



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND ADMIRALTY DIVISION**  
**CIVIL SUIT NO. 868 OF 2010**

**MAWASILIANO CO-OPERATIVE SAVINGS  
& CREDIT SOCIETY LTD.....PLAINTIFF**

**VERSUS**

**TELKOMKENYA.....  
.....DEFENDANT**

**JUDGMENT**

1. By an amended plaint dated 18<sup>th</sup> January 2011, the plaintiff claims Kshs 51,062,660 together with interest and costs. The plaintiff is a
2. registered co-operative society under the Co-operative societies Act. Its members consisted of employees of the defendant. Under a restructuring programme carried out in the year 2006, many of those employees were retrenched. Those employees owed the plaintiff monies as loans and other advances secured by their salaries. The plaintiff sought assistance of the Communications Workers Union to negotiate with the defendant over those debts. The latter union had a collective bargaining agreement with the defendant. The plaintiff then made a demand to the defendant to deduct the payments from the dues of the employees. When this was not forthcoming, the plaintiff brought these proceedings.
3. The defendant's case is pleaded in the amended defence. Its pith is that there is no privity of contract between the parties to anchor the claim. The defendant's position is that it could not deduct monies from its employees without authority of those employees. Regarding the agreement made between it and Communications Workers Union, the defendant asserted that the plaintiff was neither a party nor named as a beneficiary. The defendant thus prayed that the suit be dismissed with costs.
4. I take the following view of the matter. From the evidence of Bernard Kimaiyo, the bedrock of the plaintiff's claims are two agreements dated 4<sup>th</sup> April 2006 and 12<sup>th</sup> April 2006. The first one (exhibit 1) is an agreement reached at a special central joint council between the union and the management of the defendant. At clause 8 (b) it provided;

*“all statutory deductions of Co-operative Societies, NSSF, NHIF, Provident Fund and Pension Scheme shall be updated and paid”.*

The agreement is signed by Khadija Mire, chief human resources officer, official side leader, B.O. Okwaro general secretary, staff side leader, Apollo Nzano chairman, J.K. Tanui official side secretary and I.O. Noo, staff side secretary. The agreement dealt with many other matters. For example there was to be a pre-retrenchment training and a phased out retrenchment process. The other agreement of 12<sup>th</sup> April 2006 (exhibit 2) had a clause number 8 (a) which at bullet point 5 had a similar provision as the one set out earlier.

5. I have found that the plaintiff was not a party to those two agreements. The plaintiff is not referred to anywhere in the body or provisions of those agreements. Whereas the plaintiff claims to be one of the third parties who were meant to benefit under the agreement, it can only be implied. Clause 8 in the agreements that the plaintiff relied on refers to statutory deductions. There is also reference to outstanding loans that were either secured or unsecured. I found from the evidence of Heward N. Njiru that the 397 employees listed in exhibit 3 were retrenched by the defendant. Those employees owed the plaintiff Kshs 51,062,660 in unpaid loans.

6. The contracts between those employees (as members of the plaintiff co-operative) and the plaintiff were distinct from their contracts of employment with the defendant, Telkom. Their loans were unsecured. Telkom, as the defendant could only deduct their dues and transmit them to the plaintiff on the authority of the individual employees. The plaintiff may be a member of the umbrella Communications Workers Union. But I find and hold that the agreements between that union and the defendant cannot, in the absence of an express provision, bind the defendant to pay the plaintiff Kshs 51,062,660.

7. A third party cannot benefit from a contract unless that contract is for his benefit. See *Provincial Construction Company Limited and another Vs Attorney General* [1991] KLR 446. That position is also reinforced by section 3 (2) of the Law of Contract Act.

8. The plaintiff did not also produce cogent evidence to show that the 397 retrenched employees were unionisable. The plaintiff did not in the alternative lead evidence to show the agreements applied to both unionisable and non-unionsable employees. I also agree with the defendant's witness Caroline Ndidi that clause 8 in the two agreements by referring to "Co-operative societies" did not enjoin the plaintiff to the agreement. The provision, as I see it, refers to "statutory deductions of Co-operatives, NSSF, NHIF etc. Such deductions in my view would include taxes. The membership dues of a member of a co-operative or payments on loans due from such a member to a co-operative could not have been contemplated by that clause. Co-operative societies are registered under the Co-operative Societies Act. That does not mean that loans due from members of a co-operative become "statutory deductions".

9. In sum, the plaintiff has failed, on a balance of probability, to demonstrate a contractual basis between it and the defendant to found its claim. The plaintiff has also not proved that it was, expressly or impliedly, to be the beneficial party in the agreements between the union and the defendant.

10. I have no doubt that the 397 individual employees are liable for their debts to the plaintiff. Section 37 of the Co-operatives Societies Act bides present and past members of a society to pay their debts to the society. But that is not the claim before the court. Again, the plaintiff is not proceeding under an agency agreement at section 35 of the Act. In the end, the plaintiff has not shown consideration upon which the liability of the defendant would be premised. The plaintiff's case fails primarily for want of contract or privity of contract. The upshot is that the claim against the defendants as pleaded and presented does not disclose a cause of action. It is a cardinal precept in the law of evidence that he who alleges has the onus of proof. The plaintiff has failed to discharge that burden.

11. I also note that the plaintiff had brought proceedings before the Co-operative Tribunal at Nairobi in Tribunal Case No 213 of 2003 over the same cause of action. There are also other proceedings in Judicial Review No 119 of 2011 at the High Court in Nairobi that are pending. In the earlier suit, there seems to be a decree. At paragraph 11 of the plaint, and paragraph 4 of the verifying affidavit, the plaintiff declared there have been no other suits or suit pending over the same subject matter. That cannot be so in view of the Tribunal case. The Tribunal case in particular was between the parties. The commissioner of co-operatives had also issued an agency notice under the Co-operative Societies Act to the defendant's

bank. Upon cross-examination of the defendant's witness it transpired that Tribunal case 213 of 2003 was struck out for being incompetent. There is then a sense in which the present proceedings offend section 6 of the Civil Procedure Act. But I make no finding on that point.

12. For all the reasons above, the plaintiff's suit is hereby dismissed. Costs are at the discretion of the court. The plaintiff is still seeking justice over the debts owed to it by the former employees of the defendant. Granted all of those circumstances, the order that commends itself to me is that each party shall bear its own costs.

It is so ordered.

**DATED** and **DELIVERED** at **NAIROBI** this 30<sup>th</sup> day of April 2012.

**G.K. KIMONDO**

**JUDGE**

**Judgment read in open court in the presence of**

Mr. Sang for L.M. Ombete for the Plaintiff.

Ms Thiaka for Mrs. Mbaabu for the Defendant.