOYCE RASUGU

**2. ABEL KEBASO OTOTO [SUING AS THE LEGAL REPRESENTATIVES O
MOSIABANO SELF HELP GROUP].....CLAIMANTS**

VERSUS

1. ANNE AKINYI OKUMU.....RESPONDENT

JUDGEMENT

1. The Claimants herein commenced this claim on behalf of **Mosiabano Self Help Group**. The two are members and officials of the group, chairperson and secretary respectively. According to the Claimants the Respondent was at all material times a member of the group.

2. Through a statement of claim dated 10th July 2019, the claimants on behalf of their afore-stated group claims against the Respondent for a **liquidated sum of Kshs. 100,000.00 interest and costs**. As can be discerned from the affidavit of service filed herein by the Claimants, a notice of claim, statement of claim, list of exhibits and witness statement were served upon the Respondent. The claimants also filed an affidavit of service evidencing the service of the hearing notice on the respondent.

3. The Respondent, upon service of the claim entered appearance and filed a response to the claim. The parties were granted an opportunity to resolve the matter amicably but the same was unsuccessful. The claim therefore proceeded for a full trial, with each party calling one witness, the 2nd claimant and the respondent respectively. The Claimants are seeking for an award of the claim of Ksh. 100,000.00 and interest at the rate of **10 percent per a month** translating to **120 percent per annum**. We shall make a determination on the interest rate later in this judgment.

4. The second Claimant testified for the claimants in support of the claim. His witness statement is dated 10th July 2019 was produced as his evidence in chief. According to this witness, on or about the **20th November 2017** the group at the instance of the Respondent, lent the latter a sum of **Kshs. 100,000.00**

5. The Loan Agreement were executed to this effect by the parties. The Loan Agreement dated 2nd December 2017 was produced as **Exhibit 1** before the Tribunal. The claimants' sought for interest for the period **2nd December 2017 to 2nd April 2019 at a rate of 10% per a month, an amount that totals to Kshs. 499,620.00 for the loan**. This calculation obviously had an error. The claim was prompted by the fact that the Respondent failed to repay the amount that he had borrowed plus the agreed interest as per the Loan Agreements.

6. The Respondent challenged the Claimants' claim by entering appearance and filing a response. She also attended and gave her evidence in defence. It was her evidence that she registered as a member of the Mosiabano Self Help Group and paid the requisite membership fee and shares worth Ksh. 30,000.00. She did apply for a loan of Ksh. 111,110.00 but only Ksh. 100,000.00 was remitted to her.

7. The respondent added that she repaid the sum to Mr. Kebaso, the 2nd claimant herein at shop on two occasions when he went to her shop in batches of Ksh. 50,000.00 and Ksh. 70,000.00. She could not recall the exact date of the repayment but the first was at the end of 2018 and the second in 2019. She alleged that save for her own records, no acknowledgement or receipt was issued to the by the claimants. She thus contended that she was not indebted to the claimants and thus the claim should be dismissed. In addition, she had continued to

8. On a preliminary issue as intimated herein above at paragraph 3, the Advocate for the claimant had conceded in the related matters, being Kisii MSET No. 1-19, where the claimants are the same that they would concede the issue of interest and if the claim is successful, will be content with interest at court rates in all these claims. Subject to the success of the claim, we shall apply court rates on interest.

ANALYSIS.

9. It is not in dispute that Mosiabano Self Help Group Is a duly registered association as contemplated under the Micro and Small Enterprises Act, 2012. It is also not in contention that the 1st and 2nd claimants were and still are the chairperson and secretary respectively of the said group. It is also admitted by both parties that the respondent was a member of the group during the relevant period.

10. From the evidence, it is not in contention that the respondent requested and was advanced a loan by the claimants. It is however disputed on whether he loan was repaid in part or in full.

11. The loan agreement form signed on the 20th November, 2017 indicates the loan request of Ksh. 111,110.00. In her evidence, she stated she received Ksh. 100,000.00.

12. For a member to benefit from the group's loans, one had to register and have shares in the group. It was not rebutted that prior to being granted the loan, a member had to put in shares in the group. In compliance, the respondent put in shares of Ksh. 30,000.00. I note that the claimant has not accounted for the same. It is not clear how the group has dealt with the respondent's deposits, in relation either to clearing part of the loan owed or interest accrued over the years.

13. As we have stated before, the claimants record keeping is thoroughly wanting. Had there been better records management, we would have no doubt witnessed fewer defaults and attendant legal claims of this nature.

14. That notwithstanding, it remains the duty of the claimant to prove and convince the tribunal, on a balance of probability that their claim is merited. In their favour though, most of the critical issues are not in dispute, we therefore have to determine two main issues:

- i. Has the respondent paid any or all of the amounts loaned to her?
- ii. Has any credit been given for the respondent's shares and the attendant interest thereon?

i. Has the respondent repaid any of the sums advanced to her?

We reiterate that the claimants have maintained a very poor record keeping culture. It makes it difficult to determine the repayment processes and documentation. It was however the responsibility of the respondent to also ensure that any payments were documented, in whatever form. In the present case though, the loan of Ksh. 100,000.00 is not disputed. Both the claimants and respondent are in agreement on this.

The respondent testified with clarity that the 2nd claimant herein did visit her shop, which she still runs, and was in the first instance paid Ksh. 50,000.00. On the second occasion, the respondent remitted to the 2nd claimant Ksh. 70,000.00 and the matter was deemed finalised. Indeed, the 2nd claimant informed the respondent that her shares of Ksh. 30,000.00 had accrued benefits and were now valued at Ksh. 180,000.00. The claimant denied these averments.

ii. Have the claimant's given the respondent credit for her shares?

From the evidence of both parties, it is clear that the claimant did not account for the respondents shares since 2017, of Ksh. 30,000.00. It would only therefore be fair that the shares be discounted from any award, if any, given in favour of the claimants.

DETERMINATION.

15. A close consideration of the evidence in this case, both by the claimants and respondents, we have no doubt that the two had a relationship arising from their membership and leadership in the Mosiabano Self Help Group. The respondent applied for a loan and was granted a facility of Ksh. 100,000.00.

16. In the evidence of the claimant, the respondent did not pay back the loan within the period proposed in the application or at all. This prompted the claimants to file the present claim.

17. The respondent however testified that while it was true the claimants lent her the stated sum, she repaid back the full amount in two instalments of Ksh. 50,000.00 and Ksh. 70,000.00 respectively. It was her firm contention that she did not owe the claimants any money and if at all any was owed, then it could be offset from her shares of Ksh. 30,000.00 which had accrued in value to Ksh. 180,000.00

18. We have asked ourselves why the claimants despite knowing where the respondent works or her place of business, they never made any effort to recover the loan from her. Indeed, there is no evidence that prior to this claim being filed, any demand was made for the respondent to repay this loan.

19. We are disinclined to allow this claim. We do not find that the claimant has discharged their duty of proof to the required standard, especially in view of the evidence of the respondent. We are persuaded by the assertions of the respondent that the 2nd claimant went to her shop and collected the due payments.

20. This position is fortified by the failure by the claimants to make any prior attempt to have the respondent pay or even engage her guarantors, who must have been well known to him. Additionally, the claimant did not formally address the respondent requiring her to pay any outstanding sums, if any.

21. In view of our determination above, we make the following orders:

1. The claimants claim is hereby dismissed.

2. The claimants to compute and pay back to the respondent the shares previously paid and not accounted to the respondent as at the time of this claim with the attendant interest based on the groups regulations.

3. The claimants to pay the respondents costs assessed at Ksh. 5,000.00

22. Orders accordingly.

Dated at Kisii this 2nd Day of March, 2020.

Joseph M. Were.....

Chairperson

Ocharo Kebira.....

Member

Annette Gikuya.....

Member