



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MURANG'A

CIVIL CASE NO 3 OF 2015

FESTUS MBURU NYANJUI & 4 OTHERS.....PLAINTIFFS

VERSUS

PERPETUAL WANGUI MAGUTU & ANOTHER.....DEFENDANTS

RULING

1. The Plaintiffs' suit as pleaded in their plaint dated 19/02/2015 is that while they and the 1<sup>st</sup> Defendant were employees of *Murata Sacco Limited* they guaranteed two loans in the total sum of 1,256,000/00 advanced to the 1<sup>st</sup> Defendant by their aforesaid employer; and that the 1<sup>st</sup> Defendant offered as further security her gratuity held by the 2<sup>nd</sup> Defendant, *Murata Sacco Staff Provident Fund*. The Plaintiffs have further pleaded that the 1<sup>st</sup> Defendant was subsequently dismissed from employment by *Murata Sacco Limited* which then commenced recovery of the monies advanced to the 1<sup>st</sup> Defendant and guaranteed by the Plaintiffs by deduction from their salaries various sums of money, which deductions are supposed to continue for three years.

2. The Plaintiffs have also pleaded that the loans advanced to the 1<sup>st</sup> Defendant cannot be recovered from her gratuity held by the 2<sup>nd</sup> Defendant. They therefore seek two main reliefs: one, an order to compel the 2<sup>nd</sup> Defendant to deposit in court all the money it holds for the 1<sup>st</sup> Defendant in its provident fund, for purposes of paying off the loans advanced to 1<sup>st</sup> Defendant and guaranteed by the Plaintiffs; and two, an order for the 1<sup>st</sup> Defendant to provide security for the loans advanced to her in order to discharge the Plaintiffs from their obligations under their guarantees.

3. Together with the plaint the Plaintiffs filed **notice of motion dated 19/02/2015** in which they seek a temporary injunction to restrain the 2<sup>nd</sup> Defendant from releasing any money due to the 1<sup>st</sup> Defendant that it holds in its provident fund pending disposal of the suit; or that in the alternative that such money be deposited in court. The Plaintiffs also seek an order that the 1<sup>st</sup> Defendant do provide alternative security for the loans guaranteed to her sufficient to discharge the Plaintiffs from their guarantees. This application is the subject of this ruling. It is supported by an affidavit sworn by the 2<sup>nd</sup> Plaintiff, Grace Gakenia Kimani, to which various documents have been annexed.

4. The 1<sup>st</sup> Defendant has opposed the application by her **replying affidavit filed on 19/03/2015**. The main point taken in the replying affidavit, and indeed in her statement of defence dated 16/03/2015, is that the orders sought in the application, and indeed in the plaint, are expressly forbidden by law.

5. I have read the supporting and replying affidavits. I have also perused the plaint and the 1<sup>st</sup> Defendant's statement of defence. The 2<sup>nd</sup> Defendant has not filed any papers in the suit and has chosen to remain neutral in the dispute between the Plaintiffs and the 1<sup>st</sup> Defendant, stating only, through its representative in court, that it will abide by any decision given by the court. I have also given due consideration to the submissions of the learned counsels appearing.

6. It is common ground that the provident fund ran by the 2<sup>nd</sup> Defendant, and in which the 1<sup>st</sup> Defendant's retirement benefits are, is governed by the provisions of the *Retirement Benefits Act, Cap*

197. Section 36 of that Act provides as follows –

**“36. Protection against attachment**

**Notwithstanding anything to the contrary contained in any other written law, where a judgment or order against a member of a scheme is made, no execution or attachment or process of any nature shall be issued in respect of the contributions or funds of the member or his employer except in accordance with the scheme rules, and such contributions shall not form part of the assets of the member or of his employer in the event of bankruptcy.”**

7. The 1<sup>st</sup> Defendant is a member of the provident scheme ran by the 2<sup>nd</sup> Defendant. What is sought in this application, and indeed in the suit, is essentially an order for attachment of her retirement benefits held in that provident scheme. The order sought, just like execution or attachment in execution of any judgment or order, is expressly forbidden by section 36 quoted above, except in accordance with the rules of the scheme. The rules of the 2<sup>nd</sup> Defendant have not been placed before the court in order to verify whether they permit the kind of order and reliefs sought by the Plaintiffs.

8. In the result, and by reason of the provisions of section 36 of the Retirement Benefits Act, Cap 197 I must refuse the application by notice of motion dated 19/02/2015. It is dismissed. The interim orders now in place are hereby vacated. Costs of the application shall be in the cause. It is so ordered.

**DATED, SIGNED AT MURANG'A THIS 9<sup>TH</sup> DAY OF JULY 2015**

**H P G WAWERU**

**JUDGE**

**DELIVERED AT MURANG'A THIS 10<sup>TH</sup> DAY OF JULY 2015**