



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL NO. 41 OF 2019

**LUCY MIRIKO MATIRI, KIRIMI M'MWAMBA AND PETER MUTHURI MURITHI (Suing as
the Chairperson, Treasurer & Secretary of KAMUCII SELF HELP GROUP)APPELLANTS**

-VERSUS-

SHADRACK MURIUNGI MARETE.....1ST RESPONDENT

EVELYN GAKII2nd RESPONDENT

(Appeal against the Judgment of E. M. Ayuka S.R.M delivered on 28th March, 2019 in Nkubu Civil Suit No. 23 of 2016)

J U D G M E N T

1. The appellants are named as officials of **KAMUCII SELF HELP GROUP** and the respondents were members of the said group. The appellants instituted legal proceedings in the subordinate court against the Respondents for recovery of loans that the respondents were alleged to have taken from said group. The appellants therefore sought judgment against the respondents for Kshs. 129,486/= plus interest of 10% per annum from December 2015.

2. In their defence dated 9/5/2016, the respondents denied the claim in toto. The matter was heard and in its judgment dated 28/3/2019, the trial Court held that the plaintiffs were not armed with the requisite authority under **Order 1 rule 13 of the Civil Procedure Rules** and therefore dismissed the suit.

3. Aggrieved by the said judgment, the appellants preferred this appeal raising 5 grounds that can be collapsed into 3: -

a. That the trial Court erred in law by applying the provisions of Order 1 rule 13 (1) and (2) of the Civil Procedure Rules to the appellants' suit yet the same had not been pleaded.

b. That the trial Court erred and misapplied the holding in Mary Nyamathira Kibui v. Virginia Wanjiku Kimundia:- the appellants' case

c. That the trial Court's decision is against the spirit of Article 159 of the Constitution of Kenya 2010 and the Oxygen Rules (section 1A, 1B & 3A of the Civil Procedure Act).

4. As a first appellate Court, this Court is enjoined to re-evaluate and reconsider the evidence afresh with a view of making its own findings and conclusions having regard to the fact that it did not see the witnesses testify (**See Selle v. Associated Motor Boat Co. Ltd [1968] EA 123**).

5. PW1 Peter Muthuri Murithi told the Court that he was the Secretary of Kamucii Self Help (hereinafter "the group"). He testified that the respondents, who are man and wife, applied for loans in the year 2012 from the group. The 1st respondent applied for Kshs. 25,000/- while the 2nd respondent applied for Kshs. 31,000/-. The loans were to be repaid within 3 months from 18/11/2012 at an interest of 10% per month. The respondents defaulted in paying their loans and fell into serious arrears.

6. Subsequently, the 1st respondent approached the group on 16/3/2015 and asked them to consolidate the 2 loans and give him until 30/6/2015 to pay. The group agreed but he failed to honor his promise and was summoned to the Chief's office on 30/7/2015 where he asked for more time to pay Kshs. 129,000/- being the consolidated amount up to November, 2015. Although he entered into an agreement to do so, he nevertheless failed to pay the said amount.

7. **PW2 Joel Mwirigi Kirima**, the Chief of Mikumbune Location, recalled how the parties appeared before him and he wrote an agreement dated 30/7/2015 in which the respondents admitted to owing the group Kshs. 129,456/-.

8. In his testimony, **DW1 Shadrack Muriungi Marete** admitted that he was a member of the group and that he had taken a loan of Kshs. 25,000/-. However, he had on various dates repaid the loan without default. That the group had failed to pay his dividends claiming that the same was to be used to offset against the said loan. He stated that he was coerced into signing the agreement in the chief's office.

9. **DW2 Evelyn Gakii** also admitted to have taken a loan of Kshs. 31,000/- from the group. She repeated the testimony of her husband, the 1st appellant, as regards non-payment of dividends by the group and the agreement executed before the Chief.

10. The appellants' advocates filed their submissions which this Court has considered.

11. The first ground was that, the trial Court erred in applying the provisions of **Order 1 rule 13 (1) and (2) of the Civil Procedure Rules** to the appellants' suit yet the same had not been pleaded. It was submitted that the said rule was not applicable as this was not a representative suit. It was further submitted that, the application of the said rule had not been pleaded in the defence and could therefore not be raised at the submission stage.

12. **Order 1 Rule 13 of the Civil Procedure Rules** provides as follows: -

“13. (1) Where there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding, and in like manner, where there are more defendants than one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding.

(2) The authority shall be in writing signed by the party giving it and shall be filed in the case”.

13. It is crystal clear that the rule requires that, where there are more than one plaintiff or defendant, an authority by others is needed before any one or more of them brings a suit on behalf of the others.

14. The question is whether this provision was applicable in the suit before the trial Court. A look at the plaint shows that the plaintiffs pleaded that they were officials of an incorporated body known as Kamucii Self Help Group. The Certificate of Registration from the Sub-County Social Development Officer dated 10/12/2015 shows that the group was registered on 17/09/2009 as a Self Help Group.

15. Its registration as such was neither denied nor challenged. At the time of filing the defence, the respondents admitted the description of the plaintiffs in paragraph 1 of the plaint, that they were filing the suit as officials of the group. The admission was in paragraph 2 of the defence. That admission remained throughout the trial and remains as such to-date.

16. At the trial, **Peter Muthuri Murithi** testified as **PW1**. He told the Court that he was the Secretary of the Group. His position or those of the others in the group was neither denied nor challenged. Further, the existence of the group as an incorporated body was never challenged. The issue was first raised in the defendant's submissions filed on 18/12/2018.

17. From the foregoing, the respondents could not be allowed to raise the issue at the stage they did. This is so on the basis that they were bound by their defence. It is trite law that a party is bound by his/her pleading.

18. In **IEBC & Anor vs. Stephen Mutinda Mule & 3 Others [2014] Eklr**, the Court of Appeal quoted with approval the dicta of Judge Pius Adelemi J.S.C in the Nigerian case of **Adetoun Oladeji (NIG) Ltd. Vs Nigeria Breweries PLC S.C. 91/2002** wherein he stated: -

“... it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue must be disregarded”.

19. The respondents had admitted the descriptive parts of the plaint. In this regard, to the extent that the trial Court went outside the pleadings and entertained an issue that had not been raised in the pleadings, that was a misdirection which cannot be allowed to stand.

20. It was submitted by the appellants that **Order 1 Rule 13 (1) and (2)** is not applicable to the appellant's suit because Kamucii Self Help Group was suing the respondents through its office bearers. That self-help groups are not body corporates therefore they cannot sue or be sued in their own names. That they can only sue through their registered officers.

21. In support of that proposition, the appellants relied in the case of **Kituo Cha Sheria v. John Ndirangu Kariuki & Another [2013] Eklr**, wherein it was observed that: -

“As a general rule, unincorporated legal persons including societies, clubs and business-names can only bring proceedings through their registered or elected officials or in their proprietor's names.”

22. The basis for an unincorporated association lacking capacity to sue and be sued in its own name is clear. A voluntary association, being only a collection of individuals who in the absence of an enabling statute, cannot sue or be sued in the common name.

23. The proper course, as is the case with partnerships, is to sue through the registered officials of such an association. In such circumstances,

there would be no requirement for an authority to be filed. The requirement for authority in **Order 1** is to ensure that the orders to be made will be binding on all those involved. Accordingly, I hold that since the plaintiffs were suing as officials of the association, it was not fatal that they did not comply with the requirements of **Order 1 Rule 13** aforesaid. They were suing as officials of the group which was an incorporated body.

24. In view of the foregoing, the trial Court misapplied the decision in *Mary Nyamathira Kibui v. Virginia Wanjiku Kimundia [2017] Eklr.* In that case, the Court found that the plaintiffs had not disclosed in the plaint the positions they held in the unincorporated body. In the present case, the appellants put it bare in the plaint that they were suing as officials of the group. The trial Court was clearly in error.

25. Having found that the trial Court was in error, it is upon this Court to interrogate whether the appellants had proved its case to the required standard.

26. It should be noted that when the respondents filed their defence, they denied each and every allegation made by the plaintiffs. They denied having been members of the group or having taken any loans from the group.

27. However, in their undated witness statements which they adopted as their evidence in chief at the trial, they not only admitted that they were members of the group, but that they also admitted that they had received loans of Kshs.25,000/- and Kshs.31,000/-, respectively.

28. They contended however, that they had repaid the said loans on various dates and that the group had withheld their dividends allegedly to offset the loans. They further alleged that the agreement the 1st respondent signed on 30/7/2015 in the area Chief's office, was through threats and coercion.

29. The legal position is that, a party is allowed to plead his/her case in the alternative or without prejudice. In the present case, there was no such pleading in the defence of the appellants' case. The respondents denied every allegation in their defence. However, when they were confronted with the hard evidence, they admitted being members of the group and the loans but alleged that they had repaid the same. Having made such an admission, the burden of proof shifted to them to prove the alleged payment. This they did not.

30. There was the issue of interest. It was not clear whether the interest was 10% per month. If that was the case, it would be usurious and against public policy. To this Court's mind, what was admitted was Kshs.25,000/- by the 1st respondent and Kshs.31,000/- by the 2nd respondent. The rate applicable would be the usual court rate in suits as it was not proved that there was any contractual rate applicable.

31. There was doubt as to the circumstances the agreement to repay Kshs.129,456/- was entered into at the Chief's camp. There was no consideration on the part of the 1st respondent to shoulder the entire debt together with additional charges. That claim has no basis. Why was he to shoulder the 2nd respondents debt? It was not clear and it cannot stand.

32. As regards the respondents' claim that the group held their dividends, there was no counterclaim in their defence. They had made no demand for the same. They are at liberty to do so but they cannot be allowed to take other peoples monies and disappear into thin air. That won't do. They should have made a counterclaim if they intended to have it set off.

33. Accordingly, I allow the appeal. I set aside the judgment of the trial Court. I allow the suit before the trial Court as follows: -

- a. Judgment is entered for the appellants against the 1st respondent for Kshs.25,000/- together with interest thereon at Court rate from the date of filing suit until payment in full.
- b. Judgment for the appellants against the 2nd respondent for Kshs.31,000/- together with interest thereon at Court rate from the date of filing suit until payment in full.
- c. I award the costs of the appeal and trial Court to the appellants.

DATED and DELIVERED at Meru this 14th day of April, 2020.

A. MABEYA

JUDGE