



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.48 of 2017

Consolidated with

CAUSE NO.49 OF 2017

JULIUS WAHOMBE NDIRANGU.....CLAIMANT

AND

DAVID KIMUTAI NG'ETICH.....CLAIMANT

VERSUS

MUKI SACCO SOCIETY LIMITED .....RESPONDENT

AND

CO-OPERATIVE BANK OF KENYA.....GARNISHEE

RULING

The ruling herein consolidates two files – **ELRC Cause No.48 of 2017 and ELRC Cause No.49 of 2017 – Julius Wahome and David Kimutai Ng'etich versus MUKI Sacco Society Limited** respectively. The main file is Cause No.48 of 2017 and the same shall apply to the consolidated file.

The claimant filed application dated 29<sup>th</sup> January, 2020 under Rule 32 of the Employment and Labour Relations Court (Procedure) Rules, 2016 and Order 23 Rule 1(4) of the Civil Procedure Rules and seeking interim orders for a an Order *nisi* for monies held by the garnishee accruing to the judgement debtor, the respondent herein in account No.01120037908500 Engineer Branch be attached and utilised to satisfy the sum of ksh.819, 202 being the decretal sum and for orders that;

*The garnishee herein be ordered to appear in court on a date to be fixed by the court and show cause why it should not pay to the decree holder the amount due from it to the judgement debtor in settlement of the decree of this court herein together with the costs of these proceedings.*

*That costs of this application be borne by the judgement debtor and be recovered and retained out of the money under the garnishee order.*

*This court be pleased to issue an order*

The application is supported by the annexed affidavit of Colbert Ojiambo, advocate for the claimant and on the grounds that the claimant applicant is the decree holder and has obtained a decree for the sum of Ksh.819,202 exclusive of costs of ksh.60,000 which has not been satisfied. The garnishee holds a credit deposit on behalf of the judgement debtor in bank account Number 01120037908500 Engineer branch and it is equitable and just to attach the credit deposits in satisfaction of the decree.

In his affidavit Mr Ojiambo avers that upon judgement herein on 14<sup>th</sup> November, 2019 the judgement debtor was ordered to pay the decree holder the decretal sum of ksh.819, 202 and 50% costs and on 17th December, 2019 he wrote a demand to the judgement debtor to pay but has refused and failed to pay thus necessitating the instant application for execution.

The judgement debtor holds account Number o1120037908500 with Cooperative bank, the garnishee and the said bank have credit deposits. The account holds sufficient amounts to satisfy the decretal sum plus costs and should be utilised to pay the owing decretal sum.

The garnishee was served with the orders and instant application but failed to attend. There are returns to confirm service vide Affidavit of Service of Kelly Ojiambo sworn on 12<sup>th</sup> February, 2020.

The respondent, the judgement debtor filed the Replying Affidavit of James Waituki Hari the chairperson and who avers that order (2) of the decree herein was subject to section 49(2) and 19 of the Employment act, 2009. The respondent's advocates wrote to the claimant on 17<sup>th</sup> December, 2019 notifying him of the amount owing and upon a deduction from the court award the claimant still owes the respondent ksh.4, 852,819.45.

Mr Hari also avers that the respondent filed suit against the claimant in Co-operative Tribunal Case No.387 of 2018 for a loan debt of the principal sum of ksh.3, 584,018.64 with costs of ksh.134, 807.38 and the claimant is aware that he is indebted to the respondent.

The garnishee order obtained was through concealment of material facts about the unpaid loan which the judgement debtor is entitled to deduct from the court award. The claimant has come to court with unclean hands and he should clear the loan he owes the judgement debtor or give acceptable proposals for the outstanding amount after due deductions of the court award.

Both parties made oral submissions.

Order 23 Rule 1 provides that;

*(1) A court may, upon the ex parte application of the decree-holder, and either before or after an oral examination of the judgment-debtor, and upon affidavit by the decree-holder or his advocate, stating that a decree has been issued and that it is still unsatisfied and to what amount, and that another person is indebted to the judgment-debtor and is within the jurisdiction, order that all debts ( other than salary or allowances coming within the provisions of Order 22 rule 42 owing from such third person (hereinafter called the "garnishee") to the judgment- debtor shall be attached to answer the decree together with costs of the garnishee proceedings; and by the same or subsequent order it may be ordered that the garnishee shall appear before the court to show cause why he should not pay the decree-holder the debt due from him to the judgement-debtor or so much thereof as may be sufficient to satisfy the decree together with costs aforesaid.*

*(2). ..*

The claimant as the judgement creditor has moved the court seeking to have his decree herein satisfied by the judgement debtor by attachment of money held by the garnishee on the judgement debtor's behalf.

The garnishee did not attend.

The respondent has opposed the application on the grounds that the court judgement and decree thereof was subject to the provisions of section 49(2) and 19 of the Employment Act, 2007 and the claimant as the decree holder owes the respondent and which amount must be deducted from the decretal sum before he can be paid.

In judgement on 14<sup>th</sup> October, 2019 the court made an award for the claimant subject to the provisions of section 49(2) read with section 19 of the Employment Act, 2007.

Section 49(2) of the Employment Act, 2007 requires the employer to deduct statutory deductions from any payment made to the employee;

*(2) Any payments made by the employer under this section shall be subject to statutory deductions.*

This being a statutory requirement is mandatory. Where an award is within the taxable bracket, the due deduction must be effected before the employee can be paid. The employer must retain such statutory dues under the Kenya Revenue Authority Act and remit accordingly and in return issue the employee with the necessary P9 form(s).

In this case, the total decretal sum should be paid less statutory deductions in accordance with section 49(2) of the Employment Act, 2007.

Under section 19 of the Employment Act, 2007 the employer is allowed to effect deductions from an employee's dues/wages/salary. For this purpose section 19(f) and (h) are relevant;

*(1) Notwithstanding section 17(1), an employer may deduct from the wages of his employee—*

*...*

*(f) any amount the deduction of which is authorised by any written law for the time being in force, collective agreement, wage determination, court order or arbitration award;*

*(g)...*

*(h) an amount due and payable by the employee under and in accordance with the terms of an agreement in writing, by way of repayment or part repayment of a loan of money made to him by the employer, not exceeding fifty percent of the wages payable to that employee after the deduction of all such other amounts as may be due from him under this section; and*

(i) ...

Any amount authorised by law, collective agreement, court order or an arbitration award is to be deducted from the employee by operation of the law.

Also amounts due for deduction from the employee are those that relates to an agreement allowing for its deduction, the repayment of a loan of money made to the employee by the employer. These too are permissible deductions by operation of the law.

As correctly submitted by the claimant, in the judgement herein at page 9 the court observed that;

*... under the claimant's employment he was offered various facilities and under his Sacco membership he had other facilities just like other members of the Sacco. The claimant as the recoveries officer had the duty to follow up on members in default of their loan repayments. He was therefore compromised in undertaking these duties while he was suffering loan arrears under his employment and also under the Sacco.*

There were loan facilities advanced to the claimant in his capacity as an employee and as a member of the respondent. The facilities advanced to him as an employee were not gone into by the respondent for the court to make a determination but by operation of section 19 of the Employment Act, 2007 these are due once determined.

The facilities advanced to the claimant as a member of the respondent are regulated under a different regime.

Mr Hari attached annexure "JWH2" to his affidavit on the basis that there is a decree in **Co-operative Tribunal No.385 of 2018 Muki Sacco Society Ltd versus Julius Ndirangu Wahome** for a decretal sum of Ksh.3, 584,018.64 and costs of ksh.134, 807.38.

The pleadings leading to the subject decree cited above are not attached. It is not possible for the court to discern form the same which as to whether it relates to the dual facilities allowed under the claimant's employment or membership with the respondent save that in the demand letter dated 17<sup>th</sup> December, 2019 there is a breakdown that the claimant owes the following loan facilities;

Normal loan ksh.1, 631,944.82;

Fosa special Ksh.1, 690,809.28; and

Sisi Kwa Sisi ksh.2, 349,267.32

**Total ksh.5, 672,021.45**

The decree in **Co-operative Tribunal No.385 of 2018 Muki Sacco Society Ltd versus Julius Ndirangu Wahome** is for the sum of ksh.3, 584,018.64 and costs of ksh.134,807.38 all being ksh.3,718,825.

This amount is at variance with what is demanded at ksh.5, 672,021.82.

The subject dispute in **Co-operative Tribunal No.385 of 2018 Muki Sacco Society Ltd versus Julius Ndirangu Wahome** having been filed after the current suit the respondent was therefore aware of the nature of claim existing herein and the details thereof were never addressed with the court. The variances noted, the matter having been addressed by the Co-operative Tribunal, I take it the forum had the requisite jurisdiction to address the matters between the parties to a conclusion and there is an enforcement/execution mechanism therefrom.

To therefore apply the proceedings under **Co-operative Tribunal No.385 of 2018 Muki Sacco Society Ltd versus Julius Ndirangu Wahome** herein without a contradistinction as to the nature of monies advanced to the claimant as an employee is to use proceedings herein irregularly. Such is to take an unfair advantage of the current proceedings without taking due regard to the existing decree issued by a different entity separate from this court and with a different mandate.

This is to take undue advantage of the claimants over matters the respondent has all along been aware of and failed to address herein in the defence. In any event, with a decree now issued under separate proceedings, execution shall follow as appropriate.

**Accordingly, the decretal sum herein shall be subjected to statutory deductions and the judgement creditor shall be paid the total sum due plus costs; costs for these proceedings shall be released by the garnishee to the claimant's advocates forthwith from the deposits held by the garnishee in the attached account to the credit of the respondent, judgement debtor, namely, Kshs. xxx [the total sum of decretal amount less statutory deductions] from account No.01120037908500 Engineer Branch.**

**Orders herein apply to ELRC Cause No.49 of 2017 as consolidated.**

**Delivered at Nakuru this 27<sup>th</sup> day of February, 2020.**

**M. MBARU**

**JUDGE**

In the presence of: .....