



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**COMMERCIAL & ADMIRALTY DIVISION**

**HCCC NO. 310 OF 2013**

**BRITANIA SACCO.....PLAINTIFF**

**VERSUS**

**JAMBO BISCUITS LIMITED.....DEFENDANT**

**JUDGMENT**

1. In a Plaintiff dated 17<sup>th</sup> May 2013 and filed on the same day, Britania Sacco (**Britania or the Plaintiff**) makes a claim of Kshs.37,707,107.40 together with costs and interest against Jambo Biscuits Limited (**Jambo or the Defendant**.)

2. Britania is a cooperative society duly registered under the Co-operative Societies Act (Cap 490). Jambo is a limited liability company and was at all material times carrying on the business of manufacturing biscuits. The employees of Jambo were members of Britania sacco. The basis of Britania's claim is that Jambo made deductions from its employee's salaries for the months of July 2007 to December 2007 which ought to have been paid over to Britania but was not.

3. That towards part settlement of the claim, Jambo made eight (8) payments amounting to Kshs.904,000/= during the months of November 2007, December 2007, and January 2008 reducing the principal debt from Kshs.2,312,518 to Kshs.1,408,518. The amount claimed is substantially more being Kshs.37,707,107.40. That is explained by Daniel Kaliku (PW1) to be due to an interest charge of 5% per month.

4. A Statement of Defence dated 21<sup>st</sup> November 2013 and filed on 22<sup>nd</sup> November 2013 starts off as a blanket denial. Jambo denies that its employees are members of Britania or that it made deductions from its employees on account of that membership.

5. But as an alternative Defence, Jambo avers that any deductions made were duly remitted to Britania. It denies owing Britania Kshs.37,707,107.40.

6. Daniel Kaliku (**PW1 or Kaliku**) and Joseph O. Maiko (**PW2**) testified for Britania. The former was secretary to the society, while the latter was the Makadara District Cooperative Officer. Although counsel for Jambo submitted that PW1 made no reference to Britania's documents and so the documents were not produced before Court, that may not be so. The Court record of 21<sup>st</sup> March 2017 shows that in his evidence in chief, Kaliku told Court that he wanted to produce the Plaintiff's List of Documents as exhibits. The Court consequently admitted the documents as follows:-

**“Plaintiff's list and documents of 17<sup>th</sup> July 2013 marked as P. Exhibit 1 Pages 12 to 61.”**

7. For Jambo, Nitin Dawda (**DW1 or Dawda**), its Managing Director, gave evidence and his evidence in chief comprised of his witness statements of 27<sup>th</sup> July 2016 and 25<sup>th</sup> May 2017. Produced as exhibits in support of the Defence were the Defendant's List and Bundle of Documents dated 27<sup>th</sup> July 2017 (**D. Exhibit Pages 3-29**).

8. The Court does not need to rehash the evidence of the witnesses. Instead it will discuss aspects of it as are relevant and helpful in resolving the issues arising for determination. Although none were proposed by the parties, I frame the following from the pleadings before Court:-

i. Were some employees of Jambo members of Britania?

ii. If so, was there an agreement that Jambo would deduct portions of the members' salaries and remit it to Britania?

iii. If the answer to (ii) is in the affirmative, did Jambo fail to make such remittance to Britania for the months of July to December 2007?

iv. Was the principal sum owed on account of that failure Kshs.1,408,518?

v. If so, why is the claim now Kshs.37,707,107.40?

vi. Is Britania entitled to the claim pleaded?

vii. What is the appropriate order as to costs?

9. The question of membership of the Jambo's employees in Britania, although denied, turned out to be non-contentious. Dawda, the sole witness for Jambo, readily admitted this. As well conceded is that Jambo would remit deductions made from its employees' salaries to Britania.

10. The real controversy has to be whether Jambo owes Britania the amount claimed in respect to unremitted deductions.

11. In a bid to prove the claim, PW1 selected some members' pay slips for the months of July – December 2007 showing deductions made by the employer (See **P. Exhibit Pages 52 to 58**). Let me take just two examples. For David Kondoro Mwakio (**P. Exhibit Page 58**), it shows a society deduction of Kshs.3,682.00 on his pay for September 2007. For Bernard Oduary Ogayo (**P. Exhibit Page 55**), there was a society deduction of Kshs.4,302.00 for December 2007. I will return to this latter slip because there was a debate as to whether Jambo was still making deductions for December 2007.

12. As to the amount deducted from the employees for the relevant months of July 2007 to December 2007 and which were allegedly not remitted, Britania furnished the following tabulation (**P. Exhibit Page 26 to 41**):-

**“July 2007 - 377,296.00**

**August 2007 - 387,085.00**

**September 2007 - 394,067.00**

**October - 373,611.00**

**December 2007 - 391,620.00”**

13. The tabulations also had details of how much was deducted for each member. It is possible to relate some of the pay slips produced to the tables. Again, for illustration, I use the two picked earlier. The deduction of David Kondoro Mwakio of Kshs.3,682.00 made to his pay of September 2007 is listed in the table showing details of deductions for September 2007 (**P. Exhibit Page 32** – third name from top). Bernard Oduary Ogayo's deduction of Kshs.4,302.00 for December 2007 is on the table found at **P. Exhibit Page 40** (the first name under “Personnel & Admin.”)

14. I however agree with counsel for Jambo that Britania which borne the legal burden of proving its case was required to provide proof of all deductions which were to be remitted. Production of select pay slips may not have been enough. The list of members produced by Britania show 69 members from Jambo, ten (10) select pay slips fell far short of proving the deductions made for 69 members in respect for 6 months (July to December 2007.)

15. But help to this otherwise weak aspect of Britania's case comes from an unlikely quarter. Dawda of Jambo testified as follows:-

**“The average deduction was Kshs.300,000 per month.”**

This is not far off the mark of the monthly deductions set out in the table which range from Kshs.377,296.00 to 394,067.00 per month. I accept, and so hold, that on a balance of probabilities, the tables produced by Britania represents the deductions made by Jambo and which were to be paid to Britania at least for the months of July 2007, August 2007 and September 2007. The reason why the holding is at this stage just for the three months is explained presently.

16. Britania refutes making deductions for October 2007, November 2007 and December 2007 because of a letter of 24<sup>th</sup> October 2007 (**D. Exhibit Page 29**). In that letter the management committee of Britania communicates to Jambo a decision that effective October 2007, no payroll deductions should be made. However, the evidence of Kaliku was that:-

**“We asked the Defendant to stop deductions on 24<sup>th</sup> October 2007 but the Defendant continued deducting upto 31<sup>st</sup> December 2007 thereafter he (sic) complied.”**

17. Dawda sought to contest this evidence and insisted that Jambo stopped making deductions in October 2007 in deference to the letter of 24<sup>th</sup> October 2007.

18. The evidence in the pay slips supports the society's contention and contradicts that of the employer. A copy of the pay slip (**P. Exhibit**

**Page 54)** of Bernard Oduoy Ogayo for November 2007 shows society deduction of Kshs.4,302.00. A similar amount is deducted in his December 2007 pay (**D. Exhibit Page 55**).

19. On this aspect, and from the evidence, the Court chooses to believe the evidence of Britania over that of Jambo. That Court finds that deductions persisted beyond September 2007 to December 2007.

20. I can now make a more complete call. Further to what I had held earlier the Court therefore holds that for the period under contention, Jambo made the following deductions from the employees and which they ought to have remitted to Britania:-

**July 2007 - 377,296.00**

**August 2007 - 387,085.00**

**September 2007 - 394,067.00**

**October - 373,611.00**

**December 2007 - 391,620.00**

21. The next issue is whether the sums were duly remitted by Jambo to Britania. The evidence by Kaliku was that there was a cash payment of Kshs.1,304,000.00 as tabulated by Jambo (**D. Exhibit Page 5**). These payments are as follows:-

**Date of payment   Amount**

**29-10-2007   250,000.00**

**3-11-2007   150,000.00**

**12-11-2007   104,000.00**

**17-11-2007   100,000.00**

**26-11-2007   100,000.00**

**3-12-2007   100,000.00**

**11-12-2007   100,000.00**

**19-12-2007   100,000.00**

**24-12-2007   100,000.00**

**19-1-2008   200,000.00**

**Total 1,304,000.00**

22. But Kaliku says there is a twist to the matter because of the Kshs.1,304,000.00 said to have been paid Kshs.400,000.00 was to replace cheques paid but which had bounced. He gave the 4 bounced cheques as Nos.2790, 2791, 2792, and 2796 each of Kshs.100,000.00.

23. On his part, Dawda asserts that Britania wrongfully refuses to give credit for the sum of Kshs.400,000.00. He also gave evidence that Britania refuses to acknowledge the following further payments made by way of cheques:-

**Cheque No.   Amount**

**002789   100,000.00**

**002790   100,000.00**

**002791   100,000.00**

**002792   100,000.00**

**002793   100,000.00**

002794 100,000.00

002795 100,000.00

002796 100,000.00

002797 100,000.00

002798 100,000.00

002799 100,000.00

002800 100,000.00

**Total 1,200,000.00**

24. What is to be made of this conflicting positions?

25. To support its case that the cheques had been paid, Jambo produced counterfoils to the cheques (**D. Exhibit Pages 6 to 17**) and copies of some Bank statements (**D. Exhibit Pages 18 to 28**). In reaction to the Bank statements, Kaliku (**PW1**) testifies:-

**“The following cheques No. 2790, 2791, 2792, and 2796 bounced. The rest I cannot confirm who was paid.”**

26. In reminding of the onus of the Plaintiff to prove its case, counsel for Jambo makes heavy weather of the non-production by Britania of its bank statements to dispute payment of the cheques said to have been made by its client. Counsel will of course recall that in a Ruling of 29<sup>th</sup> June 2018 this Court expunged amongst other documents, the copies of bank statements of Britania on the ground that the person who sought to produce them was not an employee of Britania and further had not shown a basis for producing them on behalf of Britania. This indeed was on the urging of Jambo. The crucial issue is whether that by itself disabled Britania for demonstrating its claim.

27. In his testimony to Court, Dawda denied that any of the cheques paid were returned dishonoured. It was also his testimony that:-

**“I am not aware of any notice of dishonour. Dishonour would also reflect automatically on the Bank statement.”**

28. So the Court turns to the bank statements availed to the Court by Jambo. As correctly pointed out by counsel for Britania there is evidence that at least two cheques Nos. 2791 and 2792 were dishonoured. Jambo’s bank statement at **P. Exhibit Page 21** shows that cheque No. 2791 was unpaid. In respect to cheque No. 2792 is an entry of an unpaid cheque. It is clear therefore that Mr. Dawda was less than candid when he told Court that none of the cheques were returned dishonoured.

29. Then there is something even more disturbing about the manner in which Jambo presented its defence. Of the bank statements (**D. Exhibit Pages 18 to 28**), Dawda attempts to give the impression that they are the entire statements for the period August 2007 and September 2007. He says:-

**“These are statements from Bank, are from August 2007 and September 2007. This was proof of remittance.”**

30. Yet on close scrutiny certain pages are obviously missing from the statements presented by Jambo. These are pages 109, 110, 112, 113, 116, 117, 118, 119, 126, 128, 129. And there is a pattern to it. The pages missing are in respect to periods after entries of purported payments of 8 cheques said by Jambo to have been paid. Some are tabulated in the Plaintiff written submissions and others are noticed by the Court:-

**Cheque Page Missing pages**

2797 108 109, 110

2798 111 112, 113

2799 114 116, 117, 118, 119

2800 115 116, 117, 118, 119

2789 120 122

2790 121 122

2793 125 126

2794 127 128

2795 127 128

2796 130 131

31. One quickly notices that had all these pages been availed then it would have been easy to verify whether the cheques in contention were returned unpaid. It seems to this Court that Jambo deliberately withheld some pages of the bank statements so as to suppress evidence. Is it possible that the missing pages would have revealed that although the ten cheques had been presented each one of them were returned dishonoured as cheque Nos. 2791 and 2792?

32. This Court draws a negative inference on the conduct of Jambo who, in addition, did not produce copies of the purported paid cheques ostensibly because the cheques were old and could not be retrieved by the Bank.

33. While Britania did not produce its own bank statement to disprove the payments, nothing much can be gained by Jambo from this lapse. The evidence presented by Jambo and some information withheld by it came to the aid of Britania's case.

34. The sum total of the evidence before me is that, for the months of July to December 2007, Jambo deducted a sum of Kshs.1,923,679.00 from the salaries of its employees ostensibly for remittance to Britania. That remittance was not made as required by law and on demand Jambo only paid a sum of Kshs.904,000.00. These payments came in bits and at different times.

35. Now there is something atrocious and reprehensible about an employer who deducts his employees' salary on account of society contributions and then keeps the money instead of remitting it to the society. The law shows its strong indignation for such conduct and imposes a heavy penalty on an offending employer. Section 35 of the Act provides:-

**“Failure to remit the sum deducted;**

**(1) Where an employer of a person who is a member of a co-operative society has, under the instructions of the employee, made a deduction from the employee's emoluments for remittance to the co-operative society concerned but fails to remit the deductions within seven days after the date upon which the deduction was made, the employer shall be liable to pay the sum deducted together with compound interest thereon at a rate of not less than five per cent per month.**

**(2) The Commissioner may, on behalf of the society, institute legal proceedings in court for recovery of the sum owing under subsection (1) without prejudice to any other mode of recovery and such sum shall be a civil debt recoverable summarily.**

**(3) The Commissioner may, by written notice, appoint any person, bank or institution to be an agent of the society for the purposes of collection and recovery of a debt owed to the society.**

**(4) The agent shall pay the amount specified in the notice issued under subsection (3) out of any moneys which may, at any time during the twelve months following the date of the notice, be held by him for the employer or are due from him to the employer.**

**(5) Where an agent claims to be or to have become unable to comply with subsection (3) by reason of lack of moneys held by or due from him, he shall give a written notification to the Commissioner stating the reasons for his inability and the Commissioner may—**

**(a) accept the notification and cancel or amend the notice accordingly; or**

**(b) if he is not satisfied with the reasons, reject the notification in writing.**

**(6) Where an agent fails to notify the Commissioner or the notification is rejected, it shall be presumed that the agent has sufficient moneys for the payment of the amount specified in the notice.**

**(7) Where an agent fails to pay the amount specified in the notice within thirty days from the date of service or the date on which any moneys come into his hands for or become due to him from the employer, the agent shall be liable for the amount specified in the notification as if he were the employer.**

**(8) In any proceedings for the collection or recovery of the amount specified in the notice, it shall not be a defence for the agent to claim lack of the moneys.**

**(9) This section shall apply notwithstanding that the failure under subsection (1), to remit the sum deducted may constitute an offence under some other law for which the employer has been prosecuted, or is being, or is likely to be prosecuted.**

**(10) In this section “employer” includes any person, firm or organization holding remuneration or payment for produce of a member of a co-operative society and the term “employee” includes any person who receives remuneration or payment for produce from such persons or firm or organization.”**

36. Britania produced a table on how the default sum attracted interest up to May 2013 (See **P. Exhibit Page 61**). By the end of May 2013, the interest stood at Kshs.36,298,589.40. Maiko (**PW2**) was the District Cooperative Officer of Makadara District (and later Nairobi East District) under whose jurisdiction Britania fell. He stated that he worked out the interest. Although Maiko did not hold any accounting certificates or qualifications, he told Court that he held a Diploma in Cooperative Management from the Cooperative College of Kenya which also covers co-operative accounting. I do not perceive that working out the interest is a sophisticated arithmetic or accounting exercise. Both witnesses for the Plaintiff were extensively cross-examined but were not faulted on the workings. This Court believes them.

37. Counsel for Jambo argued that there was an inconsistency in Britania's own evidence. In their advocate's letter of 17<sup>th</sup> June 2003, the advocate states that after payment of Kshs.904,000.00 that amount offset the debt of July to December 2007 from Kshs.2,312,518.00 to Kshs.1,408,518.00. He contrasts it with PW2's letter of 27<sup>th</sup> November 2008 to the effect that non-remittances from October 2007 to October 2008 stood at Kshs.2,381,800.35 with interest included. As I understand it, there would be changes on the amount owed from month to month due to the application of compound interest of 5% on every seventh day of default. Even if there was inconsistency in the amounts demanded, the Court has found that there was indeed default in the remittances and the interest calculation on the amount due has not been faulted.

38. Jambo was well aware that a penalty would be imposed on default. Dawda testified:-

**“The payments I made included the penalty. My internal accountant advised me of my penalty.”**

The charge of interest is deserved. The law provides for it. And Jambo's conduct calls for such censure because in addition to failing to remit up to September 2007, it continued to deduct after October 2007 (without remitting) even after instructions from the Sacco not to do so.

39. The Plaintiff has proved its claim. I enter Judgment for the sum of Kshs.37,707,107.40 as prayed. But as the Plaintiff did not specify the rate of interest it seeks on this amount, it shall attract interest at Court rates from the date of filing of the suit. The Plaintiff shall also have costs of the suit.

**Dated, Signed and Delivered in Court at Nairobi this 22<sup>nd</sup> Day of February 2021**

**F. TUIYOTT**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17<sup>th</sup> April 2020, this Judgment has been delivered to the parties through virtual platform.

**F. TUIYOTT**

**JUDGE**

**PRESENT:**

Court Assistant: Nixon

Kibanya for Defendant

No appearance for Plaintiff