



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

Miscellaneous Civil Appeal 119 of 2011

**IN THE MATTER OF: AN APPLICATION SEEKING ORDERS OF JUDICIAL REVIEW BY
TELCOM KENYA LTD.**

AND

**IN THE MATTER OF: THE CO-OPERATIVE SOCIETIES ACT CAP.490 LAWS OF
KENYA**

BETWEEN

REPUBLIC.....APPLICANT

-VERSUS-

**COMMISSIONER FOR CO-OPERATIVE
DEVELOPMENT.....RESPONDENT**

AND

**MAWASILIANO SACCO SOCIETY LIMITED.....INTERESTED
PARTY**

EXPARTE.....TELCOM KENYA LTD

J U D G M E N T

By a Notice of Motion dated 18th May 2011 and filed in court on 19th May 2011, the Exparte Applicant herein Telkom Kenya Ltd sought the following orders against the Respondent, the Commissioner for Co-operative Development:

(a) An order of certiorari to remove to this Honourable court for the purposes of being Quashed the NOTICE dated 26th April 2011 issued by one P.N. Gichuhi for the Respondent requiring the Applicant to make an appropriate proposal to pay Kshs.51,062,660.00 allegedly owed to Mwasiliano Sacco Society Ltd.

(b) An order of certiorari to remove to this Honourable Court for purposes of being Quashed the AGENCY NOTICE dated 12th May 2011 issued by one P.N. Gichuhi for the Respondent to Standard Chartered Bank, Kenyatta Avenue, P.O. Box 30001 -00100 Nairobi, (the applicant's banker), Kenya Commercial Bank Limited and Commercial Bank of Africa, under Section 35 of the Co-operative Societies Act, declaring it an agent of Mwasiliano Sacco Society Ltd and requiring it to pay Mwasiliano Sacco Society Limited Account No.01120000548000 held at Co-operative Bank – Co-operative House Kshs.660,977,559.70 plus interest from the applicant's Account No.0104023376700 held by the bank, any other Account current, Deposit or Savings held by the Applicant with the Bank (Standard Chartered), Kenya Commercial Bank Limited and Commercial Bank of Africa Limited, and if the funds held are not sufficient from all future credits that may become available within twelve (12) months alleging the money is withheld by the applicant.

(c) An order of prohibition to prohibit the Respondent, its Servants and or Agents from executing and or enforcing the impugned Notice and Agency Notice on behalf of Mwasiliano Sacco Society Ltd against its Accounts current, deposit or saving held by Standard Chartered Bank, Kenya Commercial Bank Limited, Commercial Bank of Africa, or any other Bank and all future credits that may become available to it.

(d) Costs and incidentals to these proceedings.

The Notice of Motion was filed pursuant to leave granted by Musinga, J on 18th May 2011. It is supported by the statutory statement dated 17th May 2011 and the verifying affidavit sworn by Lois A. Allela, the Head of Legal Affairs of the Applicant.

The Application is opposed by both the Respondent herein and the Interested Party Mwasiliano Sacco Society Ltd.

The Respondent filed grounds of opposition on 23rd September 2011 while on behalf of the Interested Party a replying affidavit sworn on 8th July 2011 by Bernard Kimaiyo Chemogom, Chairman of the Interested Party was filed on 8th July 2011.

The Applicant's case is well captured in the depositions of Loice A. Allela in the verifying affidavit sworn on 17th May 2011. She stated that on 6th May 2011, one P.N. Gichuhi purportedly acting for the Respondent herein issued the Applicant with Notice dated 26th April 2011 purportedly made under the provisions of the Co-operative Societies Act requiring the applicant to make an appropriate proposal on how to pay Kshs.51,062,660.00 purportedly owed to Mwasiliano Sacco Society Ltd and resume remitting the monthly deductions punctually. The money is the subject of HCCC 868 of 2010 MILIMANI NAIROBI in which the claim is denied.

The notice was followed by Agency Notices issued to the Applicant's bankers Standard Chartered Bank of Kenya Ltd, Kenyatta Avenue Branch – by P.N. Gichuhi purportedly acting for the Respondent in the exercise of powers conferred upon him by **Section 35** of the Co-operative Societies Act requiring the bank to pay the Account No.01120000548000 Co-operative Bank – Co-operative House Kshs.660,977,559.70 being the principal amount plus interest from the Applicant's main Account No.0104023376700 with the bank or any other account, current, deposit of savings held by the Bank or if the funds held are not sufficient to pay from all future credits that may become available within 12 months from the date of the notice (12th May 2011).

The Notice requiring the Applicant to make proposals for payment to the Interested Party and the Agency

Notice dated 12th May 2011 are attached to the verifying affidavit and marked LAA1 and LAA2.

It is the Applicant's contention that a similar Agency notice was issued to its other Bankers Kenya Commercial Bank and Commercial Bank of Africa but copies of notices served on the said banks were not availed to the Applicant.

The Applicant's position is that there is no basis for the issuance of the notices by the Respondent on behalf of the Interested Party as the Applicant did not have any instructions to deduct any monies from its employees emoluments and did not therefore make any deductions from its employees terminal benefits which it could have remitted to the Interested Party under Section 35 of the Co-operative Societies Act.

The Applicant contends that it does not owe the Interested Party the money subject matter of the notices dated 26th April 2011 and 12th May 2011 a fact which was admitted by the Interested Party in pleadings filed in case No.213 of 2006 filed at the Co-operative Tribunal (Nairobi) against the Applicant and 3 others by the Interested Party and 3 other persons. The said pleadings were annexed to the application and marked LAA3. There is evidence that the said Tribunal Case No.213 of 2006 was dismissed as against the Applicant with costs in a ruling dated 1st March 2007 on a preliminary point of law raised by the Applicant on the issue of jurisdiction of the Co-operative Tribunal. A certified copy of the said Ruling is exhibited and marked LAA4.

It is further stated by the Applicant that there is a case pending between the parties namely HCCC No.868 of 2010 filed by the Interested Party at the Milimani Commercial Courts in which the Interested Party seeks payment of Kshs.51,062,660.00 on interest at 5% per month from May 2006 till payment in full, costs or any other relief that the court may deem fit to grant on grounds that the Applicant had refused and/or neglected to recover unsecured loans from members of the Interested Party who the Applicant had retrenched occasioning it loss of Kshs.51,062,660 value of its unsecured loans.

The Applicant filed a defence dated 21st January 2011 which it amended on 2nd February 2011 denying the Interested Party's claim in its entirety. According to the Applicant, the case is still pending hearing.

The Applicant claims that it is entitled to orders sought as the aforesaid notices were issued arbitrarily, irregularly and illegally and that in issuing the notices, the Respondent was motivated by malice and bad faith. The Applicant further complains that in issuing the said notices, the Respondent abused its power under Section 3(3) and Section 35 of the Co-operative Societies Act and violated the rules of Natural Justice.

It is important to note that though the Respondent was aware of the averments in the verifying affidavit since he was obviously served with the Applicant's pleadings, he chose to file grounds of opposition which did not respond specifically to the issues raised by the Applicant in its pleadings. In my assessment, the grounds of opposition appear to have been filed in a hurry as a matter of formality since they were too general, vague, ambiguous and unresponsive to the issues raised by the Applicant.

The Respondent did not file a Replying affidavit to contravert all the statements of facts contained in the verifying affidavit sworn on behalf of the applicant meaning that the averments in the verifying affidavit are not disputed and are therefore deemed to be admitted by the Respondent.

On its part, the Interested party through the replying affidavit filed on its behalf opposed the Applicant's notice of motion claiming that though Tribunal Case No.213 of 2006 was dismissed against the Applicant with costs, the tribunal subsequently issued an exparte order directed at the Applicant requiring it to attach a sum of Kshs.12,135,429.90 in the hands of its 168 retrenched former employees who were members of the Interested party which order the Applicant by its own admission ignored.

The Interested party also averred that the Applicant had agreed to deduct from retrenchment packages due to its retrenched workers monies owed to the Interested party and remit the same to the society. That the Respondent acted within his legal powers in issuing the impugned notices as the said agreements put the

Applicant in the category of employees who had made deductions of monies owed to the Interested Party from its employees and failed to remit the same to the society. However, a look at the two agreements annexed to the replying affidavit marked BKCI(a),4(b) shows that the said agreements were between the Communication Workers Union (COWU) and the Applicant and not between the Interested Party and the Applicant. The two co-operative societies, i.e. the Interested Party and Communication Workers Union (COWU) appear to be two completely different entities and as the agreements did not concern the Interested Party, the relevance of the said agreements to the instant proceedings is difficult to fathom.

In order to advance their respective positions, the parties herein filed written submissions which were highlighted before me by their advocates on record on 25th January 2012.

Having considered the application in its entirety alongside the submissions made by M/s Mbabu for the Exparte Applicant, M/s Chelagat for the Respondent and Mr. Ombeta for the Interested Party, I find that there was some history of litigation between the Interested Party and the Applicant herein both in the co-operative Tribunal and in the Commercial Division of the High Court before the instant judicial review proceedings were filed by the Applicant. The litigation was over dues allegedly owed to the Interested Party by retrenched employees of the Applicant who were members of the Interested Party which the Interested Party was seeking to recover from the Applicant and which apparently formed the basis for the issuance of the two impugned notices by the Respondent against the Applicant on behalf of the Interested Party.

In my considered view, from the pleadings filed herein and the submissions made by counsel for the respective parties, five main issues emerge for determination by this court which are as follows:

- (1) *Is the Applicant's Notice of Motion dated 18th March 2011 properly before this court?***
- (2) *Was the Respondent's action in issuing the two impugned notices dated 26th April 2011 and 12th May 2011 illegal and ultra vires the provisions of Section 3 (3) and Section 35 of the Co-operative Societies Act Cap 490 Laws of Kenya (hereinafter referred to as the Act)?***
- (3) *Did the Respondent issue the two impugned notices arbitrarily, irregularly, capriciously and were the notices oppressive to the Applicant and a reflection of abuse of power by the Respondent?***
- (4) *Were the impugned notices issued in violation of the Rules of natural Justice and if so, what are the consequences of failure to observe the rules of natural justice?***
- (5) *Has the Applicant demonstrated that it is entitled to the orders sought?***

Turning now to the first issue, Mr. Ombeta at the tail end of his written submissions dated 5th October 2011 claimed that the Notice of Motion filed by the Applicant is incurably defective as it contravenes Order 53 Rule 4(1) of the Civil Procedure Rules in that it was not supported by the statement and verifying affidavit that had accompanied the Chamber Summons seeking leave to commence judicial review proceedings.

Looking at the provisions of Order 53 Rule 4(1) of the Civil Procedure Rules, I with respect find no merit in this submission by Mr. Ombeta. Order 53 Rule 4(1) of the Civil Procedure Rules does not require expression on the face of the substantive motion that it is supported by the statement accompanying the chamber summons application for leave. It only requires that the said statutory statement be served on the Respondent and Interested party together with the notice of motion and that all affidavits filed in connection with the application for leave should be supplied to the other parties on demand. I think it is prudent to reproduce verbatim the provisions of Order 53 Rule 4(1) of the Civil Procedure Rules in order to appreciate its true import. It provides as follows:

“Copies of the statement accompanying the application for leave shall be served with the notice of motion, and copies of any affidavits accompanying the application for leave shall be supplied on demand

and no grounds shall, subject as hereafter in this rule provided, be relied upon or any relief sought at the hearing of the motion except the grounds and relief set out in the said statement”.

As the Interested Party has not claimed that it was not served with the statutory statement together with the Notice of Motion or that the grounds relied upon in the Notice of Motion and reliefs sought are different from those indicated in the statutory statement, I find that the said Notice of Motion is not defective or incompetent as alleged and it is properly before the court.

I now propose to deal with all the other issues together since in my view they are all inter related.

On behalf of the Applicant, M/s Mbabu submitted that the two impugned notices were illegal as they lacked any legal basis having been issued in contravention of Section 35 of the Co-operative Societies Act (*hereinafter referred to as the Act*).

Section 35 of the Act reads as follows:

“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 not less than five percent per month”

The Applicant maintains that the impugned notices had no legal basis as the Applicant did not owe the Interested party any money as it had not received any instructions from its retrenched employees who were members of the Interested Party to deduct any money from their retrenchment packages or emoluments for remittance to the Interested Party. The Applicant contended that in the absence of such instructions, it had not made any deductions from its employees emoluments and it was not therefore holding any money leave alone the monies stated in the impugned notices which it had failed to remit to the Interested Party within 7 days to justify intervention by the Respondent under Section 35 of the Act.

It was further submitted on behalf of the Applicant that since Section 3 of the Act vested the power or mandate to enforce the provisions of the Act to the office of the Respondent, Section 35 of the Act did not have any room for delegation of such powers to other officers and that since the impugned notices were issued by one P.N. Gichuhi on behalf of the Respondent they were illegal as the said P.N. Gichuhi did not have any power under the law to issue the said notices on behalf of the Respondent.

M/s Chelagat for the Respondent submitted that the orders sought were not available to the Applicant allegedly because the Respondent acted within the law particularly Section 35 of the Act which empowered the Respondent to issue Agency notices where employers had withheld deductions from employees emoluments instead of remitting the same to the relevant co-operative societies.

It is important to note at this juncture that the Interested Party supported the Respondent fully in his submissions. The corpus of the Respondent’s submissions was that in issuing the impugned notices, the Respondent acted in accordance with the law in the execution of his mandate under Section 3(3) of the Co-operative Societies Act which required him to regulate the growth and development of the Co-operative Societies in Kenya which included the Interested Party in this case by providing them with services for their organization, registration, operation, advancement and dissolution. The Respondent was also mandated to administer the provisions of the Co-operative Societies Act and in the Respondent’s view in so far as the impugned notices were issued in accordance with Section 35 of the Act, they were lawfully issued and the Applicant was not entitled to the orders sought.

Though it is common ground that the Respondent had a statutory duty to regulate and promote the growth of Co-operative Societies and intervene on their behalf under Section 35 of the Act to recover monies deducted from members of Co-operative Societies but unlawfully withheld by employers, this was a public duty which the Respondent was legally obligated to exercise rationally and fairly with due regard to the rights of the persons or entities he was instituting action against on behalf of the Co-operative

Societies. In the performance of his duties, the Respondent being a public officer did not only have a public duty to act fairly but also had a duty to execute his mandate under the Act in accordance with the law generally and particularly in accordance with the provisions of the Co-operative Societies Act which donated to him jurisdiction to intervene in matters affecting Co-operative Societies like the Interested Party in this case.

In this case, the Applicant complains that the Respondent issued the impugned Agency Notice dated 12th May 2011 illegally as this was done purportedly under Section 35 of the Act which in the particular context of this case did not empower the Respondent to issue such a notice. Before the said Agency Notice was issued, the Respondent had written to the Applicant letter dated 26th April, 2011 directing it to make proposals of how it was going to pay Kshs.51,062,660 made up of members contribution deducted from its employees which it had allegedly not remitted to the Interested Party. In this letter the Respondent threatened to take legal enforcement measures if no proposals on payment were received from the Applicant within 10 days. It is apparent that the Applicant failed to make the required proposals giving rise to the issuance of the Agency notice dated 12th May 2011 purportedly under Section 35 of the Act.

Before I come to a consideration of whether the said Agency notice was legally issued or not and whether it should be quashed by orders of certiorari as prayed, I wish to first deal with the contents of the letter dated 26th April 2011 with a view to establishing whether it amounted to a notice as described by the Applicant or a decision for which orders of certiorari were available as sought by the Applicant.

Having read the said letter, I agree with the Respondent's submission that the said letter contained a notice to the Applicant from the Respondent informing it that it owed the Interested Party a sum of Kshs.51,062,660/- for which it was supposed to make proposal for payment in 10 days – failure to which action was to be taken. It was not communicating a decision made by the Respondent which had any adverse effects on the Applicant. It was in a sense a notice giving the Applicant an opportunity to respond to the claims of alleged indebtedness to the Interested Party made therein and the Applicant was at liberty to choose whether or not to comply with it. I find that the said letter did not amount to a decision which can be brought within the parameters in which orders of certiorari can issue and in the circumstances it is my view that the Applicant has not demonstrated that it is deserving of the orders sought in Prayer (a). ***I therefore decline to grant the orders sought in Prayer (a) in the Applicant's Notice of Motion dated 18th May 2011.***

Coming now to the complaint's made by the Applicant regarding the Agency notice dated 12th May 2011, I wish to observe that the same is addressed to the branch manager, Standard Chartered under the Ref "unremitted dues to Mwasilaiano Sacco Ltd" issued by one P.N. Gichohi for the Respondent. The said Agency notice was expressed to be issued under Section 35 of the Act requiring the bank to pay Kshs.660,977,559.70 out of the Applicant's Bank Accounts held with the Standard Chartered Bank, Kenyatta Avenue to bank Account No.01120000548000 belonging to the Interested party held at Co-operative Bank. The amount of **Kshs.660,977,559.70** was described to be Principal amount plus interest withheld by the Applicant.

In order to determine whether the said Agency notice was lawfully issued under Section 35 of the Act or ***ultra vires*** the said provision, I think it is important to reproduce Section 35 of the Act in order to understand when the Respondent was legally mandated to exercise the powers bestowed on him by the said provision of the law. Section 35 (1) has already been reproduced earlier in this judgment and there is no need to reproduce it again at this point but I will proceed to quote verbatim the provisions of Section 35 (2) & (3). I must however add that Section 35(2) & (3) of the Act only become relevant and applicable if the Respondent is satisfied that an employer has unlawfully retained funds payable to a Co-operative Society and finds his intervention necessary in order to recover the withheld funds on behalf of the affected Co-operative Society.

Section 35 (2) & (3) of the Act reads as follows:

Section 35(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”

Section 35(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”.

A reading of the foregoing provisions of the law shows that Section 35(1) of the Act only becomes applicable when an employer having received instructions from its employees who are members of a Co-operative Society deducts emoluments from the employees and fails to remit the same to the Co-operative Society concerned within 7 days.

When such a situation arises, the Respondent is then mandated to intervene by either instituting civil proceedings for the recovery of the sums withheld or appointing a person, bank or institution as its Agent to collect and pay the debt owed to a Co-operative Society.

In my humble opinion, Section 35(1) of the Act bestows upon the Respondent a duty to establish as a fact before taking action under Section 35 (2) or Section 35(3) that a certain employer has deducted emoluments from its employees but instead of remitting the same to the employees Co-operative Society, it had retained the monies so deducted for more than 7 days.

In the instant case, the Applicant has denied having deducted monies from its employees’ terminal benefits meant to be paid to the Interested Party. Infact the Applicant has maintained that it did not even have instructions from its employees to make such deductions and without such instructions it could not have deducted any money from its employees’ terminal benefits to be paid to the Interested Party.

These claims by the Applicant were contained in the verifying affidavit sworn on its behalf by Lois A. Allela its head of Legal Affairs and the Respondent who was served with the Applicant’s pleadings and must have been aware of the same averments did not file a replying affidavit to deny the said claims. Failure to file a replying affidavit to contravert the said claims means that the same were not denied.

In the circumstances and in the absence of evidence by the Respondent to prove that the Applicant had actually deducted money from its employees, members of the Interested Party which it had unlawfully withheld instead of remitting it to the interested Party, the Respondent had no jurisdiction to invoke the provisions of Section 35 (1) which would have empowered him to issue an Agency notice under Section 35 (2) of the Act.

Infact from the material placed before the court by the Applicant herein one wonders what informed the Respondent’s decision to issue the said Agency notice given that even from the pleadings in cases filed by the Interested Party against the Applicant at the Co-operative Tribunal Case No.213 of 2006 and at the High Courts Commercial Division in HCCC 868 of 2010 the Interested Party on whose behalf the Respondent had intervened in issuing the impugned Agency notice, had itself admitted that the Applicant had failed to make any deductions from its retrenched employees monies owed to the Interested Party in the form of unsecured loans. The said pleadings are attached to the Applicant’s application for leave and are marked LAA5 and LAA7.

The Interested Party’s claim in Co-operative Tribunal Case No.213 of 2006 was based on grounds that employees of the Applicant had refused and/or neglected to sign authorization forms instructing their employers to deduct loans they owed the Interested Party from their terminal benefits. The suit in HCCC 868 of 2010 also filed by the Interested Party against the Applicant was founded on the claim that the Applicant had refused or neglected to recover unsecured loans from members of the Interested Party who were its retrenched employees thus occasioning loss to the Interested Party in the sum of Kshs.51,062,660.00 value of the unsecured loans. It also averred that the Applicant had ignored the exparte order issued by the tribunal attaching a sum of **Kshs.12,135,429.90** of the terminal benefits due to its employees.

In my understanding, these were tacit admissions by the Interested Party that no deductions had been made by the Applicant from terminal benefits of its retrenched employees which it could have withheld from the Interested Party. Had the Respondent acted reasonably and rationally by conducting due diligence before issuing the Agency notice dated 12th May 2011 as envisaged by Section 35 (1) of the Act, he would have discovered that there was litigation pending between the two parties in the Co-operative Tribunal and at the High Court involving the same sums of money subject of the notice to the Interested Party dated 26th April 2011 which was the precursor to the issuance of the impugned Agency notice though amounts in the two notices varied and he would have either concluded from the pleadings that in fact no money was being withheld from the Interested Party by the Applicant or would have awaited determination of HCCC 868 of 2010 before issuing the said Agency notice.

The agreements executed by Communication Workers Union (COWU) and the Applicant could not have been used as a basis for assuming that the Applicant had made any deductions from its employees payable to the Interested Party since the Interested Party was not a party to those agreements. They did not concern the Interested Party in this case.

In view of the foregoing, this court is satisfied that there was no legal basis at all for issuing the Agency notice dated 12th May 2011 and in failing to ascertain whether or not the Applicant was withholding monies deducted from its retrenched employees owed to the Interested Party before issuing the said Agency notice, the Respondent acted arbitrarily, irrationally and capriciously to the detriment of the Applicant. In the circumstances of this case, I also find that the Respondent acted *ultra vires* the provisions of Section 35 (1) of the Act since Section 35 (1) mandated him to intervene by way of either civil proceedings or issuing Agency notices only in situations where employers had withheld money owed to Co-operative Societies and not where no money is owed to Co-operative Societies like the Interested Party in this case. In fact, the action by the Respondent in this case amounted to abuse of the powers bestowed on him by Section 3 and Section 35 of the said Act. Consequently, it is my finding that the Agency notice dated 12th May 2012 was illegally issued and is a good candidate for quashing by way of orders of certiorari.

It is also instructive to note that from the material placed before the court, before issuing the Agency notice, the Respondent did not give the Applicant an opportunity to make either oral or written representations on the claims that it had unlawfully withheld money owed to the Interested Party. The Agency notice was an order issued directly to a bank to pay money to the Interested Party out of the Applicant's bank accounts. It was therefore an order that had the effect of affecting the Applicant's right to property (money) and was obviously adverse to the Applicant's interests. It was an order condemning the Applicant to pay money to the Interested Party without giving it an explanation of how the monies allegedly owed had changed from **Kshs.51,062,660.00** to a massive **Kshs.660,977,559.70** or how any of the said sums had been arrived at and what they represented. The Respondent issued the said Agency notice without giving the Applicant an opportunity to be heard on whether it was unlawfully withholding the said sums of money from the Interested Party as alleged or not. This action by the Respondent clearly violated the basic tenets of the rules of natural justice which require that no person should be condemned unheard. Failure to comply with the rules of natural justice before issuing the said Agency notice means that the notice was issued contrary to the law and this made the said notice or the decision of the Respondent to issue the said notice void *ab initio*.

Besides, by issuing the Agency notice without giving the Applicant an opportunity to make representations on the amount allegedly withheld by it, the Respondent failed his duty to act fairly. This in turn means that the Respondent subjected the Applicant to unfair administrative action thereby violating the Applicant's right to fair administrative action as enshrined in Article 47 of the Constitution of Kenya 2010. It is important to note that the letter dated 26th April 2011 gave the Applicant opportunity to respond to alleged indebtedness to the Interested Party to the tune of **Kshs.51,062,660.00** and not the amount directed to be recovered in the Agency notice amounting to **Kshs.660,977,559.70**.

Since as noted above the said Agency notice was illegally issued, it is immaterial whether it was issued by

the Respondent himself or by P.N. Gichuhi on his behalf. The identity of the person issuing the notice is not important since the notice was illegal in any event.

For all the foregoing reasons, I am satisfied that the Applicant has demonstrated that it is deserving of the orders of certiorari as sought in Prayer (b).

Consequently, I order that the Agency notice dated 12th May 2011 be removed to the High Court for quashing in terms of Prayer (b) of the Notice of Motion dated 18th May 2011.

On the prayer for prohibition, the Applicant had stated in its pleadings that it was aware that similar Agency notices had been issued by the Respondent to other banks like Kenya Commercial Bank and Commercial Bank of Africa but explained that it had not attached the other Agency notices to the Application for leave or availed them to the court before hearing of the motion as required by Order 53 Rule (7)(1) of the Civil Procedure Rules explaining that failure to do so was occasioned by the fact that those other Agency notices had not been availed to it.

The Respondent did not deny having issued other Agency notices to the other banks specified by the Applicant. As observed earlier, the law is that what is not denied is deemed to be admitted. In the absence of evidence to counter the Applicant's aforesaid claim and in the light of Respondent's implied admission of the claims by the Applicant, I accept the Applicant's assertion that the Respondent had issued other notices similar to the one issued to Standard Chartered Bank for recovery of money allegedly owed to the Interested Party by the Applicant and since no prayers for certiorari were sought for quashing of the said Agency notices and consequently no orders of certiorari can be issued to quash them by this court, the said Agency notices are capable of enforcement by the banks to which they were issued. Given the claim by the Applicant which is not denied by the Respondent that the said Agency notices were issued in similar circumstances as the Agency notice dated 12th May 2012 which has just been quashed by this court, I find that it would not be in the interest of justice if the same were enforced against the Applicant depriving it of its money before the due process of the law is followed.

In the interest of administering substantive justice between the parties herein, I think it will be appropriate to issue orders of prohibition as sought in Prayer C directed to Kenya Commercial Bank and Commercial Bank of Africa only.

It is my finding that since orders of certiorari have been issued to quash the Agency notice issued to Standard Chartered Bank, the said notice is now null and void and is of no legal effect and consequently it is not capable of enforcement by the said bank against the Applicant. It would therefore not be necessary in the circumstances to issue orders of prohibition against the execution of the said notice. Issuing such an order would in my view not serve any useful purpose.

In the end, the Notice of Motion dated 18th May 2011 succeeds and it is hereby allowed in terms of Prayers (b) and (c) as stated herein above with costs to the Applicant.

Dated, Signed and Delivered by me at Nairobi this 26th day of March, 2012.

C. W. GITHUA

JUDGE

In the presence of:

Florence – Court Clerk

M/s Mbaabu for Applicant

M/s Chelagat for Respondent

N/A for the Interested Party