



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

ELRC CAUSE NO. E006 OF 2021

(FORMERLY HCCC. NO. 14 OF 2016)

SHERACCO CO-OP SAVINGS AND

CREDIT SOCIETY LIMITED.....PLAINTIFF/RESPONDENT

VERSUS

KARUTURI LIMITED (Under receivership).....1ST DEFENDANT

CFC STANBIC BANK LTD.....2ND DEFENDANT/APPLICANT

RULING

Introduction

1. This suit was instituted by a plaint dated 19th March 2016 by the firm of Karanja Mbugua and company Advocates seeking for the court to compel the defendants jointly to remit Kshs. 24,936,647.97/- as at 7th February, 2016, being monies deducted by the defendants from the Plaintiff's members' monthly salaries which have not been remitted to the plaintiff for savings together with interest thereon. The firm of Iseme Kamau & Maema Advocates Entered appearance and filed a Defence for the 2nd Defendant CFC Stanbic Bank Ltd on 8th May, 2017 contending that it is a stranger to this suit, while the 1st Defendant has never entered appearance. It is noteworthy that Leave to sue the 1st defendant was obtained vide **Nakuru High Court Misc. Application No. 103 of 2016** on the 15th March 2016.

2. Subsequently, the 2nd Defendant filed the application for determination by this court dated 28th June, 2017 pursuant to Order 1 Rule 10(2), Order 11 of the Civil Procedure Rules seeking the for Orders that;

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

2) That the costs of this Application 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.

3. The application is based on the grounds in the face of the application and the supporting Affidavit deposed upon on the 28th June, 2017, by **Angeline Njuguna**, the 2nd Respondent's legal officer on the following grounds;

a) That there is no relationship between the applicant and the plaintiff to warrant the grant of the prayer sought.

b) That there is no evidence adduced before this Court to demonstrate any relationship between the applicant and the plaintiff or its members.

c) That the 2nd Defendant/Applicant is a stranger to payment of any salaries or union deductions to the 1st Defendant as alleged or at all. further that no evidence has been adduced before this Court to demonstrate the said deductions.

d) That the Respondent herein has not complied with section 35 of the Co-operative Societies Act.

e) That there is no nexus between the applicant and the Respondent as such the Respondent has been wrongly sued.

f) That the suit offends the procedure laid down under the repealed companies Act on priority of payment of secured creditors, such as itself being a debenture holder whose security had crystalized enabling it to put the 1st defendant under receivership to secure its debt, as such this application is an abuse of Court process.

4. The plaintiff/ Respondent opposed this application and filed a relying Affidavit deposed upon on 10th January, 2020 by **Ferdinand Juma**, the Chairman of the Plaintiff Sacco who contends that the 2nd Defendant has been jointly sued with the 1st Defendant by dint of Order 1 Rule 3,5,6,7, and 9 of the Civil Procedure Rules. That the 2nd Defendant is the one that is in control of the 1st defendant as such they are held vicariously liable for any acts and omissions committed by the 1st defendant.

5. He stated that prior to and after the placement of the 1st Defendant under receivership by the 2nd defendant pursuant to its debenture holders' rights, all former employee/ workers of the 1st defendant had their sacco savings deducted directly from their salaries and deposited with the plaintiff society.

6. That when the 1st Defendant was placed under receivership on 21st October, 2015, the 2nd defendant appointed a manager to run and operate the affairs of the 1st Defendant and remit all proceeds of the business to the said Bank as evidenced by the letter dated 11th March, 2016. Therefore, he contends that after receivership the 1st Defendant acted as an agent of the 2nd Respondent and the issue of vicarious liability arose therefrom.

7. That the 2nd Defendant' manager at the 1st defendant company acknowledged in the letter dated 14th July, 2016 withholding some of the savings as per the records in their company and blatantly refused to remit the said savings to the plaintiff.

8. That prior to the institution of this Suit a formal demand letter had been lodged with the 1st defendant manager on 29th February, 2016 by the advocates for the plaintiff and on 20th may, 2015 and 25th January, 2016 by the Sub- county co-operatives officer. Subsequently the letter of 25th January, 2016 was responded to by the 1st Defendant manager who intimated the settlement of the said accounts but have failed to make good their promise.

9. Therefore, he stated that the 2nd Defendant are vicariously liable for the actions of the 1st Defendant's manager therefore have been properly sued.

10. The parties filed submissions to dispose of the application with the applicant filing on 17th February, 2020 and the Respondent on 7th February, 2020.

Applicant's submissions.

11. The applicant's Counsel submitted that the suit as filed does not disclose any reasonable cause of action against the applicant, and that this Court is mandated to look at the plaint as filed and not beyond as held in in Attorney **General-v- Oluoch [1972] I EA 392**. He further argued that the plaint must disclose three elements; that the plaintiff enjoyed a right; that a right has been violated and the defendant is liable.

12. He maintains that it is not involved in the running of the activities of the 1st defendant neither has it received the plaintiff's deductions as such should not be held responsible for the liabilities of the 1st defendant.

13. It was submitted that the argument by the applicant that the receiver and the manager of the 1st Defendant are agents of the 2nd Defendant is misconceived and that such employees are employees and agents of the 1st Defendant and not of the debenture Holder and cited the case of **Surya Holdings Limited & 2 others -v- CFC Stanbic Bank Limited [2015] eKLR** and the Court of Appeal case of **Manuel Anidos -v- Kinangop Wind park Limited 9In receivership) & 2 others [2019] eKLR**.

14. Accordingly, he submitted that the duty to deduct and remit the Sacco contributions vested with the 1st Defendant and not the 2nd Defendant as alleged.

15. It was submitted further that the Plaintiff joined the 2nd defendant in this suit to avoid the ranking of claims and priority of payment procedure provided for under Section 95(1) and section 311(1) of the repealed Company's Act and subject the applicant to unwarranted settlement of decree which it is a stranger to. He argued further that the plaintiff after obtaining default judgement against the 1st Defendant ought to have obtained a decree and register it with the appointed liquidator and simply follow priority of payment as stipulated under the law.

16. The applicant submitted that the Court directed the plaintiff on 29th April, 2019 to file and serve all the necessary documents and fixed the matter for hearing on 1st July, 2019 before the parties complied with Order 11 of the civil procedure Rules therefore the case is not ready for hearing.

17. He concluded by emphasizing that they have been wrongly sued and their name should be struck off these proceedings as the issue for determination is between the plaintiff and the 1st Defendant.

Plaintiff/ Respondents submissions

18. The gist of the respondent's submissions are that, the Applicant in exercising its debenture Holders' right, appointed the 1st Defendant,

receiver and manager as such the said manager and receiver running the 1st defendant is an agent of the 2nd Defendant therefore its Members' contributions deducted by the 1st defendant prior to and past the appointment of the Receiver are in the hands of the 2nd defendant's manager and therefore it is necessary to have the 2nd Defendant on board in this Suit for this Court to determine the issues conclusively.

19. I have examined the averments and submissions of the parties herein. The 2nd respondent herein have been sued by the claimants herein because they are receiver manager for the 1st respondent and therefore also agents of the 1st respondent which the 2nd respondent have denied. The 2nd respondent have denied being agents of the receiver manager.

20. They deny being agents of the debenture holders. I have looked at the plaint as filed before this court, the claimant claim that the respondents have been deducting their dues. The claimant have not demonstrated how the 2nd respondent in particular have actually deducted the dues from the claimant's employees and failed to remit to that SACCO.

(a) There is actually no demonstration of any employee-employer relationship.

(b) For the claimants to show that this claim is properly before this court as an employment relationship matter. In my view there is no employer-employee relationship between the claimant and 2nd respondent either.

21. I therefore find that this application is merited and allow it to the extent that the 2nd respondent are strike out of this suit.

22. There will be no order as to costs.

RULING DELIVERED VIRTUALLY THIS 29TH DAY OF JUNE, 2021.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Karanja Mbugua for claimant – present

1st respondent – absent

2nd respondent – absent

Court Assistant - Wanyoike