



**REPUBLIC OF KENYA**

**High Court at Kakamega**

**Judicial Review 50 of 2010**

**REPUBLIC ..... APPLICANT**

**VERSUS**

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

**AND**

**WECO SACCO SOCIETY LTD. .... INTERESTED PARTY**

**R U L I N G**

The ex-parte applicant by his application dated 16th December, 2010 is seeking orders of certiorari and prohibition against the respondent in relation to an agency notice sent to the applicant's bank, Kenya Commercial Bank – Kakamega branch, for the recovery of a sum of KShs.1,571,538.55. The applicant contends that the decision of the respondent contained in a letter dated 15th June, 2010 was made arbitrarily and without any basis.

The applicant's contentions as stated in the application and the written submissions is that the dispute involving some of the applicant's past members was resolved in the year 2007 and an amount of KShs.4,822/= was remitted as a final settlement. The applicant contends that the settlement of KShs.4,822/= was as a result of similar agency notice issued by the respondent on the 4<sup>th</sup> of January 2007 for the recovery of KShs.205,903.55. It is the applicant's position that, having settled the debt, the respondent ought to have inquired from the applicant first before issuing a demand notice. The applicant was not consulted and was not accorded a hearing. The decision to issue the agency notice was done arbitrarily.

On his part, the respondent filed a replying affidavit sworn on the 28<sup>th</sup> day of February 2011. The respondent maintains that the agency notice was issued after the interested party complained to him. The notice was issued in accordance with the provisions of Section 35(3) of the Co-operative Societies Act. He exercised due diligence and followed the laid down procedure before issuing the notice.

The interested party filed a replying affidavit sworn by JAPHETH MAKOKHA KATAKA on the 28<sup>th</sup> day of June 2011 and filed written submissions as well. The interested party maintains that the orders being sought are not available to the applicant. The agency notice was issued in accordance with the powers given to the respondent by the Section 35 of the Co-operative Societies Act. Judicial Review orders are only available if the act complained of was done without jurisdiction or in excess of jurisdiction or that there was a departure from the rules of natural justice. The interested party annexed correspondences addressed to the applicant and maintains that the applicant was reminded about the existence of the debt.

Section 35 of the Co-operative Societies Act states as follows:-

**“35: (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 deducted together with compound interest thereon at a rate of not less than five percent 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 the any other mode of recovery and such sum shall be a civil debt recoverable summarily.**

**(3) The Commissioner may, by cancel or amend the notice accordingly; or with notices, 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) .....**

**(6) .....**

**(7) where an agent fails to pay 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.”**

The replying affidavit by Japheth Makokha Kataka annexed the list of members who used to make contributions to the applicant by 1992. It is clear from that affidavit that the amount due from the applicant was for the period November to December 1991 and January 1992. The amount due was KShs.4,822/= and when that amount was paid in 2007, it had accumulated to over KShs.289,726.75 as per the letter annexed as JMK 3 dated 25<sup>th</sup> April 2007. BY 31<sup>st</sup> December 2007 the amount due was KShs.489,283/= as per the annexed letter marked as “JMK 4” dated 22<sup>nd</sup> April 2008. It is the position of the interested party that the amount of KShs.4,822/= that was remitted did not include the interest that was accumulating on compound basis.

From the pleadings herein, it is evident that the basis of the agency notice is the sum of KShs.4,822/= that had not been remitted for the three months period – November to December 1991 and January 1992. The respondent did send an agency notice dated 4<sup>th</sup> January 2007 for KShs.205,903.55. As a result of that notice, the District Co-operative officer, Kakamega held a meeting on 27<sup>th</sup> February, 2007 at 2.00 p.m. between officials of the applicant (Chebuyusi High School) and those of the interested party. As a result of that meeting parties agreed as follows:-

- 1. Weco Sacco Society Limited has a right to demand KSh.4,822/= only.**
- 2. The amount referred above is owed to Weco for a failure to remit by Chebuyusi School way back in 1991**
- 3. The referred amount therefore did not fall under the category that attracts compound interest of 3% of 1997 and 5% from 2004 to-date according to the Co-operative Societies Act.**
- 4. The officials of Chebuyusi Secondary School consented and agreed to settle the debt of KShs.4,822/= instantly.**

**5. The officials of Weco Society Limited agreed and received the said amount according to full settlement of the debt.”**

The above agreement is contained in a letter dated 26<sup>th</sup> February 2007 written by the Kakamega District Co-operative officer addressed to the Commissioner of Co-operative Development, Nairobi, the respondent herein.

The interested parties have not denied that its three officials did attend the meeting with the District Co-operative officer. The officials were:-

- (i) Japheth Kataka - Chairman
- (ii) Peter Waswa - Hon. Secretary
- (iii) Ezekiel Odinga - Treasurer

From the letter dated 26<sup>th</sup> February 2007, it is established that the debt was fully paid. Further, the amount that was due did not attract any compound interest as it did not fall within the category of debts that attracted compound interest. For Japheth Makokha Kataka who was present at the meeting called by the District Co-operative officer to swear an affidavit four years later and claim that interest was accumulating on the sum of KShs.4,822/= is to negate what was agreed at the meeting of 27<sup>th</sup> February 2007. The results of the meeting were communicated to the respondent and his claim that before issuing the agency notice “exercised due diligence and observed the laid down procedures that no breach or partiality was committed on his part” is unfounded. The respondent does not explain how the same issue that had been fully settled was revived.

Other than the agency notice of 4<sup>th</sup> January 2007, there seems to have been no other correspondence from the respondent to the applicant until 23<sup>rd</sup> April 2010 when another agency notice was issued for KShs.1,571,538.55. This notice was followed in quick succession with another one for similar amount dated 15<sup>th</sup> June 2010 which triggered the filing of the current application. There is no evidence that the respondent, before issuing subsequent agency notices consulted the applicant or that the applicant was accorded a hearing. The letter dated 26<sup>th</sup> February 2007 was written by an official working under the respondent and the same was ignored. The respondent maintains that he received complaints from the interested party and invoked his powers under Section 35 of the Co-operative Societies Act.

Given the above background, I am satisfied that the dispute between the applicant and the interested party was settled way back on the 27<sup>th</sup> February 2007 by the Kakamega District Co-operative officer, **MR. M. O. AKONGOSO**. The decision of that meeting was received by Mr. Ezekiel Odinga, the treasurer of the interested party on the same day 27<sup>th</sup> February 2007. Therefore the respondent’s decision to issue agency notices after the matter had been settled was done in excess of jurisdiction and without following rules of natural justice. The decision to issue the agency notice was unilateral, subjective, unnecessary and arbitrary and cannot be allowed to hang over the applicant’s bank accounts. Since the agency notices have not been withdrawn and both the respondent and the interested party still maintain that they were issued lawfully, I do find that the applicants are entitled to the two orders of certiorari and prohibition as prayed.

In the end, the application dated 16<sup>th</sup> December, 2010 is granted as prayed. The agency notices are hereby quashed and the respondent and interested party or their agents are hereby prohibited from ever demanding any amount from the applicant in relation to the dispute herein. The applicant shall have the costs of these proceedings.

***Delivered, dated and signed at Kakamega this 31<sup>st</sup> day of July 2012***

**SAID J. CHITEMBWE**

**JUDGE**