Lumfa Self Help Group v Mwangi (Civil Appeal 221 of 2019)
[2024] KEHC 6093 (KLR) (30 May 2024) (Judgment)

Neutral citation: [2024] KEHC 6093 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL APPEAL 221 OF 2019

HI ONG'UDI, J

MAY 30, 2024

BETWEEN

LUMFA SELF HELP GROUP ..... APPELLANT

AND

PETER GICHUKI MWANGI ..... RESPONDENT

(Being an appeal from the Judgment of Mr. D. M. Kivuti Senior Resident Magistrate delivered in Milimani Commercial Court SRMCC No 8548 of 2017)

JUDGMENT

1. Lumfa Self-help Group the appellant herein sued the respondent for recovery of Ksh 220,000/- which it paid for the respondent in respect of a loan from K-Rep bank. The payment was made since the appellant had guaranteed the respondent in respect of the loan. The respondent filed a defence dated 14/2/2018 denying the claim. He further pleaded that the suit was time barred. The appellant filed a reply to the defence dated 15/2/2018. The matter was heard on 17/1/2019 in the absence of the respondent. Judgment was delivered on 29/3/2019 dismissing the suit with costs.

2. Being aggrieved by the Judgment, the appellant filed this appeal on the following grounds:

    i. That the learned Magistrate erred in law by holding that Appellant's suit was filed out of time and therefore time barred.

    ii. That the learned Magistrate erred in fact by failing to appreciate the evidence placed before him that the respondent had been repaying and/or servicing his loan to the appellant until 12th February, 2013 when he defaulted henceforth.

    iii. That the learned Magistrate erred in fact by failing to accurately calculate the six years period between rising of the cause of action on 12/2/2013 and its expiry on 12/2/2019.

iv. That in the circumstances of the case, the finding of the learned trial Magistrate is not in line with the law, practice or the evidence placed before him.

3. The appellant called one witness Mr. John Thuo (PW1) to testify on its behalf. He stated that he was the appellant's vice chair. In his witness statement which he adopted as evidence he stated that on 21/11/2009 the appellant guaranteed the respondent a loan of Ksh 350,000/= with K-Rep bank. In December, 2009 the respondent defaulted and the appellant paid the bank Ksh 220,000/=

4. He explained that there was an agreement that on default any monies advanced by the appellant would attract an interest of 10% on quarterly basis from the date of the reimbursement. Further that money so advanced had to be paid within 12 months. That the respondent failed to honour this hence the filing of the suit.

5. PW1 produced the list of documents in support. The claim was for Ksh 220,000/= plus interest accrued plus costs.

6. The appeal was canvassed by way of written submissions.

Appellant's submissions

7. These were filed by S. M. Muhia & Co. Advocates and are dated 5/02/2024. Counsel submitted that the appellant gave sufficient evidence to support the suit. He argues that the delay in prosecuting the suit was not deliberate. Rather it was because of a delayed court process and the respondent has not shown that the delay in prosecuting the suit had given rise to substantial risk to fair trial or had resulted in grave injustice to it. He argued that the appellant had explained in his pleadings why it had taken long to file the suit. That in the interest of justice the suit should not have been dismissed.

8. On whether a self-help group has capacity to sue in its own name counsel submitted that based on section 107 of the *Evidence Act* it has the right and capacity to sue. He argued that even where there is prolonged delay justice demanded that parties must be heard. He relied on the case of Chandaria Industries Ltd V Sonal Holdings (K) Limited & another HCCC No. 429 of 2011 where Justice J. B. Havelock cited with approval the case of Allen V Sir Alfred MCAlpine & Sons Ltd (1968) ALL ER 543 where it was held inter alia that:

> " but in exercising a discretion, even a judicial one, the courts can temper logic with humanity and the prospect that an innocent plaintiff will be left without any effective remedy for the loss of his cause of action against the defendant is a factor to be taken into consideration in weighing, on the one hand, the hardship to the plaintiff if the action is dismissed, and, on the other hand, the hardship to the defendant and the prejudice to the due administration of justice if it is allowed to proceed"

Respondent's submissions

9. These were filed by M. P. Mwangi & company advocates and are dated 8th February, 2024. Counsel identified two issues for determination namely:

   i. When did the cause of action arise?

   ii. Whether the suit before the trial magistrate was statute barred.

10. On the first issue counsel submitted that there was no document to confirm the assertions in paragraph 5 of the plaint of the appellant being a guarantor of the respondent's loan with K-Rep bank. Secondly there was no evidence to show that the appellant paid the loan on behalf of the respondent.

11. On the second issue counsel submitted that the alleged cause of action arose in the year 2009 and the appellant was entitled to claim it within 6 years yet it was filed in 2017 which was eight (8) years after the cause of action arose. He referred to section 4(1) of the *Limitation of Actions Act* Cap 22 Laws of Kenya which provides:

> " The following actions may not be brought after the end of six years from the date on which the cause of action accrued – action founded on contract".

12. He contends that the end of the six (6) years was December, 2015. The appellant filed the Civil suit No. 8548 of 2017 without seeking leave from the court. To him this is not a technicality as enshrined in Article 159(d) of *the Constitution* as well as sections 1A & 1B of the *Civil Procedure Act*. Reliance was placed on the case of Kamongo Farmers Co-operative Society Ltd V Chief Land Registrar & 9 others (2018) e KLR. He also referred to the dictum by Kiage J – in Nicholas Kiptoo Arap Korir Salat V IEBC & 6 others [2013] e KLR

13. Counsel additionally referred to sections 23 and 24 of the *Limitation of Actions Act* which provides:

Section 23

" (1) Where

a. A right of action (including a foreclosure action) to recover land: or

b. A right of a mortgage of movable property to being a foreclosure action in respect of the property

Has accrued, and

i. The person in possession of the land or movable property acknowledges the title of the person to whom the right of action has accrued: or

ii. In the case of foreclosure or other action by a mortgagee, the person in possession of the land or movable property or the person liable for the mortgage debt makes any payment in respect thereof, whether of principal or interest.

The right accrues on and not before the date of the acknowledgement of payment.

(2) Where a mortgagee is, by virtue of the mortgage, in possession of any mortgaged land and either receives any sum in respect of the principal or interest of the mortgage debt or acknowledges the title of the mortgagor, or his equity of redemption, an action to redeem the land in his possession may be brought at any time before the end of twelve years from the date of the payment or acknowledgement.

(3) Where a right of action has accrued to recover a debt or other liquidated claim, or a claim to movable property or a deceased person, and the person liable or accountable therefore acknowledges the claim or makes any payment in respect of it, the right accrues on and not before the date of the acknowledgment or the last payment.

Provided that a payment of a part of the rent or interest date at any time does not extend the period for claiming the remainder then due, but a payment of interest is treated as a payment in respect of principal debt.

Section 24

> "(1) Every acknowledgement of the kind mentioned in section 23 must be in writing and signed by the person making it.
>
> (2) The acknowledgement or payment mentioned in section 23 is one made to the person, or to an agent of the person, whose title or claim is being acknowledged, or in respect of whose claim the payment is being made, as the case may be, and it may be made by the agent of the person by whom it is required by that section to be made.

He thus submitted that there was no evidence adduced to show that the respondent serviced a loan with the appellant.

Analysis and determination

14. Having carefully considered the grounds of appeal, record of appeal, both submissions, decided cases and the law I find three issues falling for determination namely:

    i. Whether the appellant had capacity to sue.

    ii. Whether the suit was time barred.

    iii. Whether the appellants case was proved.

15. This being a first appeal this court has a duty to re-evaluate and re-consider the evidence on record and arrive at its own conclusion. It should bear in mind that it did not see nor hear the witnesses and give an allowance for that. See

    i. Selle V Associated Motor Boat Company Ltd & other [1968] E A 123

    ii. Kamau V Mungai & another [2006] 1 KLR 150.

Issue No (i) Whether the appellant had capacity to sue.

16. In the plaint dated 1st December, 2017 at paragraph *1* the appellant described itself as a "Self-Help Group/Project duly registered under the Ministry of Gender, Children & Social Development; The learned trial Magistrate while relying on the cases of Kituo cha Sheria Vs John Ndirangu Kariuki & another [2013] e KLR and Dennis Ololoigero & 4 others Vs The Art of Ventures Limited & 2 others [2006] e KLR found that the appellant had no legal capacity to file the suit.

17. The above has been held in a number of cases. This does not mean groups like the appellant cannot file cases, but they have to follow due process. I am in agreement with the finding by Justice Munyao in Kipsiwo Community Self Help Group V Attorney General & 6 others [2013] e KLR. This is what is stated:

> "Kipsiwo Self Help Group had no capacity to institute action in its own name. A person recognized in law had to sue on behalf of members of Kipsiwo Self Help Group and such members had to be named and identified with precision. The person bringing action has to demonstrate that he has permission to bring the action on behalf of the members of the Group, or on behalf of the people he seeks to represent if it is a representative suit. The importance of this, is so as to recognize the persons who seek legal redress, and so that orders are not issued in favour or against people who cannot be precisely identified. This may look minor, but it is extremely significant. In litigation, rights and duties will be imposed on the

litigants. If the court does not know who the litigants are, then it becomes impossible for the court to enforce its own orders, for it will be clear, who the beneficiary of the order was, or who had obligation to obey or enforce such order".

18. Justice Munyao in the same case stated:

> " It is clear that Self Help Groups are not incorporated bodies. In fact, I know of no law that recognizes them or incorporates them. They are probably the brain – child of administrators who at times had to come with a took to identify specific groups of people that needed assistance or needed to undertake projects together. They seem to have helped harness resources at community level. The only problem is that the government has not put in place any legal framework under which they can be registered and managed. Such groups, in absence of a legal framework, indeed stand the risk of being declared unlawful societies as held in the case of Dennis Ololoigero
>
> .....Self Help Groups having no legal personality, cannot therefore institute proceedings in their own name".

19. Other cases where courts have addressed this issue are: Free Pentecostal Fellowship in Kenya Vs Kenya Commercial Bank (1992) KLR 354 and St. Mary School, Nairobi Vs Josphat Gitonga Kabugi Nairobi Milimanni HCCC No. 65 of 2004.

20. The Appellant's argument about justice being done without adherence to the law does not hold any water. It is an open fact that the appellant could not file the suit in its own name. I therefore agree with the trial court that the appellant had no capacity to file the suit.

Issue No (ii) Whether the suit was time barred

21. From the facts the appellant claims to have paid K-Rep bank Ksh 220,000/= as a guarantor to the respondent. This was in December, 2009 it follows that if at all the respondent owed the appellant that sum of money the operation date was December, 2009. The limitation period in this case was six (6) years under section 4(1) (a) of the *Limitation of Actions Act*. The suit herein was filed in December, 2017 which was eight (8) years ie. two (2) years after the limitation. There is no evidence that any leave was sought for late filing of the claim.

Issue No (iii) Whether the appellants case was proved.

22. The alleged agreement between the appellant and respondent on change of interest on any unpaid sum was never produced by the appellant. Secondly the appellant did not avail any evidence showing it had in December, 2009 paid K-Rep Bank the outstanding sum of Ksh 220,000/=.

23. From the above analysis it is clear that

    i. The appellant had no legal capacity to file the suit

    ii. The suit was time barred at the time it was filed yet there was no leave sought for its being filed out of time. For these reasons I find that the learned trial Magistrate did not err in dismissing it. The Judgment is hereby upheld.

    The upshot is that the appeal has no merit and is dismissed with costs.

24. Orders accordingly

Delivered virtually, dated and signed this 30th day of May, 2024 in open court at Nakuru

H. I. ONG'UDI

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR