



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: GICHERU, TUNOI & SHAH, J.J.A.)

CIVIL APPEAL NO. 96 OF 1997

BETWEEN

ANJELINE AKINYI OTIENOAPPELLANT

AND

MALABA MALAKISI FARMERS CO-OP. UNION LTD.RESPONDENT

**(Appeal from the Judgment and Decree of the High Court of Kenya at Bungoma by Honourable
Mr. Justice C. O.**

Ong'udi dated 9th day of December, 1996

in

H.C.C.C. NO. 140 OF 1995)

JUDGMENT OF THE COURT

This is an appeal from a judgment and decree of the superior court at Bungoma (Ong'udi, J.) dismissing the appellant's claim for the recovery of the principal amount of Shs.800,000.00 allegedly advanced to the respondent as a loan and subsequent accruing interest of Shs.9,911,111.00.

The learned Judge dismissed the suit on the ground that the respondent being a co-operative society had breached the mandatory provisions of the Co-operative Societies Act Cap 490 of the Laws of Kenya (the Act) and Rules 44 and 45 made thereunder in purporting to enter into an illegal agreement with the appellant and by acquiring the loan contrary to the said laid down rules.

The appellant is a wealthy business woman at Bungoma. She owns a shop amongst other properties. She buys and sells maize and fish in large quantities. The respondent, which appears cash strapped and in large debts, is a body corporate established under the Act and is based at the small town of Malakisi. It buys and gins cotton.

By a written agreement dated 20th January, 1994, the appellant agreed to lend Shs.500,000.00 to the respondent for the purposes of buying cotton during the 1994 crop season. The loan was to be repaid at the end of the ginning period. The interest was to be paid weekly at the rate of Shs.2.50 on every Shs.18.00. The first weekly interest fell due for payment on 27th January, 1994, but was to be effected together with the second week's payment on 3rd February, 1994.

However, soon thereafter and before the first agreement was implemented, to be precise on 25th January,

1994, the parties executed the second written agreement whereby the appellant made a further loan of Shs.300,000.00 to the respondent at the same rate of interest and on the same terms of repayment.

At the time of the institution of the suit the respondent was hopelessly in arrears and was unable to service the interest, and; though it had paid Shs.631,667.80, the interest for 82 weeks amounting to Shs.9,911,111.00 remained unpaid. It is not denied that the loan was made nor is it averred that the rate of interest specified in the agreement was oppressive or unconscionable. The appeal turns entirely on whether or not the learned Judge erred in bringing into play the provisions of the Act. His tersely written judgment is as follows:

"In purporting to enter into an agreement the plaintiff and the officers of the defendant never followed the provisions of the co-operative societies Rules. The authorities cited by Ms Nanzushi are clearly distinguishable and inapplicable here as the two alleged agreements were in violation of the Rules and are unlawful. "

The court will not assist a party to an illegal contract to recover his money - Kiriri Cotton Co. Ltd. v. Rachoddas Kashanji Dewani (1958) EA 239 and Hanad Bin Awati Baali & Another v. Hannad Bin Said Batwasaff 17 KLR 30. For the above reasons I dismiss the suit with costs. "

Mr. Onyinkwa, for the appellant, submitted that the learned Judge should have held that the Act did not bind the appellant as she knew nothing about it. But, the appellant whilst dealing with the respondent ought to have known that the Act lays down the conditions under which a co-operative society can borrow moneys. She cannot plead ignorance of the law as a defence.

As correctly observed by the learned Judge, the respondent's day to day activities are governed by the Act and the rules made thereunder. Under Rule 44 the appellant's maximum liability which it may incur in loans or deposits from non-members, the appellant being one of them, must be fixed at a general meeting. Rule 45 provides as follows:-

"45. The conditions under which a registered society may receive deposits and loans from persons who are not members under section 41 of the Act, shall be that - (a)the Commissioner is satisfied that the society genuinely needs the deposit or loan; (b)the Commissioner is satisfied that the terms of the deposit or loan and the rate of interest are reasonable; (c)repayment of the deposit or loan is secured to the satisfaction of the Commissioner; (d)the maximum liability fixed under rule 44 of these Rules is not exceeded; and (e)the Commissioner has given written approval for the deposit or loan. "

The agreements entered into by the parties, thus, blatantly flouted the limitation of borrowing powers and the conditions under which a registered co-operative society in Kenya may receive loans from non-members. The Act forbids performance of the agreement without the strict observance of the formalities envisaged by Rules 44 and 45 made under the Act and a contract that is performed or entered into in breach of these Rules is illegal and the recovery of the loan must inevitably fail. This is the position into which the appellant's suit fell.

Illegality through statute aside, what is the gist of the appellant's claim? From Shs.800,000.00 she lent less Shs.631,667.80 she has already received she expected the learned Judge to decree payment to her of Shs.9,911,110.00 largely made of interest allegedly accrued within a period of 82 weeks. This is at the rate of about 284% per annum. This rate of interest is obviously manifestly harsh, unconscionable, oppressive and so exorbitant that no reasonable court could conscientiously countenance it. Indeed, we think that it is farcical and ridiculous beyond all reason.

In the result, we uphold the decision of the superior court and accordingly, we dismiss the appellant's appeal with costs to the respondent.

Dated and delivered at Nairobi this 11th day of June, 1998.

J. E. GICHERU

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JUDGE OF APPEAL

P. K. TUNOI

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JUDGE OF APPEAL

A. B. SHAH

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR