



REPUBLIC OF KENYA



KENYA LAW
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**Mundia & another v Stima Sacco Ltd & another (Civil Appeal
E983 of 2023) [2024] KEHC 6988 (KLR) (Civ) (12 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 6988 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E983 OF 2023

JN MULWA, J

JUNE 12, 2024

BETWEEN

GRACE WANGUI MUNDIA 1ST APPELLANT

EUNICE NGAI NYAGA 2ND APPELLANT

AND

STIMA SACCO LTD 1ST RESPONDENT

JOASH MUMO NDANGI 2ND RESPONDENT

RULING

1. For consideration and determination is the Appellant's Application dated 26/09/2023, brought under Sections 1A, 1 and 3A of the *Civil Procedure Act*, and Order 40 Rule 2 & 3 of the *Civil Procedure Rules* together with Section 81 of the *Co-operative Societies Act*.
2. The appellants who are the applicants herein seek orders of injunction to restrain the first respondent Stima Sacco Limited from withdrawing and/or deducting the appellant's salaries and /or deposits in the Sacco or any other property pending hearing and determination of the appeal; and a further order of refund of all money wrongfully deducted from their salaries and or sacco deposits towards recovery of the Second respondents loan from the appellant Sacco.
3. The application is supported by grounds stated at the face thereof and Supporting Affidavit sworn by the first appellant on 26/9/2023.
4. Judgment in the Cooperative Tribunal case no. 216/2019 was delivered on 21/9/2023 in which the appellants were found liable to repay two loans taken by the 2nd respondent that they had guaranteed to pay if default occurred with each party to bear their own costs.



5. In response to the Application the 1st respondent swore and filed a Replying Affidavit sworn on 25/10/2023 and a Supplementary Affidavit sworn on 31/10/2023 by the first respondent objecting to the orders sought.

Parties tendered oral arguments on the application.

6. The appellants'/applicants' arguments are that they indeed guaranteed the 2nd respondent's loan but only to the extent of Kshs. 921,934.50/- and Kshs. 220,049/= respectively but upon default by the 2nd respondent the Sacco attached their salaries which did not form part of the contract of guarantee and referred to the loan application form exhibit number GWM2 and GWM3 as proof of attachment of their salaries which they argue is irregular illegal and against Sacco By-Laws.

They also exhibited GWM4 -5 as loan appraisal forms.

7. It is their case that they filed a claim at the Co-operative Tribunal *vide* Tribunal Case number 216 of 2019 but upon hearing the Tribunal by its judgment dated 21/09/2023 dismissed their claim wherein it was found that the guarantors (now the applicants) are liable for the repayment of the two loans. Being dissatisfied with the judgment they lodged this appeal. It is their argument that if the orders sought are not granted pending hearing and determination of the appeal, they will suffer prejudice as their salaries and sacco deposits will be irregularly attached which will render the appeal nugatory as well as suffering irreparable loss.
8. The applicants therefore seek injunction orders to restrain the 1st respondent from attaching their salaries and deposits pending hearing and termination of their appeal citing the celebrated case *Giella v Cassman Brown* [1973] EA 358 and *Ratansi*.
9. The 1st Respondent's case is that the applicants agreed to guarantee the two loans to the second respondent by appending their signatures to the loan application forms for a sum of Kshs. 3,000,000/= on 30/10/2023 and a further loan of Kshs. 600,000/= on 19/12/2023 exhibited in the loan application forms.
10. It is their deposition that thereafter upon default by the 2nd respondent, all necessary notices were issued to them as guarantors (provided) but they failed to respond leading to sale of the land offered as security as well as attaching their salaries and deposits held by the Sacco.
11. It is therefore its submission that having consented to be liable as guarantors should the borrower default they cannot be prejudiced. It is urged for dismissal of the application for lack of merits with costs.

Analysis And Disposition.

12. Documentary evidence does not lie save when it is alleged and proved that the documents were fraudulently obtained. This is not the position in this matter.

The loan application form by the 1st Respondent Exhibit G WM2 dated 24/11/2014 was for Kshs. 3,000,000/= payable in 48 months and guaranteed by seven guarantors among them the two applicants.

13. The repayment guarantees states: -

“We the undersigned hereby accept jointly and severally liability for the repayment of this loan in the event of the borrower's default. We understand that the amount in default may



be recovered by an offset against our deposits or attachment of our property, salary, Fosa deposits and other property owned by us.”

The applicants signed, wrote down their Identity Card numbers and appended their signature to the form.

14. The second loan application form is for Kshs. 6 million with a repayment period of 60 months. It is dated 13/02/2015. The guarantors are seven and the two appellants appended their signatures thereto.

I have seen the loan application forms. There is no allegation by the applicants that they did not sign them.

15. Upon default the 1st Respondent proceeded to attach their salaries, which the applicants state was irregular as it was without a court order. I have seen the salary deductions- exhibit GWM 3- for the 1st appellant. A monthly sum of Kshs. 69,088.33/= was attached for the period 2019 January to April 2019. I have not seen any evidence of salary attachment or deduction by the first respondent.

16. Looking at the pay slips for the period stated, it shows the applicants basic salary plus allowances as Kshs. 107,878/=after the deduction of Kshs. 69,088/= leaving a balance of Kshs. 38,790/=

It is not explained why current salary pay slips at the date of the application were not exhibited for the court to determine whether indeed upon deduction of the loans, the applicants are not left with at least a third of their salary. A court does not act in a vacuum. Every allegation of fact ought to be proved to the required standard of proof.

17. For grant of an order of temporary injunction conditions in *Giella v Cassman Brown* [1973] EA 358 an applicant must: -

- a. Establish his case only at a prima facie level.
- b. Demonstrate irreparable injury if a temporary injunction is not granted and,
- c. Allay any doubts as to (b) by showing that the balance of conveniences is in his favour.

18. See also *Kenya Commercial Finance Company Limited v Afraba Education Society* [2001] Volume 1, EA 86, *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR among many other learned decisions.

19. On a *prima facie* level, upon consideration of the documents provided, the obvious thing that appears is that the applicants guaranteed the loans and agreed to repayment in case of default by their Sacco Fosa deposits and checkoff against their salaries.

20. On irreparable injury, an injury that a party voluntarily inflicts on itself with full knowledge of its repercussions cannot be irreparable, but one has to live with it until otherwise cured by a court upon full hearing.

21. On balance of probabilities, the court in Kenya commercial finance case (*Supra*), rendered that;

“...if the applicant establishes a *prima facie* case that alone is not sufficient basis for grant of an interlocutory injunctions, the court must further be satisfied that the injury the respondent will suffer in the event the injunction is not granted will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying no interlocutory orders of injunction should normally be granted, however strong



the applicant's claim may appear at that stage. If *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration-----”

22. Without further interrogation, it is quite obvious that the applicants have not established a prima facie case with a probability of success. It has not been alleged that the 1st respondent Sacco would be incapable of paying back the deductions from the applicant's salaries and Sacco deposits should the appeal be successful. The court therefore finds that the balance of convenience tilts in favour of the First Respondent.
23. Consequently, I find no merit in the applicant's application dated 26/09/2023. It is dismissed. Each party shall bear its own cost of the application.
24. Additionally, the court notes that the Record of Appeal has not been filed. If that be so, it is directed that the same be filed within 45 days as proceedings from the Tribunal have been provided to the parties. The appeal shall be listed for mention for direction on 19/09/2024.

DELIVERED DATED AND SIGNED AT NAIROBI THIS 12TH DAY OF JUNE 2024.

JANET MULWA

JUDGE

