



Lavington Security Limited v Lavington United Sacco Society Limited (Civil Case E116 of 2019) [2021] KEHC 104 (KLR) (Commercial and Tax) (8 October 2021) (Judgment)

Neutral citation: [2021] KEHC 104 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E116 OF 2019
A MABEYA, J
OCTOBER 8, 2021**

BETWEEN

LAVINGTON SECURITY LIMITED PLAINTIFF

AND

LAVINGTON UNITED SACCO SOCIETY LIMITED DEFENDANT

JUDGMENT

1. The Plaintiff is a limited liability company duly incorporated under the *Companies Act*, and provides security services. The defendant is a society under the *Co-operative Societies Act* and carries on sacco business.
2. By a plaint dated 3/5/2019, the plaintiff pleaded that in 2012, it established a welfare fund for its employees to address their emergencies and cater for their well-being. When the welfare membership grew to great numbers, members and the fund became unmanageable, agreed to form a Sacco Society (the defendant herein) to manage the fund. Some of the plaintiff's employees opted to join the defendant while others remained as welfare members only.
3. At the request and with the consent of its employees, the plaintiff continued to deduct a portion of its employee's monthly income as staff welfare funds, and remitted the same to the defendant in trust. That between the period September, 2012 and July, 2018, the plaintiff had remitted to the defendant, a total sum of Kshs. 46,928,876/=.
4. That the plaintiff was under the belief that the defendant was the rightful custodian endowed with power to receive such funds. That however, the plaintiff later became aware that under the *Co-operative Societies Act*, the defendant lacked the right or mandate to receive and accept welfare funds of the plaintiff's employees. The plaintiff therefore claimed a refund of the said Kshs. 46,928,876/= together



with accrued interest of Kshs. 19,520,389/= as at 31st January 2019 which the defendant had allegedly illegally accepted and converted.

5. The defendant filed a defence and counter claim dated 31/5/2019. It was its case that the money remitted to it by the plaintiff was not the plaintiff's money. That it was the defendant's individual member contribution and was credited to its members individual accounts.
6. It admitted having received money but not the claimed Kshs. 46, 928,876/=. That the money received was not the plaintiff's property but that of the defendant's members. In the premises, the plaintiff lacked locus to bring the suit. It contended that the suit herein did not disclose any reasonable cause of action and was founded on malice.
7. The defendant counterclaimed for Kshs. 15,000,000/= which was allegedly deducted from the defendant's members between the period of September 2012 and May 2019, but not remitted to the defendant. The defendant also prayed for interest on the sum at the rate of 5% per month from September 2012 to date, and costs of this suit.
8. At the hearing, the plaintiff called three witnesses. PW1 was Jonah Kiprotich Telo, the plaintiff's director. He adopted his witness statement dated 10/4/2019 and told the Court how the plaintiff created a welfare fund for its employees. The plaintiff would deduct a portion of money from the employees and credit that fund. However, the plaintiff erroneously sent the monies in that fund to the defendant in the sum of Kshs. 46,928,876/= which it now claimed for, together with interest of Kshs. 19,520,389.80.
9. He testified that the welfare fund was different from the members' individual share contribution with the defendant. That the members could not borrow against the welfare kitty while they could do so on their individual contribution to the defendant. That members who left the plaintiff company often claimed for their welfare funds which the plaintiff could not pay as it had erroneously sent the same to the defendant. That the plaintiff company and the defendant sacco were separate entities.
10. PW2 was Raymond Koech, the plaintiff's finance manager. He testified that the defendant was established by the plaintiff on behalf of its employees. That his role was to ensure that employee deductions in form of welfare fund and share contributions were remitted to the defendant. He produced PExh1, PExh2 and PExh3 which showed the deductions made to the employees' pay for the period 2012-2015, 2015-2016 and 2017-2018.
11. It was his evidence that he erroneously sent the welfare money to the defendant under the belief that the defendant was the rightful custodian. That the money was sent as a lump sum. Later the Commissioner of Cooperatives advised that the defendant could only collect money from its members and not otherwise. That all the plaintiff's employees were being deducted for the welfare fund yet not all of them were members of the defendant's.
12. PW3 was David Kipchirchir Kigen, a senior manager with the plaintiff. He told the Court that in 2012, the plaintiff's management agreed to start a welfare fund for it employees, to assist in emergencies and urgent situations. That a portion of the staff salary would be deducted as of September 2012 and retained for that purpose.
13. That after sometime, the welfare membership grew thereby necessitating the establishment of a Sacco to manage the welfare. In this regard, the defendant was registered in August 2013. That some of the plaintiff's employees joined the defendant while others remained as welfare members only.
14. That the welfare contributions for employees who joined the Sacco were remitted to it as part of their shares, while welfare members continued to have their monthly salary deducted and retained by the



- plaintiff. He testified that he left the plaintiff in 2019, but during his employment, he was a member of the defendant and contributed towards it and benefited from it.
15. Dw1 was Raphael Chepchieng Kiptui, the defendant's CEO. He testified how the plaintiff had established a welfare fund to assist its employees in benevolent times. Once the fund increased, the employees resolved to register a Society to take over the management of that fund. It is then that the defendant was formed.
 16. The defendant did not continue to receive welfare funds in the years 2014 to 2018. That the employees who became members of the defendant used the transferred fund as their initial deposit and contribution against which they took loans. Several members have since left the plaintiff's employment and the defendant refunded their contributions including the initial deposits and share contributions. He insisted that the plaintiff had no right to claim any funds as it belonged to its individual members. It is for this reason that the defendant was counterclaiming Kshs. 15,000,000/=.
 17. The parties filed their respective submissions which the Court has carefully considered.
 18. The parties did not agree on the issues to be tried. However, having considered the pleadings and the evidence on record, the issues that fall for determination are: whether the plaintiff has locus to claim the refund of Kshs. 46,928,876/-, whether the defendant owes the plaintiff the sum of Kshs. 46,928,876/-, whether the plaintiff is entitled to interest on the money paid to the defendant in the sum of Kshs. 19,520,389/- and whether the defendant is entitled to Kshs.15,000,000/- from the plaintiff.
 19. On the first issue, the defendant contended that the plaintiff had no locus to bring this suit as it claimed money that did not belong to it. That the money in contention belonged to its employees, none of which had laid a claim or even demanded the money back.
 20. The evidence on record is that the plaintiff began a welfare fund in 2012 on behalf of its employees. The plaintiff would deduct a portion of the employees' salary and transfer the same to that fund. When the fund grew astronomically, the plaintiff established a Sacco for its members. That Sacco happened to be the defendant to whom the entire fund was transferred.
 21. The defendant was formed in 2013 to manage the fund and undertake the work which the welfare fund was undertaking. The plaintiff's employees joined the defendant and deductions continued to be made but under the new set of circumstances where the defendant run the affairs of the welfare but as a Sacco.
 22. The question that begs is, to whom did the welfare money belong? The plaintiff admitted that it deducted its employees' salaries and deposited the same in the welfare fund. When the defendant was established, it transferred the monies in the fund to the defendant. The plaintiff continued to deduct its employees' salaries and remit the same to the defendant as the employees respective contribution to the defendant.
 23. The evidence of Dw1, which was not challenged was that the initial amount that was transferred by the plaintiff to the defendant represented the respective employees' share capital in the defendant. Some of the plaintiff's employees, who became the defendant's members utilized the same either as collateral for loans while others withdrew the same.
 24. There is nothing on record to show that after the plaintiff deducted the money from the employees' salary, the monies became the plaintiff's. Although it was held and later transferred to the defendant in the name of the plaintiff, the property therein remained that of the employees for their own use. Once they required the same, either from the plaintiff or the defendant, the same was liable to be paid



- over without question. It remained in the defendant's books in the individual names of the plaintiff's employees.
25. This suit was not brought on behalf of the plaintiff's employees. There was no evidence to show that any of the plaintiff's employees had demanded the said money from the plaintiff. This suit was brought by the plaintiff in its own right. There was no consent or authority from the plaintiff's employees to the filing of this suit on their behalf.
26. Further, there was no indication that the plaintiff's employees were demanding a refund of their deductions from the plaintiff. In such circumstances, did the plaintiff have locus to bring the suit?
27. In *Plantations Limited v National Bank of Kenya Limited & 2 others* [2019] Eklr, it was held that -
- “It is therefore evident that locus standi is the right to appear and be heard in Court or other proceedings and literally, it means ‘a place of standing’. Therefore if a party is found to have no locus standi, then it means he/she cannot be heard even on whether or not he has a case worth listening to. It is further evident that if this Court was to find that the Applicant has no locus standi, then the Applicant cannot be heard and that point alone may dispose of the suit”.
28. In *Law Society of Kenya vs Commissioner of Lands & others*, Nakuru High Court Civil Case No.464 of 2000, the court held that: -
- “Locus Standi signifies a right to be heard, A person must have sufficiency of interest to sustain his standing to sue in Court of Law”.
29. Does the plaintiff have any sufficient interest in the money claimed for? The answer is in the negative. I see no direct or indirect interest that the plaintiff, would have in the subject monies in its own right. Its duty was only to deduct and forward the deducted funds to the defendant.
30. In this Court's view, the plaintiff would have had proper standing to bring such a suit in the circumstances where its employees would have demanded for refunds from it. It is only then that it would have sought to bring this suit on their behalf. But without proof that the true owners of the money have complained and demanded for the same from the plaintiff, I fail to see what interest the plaintiff would have in order to rightfully claim the money in question.
31. The effect of a successful suit would be that the money would be refunded to the plaintiff. But on who's authority? It may be a total shock to the plaintiff's employees to realize that the monies they so believed was entrusted to the defendant was no longer with the Sacco. That it will be with the employer who already lacked any structure to handle the funds, the very reason it created a Sacco. Such would be but an extreme embarrassment as the order for payment from the defendant to the plaintiff would have been made without proof of authorization from the actual owners of the subject money.
32. The upshot is that the plaintiff lacks locus to bring this suit and the same cannot stand.
33. In normal circumstances, I would have stopped there. However, I deem it trite to consider the plaintiff's case on merit. This is so because I am not the last Court of resort. There is the Court of Appeal which should consider my views on the merits of the plaintiff's case. In this regard, I propose to deal with the other issues set out above.
34. The second issue is whether the plaintiff is entitled to the sum of Kshs. 46,928,876/-. It is not in dispute that the plaintiff made salary deductions from its employees and remitted the same to the defendant as a Sacco. There are three issues that will fall for consideration on this issue. These are; whether the



- defendant had legal capacity to hold money belonging to non-members, whether all the plaintiff's employees were or are members of the defendant, and, for what purpose was the deductions i.e. was it for welfare contribution or individual Sacco contribution, or both?
35. It was the plaintiff's case that its officials erroneously remitted welfare deductions of its employees to the defendant. That the latter had no legal right to hold funds that did not belong to its members. That it noticed this after the Commissioner of Co-operative Societies informed it of that fact. The plaintiff contended that not all of its employees were members of the defendant yet all its employees were being deducted the subject monies.
 36. The Court carefully considered the plaintiff's bundle of documents. The plaintiff did not provide a list of those employees who became members of the defendant and who did not. Instead, the plaintiff attempted to shift the burden of proof to the defendant. I disagree with the plaintiff's contention that it was upon the defendant to prove that all the plaintiff's employees were its members.
 37. The law is trite that he who alleges must prove. It was the plaintiff to demonstrate that the entire sum claimed by it belonged to its employees who were not members of the defendant. That is the gist of sections 107 and 108 of the *Evidence Act*.
 38. In any case, it came out clearly at the trial that some of the plaintiff's employees had taken loans against their savings with the defendant on the subject money while others had already received refunds upon retiring from the plaintiff or exiting the plaintiff's company. It cannot therefore be reasonable for the plaintiff to claim the entire sum that it remitted to the defendant without factoring in whatever has already been paid out to the persons falling in the aforesaid categories and those who still want to retain their monies with the defendant as their share capital or contributions.
 39. Accordingly, I answer the second issue in the negative. The plaintiff has not proved that the defendant owes it the claimed sum.
 40. The next issue is whether the defendant owes the plaintiff the sum of Kshs.19, 520,389/- in interest. This claim was predicated upon the assumption that the defendant owed the plaintiff the claimed amount. Having found that the amount claimed is not due, the answer to this issue is in the negative. The plaintiff did not prove that the defendant owes it interest of Kshs. 19,520,389/-.
 41. The last issue relates to the defendant's counter-claim against the plaintiff. It was the defendant's case that from September 2012 to May 2019, the plaintiff had not remitted the monies deducted from its employee's salaries to the defendant. That the total unremitted deductions were Kshs. 15,000,000/= which the defendant claimed from the plaintiff together with interest at 5% per month.
 42. DWI testified that the defendant did not continue receiving money in the name of welfare funds between 2014 and 2018. However, this is not the situation reflected in the defendant's statement of account. The same defendant's statement of account reflect the title 'welfare funds' in the account statements of 2014-2017. The witness statement of DWI did not assist this court much as far as the counter-claim was concerned. Indeed, there was no much effort to prove the counter-claim.
 43. The documentary evidence before Court contradicts the defendant's claim that it did not receive the plaintiff's employee's deductions in the subject period. For instance, one of the documents in DExh1 was titled CS. 15546. It contained a statement of account for the defendant for several years. The members' deposits as at 31/12/2015 was 43,779,256/=. The same document reflected member's deposits for 2014 at 19,365,244/=.



44. At clause 16(b), there was a reflection of member deposits as at 31/12/2015. As at 31/12/2016, there was a reflection of members' deposits of Kshs. 68,559,476/=. The same situation is evident in the statement of account as at 31/12/2017 whereby the total deposits are Kshs. 96,168,259/=.
45. The foregoing was prove that there was continued increase in member deposits and welfare funds between 2015-2017. In this regard, it was not clear how the alleged sum of Kshs. 15,000,000/- arose. That claim was therefore not proved and is dismissed.
46. The upshot is that, both the plaintiff's suit and the defendant's counter claim were not proved. They are unmerited and are both dismissed with costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF OCTOBER, 2021.

A. MABEYA, FCI Arb

JUDGE

