



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL SUIT NUMBER 38 OF 2019

EGERTON UNIVERSITY SACCO SOCIETY LTD.....PLAINTIFF/APPLICANT

VERSUS

EGERTON UNIVERSITY.....1ST DEFENDANT/RESPONDENT

KENYA COMMERCIAL BANK.....2ND DEFENDANT/RESPONDENT

RULING

1. The plaintiff herein filed a plaint dated 8th October, 2019 seeking orders:-

- a) **An order that the 1st defendant releases the Kshs. 434,406,515.15/= to the plaintiff and all other subsequent deductions.**
- b) **The 2nd defendant be compelled to act as an agent as appointed by the Commissions for Cooperative Development to recover from the 1st Defendant's account numbers 1101906812,1108550703, 1101910895,1101607681,1101909579, 1101909781, 1108044956, 1108550584, 1101983680 and 1101893796 and deposit in the plaintiff's account No 01120025000700 with Cooperative Bank Nakuru Branch.**
- c) **Costs of the suit and interest.**

2. The grounds for seeking those the orders were *inter alia* as found in the following paragraphs of the plaint:

4. *At all material times herein the 1st defendant has been mandated to make deductions from its employees salaries who are members of the plaintiff and remitting the said deductions to the plaintiff on a monthly basis.*
6. *The plaintiff avers that from November 2017 the 1st Defendant herein has persistently defaulted in remitting the deductions it makes from its employees who are members of the plaintiff resulting to the plaintiff facing serious financial challenges in meeting its members expectations of loan disbursements.*
7. *The plaintiff avers that after several communications to the 1st Defendant, the parties entered into an agreement on the 23rd July 2018 where the University paid a sum of Kshs. 153,230,443.50/= out of the owing sum that stood at Kshs. 236,323,107.28/=.*
8. *It was a term of the said agreement that the 1st Defendant would pay the balance of Kshs. 51,076,816.00/= which was the owing principal sum within twelve months with effect from August, 2018.*
9. *It was a term of the said agreement/consent that the accrued interest of Kshs. 32,015,849/= was to be paid within twelve months with effect from August, 2018.*
10. *It was a term of the said agreement/consent that there was an interest on the outstanding principal sum owing of Kshs. 83,092,665/= payable at the rate of Kshs. 6,924,388.65 with effect from August, 2018.*
11. *It was a term of the said agreement/consent that there was an interest on the outstanding principal sum owing of Kshs. 83,092,665/= payable at the rate of Kshs. 6,924,388.65 with effect from August 2018.*

3. Thereafter the 1st defendant reneged on the said agreements creating an outstanding backlog of Kshs. 434,406,515/15.

4. Thereafter the plaintiff sought the assistance of the Commissioner for Co-operative Development to have the 1st defendant remit the deductions to its employees. In that regard the applicant set out the issues with the said Commissioner thus:

14. The plaintiff contends that the Commissioner for Cooperative Development did not appoint the Kenya Commercial Bank (the 2nd Defendant) as an agent to collect the owing sum from the 2nd Defendants account No. 1101906812, 1108550703, 1101910895, 1101607681, 1101909579, 1101909781, 1108044956, 1108550584, 1101983680, 1101893796 and deposit it in the plaintiff's account No. 01120025000700 with Co-operative Branch Nakuru Branch.

15. The plaintiff avers that the 2nd Defendant has failed/refused and or neglected to collect a sum of Kshs. 434,406,515.15/= from the 2nd Defendants account and to deposit it in the plaintiff's account No. 01120025000700 with Co-operative Bank Nakuru Branch.

5. With that plaint the plaintiff filed Notice of Motion brought under **Order 50 rules 1, 2 and 3** of the **Civil Procedure Rules** and **Section 1A, 1B and 3A of the Civil Procedure Act** seeking orders:-

(a) That the application be marked as urgent and service be dispensed with in the first instance.

(b) That pending the hearing and determination of this case(sic) inter-partes, the honourable court be pleased to order the 2nd Defendant Kenya Commercial Bank to attach the funds in the following accounts belonging to Egerton University Account numbers 1101906812, 1108550703, 1101910895, 1101607681, 1101909579, 1101907681, 1101909579, 1101909781, 1108044956, 1108550584, 1101983680, 1101893796, 1137209518, 1101909518, 1101909781, 1137209542 and 1108044956 as in compliance of an agency appointment to attach funds granted by the Commissioner for Cooperative Development on 10th May 2018 for a total sum of Kshs. 434,406,515.15/=

c) That pending the hearing and determination of this suit, the honourable court be pleased to order the 2nd Defendant Kenya Commercial Bank to attach the funds in the following accounts belonging to Egerton University Account numbers 1101906812, 1108550703, 1101910895, 1101607681, 1101909579, 1101907681, 1101909579, 1101909781, 1108044956, 1108550584, 1101983680, 1101893796, 1137209518, 1101909518, 1101909781, 1137209542 and 1108044956 as in compliance of an agency appointment to attach funds granted by the Commissioner for Co-operative Development on 10th May 2018 for a total sum of Kshs. 434,406,515.15/=.

d) That upon attachment of the funds in the above accounts in prayer (b) the same be deposited in the plaintiff's account No. 01120025000700 with Co-operative Bank Nakuru Branch.

e) That there be an order for the 1st Defendant to be submitting without fail all the monthly deductions from its employees who are members of the plaintiff into the plaintiff's account No. 01120025000700 with Co-operative Bank Nakuru Branch.

f) That costs be provided for.

6. The application is supported by the grounds on the face of the application and the affidavit of Ezekiel Cheboi sworn on 8th October, 2019 reiterating the contents of the plaint set out hereinabove.

7. The 2nd defendant/respondent appointed Mburu Maina & Company Advocates who filed Notice of Appointment on 17th October, 2019.

8. The 1st defendant/respondent through the firm of Sheth & Wathigo Advocates, filed defence on 4th November, 2019, averred that any default (if at all) had been explained to the employees, and that the plaintiff "has no *locus standi* or privity of contract to demand payments of any such monies, denied the existence of any, "*competent or binding agreement on actionable agreement*" as alleged and put the plaintiff to strict proof thereof; contended that any agreement entered into was "*tentative and contingent*" upon events that never materialized and any interest charged by the plaintiff would be illegal and unenforceable, that the agreements entered into were informal and unenforceable.

9. Further and without prejudice to anything contained in the statement of defence or to any contention made therein 1st defendant /respondent averred that if the plaintiff indeed had any *locus standi* to lay claim in respect to statutory or any deductions of the employees (which was denied) and that the 1st defendant/respondent had defaulted, the default was not to the extent claimed and the sum claimed included illegal interest. To which the plaintiff /applicant was put to strict proof.

10. Denying the jurisdiction of this court, the 1st defendant/respondent stated,

"11. The 1st defendant moreover contends that if there is any dispute between the plaintiff and the 1st defendant respecting deductions and remittals of the contributions, the same should in the first place have been lodged at the co-operative tribunal and therefore the honorable court should decline original subject matter jurisdiction in the first place and strike out the suit herein as incompetent and premature."

With that the court was urged to strike out the suit, dismiss it with costs.

11. The Notice of Motion was opposed vide the Replying Affidavit sworn by Moses Odero Ouma on 1st November, 2019. In the affidavit, he conceded that the 1st respondent had “*been forced to default in some of its statutory obligations for employees*” including “*pension contributions, PAYE, NSSF, NHIF*” for more than one (1) year, and had pending bills to creditors standing at Kshs. 3.6 billion as at June 2019. He went on to paint a horrifying kaleidoscope of the financial woes of the 1st respondent’s caused by;

(i) The dwindling number of parallel students.

(ii) Reduced capitation by the Government of Kenya.

(iii) Failure by the Government of Kenya to pay for some 3,882 students studying at the university in the year 2018/2019 creating a deficit of Kshs. 695 million.

12. More importantly he deponed that the 1st respondent following some reconciliation with the plaintiff had arrived at an outstanding amount of about Kshs. 229,753,002/90/= which was subject to audit.

13. He also conceded that indeed an agency notice had been issued by the Commissioner of Cooperatives because there were funds in the account deposited by the Government of Kenya for purposes of putting up an ultra modern library but as a result of the attachment that construction had been put on hold.

14. He deponed further that it was the 1st respondent’s contention that the plaintiff/applicant had no proprietary rights over the said monies as the agreement for deduction was between the respondent and each individual employee, that this matter belonged elsewhere. He expressed the concern that should the orders sought be granted, then the 1st respondent would ground to a halt as even basic salaries would not be paid. He annexed a bunch of documents to support his affidavit.

15. The 2nd respondent filed an affidavit sworn by Roseline Vuyanzi Akidiva. She conceded that indeed on 14th May, 2018, the plaintiff/applicant did serve the 2nd defendant/respondent with a letter dated 10th May, 2018 “*purporting to appoint the 2nd defendant as an agent of the plaintiff and the same was alleged to have been authored by the Commissioner for Cooperative Development*”. On 23rd July, 2018, the 2nd respondent and the applicant entered into consent suspending the enforcement of the said agency relationship, that neither the plaintiff/applicant nor the 1st defendant/respondent informed the 2nd defendant/respondent of any breach of the said agency relationship and neither was a formal application made/or letter written to reinstate the same. She went on to demonstrate the state of the 1st defendant/respondent accounts;

8. *THAT the 1st Defendant is a holder of the following account numbers with the 2nd defendant; Account number 1101906812, 1108550703, 1101910895, 1101607681, 1108044956, 1108550584, 1101893796, 1137209518 and 1137209542.*

9. *THAT the book balance as at 25/10/2019 for all the accounts herein were;*

a. *Account Number 1101906812 being Kshs. 109,503,842.06/=*

b. *Account Number 1108550703 being Kshs. 46,842,878.81/=*

c. *Account Number 1101910895 being Kshs. 21,300,905.66/=*

d. *Account Number 1101907681 being Kshs. -9,995.89/=*

e. *Account Number 1101906579 being Kshs. 695,903.30/=*

f. *Account Number 1101909781 being Kshs. 1,089,409.03/=*

g. *Account Number 1108044956 being Kshs. 552,338.85/=*

h. *Account Number 1108550584 being Kshs. 516,794.70/=*

i. *Account Number 1101893796 being Kshs. 688,193.45/=*

j. *Account Number 1137209518 being Kshs. 68,693,163.45/-*

k. *Account Number 1137209542 being Kshs. 428,552.60/=*

10. *THAT the 1st Defendant is NOT a holder of account Number 1101909518 and 1101983680 as quoted in the Application and the same do not exist in our system.*

16. The application was argued orally by Ms Nancy Njoroge for plaintiff/applicant, Mr. Kisila for 1st defendant/respondent, Mr. Cheruiyot for 2nd defendant/respondent.

17. **APPLICANT'S ARGUMENTS**

Ms Njoroge summed up the facts as set out in the plaint, the supporting affidavits and the annexures. She argued on;

i) **Jurisdiction**

That **Section 35** of the **Cooperative Societies Act** allowed such proceedings and even the charging of interest. That the Sacco had *locus standi* to sue the respondents as this was now a civil debt; that the commissioner was at liberty institute proceedings but had not done so.

ii) **Privity of contract**

That the Sacco had the full mandate of its members to file this suit. That the board members of the 1st respondent are the ones who entered into the consent /payment agreement with the plaintiff/applicant. The 1st respondent could not now be heard to be denying that they were privy to that agreement.

iii) **On orders to issue**

That the 1st respondent had conceded the payment of Kshs. 26 million, the court could issue orders for the attachment of the balance by applying **Section 35** of the **Cooperative Societies Act**.

18. **1ST DEFENDANT/RESPONDENT ARGUMENTS**

Mr. Kisila submitted that the 1st respondent relied on its pleadings and affidavit, documents and statements.

(i) **On jurisdiction**

He reiterated that this was a matter for the Tribunal. That **order 50** of the CPR was about procedure. That applicable procedure was to be found at **Order 39**, attachment of property before judgment. That the proper procedure had not been complied with and the matter was not ripe for the orders sought which could only be done in the clearest of circumstances and this was not one of them.

He relied on;

(i) **David W. Ndirangu vs Adija Hassan Abdalla [1980] eKLR**

(ii) **Kuria Kanyongo T/A Amigos Bar & Restaurant vs Francis Ndemi Kinuthia & Others (1988) 2 KAR**

(iii) **Sundip Jagdish Patel vs Erad Suppliers & General Contractors Limited [2013] eKLR**

(ii) **On Plaintiff/applicant's locus standi**

That plaintiff could not have *locus standi* to sue on behalf of members because even under **Section 35**, it was about individual membership. That there was no provision in the law for members to donate that right to the Sacco. Liability for any failure to pay was to the individual member not to the Sacco.

(iii) **On orders to issue**

That the claim of Kshs. 434,406,415 was not substantiated by any of the filed documents. The plaintiff/applicant would have to prove that this was actually owing, there were no particulars of the employees alleged to be owed i.e. who were claiming deductions and no remittances. That **Section 35** was about individual members of the Sacco. That the court could not issue the orders sought as the 1st respondent had no money in its account and such an attachment would paralyse the institution. In any event the 1st respondent was a running institution with vast assets and it had not been demonstrated that it would be unable to pay the plaintiff applicant.

19. **2ND DEFENDANT/RESPONDENT ARGUMENTS**

Mr. Cheruiyot submitted that the only reason they were in court was because they hold the 1st respondent's account. He reiterated the contents of the replying affidavit and the fact that the available funds of Kshs. 4,590,474/50 would not be sufficient to satisfy the amount sought. That they were ready to comply with any orders, but would be seeking costs.

20. **PLAINTIFF'S/APPLICANT'S REJOINDER**

That the applicant had the locus to pursue this on behalf of members to avoid collapse of their Sacco. That **Section 35** on whether Commissioner can sue gives him/her the discretion. That there is an agreement for payment which the 1st respondent ought to honour. That it is in the interests of justice for this court to protect the Sacco from collapse by attaching what is admitted by the 1st respondent.

21. The issues for determination are

- (i) **Whether this court has jurisdiction to hear this matter.**
- (ii) **Whether the plaintiff/applicant has locus standi to bring this suit.**
- (iii) **What is the applicable law/rules/principles?**
- (iv) **What orders to issue.**

ANALYSIS AND DETERMINATION

22. On jurisdiction; The **Cooperative Tribunal** is seized with jurisdiction over matters set out at **Section 76** of the **Act**. It is clearly disputes amongst members, past members, persons claiming through members and deceased members, between members, past members and the society, its committee or any office of the society, between the society and any other cooperative society. The nature of disputes is also set out under **Section 76(2)**, again these would be claims which include by a Cooperative Society for any debt/demand from a member, a claim by a member etc. for debt due from a cooperative society. The plaintiff/applicant is a cooperative society but is not claiming from its members but on their behalf. The other parties are not members of a cooperative society neither are they cooperative societies. A plain reading of these provisions clearly points out to the fact that it is only where disputes are between/among members of a Sacco or against the Sacco or the Sacco against a member that the tribunal will have jurisdiction. Hence, in my view this is not a case for this court to down its tools. The plaintiff/applicant is correctly before this court.

23. On plaintiff/applicants *locus standi*, it is argued that the issue of contributions to the Sacco by members is indeed an individual arrangement with the Sacco. It is the employee of the 1st respondent who gives instructions to the Sacco to deduct and remit certain amounts of money to the Sacco. **Section 12** of the **Cooperative Societies Act**, provides that upon registration a Cooperative Society “*shall become a body corporate... to sue and be sued and to do all things necessary for the purpose of, or in accordance with its by laws*”. Under **Section 2** of the **SACCO Societies Act, No. 14 of 2008** means “*a Savings and Credit Cooperative Society registered under the Cooperative Societies Act*.”

Sacco business includes “*the receipt of non withdrawable deposits from members... (which) may be used as collateral against borrowings, providing finance and domestic money transfer services*”. Clearly therefore without money, without the members contribution a Sacco may not exist, as its existence and ability to provide the services required by its members depends on the lifeline provided by the members contributions. I am imagining the pandemonium if each and every member of the Sacco would have to institute an individual suit against the 1st respondent for the said default. Of course that right of an individual member to sue the 1st respondent based on the individual agreement for deduction and remittance, cannot be taken away, but the Sacco has an interest in the members contributions, they are the pool from where loans obtained and availed to members. The deductions for the repayment of those loans is both individual and collective, as it is also from the same deductions for loan repayments that he Sacco is able to provide the loan facility to others. The argument that it does not have *the right to bring this suit and be heard by this court* on this issue on behalf of its members against their employer the 1st defendant/respondent is not tenable. In any event no single member has come forward to say they have not given the authority to the Sacco to sue on their behalf.

24. Regarding the *locus standi* of the Commissioner, provided for under **Section 35** of the **Act**, it is clear that that is discretionary. He/she may choose not to bring proceedings. **Section 35(2)** gives the commissioner those powers, “*without prejudice to any other mode of recovery and such sum shall be a civil debt recoverable summarily*”. The members have evidently chosen this mode to recover their monies.

25. True, it is was alleged that the Commissioner issued an agency notice to the 2nd defendant/respondent but the same could not be effected for whatever reason and both the applicant and the 2nd respondent consented not to proceed. Can this court direct the Commissioner on how to proceed? The Commissioner is not a party to this suit. **Section 35 (3) ,(4),(5), (6), (7), (8) and (9)** speaks to this. It provides the steps the Commissioner will take upon the issuance of an agency notice.

(3) *The Commissioner may, by written notice, appoint any person, bank or institution to be an agent of the society for the purposes of collection and recovery of a debt owed to the society.*

(4) *The agent shall pay the amount specified in the notice issued under subsection (3) out of any moneys which may, at any time during the twelve months following the date of the notice, be held by him for the employer or are due from him to the employer.*

(5) *Where an agent claims to be or to have become unable to comply with subsection (3) by reason of lack of moneys held by or due from him, he shall give a written notification to the Commissioner stating the reasons for his inability and the Commissioner may—*

(a) *accept the notification and cancel or amend the notice accordingly; or*

(b) *if he is not satisfied with the reasons, reject the notification in writing.*

(6) *Where an agent fails to notify the Commissioner or the notification is rejected, it shall be presumed that the agent has sufficient moneys for the payment of the amount specified in the notice.*

(7) Where an agent fails to pay the amount specified in the notice within thirty days from the date of service or the date on which any moneys come into his hands for or become due to him from the employer, the agent shall be liable for the amount specified in the notification as if he were the employer.

(8) In any proceedings for the collection or recovery of the amount specified in the notice, it shall not be a defence for the agent to claim lack of the moneys.

26. These provisions are dependent on what happens after the service of the agency notice. The 2nd respondent states that it was served with what was purported to be an agency notice from the Commissioner. It is apparent that it did not consider what it was served with to have been a notice and to that end, did not act on it. It is only the Commissioner acting with the powers donated to that office who can enforce the default of the agency notice. For the court to issue any orders regarding the agency notice the Commissioner needed to have been a party to these proceedings.

27. Has the applicant satisfied the requirements for attachment before judgment? There is a very elaborate procedure set out under **Order 39** of the **Civil Procedure Rules**. In **David Ndirangu** case above the Court of Appeal discussed the provisions of **Order 38 (now 39)** and emphasized that there was need to follow the steps set out therein. The court observed;

“By rule 6 of the order, it is upon the defendants’s failure to show cause why he should not furnish security, or to furnish the security required within the specified time that the court may order the attachment of the property sufficient to satisfy the decree which may be passed in the suit. The learned judge was in error to order the summary attachment of the vehicle at first instance on the respondent’s application without calling upon and requiring the appellant to show cause. The very first ground of appeal therefore succeeds and I would pronounce the initial order of January 22, 1979 a nullity. On the application to set aside the illegal order of January 22, 1979, I can only say that the above stated reasons of the learned judge for dismissing the application, was to say the least, a perpetuation of the first error and based on totally inapplicable reasoning in the premises, I would therefore allow this appeal with costs to the appellant here and in the court below, and order that the attachment of Toyota No KDJ 643 be set aside.”

28. Although this is not an ex-parte application the principles apply. In this case the 1st respondent admitted to owing Kshs. 214,369,875/= vide the Vice Chancellor’s (VC) letter of 7th August, 2019 as at 31st July, 2019. The VC stated in her letter that as soon as capitation was received, the Sacco would receive priority. Earlier on, on 23rd July, 2018 the 1st respondent entered into a “consent” with the plaintiff/applicant to pay the outstanding balance of Kshs. 51,076,816 and interest of Kshs. 32,015,849 in twelve (12) instalments pursuant to **Sections 35(3) to (10)** of the **Cooperative Societies Act**. The audit report for 2018/2019 shows that the 1st respondent has outstanding balance as at 28th October, 2019 for EU Sacco at 229,753,002/90.

29. With this background the applicant’s prayer is that the 2nd respondent be ordered to execute its duty as mandated by the Commissioner for Cooperative Development in its notice of 19th December, 2018 or compel the 1st defendant to surrender the sum of Kshs. 434,406,515/15.

30. According to section 35(2) the amount owing, and in this case it is admitted in the audit report to be Kshs. 229,753,002/90 as at October 2019, is recoverable summarily. See **Kivi Savings and Credit Co-operative Society Limited v Kivi Limited [2017] eKLR** where the applicants moved the court for summary judgment to recover their deductions. Evidently it is not the same as attachment before judgment. And according to the law the enforcement mechanisms for the agency notice as against the agent are only available to the Commissioner. It is the Commissioner’s mandate to deal with the respondent and my view is that no related orders are available to the plaintiff/ applicant in the absence of the Commissioner’s participation in this matter.

31. With regard to the issue of attachment before judgment, the whole process as required by **Order 39** must be complied with and the conditions therein met before any order of attachment is issued. That plaintiff applicant has not complied.

32. The plaintiff is not without relief. The CPR does provide relief in the face of an admission. However seeing that that is not an order that was sought in this matter, I have not the basis to grant it.

33. Hence I find that this court has the jurisdiction to hear the matter as suit for recovery of civil debt. The plaintiff applicant has the *locus standi* to bring this suit. The 1st respondent admits owing the sum of Ksh 229,753,002/90 recoverable summarily.

34. The orders sought for attachment before judgment be compelling the 2nd respondent to pay the sums owed through the accounts held by the plaintiff applicant as tied to the agency notice said have been issued by the commissioner for cooperative development to the 2nd respondent are not available to the plaintiff/applicant. There lies the difference between recoverable summarily and attachment before judgment.

35. The application is there for declined.

36. Costs in the cause.

Dated, delivered and signed at Nakuru this 16th day of January, 2020.

Mumbua Matheka

Judge

In the presence of

..... Court Assistant

Applicant

Respondent