



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

PETITION NO 43 OF 2015

ORTHODOX TOWERS MANAGEMENT CO. LTD.....
.....PETITIONER

VERSUS

THE ATTORNEY GENERAL.....
.....RESPONDENT

AND

MILIKI SAVINGS & CREDIT SOCIETY LTD.....1ST
INTERESTED PARTY

ORTHODOX ARCHBISHOPRIC OF KENYA AND IRINOUPOLIS.....2ND
INTERESTED PARTY

RULING NO.2

1. In the ruling of this Court delivered on 3rd June 2015, I made the following order at paragraph 45 thereof:

45. With respect to the amount of Kshs47,924,846/= deposited in Court by the applicant, I direct that it be released forthwith to the 1st interested party, and the interest accrued thereon to be paid to the interested party by the petitioner.

2. The petitioner has now approached the Court by way of an application made orally seeking an interpretation of the order with respect to the interest. Mr. Waweru for the petitioner, who was also holding brief for Ms. Githii for the 2nd interested party, stated that the petitioner had been moved to approach the Court because of a letter dated 5th June 2015 in which the Commissioner for Co-operatives had demanded from the petitioner's bankers interest of Kshs10,813,542.

3. Mr. Waweru submitted that his understanding of the orders of the Court was that the interest was to be the interest on the sum deposited in Court from 10th February 2015, which was to be calculated at court rates. He submitted that they do not know how the interest of Kshs10,813,542 was calculated as it was not in line with the directive of the Court in the judgment, and the petitioner is not a party to the dispute between the 1st interested party and the 2nd interested party which is before the Industrial Court, a dispute that is not yet complete.

4. It was his further submission that as the petitioner is not a party to those proceedings, it cannot

therefore be charged interest on the amount. Mr. Waweru submitted that the petitioner was seeking clarity and also that the Court calculates the interest.

5. In reply, Mr. Moimbo for the respondent submitted that paragraph 45 of the decision of the Court made on 3rd June 2015 was clear; that the Court directed that the amount deposited in Court be released to the 1st interested party and the interest accrued thereon paid to the interested party by the petitioner. It was his case that there was no difficulty as to whether the rate applicable is the court rates or the rates under section 35(1) of the Co-operative Societies Act Cap 490, which provides that the rate applicable is a compound interest of not less than 5% per month.
6. According to Mr. Moimbo, once the Court found that the petitioner's application had no merit, the respondent went to the Commissioner who applied the rates under statute, which resulted in the amount of Kshs10,813,542. It was his contention that the present application is meant to frustrate the payment of the amount owed to the 1st interested party.
7. Mr Ingutya for the 1st interested party associated himself with the submissions made by Mr. Moimbo. It was his submission that the Court had ordered that the interest accrued on the amount be paid to the 1st interested party.
8. According to Mr. Ingutya, his interpretation of the direction of the Court was that the interest would be calculated according to the law, and that he made reference to section 35 of the Cooperative Societies Act. It was his submission that the question of the rate that applies on a debt owed to a savings and credit co-operative society is settled as section 35 of the cooperative societies Act provides for interest to accrue at 5% compounded. It was his further contention that if the petitioner or 2nd interested party have a problem with the provisions of section 35 of the said Act, they can lobby Parliament or challenge the provision, but they cannot challenge it as they are now doing; and further, that the actions that the Commissioner has taken is open to challenge, but not before this Court. Counsel further reiterated that the account in dispute does not belong to the petitioner; that it holds money from the 2nd interested party which the petitioner is holding as agent. He asked that the application be dismissed with costs.
9. In reply, Mr. Waweru submitted that the petitioner was not challenging section 35 of the Co-operative Societies Act. Rather, the petitioner was following the directive of the court that interest be charged from 10th of February 2015 to 3rd of June 2015; and that what the petitioner was asking is what that rate of interest should be.
10. It is worthwhile, in determining the question raised by the petitioner this morning, to consider the proceeding before the Court on 3rd June 2015, when the Court delivered its ruling on the petitioner's application. After delivery of the ruling, Ms. Githii submitted that the funds were with the Court, and the petitioner should not be condemned to pay any interest that has accrued in the interim. Mr. Waweru agreed with this submission.
11. In reply, Mr. Ingutya, who was present for the 1st interested party and also held brief for Mr. Moimbo for the respondent, submitted that the money due to the 1st interested party was not in the hands of the interested party, and that interest accrues as a matter of law. It was also his submission that the fact that the money was in the hands of the Court does not mean that the law, the Cooperative Societies Act, which provides for the accrual of interest on any money outstanding, should not be followed. It was his submission that the interest was due from the date the money was deposited in Court until the date of the judgment.
12. Upon considering the respective submissions of the parties, I made the following ruling:

“The amount in dispute was deposited in Court pursuant to the application of the petitioner on 10/2/2015. Consequently, any interest that should have accrued to the 1st

interested party, which should have had the funds at that stage, should rightly be borne by the petitioner. I therefore see no need to vary the judgment of the court with respect to the interest on the amount from 10/2/2015 till the date of this ruling.”

13. In my view, both the contents of paragraph 45 of the ruling made on 3rd June 2015, as well as the later, *ex tempore* ruling on the same date, are clear. The petitioner was supposed to have released the amount in dispute to the 1st interested party by the 10th of February 2015, pursuant to the agency notice to its bankers issued by the Commissioner of Co-operatives. Instead it sought interim orders from the Court, and obtained an order to deposit the amount in Court. That did not stop the right of the 1st interested party under the Co-operative Societies Act from accruing. Section 35(1) provides as follows:

35.(1) Where an employer of a person who is a member of a cooperative society has, under the instructions of the employee, made a deduction from the employee’s emoluments for remittance to the cooperative society concerned but fails to remit the deductions within seven days after the date upon which the deduction was made, the employer shall be liable to pay the sum deducted together with compound interest thereon at a rate not less than five percent per month.

14. For the avoidance of doubt, it is my view, and for clarity, that was the view of this Court in its rulings on 3rd June 2015, that the only rate of interest applicable in the circumstances of this case is the rate provided for by law, under section 35(1) of the Co-operatives Societies Act. The 1st interested party, through the office of the Commissioner of Co-operative Societies which had issued the agency notice, was entitled to the amount of **Kshs.47,924,846/=** as at 10th February 2015. It is entitled to the statutory interest under Section 35(1) of the Co-operative Societies Act for the period the amount was deposited in Court pursuant to the orders made in favour of the petitioner.

15. It is so ordered.

Dated Delivered and Signed at Nairobi this 11th day of June 2015

MUMBI NGUGI

JUDGE

Mr. Waweru instructed by the firm of B. Mbai & Co. Advocates for the petitioner, and holding brief for Ms. Githii for the 2nd interested party.

Mr Moimbo instructed by the State Law Office for the 1st respondent.

Mr. Ingutya instructed by the firm of Arthur Ingutya & Co. Advocates for 1st interested party.