



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT HOMA BAY

CIVIL APPEAL NO.34 OF 2016

JOHN OCHIENG..... 1ST APPELLANT

EUNICE AKINYI.....2ND APPELLANT

STEVEN OTIENO NGURE.....3RD APPELLANT

ALPHAEUS OCHIENG..... 4TH APPELLANT

(All suing in a representative capacity as officials of

Asumbi Andigo Self Help Group)

VERSUS

SIMEON ODHIAMBO MBUOR RESPONDENT

(Being an appeal from the judgment of the CM's Court Homa Bay delivered on 4th August 2016 in Homa Bay Civil Suit No.15 of 2014 – N. Kariuki, RM)

JUDGMENT

1. The appellants, **John Ochieng, Eunice Akinyi, Steven Otieno Ngure** and **Alphaeus Ochieng**, in a plaint dated 5th February 2014 and filed at the Chief Magistrate's Court Homa Bay on 6th February 2014 on behalf of **Asumbi Andigo self Help Group**, claimed a sum of Kshs.12, 350/= together with interest and costs of the suit from the respondent, **Simeon Odhiambo Mbuor**, who was a member of the aforestated self-help group.

2. It was alleged that on or about the 21st December 2012, the respondent (defendant) was advanced a loan of Kshs.10, 000/=, by the self-help group after applying for the same. As per the terms of the loan agreement, he was to repay the loan within a period of three (3) months from the date of issuance but in breach of the agreement made a part payment of Kshs.3,000/= and refused or failed to pay the outstanding balance despite several demands to do so.

3. The appellants (plaintiffs) therefore filed the present suit and prayed for judgment against the respondent for the claimed amount.

The respondent in a statement dated 27th March 2014 and filed in court on 29th March 2014, denied the claim and contended that he repaid the loan advanced to him. He also contended that he even made over payments that were to be treated as his shares in the self-help group. He further contended that the suit against him was premature as out of court settlements were not exhausted. He therefore prayed for the dismissal of the suit.

4. After a full hearing of the suit, being **CMCC No.16 of 2014**, the Learned Resident Magistrate concluded that the plaintiffs (appellants) had failed to prove their case against the defendant (respondent). Consequently, the case was dismissed with costs to the respondent.

Being aggrieved by the trial court's judgment, the appellant mounted the present appeal on the basis of the grounds contained in the memorandum of appeal filed herein on 19th August 2016.

5. The appeal was canvassed by way of written submissions and in that regard, the appellants filed their submissions on 4th May 2018,

through the firm of **Nyauke & Co. Advocates**, while the respondent filed his submissions in person on the 18th May 2018.

At this point, the duty of this court was to revisit the evidence and arrive at its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses. Such guideline was affirmed in **Selle –vs- Associated Motor Boat Co. [1968] EA 123**. (See also, **Abdul Hameed Saif –vs- Ali Mohamed Sholan (1955) 22 EACA 270**).

6. Having given due consideration to the grounds in support of the appeal as well as the rival submissions of both parties and also having considered the evidence led at the trial by the appellants, John Ochieng (**PW1**) in his capacity as the chairperson of the self-help group, Stephen Otieno Ngure (**PW2**) in his capacity as the secretary of the group and Eunice Akinyi (**PW3**) in her capacity as the treasurer of the group as well as the evidence led by the respondent, Simon Odhiambo Mbuor (**DW1**). It became apparent to this court that there was no substantial or any dispute that indeed a loan of Kshs.10, 000/= was advanced to the respondent by the appellant self-help group.

7. The bone of contention was whether the respondent acted in breach of the terms of the loan agreement by failing to repay the loan amount or part thereof.

In the opinion of the trial court, the payment receipts produced in court by the respondent were not disproved by the appellants by way of evidence of an expert to confirm that they were forged documents as alleged by the appellants.

8. The receipts were therefore found to be genuine and treated as proof that the loan was fully repaid by the respondent as contended by himself. Therefore, the appellants' case was dismissed with costs to the respondent for want of proof on a balance of probabilities. It was however, noted by the trial court that both parties had acknowledged the existence of a pending criminal case against the respondent for forgery of the receipts he produced as evidence in this matter.

The court opined that the existence of the criminal case was not proof that the receipts produced by the respondent were fake as the criminal case had not been determined as at the time of the delivery of the impugned judgment.

9. In this court's opinion, whereas the existence of the criminal case against the respondent could not prove that the receipts he produced in this case were false documents, nonetheless, it did cast great suspicion that the receipts may not have been genuine and were most probably fake documents given the appellants' contention in the trial that the respondent actually admitted that the receipts were fake and offered to settle the matter out of court.

10. The respondent's admission which was not contested or disputed in his cross examination of the appellants did in fact disprove the receipts as being genuine and confirmed that the respondent did not repay the full loan as agreed and that the attempts to realize the security pledged by himself for the repayment of the loan i.e. a sewing machine, were thwarted by himself when he deliberately involved the police in a matter which did not fall within their realm.

11. It may also be noted that the receipts formed the bedrock of the respondent's defence and were admitted by the trial court as proper evidence in proving the respondent's contention that he fully repaid the loan advanced to him, yet there was clear indication from the respondent's evidence that the receipts were not the originals or were not certified as copies of the original. Further, the signatures of the receiving officials were all different thereby raising more suspicion that the receipts may not have been genuine.

12. To a large extent the respondent dwelled on the interest chargeable on the loan but this was not an issue in dispute nor was it pleaded in the statement of defence.

It is for all the foregoing reasons that this court must find and now finds that the judgment of the trial court was against the weight of the evidence.

In that regard, grounds one, two, three, four and six are hereby sustained.

Grounds five and seven are unsustainable for want of proper basis and for being an unwarranted personal attack on the competence of the trial court.

13. Otherwise, the appeal is allowed to the extent that the judgment of the trial court be and is hereby set aside and substituted with a judgment in favour of the appellants as prayed in the plaint.

The appellants shall be entitled to the costs of the appeal.

Ordered accordingly.

J.R. KARANJAH

JUDGE

02.07.2019

[Delivered and signed this 2nd day of July, 2019].