



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL APPEAL NO. 73 OF 2012**

**BANDARI SACCO LIMITED.....APPELLANT**

**VERSUS**

**1. CHRISTOPHER I. OKWI**

**2. DAVID KARIUKI**

**3. ANNAH W. TIPIS**

**4. JON O. OMINGO**

**5. MARY MUGHO**

**6. SAMSON DOYO.....RESPONDENTS**

**J U D G M E N T**

1. This an appeal by a co-operative society against a judgment by the co-operative Tribunal by which the tribunal ordered the appellant to refund to the respondents, its co-operators, their various shares utilized to pay an indebtedness of the 7<sup>th</sup> Respondent after he defaulted to pay a loan granted to him and guaranteed by the 1<sup>st</sup> – 6<sup>th</sup> Respondents.

2. The claim as pleaded in the statement of claim was that the 1<sup>st</sup> – 6<sup>th</sup> Respondents guaranteed the 7<sup>th</sup> respondent a loan of Ksh.2,000,000/= from the Appellant. The 7<sup>th</sup> Respondent defaulted in payment of the loan due to loss of his job with the appellant. In their claim before the tribunal the 1<sup>st</sup> -6<sup>th</sup> Respondent blamed the Appellant for unilaterally recovering the total sum of Kshs.2,000,000/= despite the fact that the 7<sup>th</sup> Respondent had paid the loan directly to the appellant. On that basis the 1<sup>st</sup> -6<sup>th</sup> respondent prayed that the Appellant be restrained from attaching their shares and to reinstate the said shared with all dividends for May 2007 to the date of the filing the claim being the 08/07/2010.

3. In its statement of defence the Appellant admitted the description of the parties and the existence of the loan and guarantee agreement but denied having been wrong in recovery of the guaranteed sums from the 1<sup>st</sup> – 6<sup>th</sup> Respondents while contending that the recovery was done contractually, lawfully and legitimately and in accordance with the loan agreement policy which was well within Respondents knowledge after the Respondents were made aware of the default by the loanee.

4. All the particulars of wrongdoing and malice were denied with a contention that the 1<sup>st</sup> – 6<sup>th</sup> Respondent had a remedy by way of recovery from the 7<sup>th</sup> Respondent through the available legal avenues. It was then pleaded, without prejudice, that after the recovery, the 7<sup>th</sup> defendant, had by a standing order of Kshs.26,000/= remitted to the appellant payments which were then applied to refund the 1<sup>st</sup> -6<sup>th</sup> Respondents on *pro-rata* basis. The Appellant denied having been served with any demanded before suit but added that the same would have been of no consequence.

5. For the 7<sup>th</sup> Respondent, a defence was filed which admitted the loan and the fact of default which persisted for a period of six (6) months but contended that at the time the aggregate arrears outstanding was Kshs.277,000/= which was the only sum the Appellant could have recovered and not the entire loan. It was then contended that in accordance with the Act, Rules and Society's Bye- Laws and the loan policy only the balance of the loan was due for recovery and that in seeking to recover the sum loaned the Appellant acted illegally, unlawfully, arbitrarily and with impunity. He supported the claim by the 1<sup>st</sup> – 6<sup>th</sup> Respondents and prayed that the judgment be entered as prayed.

**Evidence led**

6. For the 1<sup>st</sup> – 6<sup>th</sup> Respondents, 1<sup>st</sup>, 4<sup>th</sup>, 6<sup>th</sup> and 2<sup>nd</sup> Respondents gave evidence; the essence of their evidence is that indeed they guaranteed the 7<sup>th</sup> Respondent a loan of some Kshs.2,000,000/=; that the 7<sup>th</sup> respondent defaulted on account of loss of his job, they were notified of the default and subsequent recovery of the guaranteed sums by letters dated May 2007. In cross examination, they said that there was some little money trickling into their accounts but complained that it was too little and would take too long to effect full recovery. In fact the four said they received letters informing them of default in January and calling for a meeting which none of them attended.

7. For the appellant, one John Ogutu Ragana gave evidence. He said that the 7<sup>th</sup> Respondent defaulted for 6 months and the shares belonging to guarantors, 1<sup>st</sup> -6<sup>th</sup> Respondents, were attached to pay the loan and that after recovery the 7<sup>th</sup> Respondent gave standing order instructions in the sum of Kshs.26,000/= from March 2008 which it was using to refund the shares belonging to 1<sup>st</sup> – 6<sup>th</sup> Respondents in a *pro-rata* way. He denied any malice in the recovery and that the payment by the 7<sup>th</sup> Respondent was distributed to all the 11 guarantors as shown on a worksheet produced.

8. On cross-examination and on the disparity between the sums demanded and that actually recovered, the witness said there was application of interests upon default creating the increase. On the duration of the loan to the 7<sup>th</sup> Respondent, the witness said that the 7<sup>th</sup> Respondent was the General Manager of the Appellant and headed the team approving the loans. He repeated that there was a default for 6 months before the recovery was made and well after the guarantors had been notified. To the witness the policy was that no loan would exceed a period of 72 months to be re-paid.

9. The 7<sup>th</sup> respondent on his part gave evidence that after the loan was advanced at the beginning of October 2006, he lost his job in 2 – 3 week thereafter. He said that as the General Manager he enjoyed other benefits besides co-operative loans. He said at the time he lost his job he had taken a year in advance salary totaling Kshs.1,600,000/= and on education loan of Kshs.347,880/=.

10. He confirmed that the loan of Kshs.2,000,000/= was indeed recovered from his guarantors and that as at the date of giving evidence he had paid over Kshs.2,000,000/= but complained that the money he was paying was not being remitted to the guarantors.

11. On cross examination he said that he was supposed to pay Kshs.38,000/= monthly but did a standing order of Kshs.26,000/= after loosing his job.

12. With the evidence by the six witnesses, case closed, the parties were given a chance to file submissions whereafter the tribunal rendered its determination dated 11/01/2012 in which it allowed the claim and found that the Appellant had not right to attach the Respondents' shares and at the same time continue receiving payments from the 7<sup>th</sup> Respondent and therefore decreed that the shares be reinstated; that the 1<sup>st</sup> -7<sup>th</sup> Respondent be paid dividends from the date the shares were attached to the date of judgment, an order that statement of account for all deductions made by the appellant as well as statements on the attached shares and dividend earned he provided in that award the tribunal isolated 5 issues and in the end rendered itself as follow:-

**“The 1<sup>st</sup> Respondent ought to have penalized the 2<sup>nd</sup> Respondent for the months he defaulted and they also ought to have reversed the attachment when the 2<sup>nd</sup> Respondent resumed the repayments.**

**We find that the 1<sup>st</sup> Respondent has no right to attach the guarantor's shares and at the same time continue receiving payments from the 2<sup>nd</sup> Respondent for the same loan.**

**There is also evidence that the 1<sup>st</sup> Respondent terminated the employment of the 2<sup>nd</sup> Respondent abruptly. After that, they did not call upon the 2<sup>nd</sup> Respondent to continue repaying the loan. There is evidence that the 2<sup>nd</sup> Respondent made proposals which the 1<sup>st</sup> Respondent did not even give consideration. Instead, they attached the guarantors' shares.**

**We find that the manner the 1<sup>st</sup> Respondent handled the whole issue smacks malice. The 1<sup>st</sup> Respondent refused to give the 2<sup>nd</sup> Respondent a chance to make proposals and instead recalled the entire loan from the guarantors by attaching their shares and then they continued receiving repayments from the 2<sup>nd</sup> Respondent for the same loan.**

**The 1<sup>st</sup> Respondent admitted that they are still receiving the repayments from the 2<sup>nd</sup> Respondent by Bank standing order todate. We therefore find that the claimants are entitled to their dividends from the date of attachment of their shares todate.**

**We also find that the Claimants are entitled to an order of accounts on the repayment which the 2<sup>nd</sup> Respondent has made and also on their shares. We accordingly direct that the 1<sup>st</sup> Respondent gives an account of all the deductions made by the 2<sup>nd</sup> Respondent towards the loan repayment.**

**The claimants are also entitled to statements on their shares which were attached by the 1<sup>st</sup> Respondent and the dividends they have earned to-date. The said report to be made within 30 days of service of the order upon the 1<sup>st</sup> Respondents”.**

13. This being a first appeal, the court is obligated re-evaluate, re-examined and re-appraise the entire evidence and come to its own conclusions.

14. In coming to the conclusion that the Appellant had not followed the procedure adopted the loan policy, the tribunal relied on close 30 of the loan policy. Policy in so far as the letter to the loanee was not copied to the guarantors.

15. The tribunal did not find that no notice was ever issued to the guarantors. No. It only faulted the Appellant for failure to copy the notice to the loan to the guarantors.

16. However, there is on the record before me at pages 342 – 344 of the record letters dated 2/01/2007 and 12/02/2007. Both to this court qualified as the two notices due to the guarantors from the Appellant Sacco under clause 30 of the loan policy.

17. I understand the loan policy to say and dictate that notice be given of default and a second one to the effect that the default has persisted and that the guarantor would be expected to honour their obligations. Once the two notices are given, as was done in this case, to say that the letter to the loanee having not been copied to the guarantors nullified the other notices and the subsequent enforcement of the rights between the parties would be to elevate technicalities over and above the need to do justice to the parties.

18. The duty of the court is to hold parties to their bargain and own negotiated and settled terms of engagement and not to re-write a covenant between the parties. The Court of Appeal in underscoring this dictate to the court said in *National Bank of Kenya Ltd vs Pipeplastic Somkolet (K) Ltd & Another [2001] eKLR*:-

**“This, in our view, is a serious mis-direction on the part of the judge. A Court of Law cannot re-write a contract between parties. The parties are bound by their terms of the contract, unless coercion, fraud or undue influence be pleaded and proved”.**

19. In this matter, the evidence by the 1<sup>st</sup> – 6<sup>th</sup> Respondents, including that by the 7<sup>th</sup> defendant was that there was a contract to utilize the guarantor’s shares to settle the debt in case of default by the loanee. That was the fundamental question the court was called upon to determine. Having heard the parties, it would appear that in isolating issue for the determination, the Tribunal lost its campus when it failed to consider this as the fulcrum upon its determination would rest. To that extent the trial court did misdirect itself and wholly failed to appreciate the dispute before it and ultimately arrived as a wholly erroneous decision.

20. I do find that with the conceded default, from a period between November 2006 and May 2007, when the Appellant sought to enforce its rights by enforcing the obligations assumed by the 1<sup>st</sup> – 6<sup>th</sup> Respondents, the Appellant was beyond fault. I do find that the appellant was lawfully, legally and contractually entitled to its right to seize the shares belonging to the 1<sup>st</sup> – 6<sup>th</sup> Respondents and applying same to settle the indebtedness of the 7<sup>th</sup> Respondent in terms of the guarantees executed by the said 1<sup>st</sup> – 6<sup>th</sup> Respondents in favour of the Appellant.

21. That being my finding it then follows that there could not be a valid reason to order for the reinstatement of the shares and payment of dividends of such seized shares.

22. However, there was evidence that after the utilization of the shares to settle the 7<sup>th</sup> Respondents loan, the said 7<sup>th</sup> Respondent initiated a standing order for the sum of Kshs.26,000 by a letter dated 17/10/2011 (see page 356 of the Record of Appeal).

23. That remittance according to the Appellants witness was employed to refund the 1<sup>st</sup> – 6<sup>th</sup> Respondents for shares utilized to pay the loan. Infact the evidence by claimants who gave evidence conceded the fact that there was some money getting into their accounts. Since such accounts are maintained by the Appellant, the appellant cannot, in the spirit of candor and transparency, run away from the obligations to avail to the Respondents how much has been so remitted and how the same has been applied.

24. To that extent, I make an order that while the claim should stand dismissed, the Appellant has a duty to provide accounts to all the Respondents for the sum remitted to the Appellant by the 7<sup>th</sup> Respondent and contended to have been utilized towards refunding the shares of the 1<sup>st</sup> – 6<sup>th</sup> Respondent.

25. The upshot is that the appeal succeeds, the award by the tribunal is set aside and in its place substituted a decision dismissing the claim with a rider that an accurate and true accounts be provided to the Respondents, not for the dividends and forfeited shares, but for the receipts of remittance by the 7<sup>th</sup> Respondent and how the same has been applied. That be done within 30 days from today and in default the same be enforced before the trial court.

26. On costs, the appeal has succeeded and I award to the appellant the costs thereof to be paid by the Respondents equally.

**Dated and delivered at Mombasa this 6th day of November 2018.**

**P.J.O. OTIENO**

**JUDGE**