



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIHARA KARIUKI (PCA), SICHALE & OTIENO-ODEK, J.J.A.)

CIVIL APPEAL NO. 185 OF 2009

BETWEEN

SERAPHINE NDINDA KITAKA.....1st APPELLANT

SETH SYOMOTI MWONGELEA 2nd APPELLANT

TERESIA NDUNDA3rd APPELLANT

AND

PRAXEDES NZISA WAMBUA 1st RESPONDENT

MUTINDU KING'OKU.....2nd RESPONDENT

MARY WAMBUA.....3rd RESPONDENT

SAVETH KAMUYA.....4th RESPONDENT

ANNA MWELU.....5th RESPONDENT

MBEKE ZAKAYO.....6th RESPONDENT

BETH NGANDA.....7th RESPONDENT

*(An appeal from the Judgment and Decree of the High Court of Kenya at Machakos (Lenaola J.)
dated 17th February 2009 in*

H.C.C.C No.7 of 2003)

JUDGMENT OF THE COURT

1. By a Plaint dated 1st March 2003, it is stated that at all material times in this suit, the respondents being members of **WOTE TOWNSHIP WOMEN GROUP** were owners of **Plot No. Makueni/Unoa/11**

measuring 50X100 ft. (the suit property).

2. The respondents filed **High Court Civil Suit No. 7 of 2003** against the appellants alleging that in December 2002, the appellants unlawfully entered into and trespassed onto the respondents' suit property and started digging, excavating and carrying out construction thereon and interfering with the respondents' suit property claiming that they were also owners of the plot. In the plaint, the respondents averred that the appellant's claim of ownership to the plot was misguided and misplaced as they ceased to be members of **WOTE TOWNSHIP WOMEN GROUP**. The respondents sought a permanent injunction to restrain the appellants or their servants or agents from trespassing on to the suit property; a declaration was sought to the effect that the respondents were the lawful owners of the suit property and that the appellants had ceased to be members of **WOTE TOWNSHIP WOMEN GROUP**.

3. In a defence and counterclaim filed on 25th April 2003, the appellants denied the claim in the plaint and counter-claimed that in 1996, they jointly with the respondents purchased the suit property with each individual contributing Ksh.4,000/= towards the purchase price and which sum was paid to the vendor, one **Julius M. Kioko**; that the respondents without taking accounts and or sharing and or distributing the said suit property entered the plot and constructed on half of the plot and deprived the appellants use and enjoyment of the property. The appellants averred that having contributed to the purchase price of the suit property, they are joint owners and are entitled to enter and use the property. In the counterclaim, the appellants sought a declaration that they were joint owners of the suit property and were entitled to enter, use and occupy the property; they further claimed refund of Ksh.13,422/= being extra contributions paid to the respondents.

4. In Reply to Defence and Defence to Counterclaim, the appellants denied liability to the respondents and asserted that the respondents were not joint owners of the suit property.

5. Upon hearing the parties, the High Court (Lenaola, J.) entered judgment for the respondents and issued a permanent injunction restraining the appellants, their agents and or servants from trespassing onto the suit property; the court declared the respondents to be the lawful owners of the suit property and that the appellants had ceased to be members of **WOTE WOMEN TOWNSHIP GROUP**. Costs of the suit were awarded to the respondents.

6. In entering judgment for the respondents, the learned judge expressed himself as follows at paragraph 8 of the judgment:

“...It is clear from P. Exhibit 11 that the land in dispute was purchased when the two groups were still in harmony. It is also clear to me save for the 1st, 2nd and 5th Defendants, all other defendants were given a refund of their contributions to the group and the implication is that they have no claim to any asset of the group including the land in dispute. It is also my finding that the whole dispute has been engineered by the 1st defendant who, unhappy that she had not been refunded her contributions, filed RMCC No. 16/2000 (Makueni) which was not determined in her favour and proceeded to rally her allies to build on the plot although the plaintiffs had in fact already commenced construction on the same plot.....The evidence before me would point out the simple fact that the 1st, 2nd and 5th defendants have no legitimate claim to the land because once they were refunded their contributions, their claim ceased if ever there was one.”

7. Aggrieved by the judgment, the appellants lodged the instant appeal citing the following grounds:

“(i) That the trial judge erred in law and fact and misapprehended the evidence before him when he erroneously held that the appellants had no legitimate claim to the land as they had been refunded their contributions which findings was and is not supported by evidence and is based on misapprehension of evidence and on extraneous matters.

(ii) The judge erred in failing to note that the respondents had no capacity to sue nor did the appellants have capacity to be sued over the suit property which was registered in the name of William Kioko Musomba (deceased) and forming part of his estate.

(iii) *The learned judge erred in failing to note and hold that the purchase agreement between the appellants and respondents on one hand and Julius Kioko Musomba on the other was null and void as the seller had no capacity to sell the land of the deceased William Kioko Musomba without being a legal representative of the deceased and without having obtained grant of letters of administration to the estate of the deceased.*

(iv) *The judge erred in failing to note that the issue between the appellants and the respondents was a partnership and the suit before the Court having not been filed to dissolve the partnership and taking up of accounts by the respondent was incompetent and or premature.*

(v) *The judge erred in failing to find that the appellants were entitled to occupy and use the suit property by virtue of being joint purchasers.*

(vi) *The judge erred in failing to note that the contributions made by the appellants was a merry go round and not relating to land.*

(vii) *The judge erred in failing to take into account the respondent's admission that the 2nd appellant was still a member of the group and the 1st appellant did not terminate her membership and were thus entitled to the suit property.*

(viii) *The judge erred in granting a permanent injunction against the appellants."*

8. In this appeal, the firm of Andrew Makundi & Co. Advocates represented the appellants while the firms of O. N. Makau & Mulei teaming with J.A. Makau & Co. Advocates represented the respondents. All counsel filed written submissions in this matter and dispensed with oral highlight.

9. For the appellants, it was submitted that the learned judge erred when he held that the appellants had no legitimate claim to the suit property and that they had been refunded their contributions. Counsel submitted that from the evidence of the 1st appellant, **Seraphine Ndinda Kitaka**, she testified that she did not quit the group but only resigned as the Group Treasurer and remained a member; that PW3 **Josephine Mutindi King'oku** testified that the 1st, 2nd and 5th appellants were not given any refund of their contribution which primarily meant that they remained part and parcel of the group members whose contributions purchased the suit property and they have a legitimate claim over it. The appellants submitted that the suit property was partnership property and was purchased using part of the appellants' money and the trial judge appreciated this when he stated that the suit property was purchased when the two groups were still in harmony. Counsel submitted that having been purchased as a partnership property, the appellants had a legitimate claim over the property. The appellants emphasized that the respondents did not produce any document or concrete evidence to prove that the appellants had been refunded their contributions; that as per the letter dated 13th June 1997, the 1st appellant only resigned as treasurer and not as a group member; that group members who were not refunded their contributions continued to be members despite the fact that they did not continue to remit their contributions.

10. Counsel for the appellant cited **Section 18** of the **Partnership Act** contending that the suit property was partnership property. **Section 27** of the **Partnership Act** was cited to support submission that partnership between the appellants and respondents remained intact and the partnership has not been dissolved.

11. On the issue of Letters of Administration to the estate of the deceased **William Kioko Musomba**, the appellants cited **Section 45 (1)** of the **Succession Act (Cap 160 Laws of Kenya)** and the case of **Gitau & 2 others -v- Wandai & 5 Others (1989) KLR 23**. It was emphasized that the purported vendor, **Julius Kioko Musomba**, did not have Letters of Administration to the estate of the deceased and had no capacity to sell the suit property to the Women Group.

12. The appellants faulted the trial court for issuing a permanent injunction as the court did not take into account the contribution of the appellants towards purchase of the suit property and that the appellants

were in occupation of one third of the property.

13. The respondents in their written submissions opposed the present appeal. They submitted that Exhibits 2, 3a & 3b, 4a & 4b and 5a & 5b support the conclusion by the trial judge that the claim for those appellants whose contributions were not refunded lay in an order of accounts and not a share of the land *per se*; that the evidence on record shows the appellants were refunded their contributions and they acknowledged the same in writing and they have no claim to the property. On succession, the respondents contend that the appellants did not raise the issue in their pleadings; that the appellants specifically averred that the property had been purchased from Julius M. Kioko; that in any event, the suit before the trial court was not commenced for purposes of distributing the estate of the deceased. Counsel for the respondents urged us to uphold the trial court's finding and find that the partnership between the parties was not in issue because the appellants had opted out of the **Wote Township Women Group** and their contributions had been refunded. Counsel urged this Court to note that several issues of fact had been determined by the trial court and this Court should not interfere with the findings of fact made by the trial court. (See **William Muthee -v- Bank of Baroda, Civil Appeal No. 21 of 2006 [2014] eKLR**).

14. We have considered the grounds of appeal, submissions by counsel and authorities cited. This is a first appeal and we are obliged to re-evaluate the evidence on record and arrive at our own conclusions. (See **Selle -vs- Associated Motor Boat Co. [1968] EA 123**); see also (**Abdul Hameed Saif vs. Ali Mohamed Sholan (1955) 22 E. A. C. A. 270**).

15. The critical issue in this appeal relates to the testimony of the appellants and the evidence disclosed by Exhibits 2, 3a & 3b, 4a & 4b and 5a & 5b. At page 137 of the record there is a note dated 8th April 1999 from the 3rd appellant, **Teresia Ndunda**, in Kamba language and which note is translated at page 137 A of the record. In the note, the 3rd appellant acknowledges receiving refund of Ksh.10,466/10 from **Wote Township Women Group** and that she had ceased to be a member of the group. This is Exhibit 2 of the trial court's record. The 1st appellant by letter dated 13th October 1997 at pages 146 and 146 A of the record stated that she was no longer the treasurer of the Women Group. In her testimony, the 1st appellant stated she resigned as treasurer of the group and did not receive refund of her contribution to the Group.

16. The testimony of the 1st respondent, **Praxededes Nzisa Wambua**, before the trial court is relevant. She testified as follows:

“Each of those came and was given a refund of entitlement. We wrote minutes over the issue, did accounts and refunded each one's entitlements. There is a statement of account of Rose Mutua. I made the statement as Group Secretary. I produce it as Exhibit 1. Rose Mutua had written to our advocate confirming that she had withdrawn from the group and received her entitlements - Exhibit 2. She wrote the letter when she was served with summons in this case. It is dated 8th April 2003. Teresia Ndunda also wrote to us wishing to quit. We did her accounts. We paid her Ksh. 10,466/10 – Exhibit 3a, Exhibit 3b typed. We also allowed Kyembwa Mutunga to withdraw; we paid Ksh. 11,155/50 to her on 17th June 1999. I produce the page she signed – Exhibit 4a & 4b. We also settled Mukethe Kitetei on 13th April 2000 by paying her Ksh. 8,736/10. She signed Exhibit 5a & 5b. Seraphine Ndinda Kitaka was given any payment (sic). She owed the Group Ksh. 13,010/=. She never refunded. She however wrote to the Community Officer terminating her position as Treasurer dated 13 October 1997 – Exhibit 7....Those left the group voluntarily except Seraphine....We have not refunded contributions to Anna Mutua and Sithi Syomiti Mwongela.”

17. The testimony of PW3, **Josephine Mutindi Kingoku**, confirms that **Anna Mutua** and **Sithi Mwongela** had not been refunded their contributions. The 1st respondent testified in her capacity as Secretary of **WOTE WOMEN TOWNSHIP GROUP**. She produced minutes and records of meetings of the Group which were marked as exhibits in the case. The veracity of the minutes and exhibits produced was never challenged. **Sections 15 and 16** of the **Evidence Act** stipulates that statements made in the course of business are admissible and the fact that the act formed part of a series of similar occurrences is

relevant. The 1st respondent testified how she kept minutes and various records of the meetings and transactions involving members of the Group who wished to withdraw. A record of monies refunded to each member is clearly indicated in the various exhibits.

18. In our re-evaluation of the record, we find that the facts relating to withdrawal from membership of the **WOTE TOWNSHIP WOMEN GROUP** and refund of contributions stated in the exhibits tendered in court were not challenged and their truth and veracity remain intact. We find that the 3rd appellant, **Teresia Nunda**, had withdrawn from the Group and received refund of her contribution. We come to the conclusion that **Teresia Ndunda** is not entitled to any claim of the suit property or a claim to any asset of **Wote Township Women Group**.

19. As regards the 1st appellant, **Seraphine Ndinda Kitaka**, the evidence on record reveals that she expressed willingness to withdraw from membership of the Group and was never refunded her contribution. It is stated that she was not refunded because she owed the Group some monies. Accounts were taken before the area Chief and it was established that she owed the Group Ksh.3,603/90. (See testimony of 1st respondent). It is our considered view that having expressed the wish to cease being a member of the group and which wish was acted upon when accounts was taken between the Group and **Seraphine Ndinda Kitaka**, her right to the suit property and or any asset of the Group was extinguished and converted to a right to account. It is our view that a party cannot blow hot and cold, approbate and reprobate. We hold that 1st appellant, **Seraphine Ndinda Kitaka**, is not entitled to any claim of the suit property or a claim to any asset of **WOTE TOWNSHIP WOMEN GROUP**.

However, she is entitled to accounts to determine if she owes the Group any monies. The Group is entitled to set off any monies she owes against her contributions.

20. In relation to the 2nd appellant, **Sethi Syomiti Mwongela**, the evidence on record shows she was never refunded her contribution. It is also apparent that she had ceased making contributions to the Group and all that remained was refund of her contribution. The legal issue is what are her rights in the Group after expressing desire to withdraw from the Group and ceasing to make her contributions? Does she have a claim to ownership of the assets of the Group or is her right a right to be refunded her contribution? In answering this question, the trial court at paragraph 9 of the judgment stated:

“As for the defendants who did not have their contributions refunded, their claim would be separate and would only entail an order of accounts and not a share of the land *per se*.”

21. We have considered the legal soundness of the statement by the trial court expressed above. We have come to the conclusion that the statement and finding by the trial court that the 2nd appellant, **Sethi Syomiti Mwongela**, (among any other members who were not refunded their contributions) is entitled to accounts is sound in law. We see no reason to interfere with this finding.

22. On the issue of Letters of Administration, we have considered submissions made by counsel for the appellants. It is our view that the dispute between the parties was not a succession dispute involving the estate of the **William Kioko Musomba** (deceased). The 1st appellant testified that the seller of the suit property was **Julius Mutua Kioko**; she testified she signed the sale agreement. We find that the 1st appellant is prevaricating and not candid in raising the issue of Letters of Administration while at the same time seeking ownership to the suit property. If at all the appellants contention on Letters of Administration is to be upheld and that **Julius Mutua Kioko** had no right to sell the property, it follows that even the appellants cannot and did not acquire any proprietary rights or interest in the suit property. Based on this reasoning, on what basis would the appellants be claiming rights of ownership and entitlement to the suit property? None. We find there is no merit in the submissions relating to letters of administration as this is not a succession dispute.

23. The appellants contend that the arrangement between themselves as members of Wote Township Women Group was a merry go round. Merry go round as understood and practiced in Kenya is not a concept that creates a legal relationship; it is neither a legal person, partnership nor society; it is a

voluntary, informal, nebulous association with limited, if any, enforceable contractual or legal rights and obligations; the obligation of members to each other is enforced through the moral, ethical, honour and compassionate values of each individual.

24. Further, the appellants contend that there was a partnership between themselves as members of the Women Group. Neither the plaintiff nor the defence and counterclaim plead the issue of partnership. The facts determining the existence of the partnership were neither particularized nor itemized. Even if the relationship between the appellants, respondents and the **WOTE TOWNSHIP WOMEN GROUP** were to be taken to be a partnership, in the event of dissolution of a partnership, individual partners are entitled to accounts and consequently, we find that the trial court did not err in ordering accounts for those members who did not receive refund of their contributions.

25. In totality, we find that this appeal has no merit and is hereby dismissed with costs.

Dated and delivered at Nairobi this 2nd day of February, 2016

P. KIHARA KARIUKI, PCA

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

Certify that this is a true copy of the original.

DEPUTY REGISTRAR