



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL CASE NO. 14 OF 2016

SHERIA CO-OP SAVINGS &

CREDIT SOCIETY LIMITED.....PLAINTIFF

VERSUS

KARUTURI LIMITED (UNDER RECEIVERSHIP).....1ST DEFENDANT

STANBIC BANK LIMITED.....2ND DEFENDANT

RULING

1. Pursuant to a Court Order dated the 21/2/2019, the 2nd defendant filed its statement of defence on the 26/2/2019. It is dated the 8/5/2017. Generally the 2nd defendant states that it is a stranger to the suit between the plaintiff and the 1st defendant which was placed under Receivership by the 2nd defendant through a Receiving Order dated 10/2/2014, and subsequently wound up by an order of the court on the 30/3/2016 in **winding up cause no. 12 of 2013**.

2. This suit was instituted by the plaintiff against the defendants jointly and severally pursuant to a court order issued on the 15/3/2016 in **Nakuru High Court Miscellaneous Application No. 103 of 2016**, as the 1st defendant had already been placed under receivership.

3. **By an application dated 28/6/2019**, the 2nd defendant CFC Stanbic Bank Ltd, pursuant to **Orders 1 Rule 10(2), Order 11 and 15 of the CPR** sought **ORDERS**:

**1) That the Honourable Court be pleased to strike out the name of the 2nd Defendant from the suit**

**2) That the costs of this applicant as well as those of the suit against the 2nd defendant be borne by the plaintiff.**

**3) That in the alternative the court be pleased to direct that the parties comply with Order 11 CPR and/or practice directions of the Commercial Division of the High Court, Kenya,**

4. On grounds that there is no relationship between the applicant (2nd defendant) and the Respondent (plaintiff) to warrant any of the prayers sought against the respondent either jointly with the 1st defendant or at all, that the applicant has therefore been improperly joined in the present proceedings among others, as appears on the face of the application.

5. Together with the grounds, a supporting affidavit sworn by one **Angeline Njuguna**, a legal counsel at the 2nd defendant's bank on the 28/6/2019 has also been filed and a preliminary objection dated 28/6/2019 filed on the 28/6/2019. In opposing the application the plaintiff/respondent filed a Replying Affidavit sworn by Ferdinand Juma, Chairman of the plaintiff Society and filed on the 14/1/2020.

6. **The Preliminary Objection (P.O)** dated and filed on 28/6/2019 by the 2nd defendant is on points of law touching on the court's jurisdiction. It therefore ought to be argued and determined in the first instance, as it may dispose the suit – **Mukisa Biscuit Manufacturers Co. Ltd Vs. West End Distributors Ltd (1969)**.

7. The points of law raised in the P.O. are:

**1) That the Honorable court lacks the requisite jurisdiction to hear and determine the dispute herein by virtue of Article 163 (5) (b) of the Constitution.**

**2) That in determining the issues in controversy between the plaintiff and the 2nd defendant, this honourable court will be required to interrogate any employment relationship, employment contracts, the payment of salaries and deduction of**

**SACCO contributions as between the plaintiff's members and the 2nd defendant. Such would squarely fall within the jurisdiction of the Employment & Labour Relations Court pursuant to the provisions of Article 162 (2) (a) of the Constitution.**

8. The 2nd defendant therefore prays that the suit against it be struck out and/or transferred to the Employment & Labour Relations Court (ELRC) with costs to the 2nd defendant.

9. Submissions in support of the P.O. and in opposition thereto are filed by the respective Advocates for the parties.

**The 2nd defendant** relies fully on its averments in the supporting affidavit to the application as stated above.

Whereas the 2nd defendant submits that the P.O and the application are unopposed, I note that the plaintiff/Respondent filed its responses to both the P.O. and the application on the 14/1/2020 despite the timelines allowed by the Court of 14 days.

Whereas it is not indicted when the above documents were served upon the 2nd defendant, they are on record and the 2nd defendant is on record to have raised no objection for the admission of the responses for having been filed out of time, and without leave of court - **Article 159 (2) (d) of the Constitution.**

10. The above being a procedural technicality and the court being under a duty to dispense substantive justice without undue procedural technicalities, I shall consider all the documents thus filed by the parties. I therefore decline to accept the 2nd defendant's submission that the P.O. and the application are unopposed.

11. I have considered the oral parties submissions. **What is the cause of action is as exhibited in the plaintiff's pleadings and the 2nd defendants statement of defence?**

12. By the plaint dated 19/3/2016, the plaintiff is described as a co-operative society registered as such under the co-operative Societies Act. At paragraph 6, the plaintiffs claim against the defendants jointly and severally is for remittance of Kshs. 24,936,647.97 as at 7/2/2016 plus interest thereon at 5% P.a, being the principal sum as the total money deducted by the defendants from the plaintiffs member's monthly salaries and which sum of money the Defendants were under a duty to remit to the plaintiff as its members savings.

13. Paragraph 7 thereof speaks of the said members as being employees of Karuturi Ltd, the 1st defendant, who were deducting their sacco contributions and remitting it to the plaintiff (Sacco) but were not so remitted, and thus accumulating to the sum claimed in the plaint.

14. **Under Section 12 (1) (a) of the ELRC Act**, disputes relating to, or arising out of employment relationship between an employer and an employee fall under the ELRC jurisdiction. **Section 87 of the Employment Act** also provides for avenues in the event of complaints and jurisdiction in cases of disputes between employers and employees as follows;

**87 (1);**

Subject to the provisions of this Act, whenever  
**a) An employer or employee neglects or refuses to fulfil a contract of service, or**

**b) Any question, difference or dispute arises as to the rights or liabilities of either party**

**c) -----**

**The aggrieved party may complain to the labour officer or lodge a complaint or suit in the Employment & Labour Relations Court.**

(3) This section shall not apply in a suit where the dispute over a contract of service or any other matter referred to in sub section (1) is similar or secondary to the main issue in dispute.

15. Thus, the 2nd defendant submits that the plaintiff which is a SACCO Society is suing on behalf of its members who are employees of the 1st defendant relating to each other's rights and obligations arising under a contract of employment; and therefore the dispute ought to be heard by the ELRC Court as the relationship between the plaintiff SACCO and the defendants arise from a contract of employment.

16. It is further the 2nd defendants submission that the issue of whether or not the SACCO deductions were made either by the 1st defendant or the 2nd defendant and were not remitted to the plaintiff can only be answered after it is established whether or not there existed an employment relationship between the plaintiff's members and the defendants or either of them.

17. I like the analogy stated by the plaintiff in its submissions, of Sheria Sacco, where Judiciary employees deductions by the Judiciary are remitted to Sheria Sacco as the employees savings. By so doing, it is my view that the SACCO does not become the employer of the judiciary employees, nor does the SACCO become the employee of the Judiciary. However, and with respect to Mr. Karanja Advocate, he does not give state to which court a suit ought to be filed should, for instance, the judiciary deducts its employees contributions but fails to remit the deductions to Sheria Sacco.

18. What is clear is that there is established a contract of service between the two parties in such scenario, which is the case in the present suit, between the employer (1st defendant) and the employees (represented by the plaintiff SACCO), In which case provision of **Section 87**

**of the Employment Act** come into play.

19. An employer's obligation to deduct from the employees' salary a prescribed Sacco contribution, and to remit it to a Sacco Society falls under the employment contract, and therefore the dispute arises from the said arrangement and or contract of service. I am persuaded that it is the Employment and Labour Relations Court that has the requisite jurisdiction to interrogate the relationship and the dispute arising therefrom. I therefore find and hold that the preliminary objection raised by the 2nd defendant in the matter of Jurisdiction is merited.

20. Consequently, **this court finds itself in the unenviable position that it lacks jurisdiction to take any further step in the suit, but to lay down its tools and decline to take further proceedings in the case – owners of the Motor Vessel Lillian 'S' Vs. Caltex Oil (Kenya) Ltd (1989) KLRI and Samuel Kamau Macharia Vs. KCB & Others (2012) e KLR. For the above reasons, I find it fit and necessary to transfer this suit hereto to the court with jurisdiction to hear and determine the dispute, including the 2nd defendant's application dated the 28/6/2019.**

21. In my discretion donated to me by Statute, **under Section 27 of the Civil Procedure Act**, and upon consideration of the circumstances appertaining hereto, I make no order as to costs in respect of the preliminary objection. It is so ordered.

**Delivered, Signed and Dated electronically at Nairobi this 20th Day of May, 2020.**

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**J.N. MULWA**

**HIGH COURT JUDGE.**