



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAKURU**  
**CIVIL APPEAL NUMBER 22 OF 2013**

**COMPLY STAFF SACCO LTD.....APPELLANT**

VERSUS

**JAMES ELIKANA AYIEKO.....RESPONDENT**

*(An appeal from the Order of Paul Mayova, Acting Senior Resident magistrate in Civil Suit No. 2021 of 2011 Chief Magistrate's Court Nakuru made on 17<sup>th</sup> January 2013)*

**JUDGMENT**

1. The plaint in the primary suit **Nakuru CMCC No. 1021 of 2011** was filed on 3<sup>rd</sup> November 2011. The plaintiff sued the defendant, a limited liability company for refund of a sum of Kshs.65,000/= advanced to it by the plaintiff, in its official capacity upon terms in their duly executed agreement dated 8<sup>th</sup> May 2009.

In its statement of defence dated 28<sup>th</sup> November 2011 the defendant company denied ever borrowing or being advanced any money by the plaintiff.

2. I have seen a cheque dated 5<sup>th</sup> June 2009 drawn by the defendant company in favour of the plaintiff for the sum of Kshs.65,000/= in terms of the agreement dated 8<sup>th</sup> May 2009. The Chairman and Treasurer of the defendant company were the signatories to the agreement, as well as the cheque.

When presented for payment the cheque was dishonoured. It is this none payment of the cheque that forced the plaintiff to file the case in the lower court.

3. By its application dated 4<sup>th</sup> July 2012, the Defendant now the Appellant sought an order that its former chairman and Treasurer Aggrey Kisuya and Albert Okumu be enjoined as co-defendants in the suit and thereafter be directed to file their witness statements in respect of the suit. Reliance was had to the Agreement dated 8<sup>th</sup> May 2009 where the two were signatories on behalf of the company. Upon hearing the chamber summons application, the trial magistrate dismissed the application in his ruling made on the 17<sup>th</sup> January 2013. This dismissal order is the subject of the present appeal.

4. I have considered the reasons advanced by the trial Magistrate for the dismissal of the application, viz-a-viz the Memorandum of Appeal, and submissions by both counsel on the appeal.

The Appellant is a staff Sacco with its By-Laws that govern its operations including borrowing and lending funds. There is no doubt that the two signatories to the agreement and the cheque in refund of the borrowed sums were officials of the Sacco at the material times.

I have perused the By-Laws as provided by the Sacco. They provide for a dispute resolution mechanism between itself and its officials and members. The mechanism seems to have been ignored.

I am minded that **Section 76 of the Co-operative Societies Act** provides for dispute resolution mechanism between a member, past members or deceased members and a society. It has not been stated why the dispute mechanism between the Sacco and the two past officials was not been invoked.

5. The appellant sought to enjoin the past officials to the suit as co-defendants. The trial Magistrate in his ruling found no sound reasoning in the application to enjoin the officials of the company to the suit as co-defendant upon consideration of the Sacco's By-laws, specifically **Sections 42, 46 and 71** thereof.

6. It is not the duty of a court to rewrite agreements or by-laws of parties. Its duty is to enforce the same unless coercion, fraud or misrepresentation of material facts are alleged. None have been alleged in this matter. See **Hassan Zubeid -vs- Patrick Mwangi Kibaiya & Another (2014) e KLR**.

I have also noted that the two officials are stated as witnesses by the appellant. No doubt this will cure the need for their enjoinder to the suit as co-defendants, as they will ultimately testify to the matters in dispute.

7. The appellant purport to submit that as the two officials executed the agreement, they then ought to be enjoined to the suit. The court however notes that they did so on behalf of the company, not in their personal capacities. The law is clear on consequences when a witness fails to file its witness statements. The court cannot force a party to file a witness statement if it does not want to.

8. As to whether the borrowed money was used by the two for their personal use, that is a matter that ought to be canvassed during the hearing of the suit and so is with the allegations that they acted *ultra vires*.

9. The primary suit is not yet heard. To go into interrogation of these allegations would be to jump the gun. Evidence will be necessary to prove or disapprove the said allegations.

10. It is trite law that a limited liability company is separate from its officials.

In **Litein Tea Factory Co. Ltd & Another -vs- Davis Kiplanga Mutai (2015) e KLR**, and **Nakuru Teachers Housing Co-operative Society Ltd -vs- Wanjoya Enterprises (2017) e KLR**. I discussed the issue that a limited liability company has its own legal existence and personality separate from its directors, officials and shareholders.

It can only act and manage its affairs through the duly elected officials. It was not alleged that the two officials were not duly elected officials of the Sacco, the appellant.

11. For those reasons, I find no merit in the appellant's appeal. It is dismissed with costs to the Respondent.

Following therefore, it is directed that the primary suit be progressed for hearing and determination before the Principal Magistrate sitting at the Principal Magistrate's court, Nakuru.

**Dated, Signed and Delivered this 27<sup>th</sup> Day of July 2017.**

**J.N. MULWA**

**JUDGE**