



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL CASE NO. 656 OF 2015

ALLAN NJOROGE GATURU.....PLAINTIFF/RESPONDENT

VERSUS

NEW MILIMANI SACCO LIMITED.....DEFENDANT/RESPONDENT

JUDGMENT

1. **ALLAN NJOROGE GATURU**, the plaintiff, was at all material time a member of the defendant, **NEW MILIMANI SACCO LIMITED**. The plaintiff became a member of the defendant in the year 2011 and was assigned membership number 11968. As the name of the defendant will suggest it is a registered co-operative society. It is registered under the Co-operative Societies Act Cap. 490 of the Laws of Kenya. The plaintiff opened and operated a saving account with the defendant. The plaintiff obtained various loans from the defendant. It is in respect to one of those loans that this dispute arose.

2. The defendant did not file a defence in this matter, and on the plaintiff applying for default judgment to be entered on 5th October 2016 the Deputy Registrar of this court directed this matter be listed for formal proof. What however I find puzzling is that after that direction was given by the Deputy Registrar parties continued to conduct themselves as though the defendant had filed its defence. Parties attended court for case management conference (CMC). On 8th and 29th November 2018 the defendant's learned advocate informed the court that the defendant had complied with CMC, meaning that the defendant had filed its pleadings and documents it intended to rely on. I have perused the court file and I am unable to find such a defence or documents filed by the defendant.

3. On 16th October 2019, when this case was fixed for full hearing, parties entered consent that this case be tried based on the affidavits and submissions on record. Whereas the plaintiff has filed affidavits, witness statements, and submissions the defendant only filed a replying affidavit sworn by Julius Kiburi Wambugu on 5th February 2016.

4. The plaintiff's case is that the defendant failed to credit payments he made towards his loan and the plaintiff therefore seeks injunctive orders to restrain the defendant from realizing its security by selling the plaintiff's property which secured the plaintiff's loan; an injunction ordering the defendant to release to the plaintiff the share certificate of plot No. 233B within LR. NO. 7340/69 Embakasi; for an order that the defendant do reimburse the amount recovered from the plaintiff's saving account to pay for the loan; injunction to stop the defendant from reporting the plaintiff's name to the Credit Reference Bureau; and an award for general damages.

5. The plaintiff obtained a loan on 26th March 2015, from the defendant, for ksh.12,000,000. His loan application form indicated that the plaintiff would repay that loan in form of cash on 20th day of every month starting from 20th April 2015. The repayment period was for 12 months. The loan application form also shows that the defendant's field officer was Judy Muriithi. The plaintiff's evidence is that payments daily were channeled to the defendant through that field officer. The field officer often noted in the payments in a passbook but failed to issue a receipt through Process Data Quickly (PDQ) on the explanation that the PDQ machine was faulty. The procedure was that once the passbook was full it was taken by the defendant's field office for that officer to have a new one issued by the defendant's office. The old and filled up passbook, however, would be returned to the loanee. In the case of the plaintiff the passbook got full and the field officer, on 9th October 2015, took the passbook from the plaintiff with a promise to return it and to bring a new one. The old passbook was not returned even though the plaintiff requested the field office to avail it. That reluctance to return the old passbook led the plaintiff to make inquiries at the defendant's office. On making inquiry the plaintiff was informed that his loan was in arrears. He was also informed that the money he was paying to the field officer was not remitted to the defendant. It is then that the defendant intimidated the plaintiff that it would notify the Credit Bureau of the default and would realize its security. It is that threat which provoked the plaintiff to file this case.

6. The plaintiff's case is that by the time he was informed that the field officer was not remitting his payments to the defendant he had a loan balance of Ksh. 31,600 which he calculated by deducting the principal amount plus interest of the loan, KSh.1,259,600.00 from the amount he paid to the defendant through its field officer, Ksh.1,228,000.00, which left balance of Ksh.31,600.00.

7. The defendant has not controverted that evidence by defence. The defendant only filed a replying affidavit by which the defendant faulted

the plaintiff for not producing in evidence the filled-up passbook.

ANALYSIS AND DETERMINATION

8. The only issue for determination is, did the plaintiff make payment to the field officer.

9. The uncontroverted evidence is that the plaintiff made payments to the defendant's field officer. That contention is supported by the evidence of the plaintiff and that of the plaintiff's employee, Beatrice Mumbi Nundu, the person mandated to make payment on daily basis to the field officer. The fact that the field officer failed to remit the plaintiff's payments is supported by the defendant's action of reporting and making a complaint to the police that its field officer, Judy Muriithi had stolen money as an employee. That complaint is evidenced by the occurrence Book at the police station where it was noted:

“Stealing by servant- where one employee of the Milimani Sacco stole cash Ksh.1,172,000 which she had collected from unsuspecting members amongst them one Allan Njoroge Gaturu”

10. Further there is an affidavit sworn by a police officer, namely Patrick Mangeni, whereby he stated that that report of theft by servant, that is by Judy Wakabari Muriithi, was reported on 19th October 2015, at the Central Police Station by the defendant. That police officer stated in his affidavit that the case against that employee of the defendant was still under investigation.

11. The evidence before court is clear that Judy Muriithi was an employee of the defendant. The defendant is therefore liable for that employee's acts. In that regard I refer and rely on the case **CHESIRE & ANOTHER V Hz company limited (1982) eklr**, thus:

“However, as Sir Charles Newbold P said in Muwonge v Attorney General of Uganda [1967] EA 17:

“... the legal position is quite clear and has been quite clear for some considerable time. A master is liable for the acts of his servant committed within the course of his employment ... The master remains so liable whether the acts of the servant are negligent or deliberate or wanton or criminal. The test is: were the acts done in the course of his employment.”

This dictum accords in my view with the principles enunciated in Limpus v London General Omnibus Company [1862] 1 H & C 526.

More recently, in A & W Hemphill Ltd v Williams [1966] 2 Lloyd's List Reports, Vol 2, 101, Lord Pearce (with whose speech the four other Law Lords concurred) referred with approval to the following extract from Salmond on Torts, 13th Edition at page 133:

“The master is exempt only when the servant was exclusively on his own business.”

In the instant case the employee was on duty at the material time.”

12. Having found that the defendant liable for the acts of its field officer, Judy Muriithi, who indeed was acting within the scope of her employment, it follow that the onus of proving that that field officer did not collect money from the plaintiff falls on the defendant. The defendant did not disprove the plaintiff.

13. It follows that my finding is that the plaintiff has proved he made payments towards his loan through the defendant's field officer. Having made that determination the plaintiff is entitled to the payer of declaration that his indebtedness to the defendant is Ksh. 31,600. The defendant held in credit, in the plaintiff's account, of Ksh.536,858.21. On subtracting the amount due from the defendant, the amount due to the plaintiff is Ksh.505,258.21. The plaintiff will get judgment for that amount. The plaintiff is also entitled to the prayers for injunction. Since the plaintiff has succeeded in his claim, he shall be awarded costs of this suit.

14. In the end this is the judgment of the court:

a. An order of injunction is issued restraining the defendant, its servants or agents, from in any way dealing with or selling or advertising for sale the plaintiff's interest held in the Share Certificate of Plot No. 233B within LR 7340/69 Embakasi.

b. The defendant shall within 30 days from the date of this judgment deliver to the plaintiff Share Certificate of Plot No. 233B within LR 7340/69 Embakasi.

c. An injunction is hereby issued restraining the plaintiff from submitting the plaintiff's name to the Credit Bureau in respect to the loan issued by the defendant to the plaintiff on 26th March 2015.

d. Judgment is entered for the plaintiff against the defendant for Ksh. 505,258.21 with interest at court rate from the date of filing this suit until payment in full.

e. The plaintiff is awarded the costs of this suit.

DATED, SIGNED and DELIVERED at NAIROBI this 5th day of MAY, 2020.

MARY KASANGO

JUDGE

ORDER

In view of the measures restricting court operations due to the **COVID-19 pandemic** and in light of the Gazette Notice No 3137 of 17th April 2020 and further parties having been notified of the virtual delivery of this decision, this decision is hereby virtually delivered this **5th** day of **May, 2020**.

MARY KASANGO

JUDGE