



REPUBLIC OF KENYA

IN THE CO-OPERATIVE TRIBUNAL AT NAIROBI

TRIBUNAL CASE NO. 228 OF 2019

NYABOMITE F.C.S.LTD .....CLAIMANT

VERSUS

JOSIAH OYARO.....RESPONDENT

RULING

What is before us for consideration and determination is the Claimant's Application dated 9/8/2019. It seeks, in the main, the following orders:

- a) That the Respondent's Statement of Defence dated 30<sup>th</sup> May, 2019 be struck out;
- b) THAT this Honourable court be pleased to enter summary judgment for the Claimant/Applicant against the Respondent herein as prayed in the Statement of Claim plus costs and interest thereof;
- c) THAT the Defendant/Respondent do pay the costs of this Application; and
- d) THAT this Honourable Court be pleased to issue any other relief that it may deem fit.

The Application is supported by the grounds on its face and the following Affidavits:

- a. Supporting Affidavit sworn by Alloys Joseph on 9/8/2019; and
- b. Supplementary Affidavit sworn by the said Alloys on 16/10/2019.

The Respondent has opposed the Application Vide the following Affidavits sworn by his Advocate on record, **Mr. George Joseph Mugaka Moses**.

- a. Replying Affidavit sworn on 24/9/2019; and
- b. Supplementary Affidavit sworn on 4/10/2019.

#### **Claimant's Contention**

Vide the instant Application, the Claimant contend that the Defence filed by the Respondent is a sham and amounts to a mere denial of the claim. That he is duly indebted to him in the sum stated in the statement of claim. That in view of this, the defence is scandalous, frivolous and vexatious and is otherwise as abuse of the process of the Tribunal. That a notice of intention to surcharge was duly issued by the Commission for Co-operative Development. That subsequently, a surcharge order was

issued and duly served upon the Respondent. That the Respondent has not appealed against the said surcharge order. That it is on this basis that summary judgment should be entered against the Respondent.

#### **Respondent's Case**

Vide the Affidavits sworn by his counsel on record on 24/9/2019 and 4/10/2019 respectively, the Respondent contend that he has filed a defence which raises triable issues. That the subject matter of surcharge proceedings is alive in the High Court and that the High Court has

referred the matter for determination by the Tribunal.

### **Disposal of the Application**

Vide the directions given on 6/3/2020, the Application was disposed of by way of written submissions. The Claimant filed and served its written submissions on 2/6/2020 while the Respondent did so on 16/6/2020. We will consider the same whilst determining the issues raised by the Application.

### **Issues for determination**

We have framed the following issues for determination:

- a. Whether the Claimant has laid a proper basis to warrant entry of summary judgment against the Respondent; and**
- b. Who should bear the costs of the Application.**

### **Adoption of Surcharge Orders**

Sections 73-75 of the Co-operative Societies Act (Cap 490), Laws of Kenya, deals with surcharges generally. Section 73 provides for the manner in which surcharge is undertaken while Section 74 provides for the mechanism of challenging the process leading to the issuance of a Surcharge order. Section 75, which is relevant to the instant Application, deals with the process of recovery of the monies or awards contained in the surcharge order. It provides thus:

**“ 75 (1) Subject to Section 74, an order made pursuant to Section 73 for any monies to be repaid or contributed to a Co-operative Society shall be filed with the Tribunal and shall, without prejudice to any other mode of recovery, be a civil debt recoverable summarily.”**

The Claimant has thus invoked this provision and is thus praying that summary judgment be entered against the Respondent as pleaded in the statement of claim.

The Respondent has opposed the Application on account of the fact that the defence filed raises a triable issues.

### **Determination**

We have perused the said defence dated 30/5/2019 and filed on 4/6/2019. The Defendant has denied owing the Claimant a sum of **Kshs. 769,163.89**. He further contend that he was part of the team that Complained and requested for an inquiry to be instituted and was never under any investigation and that he was not the Hon. Secretary. That the inquiry report is subject to **Nyamira HCCC No. 1/2015**.

We have also perused annextures **“AJA1, AJA2 (a)-(c) and AJA 3 (a) and (b)**. They are an inquiry order, inquiry report, Notice of a Special General Meeting, Minutes of the meeting, Copy of Notice of Intention to surcharge, and the surcharge order respectively.

The Respondent appears at No. 9 in the surcharge order and he has been surcharged for **Kshs. 769,163.89**.

What is thus apparent is that there exist a surcharge order against the Respondent. The Claimant has moved the tribunal for adoption of the said order by way of entry of a summary judgment. The Respondent has opposed the adoption on account that there exist a suit in the High Court challenging the inquiry proceedings.

The foregoing raises the pertinent issue as to the jurisdiction of the Tribunal when it comes to surcharge orders. We answer the question as follows; That the Jurisdiction of the Tribunal when it comes to inquiry proceedings is both Appellate and original. It is original in the sense that a party in whose favour the Commissioner for Co-operative Development has issued a surcharge order can seek for adoption Under Section 75 of the Act. It is Appellate in the sense that a person aggrieved with the surcharge order can move the Tribunal to contest the same under section 74 of the Act. We hasten to say that these type of jurisdictions are distinct and cannot be exercised at the same time.

In the current Application we are being invited to exercise our original jurisdiction to adopt a surcharge order. When doing so, all we need to ascertain is whether there indeed exist a surcharge order. We have perused **annextures AJA 3(b)** of the annextures attached to the Supporting Affidavit sworn by **Alloys Joseph Abuga** on 9/8/2019. It is a surcharge order dated 25/9/2019. Vide the said order, the Respondent is required to pay the Claimant a sum of **Kshs. 769,163.89**. This is a liquidated amount whose mode of recovery is clearly spelt out in Section 75 (1) of the Act.

We have perused the responses to the Application as well as the Respondent’s written submissions filed on 16/7/2020. We have not found any material confirming that the Respondent has exercised his rights under Section 74 of the Act. All he says is that he challenged inquiry proceedings in the High Court at Nyamira and that the same were referred to the Tribunal. He stopped at this. He did not lad evidence to confirm that the said proceedings were brought within the ambit of Section 74 of the Act. This leaves us with the irresistible conclusion that there is no lawful contest against the Surcharge Order.

### **Conclusion**

