



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MIGORI
CIVIL APPEAL NO. 15 OF 2016

WIKA ONG'ONDI MAGEAPPELLANT

-VERSUS-

1. CHRISTOPHER GICHANAOKEMWEA

2. MUSA MARWA MOGOIRESPONDENTS

3. JAMES MOGOI OBUYA

(Being an appeal from the judgment and decree by

Hon. P. K. Rugut, Senior Resident Magistrate in

Rongo Senior Resident Magistrate's Civil Suit No. 99 of 2014 delivered on 11/02/2016)

JUDGMENT

1. WIKA ONGONDI MAGE, the appellant herein, was a member of the Nyachenge Abaremi Self Help Group which was registered under the Ministry of Gender, Sports, Culture and Social Services under Registration No. GCA/DSS/067/2003 on 26/08/2003 (hereinafter referred to as **'the Group'**).

2. Among the objectives of the Group under **Clause 1.001** of its 2004 Revised Constitution was to promote the welfare of its members in the fields of Agriculture, Health, Education and Business. One of the initiatives towards attaining that objective was for every member to contribute Kshs. 200/= monthly as his/her savings. The Group was then approached by a then Micro-finance, K-Rep, (hereinafter referred to as **'the Financier'**) which was willing to offer loans to individual members of the Group on conditions that the loans were to be guaranteed by the savings of such a member or members as a collateral and that the savings were to be deposited with the financier among other conditions. Under that arrangement, all the transactions between a member and the financier were to be strictly between the two and the Group's role was mainly to collect and transmit any savings or loan repayments or instalments thereof from the members to the Financier.

3. The Appellant was a beneficiary under that arrangement. That is evidenced by the Financier's Passbook produced as Plaintiff's Exhibit 1. Sometimes in September 2009, the Appellant gave notice to withdraw from the membership of the Group and requested the reimbursement of his savings then standing at Kshs. 27,000/= from the Respondents. He then filed the **Rongo Senior Resident Magistrate's Civil Suit No. 99 of 2014** (hereinafter referred to as **'the suit'**) and prayed for the said sum together with costs and interest. The Respondents opposed the suit and a full hearing was conducted where the parties herein and their respective witnesses testified. The trial court thereafter rendered its judgment and accordingly dismissed the suit with costs. It is that judgment which is the subject of this

appeal.

4. The Appellant in a 17-grounds Memorandum of Appeal challenged the finding of the trial court in totality. In essence, the Appellant's contention is that the trial court erred in disallowing the suit.

5. Directions were taken and the appeal was disposed of by way of written submissions where both parties duly complied. Each party rooted for its position and referred to some decisions. As the first appellate Court, it is now well settled that the role of this court is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. (See the case of **Selle & Ano. vs. Associated Motor Boat Co. Ltd (1968) EA 123**). This court nevertheless appreciates that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in **Mwanasokoni – versus- Kenya Bus Service Ltd. (1982-88) 1 KAR 278** and **Kiruga –versus- Kiruga & Another (1988) KLR 348**).

6. I have carefully perused and understood the contents of the pleadings, proceedings, judgment, grounds of appeal, submissions and the decisions referred to by the parties. The Appellant took the position that he only dealt with the Group through its office bearers who are the Respondents where he accumulated his savings and since he had withdrawn from that membership, he was entitled to a refund from the Group. However, the evidence revealed otherwise. The Appellant is aware and dealt with the financier as well. He took loans and even guaranteed some other members' loans before he decided to withdraw from the Group. He even wrote the letter dated 10/08/2009 (Plaintiff's Exhibit 2) to the Group requesting that his savings be used to offset a loan he had with the financier as he was undergoing serious financial constraints which had made him default in his loan repayment with the financier.

7. The Group responded to the Appellant's letter. In declining the request, the Group upon consultation with the financier advised the Appellant to first ensure that he repaid the loan he had obtained from the financier and also ensures that all the members he guaranteed their loans from the financier had repaid those loans in full before the issue of his savings would be addressed. That was the Group's letter dated 28/09/2009 which was produced as Plaintiff's Exhibit 3. The foregone was so stated by DW1 who was the Group's Secretary who further stated that the financier (who had then changed from K-Rep to Juhudi Kilimo) through a letter dated 28/05/2014 had confirmed the position and its readiness to release the Appellant's savings to him once he undertook all the required processes.

8. I would have found no difficulty in finding for the Appellant had the position been that it was the Group which was solely dealing with the aspect of loans. In this case, the aspect of the loans was independently handled by a third party, the financier, who dealt with the Appellant directly and that the Appellant's savings had been transferred to that third party. In such circumstances, I do not see how the suit was to succeed. I remain at a loss as to why the Appellant chose not to involve the financier in the suit. Could it be that he knew he was not about to go any further in the event the financier comes to play? Maybe. I can see the even predicament the trial court found itself in leading it to state that

'Having considered all options of trying to administer substantive justice in line the provisions of article 159 of the constitution, I find that the plaintiff failed to prove his case on a balance of probability,..'

9. As it stands, the Appellant still has his net savings with the financier awaiting his collection. I hereby affirm the finding of the trial court and the appeal is dismissed with costs.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 15th day of June 2017.

A. C. MRIMA

JUDGE