



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CIVIL CASE NO.87 OF 2010

THE SECRETARY BOARD OF GOVERNORS,
CHEBUYUSI HIGH SCHOOL PLAINTIFF
V E R S U S
WECO SACCO SOCIETY LIMITED 1ST DEFENDANT
THE COMMISSIONER FOR CO-OPERATIVE DEVELOPMENT 2ND DEFENDANT
THE HONOURABLE ATTORNEY GENERAL 3RD DEFENDANT

R U L I N G

1. The Application dated 25.6.2010 is brought under the provisions of Order XXXIX Rules 1, 2 and 3 of the Civil Procedure Rules and **Section 3A** of the Civil Procedure Act. It is sought that;
“1. That service of this Application upon the Defendants/Respondents in the first instance be dispensed with.
2. **That pending hearing of this Application inter-parties the Branch Manager Kenya Commercial Bank Ltd., Kakamega Branch be restrained by a temporary injunction from attaching the Plaintiff’s funds held in the Plaintiff’s A/C No. 243541369 now know as No.1101700378 or any other account operated by the Plaintiff at the said Branch in a purported compliance with the 2nd Defendant’s letter dated 15.10.2010 or any other letter addressed to him by the Defendant and or their agents.**
3. **That a temporary injunction do issue restraining Kenya Commercial Bank Ltd., Kakamega Branch from complying with the Agency Notice dated 15.06.2010 for attachment of the Plaintiff’s funds held at the said Bank pending hearing and or final determination of the suit herein.**
4. **That the 1st and 2nd Defendants be restrained by a temporary injunction from attaching and or interfering with the Plaintiff’s account held at any Bank including A/C No. 243541369 now known as No.1101700378 held at Kenya Commercial Bank Ltd., Kakamega Branch pending hearing and or final determination of the suit herein.**
5. **That the Agency Notice dated 15.06.2010 issued to M/S Kenya Commercial Bank Ltd., Kakamega Branch by the 2nd Defendant be lifted forthwith.**
6. **That the cost of this Application be borne by the Defendants jointly and severally.”**
2. Before going to the merits or otherwise of the Application, I should state that prayers 1 and 2 have been disposed of and I will say nothing about them. Prayer 5 cannot also be granted in interlocutory proceedings because to “**lift**” the Agency Notice dated 15.6.2010 would have the effect of determining the substratum of the suit which is predicated on the same Notice. I will for these reasons strike out grounds 5 of the Application and will also say the following regarding prayer 3 of the Application;
3. Order XXXIX Rules 1 and 2 provides as follows;
“R. 1 – Where in any suit it is proved by affidavit or otherwise-
(a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree: or
(b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit.
the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition

of the property as the court thinks fit until the disposal of the suit or until further orders.

2. In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right. (Emphasis added)

4. As I understand the above Rules, a temporary injunction is always directed at “**any party**” to the suit and generally to a Defendant. In the suit herein and specifically in prayer **3**, the orders of injunction are directed at Kenya Commercial Bank Ltd., which so far as I can see, is not a party to the suit and neither is it specifically named as a Defendant. To issue orders against a stranger to the suit and who has not been given the chance to be heard is against all rules of natural justice and would be unfair in any event. Prayer **3** cannot stand either and is struck off.

5. Regarding prayer **4**, it is the Applicant’s case as gleaned from the Supporting Affidavit sworn on 25.6.2010 by one, Boniface Okoth, Principal of Chebuyusi High School and Secretary of the School’s Board of Governors, that the 1st Defendant is a Savings and Credit Society whose membership was drawn from the staff of an entity known as Western College of Arts and Applied Sciences (WECO). That the Plaintiff does not have any of its members of staff who are also members of the 1st Defendant and therefore it has no statutory or other obligation to make any payments to the 1st Defendant.

6. Further, that prior to 1990, one member of the Plaintiff staff was a member of the 1st Defendant but the person (unnamed) ceased membership in that year and that on 26.2.2007, the District Co-operative Officer, Kakamega District, wrote to the 2nd Defendant and stated that the Plaintiff owed the 1st Defendant only **KShs.4,822/=** and the said amount did not attract any compound interest. Further that thereafter and on that basis the said amount had been paid to the 1st Defendant’s officials who acknowledged that no further monies were owed to it.

7. It is the Plaintiff’s further contention that having paid whatever was due to the 1st Defendant, the action by the 2nd Defendant in demanding **KShs.1,571,538.55** vide an Agency Notice dated 24.6.2010 and addressed to the Kenya Commercial Bank, was unlawful and unwarranted. That Account no. 243541369 (now known as No.1101700378) is the Plaintiff’s main account and attachment pursuant to the Agency Notice would cripple the school’s operations and the loss thereby occasioned would be irreparable. In any event, that prior to the attachment, the Plaintiff was never given a hearing and the 2nd Defendant acted in excess of powers conferred on it by the Co-operative Societies Act.

8. In a replying Affidavit sworn on 27.7.2010 by one Japheth Makokha Kataka, Chairman of the 1st Defendant, it is the case by the 1st Defendant that prior to 1992, the Plaintiff had members of its staff who were also members of the 1st Defendant. That by the date the Plaintiff was in arrears of payments to the 1st Defendant and the sum due as at February 1992 was **KShs.6,722/=** which attracted compound interest at **3%** up to 2004 and thereafter at **5%**. That whereas the 1st Plaintiff indeed paid **KShs.4,822/=** (the original sum due) on 25.4.2007, as at that date, the compound interest stood at **KShs.285,904.75** and as at the date of the Agency Notice, it stood at **KShs.1,571,538.55**. That therefore the Agency Notice was lawful and the Application for injunction, lacking in merit, should be dismissed with costs.

9. The 2nd and 3rd Defendants through the 3rd Defendant filed grounds of opposition on 5.7.2010 and in submissions filed on 28.7.2010, it is their case that an injunction cannot issue against the Government or any officer in Government by dint of **Section 16 (2)** of the Government Proceedings Act, Cap 40 which provides as follows;

“S.16 (2) – The court shall not in any civil proceedings grant any injunction or make any order against an officer of the Government if the effect of granting the injunction of making the order would be to give any relief against the government which could not have been obtained in proceedings against the Government.”

10. Further, that the 2nd Defendant acted lawfully and specifically within powers conferred on him by **section 35** of the Co-operative Societies Act and that being the case, the orders sought should not be granted.

11. It is best in my view, to begin by addressing **section 16 (2)** of Cap 40. I have elsewhere above stated that I am only dealing with prayer **4** of the Application and since no injunction can issue against the 2nd Defendant, he being sued in his capacity as an officer of Government, it follows without saying more,

that prayer 4 cannot lie as against him and must be struck off.

12. Can the orders of injunction then issue against the 1st Defendant? Not with the way the prayer is framed. The Agency Notice dated 15.6.2010 was issued by the 2nd Defendant and addressed to Kenya Commercial Bank. The 1st Defendant has not itself “**attached**” or in any way “interfered” with Account “**no.243541369 now known as No.11011700778**”. Reading Order XXXIX Rules 1 and 2, I do not see what wrong the 1st Defendant has committed and even if I were to grant an injunction against it, it is not in control of the Agency Notice as the author or recipient and the orders would be vain.

13. In a nutshell and with the issues I have raised above, I am not satisfied that the Application before has been framed in a manner that this court would apply the principles in Giella vs Cassman Brown [1973] E.A. 358 in its favour.

14. Instead I will send the Applicant back to the drawing boards and in doing so, will dismiss the Application dated 25.6.2010 with costs to the Defendant.

15. Orders accordingly.

Delivered, dated and signed at Kakamega this 18th day of November, 2010

ISAAC LENAOLA
J U D G E