REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 495 OF 2018

(CORAM: F. GIKONYO J.)

CHAI HOUSING CO-OPERATIVE SOCIETY LTD............APPELLANT

Versus

MARIE WAMBUI THANDE...RESPONDENT

(An appeal from the judgment and decree of the Co-operative Tribunal Court

at Nairobi delivered on the 15th October 2018)

JUDGMENT

[1] The appellant being the defendant in the trial court was aggrieved by the whole decision of the trial court in which the respondent was awarded Kshs. 1,007, 000/- plus costs and interest of the suit. They filed the appeal and challenged the whole decision. The grounds of appeal contained in the Memorandum of Appeal dated 11th October 2018 could be summarized into two (2) issues:

a. Whether the respondent was a member of the appellant

b. Whether the respondent has proved her claim of Kshs. 1,007,000/- against the appellant

Submissions

[2] The appeal was canvassed by way of written submissions. The appellant submitted that the respondent was not its member as no membership application form had been signed or approved. They also argued that they did not receive any monies from the respondent to purchase plots. It had notified all its members to the effect that no cash payments were to be made. That there is an express disclaimer that it would not be liable for any losses incurred by members should one elect to transact in cash. They argued further that the receipts produced do not state what plot numbers were being paid for. Its protestation is that the receipts were forgeries, fabricated and altered. Besides, the respondent did not produce any document to show that there was indeed a contract for sale of the alleged plots.

[3] The respondent's submitted that she proved her case based on the standard of probability thus the court ought to uphold the judgment of the tribunal. The grounds of appeal do not hold water for through its employees the appellant received Kshs. 1,007,000/- as payment of some plots of land that were never delivered to her. She claimed that the tribunal did not ignore any evidence placed upon it neither did it err in their findings. The appellant is responsible for the actions of its employees, who are the third parties, so long as it is done in the scope of their work or their employment. Thus, the appellant is liable to indemnify the respondent. The fact that the appellant's employees who were served with third party notices never appeared in court does not in any way exonerate the employer from its responsibility.

ANALYSIS AND DETERMINATION

[4] This court being the first appellate court should evaluate the evidence and come to its own conclusions expect being reminded that it neither saw nor heard any witnesses. See **Selle & Another v Associated Motor Board Company Ltd [1968] EA 123**.

Analysis and Determination

Was the Respondent a member of the Appellant?

[5] Whether the respondent was a member of the appellant has been touted by the Appellant as one of the issues for determination. According to **CW1 Marrie Wambui Thande** in November 2014 she went to the appellant's office where she met Gerald, the manager of the appellant. She paid Kshs. 6,600/- for registration, capital and administration fees (*Receipt No. 1*). **RW1 Eliud Ntage Githinji**, committee member and chairman investment committee stated that the membership is approved by the board. The respondent neither filled in the application form nor does her name appear in the list of members.

[6] The respondent produced a receipt that shows payment of the requisite fees for registration as a member. However she has not produced any documentation to show that she is a member. She did not follow through on the stipulated procedure provided by the appellant for one to become a member of the SACCO. Her name does even appear in the list of members. Consequently, I find that the respondent is not a member of the appellant.

Where does her claim therefore lie?

[7] The Respondent's claim lies in money paid to the Appellant. The question is: whether the respondent has proved her claim of Kshs. 1,007,000/- against the appellant. **CW1** testified that she was informed by the appellant's employees, Michael and Gerald, that they were selling plots in Kitengela and Juja areas. They took her to the said plots where she viewed and decided to buy plots Nos. 11, 12, 49, 50, 68, 69, 106 and 107 at Kitengela and Plot No. 151 and 152 at Juja. Between 3rd November 2014 and August 2015 she made several installment deposits at the appellant's office for the plots making a total of Kshs. 1,007,000/- which was received by them at the appellant's offices.

[8] According to **RW1** they did not receive any money from the respondent as alleged. They have a no cash policy. When a member purchasers a plot they get an application form for purchase of the plot which shows the plots requested and the mode of payment. Notices put on the notice board show that payment is made through payroll or directly to the bank or by cheques. No cash was made at the office. He acknowledged that Gerald Angweya and Michael Kirago were their manager and accountant respectively at that time. Thus, two ought to be held liable.

[9] The respondent stated that she went to the appellant's office where she gave their employees the money which they received and issued her with the receipt. **RW1** confirmed that the receipts are theirs but those are not their serial numbers; but a member would not know that.

[10] Whether the serial number is legit or not is a matter that is within the internal mechanism and affairs of the Appellant. It is exactly for such matters that the Turquand rule formulated from the case of **Royal British Bank v. Turquand (1856) 6 E & B 327** it seeks to protect third parties dealing with the company. Again, the two third parties were employees of the company and held senior positions which carried real or ostensible authority to act for the Appellant. Again a third party such as the Respondent was not required in law to enquire whether these officers had real authority to transact the business of selling plot for the company. See Gower's Principles of Modern Company Law on the rule in Turquand's case and on the fore-stated position that:

> **"This rule was manifested based on business convenience, for business could not be carried out if everybody who had dealings with a company had meticulously to examine its internal machinery in order to ensure that the officers with whom he dealt with had actual authority. Not only is it convenient, it is also just. The lot of creditors of a limited company is not particularly happy one: it would be unhappier still if the company could escape liability by denying the authority of the officers to act on its behalf". (Emphasis added)**

[11] Accordingly, the Respondent in dealing with the company is entitled to assume that internal company rules are complied and that the two officers herein had authority to transact the business herein for the Appellant. The respondent gave the appellant's employees the money she did not think that she was being given a fake receipt. .

[12] Are the appellant's liable for the actions of their employees? According to Sir Charles Newbold P ***Muwonge v Attorney General of Uganda*** **[1967] EA 17** he said that:

> **"... 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."**

[13] The respondent produced receipts by the appellant which indicated that she was paying money for plots which were being sold to her by the Appellant. The Contract Act recognizes that kind of incorporation of the terms of sale of land in a document by being set out in it or by reference to some other document. That aside, the two appellant's employees were in their course of employment engaging in society functions when they received the money. From the evidence the Appellant was also in the business of selling plots and although the Respondent did not follow through on the process of becoming a member she paid registration fee. The two employees received the money in the premise of the Appellant and used their positions held which were senior positions of authority, i.e. manager and accountant, to receive and received money from the Respondent on behalf of the Appellant and in the offices of the Appellant. The Appellant is therefore vicariously liable for the actions of these two employees who in the course of their employment received money from the Respondent herein.

[14] On vicarious liability see t decision by the Court of Appeal in the case of **Tabitha Nduhi Kinyua v Francis Mutua Mbuvi & another [2014] eKLR stated that:-**

> **"The principle of vicarious liability is an anomaly in our law because it imposes strict liability on an employer for the delict of its employee in circumstances in which the employer is not itself at fault. An employer will be held to be vicariously liable if its employee was acting within the course and scope of employment at the time the delict was committed."**

[15] It bears repeating, that on the basis of vicarious liability, the appellant is entitled to compensate the respondent the money their employees received. The appellant went ahead and compensated the respondent's sister her Kshs. 850,000/- which was traced in their accounts. However, even though the money was not deposited into their accounts they are liable.

[16] Before I close, I find the argument by the Appellant that the two employees should be made liable for the money they received to require further discussion. According to the appellant it filed its defence and enjoined third parties who allegedly received payments from the respondents. The third parties failed to enter appearance or file any defence and consequently judgment in default was entered against them on 5th April 2018. They claimed that these two ought to be liable for their fraudulent acts and should be held liable for any amount to be due and owing to the respondent. I will tackle this argument from the point of law.

[17] According to order 1 rule 21 of the Civil Procedure Rules:-

> **21.(1) Where a third party makes default in entering an appearance in the suit, and the suit is tried and results in favour of the plaintiff, the court may either at or after the trial enter such judgment as the nature of the suit may require for the defendant giving notice against the third party: Provided that execution thereof shall not be issued without leave of the court, until after satisfaction by such defendant of the decree against him.[Underlining mine]**

[18] In light thereof, the Appellant ought to have followed through the due procedure on third party proceedings and recover what it has paid to the Respondent herein. I rest the issue there.

[19] The foregoing analysis leads me to this finding and order: that the appeal has no merit and is dismissed with costs to the respondent.

Signed and dated at Meru this 7th day of November, 2019

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F. GIKONYO

JUDGE

Dated, signed and delivered in open court at Nairobi this 13th day of November, 2019

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L. NJUGUNA

JUDGE