



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYAMIRA**

**CIVIL APPEAL NO. 17 OF 2017**

1. JANE MOGERE.....1<sup>ST</sup> APPELLANT
2. STEPHEN MOGERE OMBUNA.....2<sup>ND</sup> APPELLANT
3. PRISCA KERUBO GATINA.....3<sup>RD</sup> APPELLANT
4. BONIFACE GATINA OMBUNA.....4<sup>TH</sup> APPELLANT

= VRS =

1. CHARLES OCHOKI OMARI.....1<sup>ST</sup> RESPONDENT
2. ALSATAN MAYOYO.....2<sup>ND</sup> RESPONDENT
3. SCHOLASTICAH MORAA MOTARI.....3<sup>RD</sup> RESPONDENT
4. NYAMANENGO SELF HELP GROUP.....4<sup>TH</sup> RESPONDENT

{Being an Appeal against the Ruling of Hon. J. Mwaniki – PM

dated and delivered on the 4<sup>th</sup> day of May 2017

in the original Keroka PMCC No. 107 of 2014}

**JUDGEMENT**

This is an appeal against the ruling of the lower court dated 4<sup>th</sup> May 2017. The gist of this appeal is that the trial Magistrate erred in dismissing the appellant’s application dated 6<sup>th</sup> October 2016 for lack of merit whereas the order/decree in respect to the application was not on costs but in regard to a sum of Kshs. 2,853,726/= allegedly due to the respondents.

This appeal was canvassed by way of written submissions which I have considered fully but as an appellate court I have considered the record of the lower court so as to arrive at my own independent conclusion. In the lower court the claim by the appellants was for: -

**“(a) Accounts and on (sic) declaration that the plaintiffs do not owe the defendants any outstanding loan.**

**(b) Costs of the suit.”**

On 6<sup>th</sup> April 2016 the trial court issued a decree as follows: -

**“1. The court orders the defendants to provide accounts and any requisite documents relating to the loan (s) taken by the plaintiffs and repayments thereof.**

**2. The court also makes no orders as to costs until the order for accounts I complied with.”**

The record shows that once the statements of accounts were filed and specifically on 16<sup>th</sup> June 2016 the court ordered that the appellant be notified to respond to the accounts. The matter was then fixed for mention on 21<sup>st</sup> July 2016. Come that date the appellants did not attend and the court reserved its ruling on the accounts. The ruling delivered on 6<sup>th</sup> September 2016 dismissed the appellant's suit against the respondent with costs. Again the record shows that on 6<sup>th</sup> October 2016 the respondents' costs were assessed at Kshs. 67,529/= and a certificate of costs of even date issued. Subsequently on 6<sup>th</sup> October 2016 C. A. Okenye Advocates filed a Notice of Motion to stay execution of the decree which they also sought to review or set aside. The gist of the notice of motion was that it was not in conformity with the order of the court; in that the court merely dismissed the suit with costs and as there was no counterclaim then there could not have been any other decree, other than a decree for costs which the respondent could execute against the appellant. In this appeal the appellant alludes to another decree for Kshs. 2,853,726/= and contends that ***“the trial Magistrate failed to note that the defendant was using the decree dated 6/4/2016 to recover the amount of Kshs. 2,853,726”*** (see ground 4 of the Memorandum of Appeal).

Having perused the record of the lower court myself, I have not come across any other decree save for the one dated 6<sup>th</sup> October 2016 and which in my view, being a certificate of the defendants' (respondents) costs was fully in conformity with the ruling of the court which dismissed the appellants' suit with costs to the respondents. The decree is for a sum of Kshs. 67,529/= but not for Kshs. 2,853,726/=. Indeed, even the notice to show cause issued on 1<sup>st</sup> November 2016 is for Kshs. 67,529/=. Apart from making reference to another decree for Kshs. 2,853,726/= and an attempted execution for that amount, the appellant has not annexed any such decree or execution proceedings in that regard. The trial Magistrate dealt with the application before him and the prayers in that application were very specific. They were: -

- “(a) That this application be certified urgent.**
- (b) That there be a stay of execution of decree pending the hearing and determination of this application.**
- (c) That the decree herein be reviewed and set aside.**
- (d) That the degree (sic) is not in conformity with the dismissal order dated 6/9/2016.**
- (e) That the respondents be condemned for costs of this application.”**

The application did not either in its body or the grounds thereof allude to a decree for Kshs. 2,853,726/=. That sum was alluded to in the supporting affidavit where the deponent deposed that he had been served with a demand letter for Kshs. 2,853,726/=. With due respect a demand letter and decree of the court are distinct and cannot be regarded as being the same. The ruling of the trial court in the application bore no error and consequently this appeal lacks merit and it is also dismissed with costs to the respondent. It is so ordered.

**Signed, dated and delivered in Nyamira this 4<sup>th</sup> day of July 2019.**

**E. N. MAINA**

**JUDGE**