



Lavington Security Ltd v Commissioner for Co-operative Development & 2 others (Civil Suit 61 of 2019) [2024] KEHC 12154 (KLR) (Commercial and Tax) (11 October 2024) (Ruling)

Neutral citation: [2024] KEHC 12154 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT 61 OF 2019
FG MUGAMBI, J
OCTOBER 11, 2024

BETWEEN

LAVINGTON SECURITY LTD PLAINTIFF

AND

COMMISSIONER FOR CO-OPERATIVE DEVELOPMENT 1ST DEFENDANT

LAVINGTON UNITED SACCO SOCIETY LTD 2ND DEFENDANT

CO-OPERATIVE BANK OF KENYA LTD 3RD DEFENDANT

RULING

Introduction

1. Following a ruling on 14/5/2024, the court was informed of a dispute over which party should receive the Kshs. 48,026,799/= deposited as security in this matter. The issue arose from an oral application by the 2nd defendant, (Lavington Sacco), on the same date, requesting the release of the funds. In compliance with the court's directions issued on 30/5/2024, both parties submitted brief arguments on the matter. This ruling now determines to whom the funds should be released.

Background

2. The genesis of the matter is a dispute between the plaintiff, (Lavington Security) and Lavington Sacco over loan repayments and unremitted member contributions. Lavington Security instituted a suit challenging agency notices issued by the 1st defendant (the Commissioner), concerning monthly savings and loan repayments owed by Lavington Security on behalf of Lavington Sacco's members for the period up to December 31, 2018.



3. The suit was settled by consent of the parties through an arrears agreement and an addendum to the agreement both dated 21/2/2019 (the agreement). The agreement detailed a payment plan by Lavington Security with respect to the arrears due to Lavington Sacco. It was an additional express term of the agreement that Lavington Security would remain current in all future remittances of the Sacco's members' monthly savings and loan repayments. Clause 5 of the agreement provided as follows:

“The Plaintiff undertakes to remain current in all future remittances as provided in the Act i.e. by the 7th day after deduction is made.”
4. On 23/10/2019 Lavington Security filed an application seeking a declaratory order that it had satisfied all the terms of the agreement which had been adopted as a consent order of the court. They further sought injunctive relief against the defendants, from demanding a further sum of Kshs. 48,026,779/= and a declaration that the said demand was ultra vires.
5. As it turned out, Lavington Security had allegedly not remitted Lavington Sacco's members' monthly contributions from January 2019 to September 2019. Consequently, the Commissioner issued agency notices dated 30/10/2019 and 1/11/2019 pursuant to Section 35 of the *Co-operative Societies Act*.
6. Through a ruling dated 4/9/2020, Lavington Security's application was dismissed on account of the fact that they had not provided any proof that their members had withdrawn from Lavington Sacco. The court dismissed their allegation that they were therefore not indebted to the Sacco for the additional monies. Importantly, the court held that:

“It is manifest that the plaintiff/applicant has clearly breached clause 5 of the Arrears Agreement and so I find. Thus prayer 3 is not merited.”
7. Following the ruling, Lavington Security then filed another application dated 9/9/2020 seeking to review the Ruling of 4/9/2020. In that application they also sought a temporary injunction restraining the defendants from enforcing the agency notices. On 1/10/2020, the court granted the temporary injunction on the condition that Lavington Security deposits the sum in question in a joint interest earning account pending hearing and determination of the application inter partes.
8. The application was heard and determined through a Ruling dated 1/7/2022, dismissing Lavington Security's application. Lavington Sacco through an application dated 7/7/2022 then sought to have the sum deposited released to it.
9. By a Ruling dated 13/10/2022, the court held that the sum of Kshs. 48,026,779/= held in the joint interest earning account shall remain in the said account pending the hearing and determination of the main suit. What followed was an application filed by Lavington Security seeking to amend their plaint. The application was dismissed, bringing the issue of the deposited security back to the forefront, as the court had not addressed it in the said Ruling.

Submissions

10. Lavington Security submits that the sum held should be released to them since it was not deposited as security for a stay of execution but rather a conditional deposit for subsistence of stay orders. They referred to the Ruling of 13/10/2022 where the court found that Lavington Sacco had not established its entitlement to the sum.
11. Lavington Security further contends that an order for conditional deposit cannot be equated to a conditional deposit for stay of execution. It is their case that the court expressed that although the subsequent dismissal of the application for review connoted that the defendants could go ahead and



- demand the said sum, they still disputed owing the sum. They pointed to the Ruling of 14/5/2024 where the court noted that this matter had been conclusively determined and any other dispute with regard to actions that happened after the consent order was filed would, if preferred, form the basis of a new cause of action.
12. As such, Lavington Security takes the view that the court should therefore restore the parties to the position that prevailed prior to the consent order. They also argue that since the main matter has been disposed, it stands that all interlocutory orders including those of 1/10/2020, lapse. They further contend that the Commissioner is free to issue fresh agency notices and that this court is not an agent of the Commissioner and should not be used as an avenue to enforce disputed agency notices.
 13. Lavington Sacco also lays claim to the money on account of the jurisdiction of this court under section 34 (1) of the *Civil Procedure Act*. The Sacco takes the position that the issue before court is a question relating to the execution of a decree. That as such, this court should declare Lavington Security to be in breach of the agreement and order the transfer of the Kshs. 48,026,779/= to the Sacco.
 14. The Sacco argues that Lavington Security had received monthly statements detailing amounts due, culminating in a demand letter dated 18/9/2019. That the court had already determined that their allegation that their employees ceased being Sacco members by 31/9/2021. The court made a finding that the allegations were unsubstantiated. As such, the authorizations for salary deductions remain unless changed by the employee with concurrence from the Sacco, which had not been done by Lavington Security.
 15. The Commissioner also agrees that the security provided by Lavington Security ought to be released since the dispute stands determined in terms of the consent order of 27/2/2019. However, in the Commissioner's view, for the same to be released the two must provide proof of the damage they suffered due to the court granting the the temporary injunction restraining the Commissioner and its bankers from enforcing the agency notices.
 16. The Commissioner further notes that the dismissal of the application by Lavington Security for orders of review discharged the temporary injunction restraining the Commissioner from enforcing the agency notices. The net effect is that the 3rd respondent (the Bank) is at liberty to enforce and effect the agency notices issued by the Commissioner.
 17. This is so noting that there was no order declaring the agency notices illegal or void. Similarly, it was in light of the order declaring that Lavington Security was under an obligation to remit the deductions subject of the agency notices in line with clause 5 of the agreement. The Commissioner thus submits that the sum should be released to the Sacco.
 18. Finally, the Commissioner submits that, in the Ruling of 3/10/2022, the court erred by holding that the amount should nonetheless remain in the joint interest-earning account until this suit is determined. That parties inadvertently failed to bring to the court's attention that the suit was actually determined via the consent order dated 27/9/2019.

Analysis and Determination

19. I have considered the parties' respective submissions on this question. To begin with, it is undisputed that this suit was determined through the consent orders of 27/9/2019 which adopted the agreement between the parties as an order of the court. For clarity, the consent, which was executed by all parties and filed in court, states as follows:



- i. By consent, the arrears payment contract dated 21st February 2019 and varied by addendum dated 21st February 2019 and both filed with this consent order and executed by the plaintiff and the 2nd defendant respectively be adopted as an order of the court.
 - ii. The suit herein be marked as settled in the above terms. (emphasis)
20. The effect of this consent order in relation to the Ruling of 13/10/2022 is as submitted by the Commissioner. The Ruling was made in error because the court was not informed that the suit had already been determined. This is evident in the Ruling, which states in part:

“The sum of Kshs. 48,026,779/= held in the joint interest earning account shall remain in the said account pending the hearing and determination of the main suit.” (emphasis)
21. The finality of the consent order was addressed in the Ruling of 14/5/2024 where I noted at paragraph 11 that:

“Once parties have reached a compromise and recorded a consent, which is then adopted by the court, the case is generally considered to be resolved. Such a consent order carries the weight of a final judgment.”
22. It is therefore my finding that the Ruling of 13/10/2022 was per incurium. It is hereby set aside in as far as it relates to the error.
23. Moving now to the arrears payment contract that is referred to in the consent, it is undisputed that clause 5 of the said agreement required that Lavington Security remains current in its remissions even after paying the amount that was due under the suit. I have already reproduced this clause earlier.
24. The court’s ruling of 4/9/2020, clearly held that Lavington Security had breached this clause. As such, Lavington Security’s argument that the deposit was not intended for execution becomes irrelevant because the underlying obligation, which was the remittance of the monies due to Lavington Sacco has already been adjudicated, and the breach established.
25. By breaching the consent order, Lavington Security effectively forfeited any claim to the deposited amount, which was intended to secure payment of the contested remittances. The sum of Kshs. 48,026,799/= therefore represents the arrears that the Sacco is entitled to, given the court’s ruling on the breach.
26. Moreover, the temporary injunction that led to the deposit being made into the joint account was lifted upon the dismissal of Lavington Security’s review application. The purpose of the deposit was to act as security during the pendency of the injunction, which has now been resolved in favor of the Sacco. Therefore, the Sacco’s claim to the funds is valid under Section 34(1) of the *Civil Procedure Act*, as this is a matter related to the execution of a court decree. For clarity, section 34(1) provides that:

“All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.”
27. From the perspective of the Commissioner, I agree that the dismissal of the application for review discharged the temporary injunction, meaning the agency notices issued by the Commissioner were no longer restrained. Since the Commissioner’s notices were not found to be unlawful or void, as it stands, there is no barrier to enforcing the notices and releasing the funds to the Sacco. This would allow the Bank to effect the agency notices. In either scenario, the matter would be resolved in favor of the Sacco.



Disposition

28. Accordingly, I therefore order that the sum of Kshs. 48,026,779/= together with all accrued interest thereon held in Mayfair-CIB Bank Limited in a joint interest earning account No. 0201550157 in the name of Professor Tom Ojienda & Associates, Wangwe & Company Associates & Paul O. Ojwang Advocates, be forthwith released to the 2nd defendant through its account detailed below:

Bank: Cooperative Bank of Kenya

Account name: Lavington United Sacco Ltd

Account No: 01120635195500

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 11TH DAY OF OCTOBER 2024.

F. MUGAMBI

JUDGE

