



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL CASE NO. 28 OF 2015

NCUNGURU WENDANI WOMEN GROUP SUING THROUGH

GRACE KAGENDO.....1ST APPELLANT

WINFRED NKATHA.....2ND APPELLANT

VERSUS

LILIAN MUTHAMIA.....1ST RESPONDENT

ESTON MACHARIA.....2ND RESPONDENT

EZEKIEL KATIWA.....3RD RESPONDENT

NICHOLAS MWENDWA.....4TH RESPONDENT

KENYA WOMEN MICROFINANCE

BANK LIMITED.....5TH RESPONDENT

JUDGEMENT

The appellants Ncungure Wendani women Group through Grace Kagendo and Winfred Nkatha had sued, Lilian Muthamia, Eston Macharia, Ezekiel Kaitiva and Nicholas Mwenda and Kenya women Finance Trust in Maua CMCC No. 78 of 2012, but were aggrieved by the finding of the trial court and they preferred the appeal herein.

In the trial court the magistrate found that the defendants were dishonest in failing to disclose and give accounts of what they had attached but the plaintiff didn't specify and prove that respondents had illegally attached items not forming part of collateral.

The trial Magistrate faulted the plaintiffs/Appellants for merely saying many things were taken from their houses without specifying. It was found that appellants didn't prove that what respondents attached was not part of collateral.

The trial court also found that the appellants failed to give account of their repayment of loan taken from 5th Respondent and there was no such prayer and therefore it was not canvassed as they avoided it.

In the 3rd issue the trial court found out that the appellants owed the Respondents and therefore in default the 5th Respondent had a right through its agents, 1st, 2nd, 3rd and 4th Respondents to realise the securities given by the appellants herein.

The trial magistrate found that the attachment was illegal and vitiated and he declared it unlawful for failure to comply with clause 7 of the 3rd schedule to the Chattels Mortgage Act. He declared the defendants/Respondent action illegal for failing to comply with mandatory provisions of the law.

It was held that they made a blunder. However the trial magistrate found that the plaintiff's case was not pegged on lack of being given statutory notice and since parties are bound by their pleadings the court was not going to make an order based on evidence that was not backed by pleadings.

It was also found that appellants didn't prove that the Respondents took their Kshs 89,000/= and the claim also failed.

The plaintiff/Appellants in plaint dated **20th March 20...** The plaintiffs/Appellants claimed in the plaint that they decided to bank money in the 5th defendants bank account when its agents failed to issue them with receipts but following decision to pay in this manner, the 1st, 2nd, 3rd and 4th Respondents acting on behalf of the 5th defendant illegally, unlawfully and forcefully invaded their homesteads and business premises taking all their essentials, business tools, household goods and cash. They gave particulars of illegality as the part of the Respondents and also gave particulars of the items taken from their houses and business premises.

They also gave particulars of loss as follows:-

- a) Loss of their necessities and household goods
- b) Loss of cash Ksh 89,000/=
- c) Illegal attachment of their goods
- d) Loss of business revenues due to illegal attachment of tools of trade.
- e) They stated in their plaint that their savings with 5th defendant were much more than the loan they took and the savings should have been treated as security for the default if any.

They also stated that the value of the goods taken by the defendants was much higher than the loan balance claimed by the defendants and that the goods were not collateral for the loan facility. That as a result of the Defendants actions they had suffered loss of business and humiliation.

Being 1st appellate court, I have a duty to re-examine the evidence on record and determine whether the trial court arrived at its findings based on the law and the evidence on record.

I have gone through evidence on record and I do agree with the trial court that the appellants generalised their claims. It would appear from the loan application forms and indeed PW2 confirmed that 20 members of the group out of 24 took loans from the 5th defendants and that they paid back in instalments upto 20th March 2012 and when they didn't get receipts, they stopped paying. She said there are people who had balances to pay and that it was Ksh. 89,000/= which defendants took forcefully. PW2 said they advised their members not to repay the loan until they got the repayment receipts that they were demanding. The members of appellant group appears to have been taking loans individually but paying collectively by guaranteeing each other and if one defaulted then all would be liable.

I think what I would have expected from the appellants is to give an account of what loan each member was given and the repayment schedule for each member.

This court would also have expected the members to produce evidence of payment whether by M-Pesa or through the 5th defendant's bank account.

The court would have expected the appellants to particularize the items that each member had offered as Chattel Mortgage to secure the loan against what was allegedly taken from them. As it stands one can't tell whether what is listed was taken from the 1st, 2nd or 3rd plaintiff and whether what was taken was given as security for any loan.

It therefore becomes difficult based on the evidence of the 2 appellants to make a finding that they are entitled to any kind of damages whether special or general. The only reprieve that this court would give the appellants and the other members of the group is that the 5th defendant has a duty to refund their savings which I have seen is spelled out in the documents filed in court being that they already attached goods that had been used to secure loan facility by the appellant group members. The appeal can't stand and it is dismissed.

Each party will bear their own costs.

HON. A.ONG'INJO

JUDGE

JUDGEMENT DELIVERED, DATED AND SIGNED IN COURT ON 12TH OCTOBER 2018.

In the presence of:

C/A: Penina

Appellants: N/A

Respondents : Mr Abubakar for

Order

Copies of judgement to be supplied to parties at their costs.

HON. A.ONG'INJO

JUDGE