



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU

CIVIL CASE NO. 159 OF 2010

COUNTY COUNCIL OF BONDO.....PLAINTIFF/APPL.

-VERSUS-

NATIONAL SOCIAL SECURITY FUND BOARD OF TRUSTEESDEFENDANT/RESP

R U L I N G

The plaintiff/applicant council was hived from the Greater Siaya County Council in 1999 vide gazette notice No. 92 of 9th July, 1999. The Greater Siaya County Council was split into 6 and each of the 6 County Councils received their share of liabilities and assets. The plaintiff/applicant received 41% of the same. The liabilities included liability to the defendant/respondent. The total liability the plaintiff/applicant inherited as relates to the defendant/respondent upto 2005 was Ksh 1,408,261. The above facts are not indispute. The dispute is in regard to penalty payable to the defendant/respondent due to late payment.

The application before court brought pursuant to Section 1A & 3A of the Civil Procedure Act, Section XXXIX Rules 1, 2, 3, & 9 of the old Civil Procedure Rules, seeks for various orders. Prayers 1, 2, 5 & 6 are spent. For consideration now are prayers 3, 4, & 7 as follows:-

- 1. That pending the hearing and determination of this application, the defendant, its servants, agents or otherwise, the respondent, its servants, agents and any other person claiming acting on their behalf from demanding, collecting, receiving and/or in any manner whatsoever collecting the monies on account of penalties from the plaintiff/applicant hearing and the determination of the suit.**
- 2. That an order that the respondent does abide by the terms and conditions of the debt outstanding agreement executed between the applicant and the respondent herein.**
- 3. That the costs of this application be awarded to the plaintiffs/applicants.**

The application is based on the affidavit of one **SILAS OODHIAMBO** and on the grounds that, the applicant does not owe any monies on account of the alleged penalties; the respondent is on the other hand demanding Kshs **11,420,699/25** and Kshs on the other **8,901,521/85** as unpaid penalties which amounts are inconsistent; the applicant has been denied receipt of local authority transfer fund (LATIF) which action may paralyze its activities; the plaintiff/applicant is likely to suffer irreparable loss and damage.

Through a replying affidavit of **BENJAMIN KANDAGOR** dated 2nd November, 2010, the defendant/respondent objected to the prayers being sought in that the respondent has demanded from the applicant penalties only and strictly in compliance with Chapter 288, the **National Social Security Fund Act**, Section 14; that there is no contradiction in the penalties being sought, that the contributions were made by the plaintiff/applicant and therefore the plaintiff/applicant ought to clear the unpaid penalties. That the respondent had reconciled its accounts and had communicated the reconciled sum of Kshs 8,901,521/85; to the plaintiff/applicant that payment of penalty is a statutory requirement and neither of the 2 parties can waive the same.

Having considered the pleadings and submissions by the opposing sides the issue for consideration is whether or not to issue the order for a temporary injunction pending final determination of the suit and whether or not to order for the parties to abide by the terms of the debt outstanding agreement.

The applicant contends that it does not owe the respondent the alleged amount in terms of penalties. However the annexures are clear that the applicant assumed 41% liability in arrears payable to the respondent which amounted to Kshs 1,408,261. In its letter dated 5th November, 2002 the applicant committed to pay the arrears and indeed proposed mode of payment.

Section 14 of the National Social Security Fund Act Chapter 258 of the Laws of Kenya provides;

“If any contribution for which a contributing employer is liable under this act is not paid within one month after the end of the month in which the contribution period or the last day of the contribution period to which it relates falls, a sum equal to five percent of the amount of that contribution shall be added to the contribution for each month or part of a month thereafter that the amount due remains unpaid, and any such additional amount shall be recoverable in the same manner as the contribution to which it is added.”

Without pre-empting the eventual out-come of the trial, the plaintiff/applicant was part of the arrangement that gave it 41% liability from the Greater Siaya Council indeed it committed to pay the liability, it therefore goes without saying that it must pay any of the statutory penalty payable due to late payment. This is a statutory requirement that the applicant ought and must meet.

There is no indication by the applicant that it has complied with the requirement of Section 14 quoted above. An injunction is an equitable remedy and he who comes to equity must come with clean hands.

As regards the debt outstanding agreement the court notes as follows:-

- It remains undated.
- There is an acknowledgement by the applicant of a debt of Kshs 11,225,696.4 as at 29/9/2010.
- Date for reconciliation is blank.
- The document is not sealed for and on behalf of those it purports to commit.
- The agreement cannot certainly oust the operation of the Law.

The court also notes that even in disputing the last sum given by the respondent the applicant does not propose to pay any sum towards the penalties.

The Principle guiding the issuance of an injunction is well settled. See the case of **GIELLA vs CASSMAN BROWN** at 1973 E. A. it is the view of this court that the applicant herein has failed to satisfy the requirement set out in the said case. Indeed in issuing a permanent injunction at an interlocutory stage the court goes further to see if the applicant has established any special circumstances to warrant the same. No special circumstances were demonstrated either. For the reasons set above the application cannot succeed. It is dismissed with costs.

DATED AND DELIVERED IN KISUMU THIS 28th DAY OF March, 2011.

ALI-ARONI

JUDGE

In the presence of:

..... present for Applicant

.....present for Respondent(s)