



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 432 OF 2015

(As Consolidated with Cause Nos. 431/2015, 433/2015, 434/2015, 435/2015, 436/2015)

(Before Hon. Justice Mathews N. Nduma)

PETERLIS OPIYO BWORE.....CLAIMANT

VERSUS

1. SPECTRE INTERNATIONAL CO. LIMITED

2. EQUITY BANK LIMITED.....RESPONDENTS

J U D G M E N T

1. The Claimants in this suit were granted temporary injunction restraining the Respondents from unlawful or illegal deducting and or receiving proceeds of any sums from the Claimants' salaries on account of loan facilities given to the Claimants by the 2nd Respondent bank. The Claimants seek these orders to be confirmed and the Respondents to jointly and severally tender an honest, truthful and accurate statement of accounts of proceeds of the deductions from the Claimant's. Salaries on account of the said loans and any excess sums paid by the Claimants be refunded to them.

Facts of the Suit

2. The facts of the consolidated suits is that the Claimants on diverse dates obtained loans from the 2nd Respondent bank which were to be repaid at monthly instalments until paid in full. The 1st Respondent was advised to deduct the monthly instalments and remit to the 2nd Respondent on behalf of the Claimants until repayment was made in full.

3. The Claimants have pleaded that the 1st Respondent proceeded to make deductions as instructed and despite the Claimants' having repaid the said loans in full, the 2nd Respondent bank still claims from the Claimants as follows:-

- (i) Peterlis Opiyo Bwore – Kshs.445,082 as at September, 2014.
- (ii) Joseph Otieno Oyoo Kshs.800,000 as at October, 2015.
- (iii) Tabitha Awiti Meyo – Kshs.123,754.80.
- (iv) John Onyango Oloo Kshs.147,659 as of September, 2015.
- (v) Joseph Martin Ouma Kshs.120,459.27 as of September, 2014.
- (vi) Christopher Nyalero Ngwaya Kshs.489,481.87.

4. The 1st Respondent admits having employed the Claimants. The 1st Respondent further admits that the Claimants instructed it to deduct from their salaries monthly loan repayment instalments.

5. The 1st Respondent stated that things did not go as planned since in the year 2014, the company ran into financial difficulties and could not maintain her employees. The 1st Respondent was shut down and the Claimants together with other employees were affected.

6. The 1st Respondent was therefore unable to deduct the required amount on loan account and remit to the 2nd Respondent.
7. 1st Respondent states that the Claimants ought to have talked to their bank and continue remitting payments directly having lost employment. The 1st Respondent denies having deducted any sums and failed to remit the same to the 2nd Respondent Bank.
8. 1st Respondent states that Claimants were recalled back to work in February 2014 but Respondent was still unable to pay salaries due financial constrains.
9. It was agreed in October 2014 that monies for repayment of the loans would no longer be deducted but the Claimants would be paid salaries and remit their loan repayments directly. 1st Respondent states that it did not deduct monies in all months as is clearly seen in the pay slips filed by the claimants.
10. 1st Respondent states that interest is payable on amounts deducted by it but not remitted to the 2nd Respondent bank.
11. 1st Respondent prays that the 2nd Respondent be compelled to print out statement for all the Claimants for the entire period from 2009 to 2017 for proper accounting to be done.
12. The 1st Respondent prays it not be condemned to pay costs.

2nd Respondent

13. The Bank in its response to the claim pleaded that the dispute in question is commercial in nature and the Employment and Labour court has no jurisdiction to deal with it.
14. The 2nd Respondent states that it is perfectly in order to demand payment of all arrear loan instalments as the Claimants are in default. The Bank relies on clause 9 of the letter of offer which provided that the lender may by written notice to the borrower terminate its obligations under the letter of offer and/or demand immediate repayment of the amount outstanding under the loan facility with accrued interest and all other amounts due and the borrower will comply with the demand forthwith.
15. 2nd Respondent notes that 1st Respondent have admitted that they did not remit to the bank all the sums deducted and had met all the staff in October 2014 and agreed that employees would be paid the full salary and they would intern make remittances to the Bank themselves.
16. 2nd Respondent relying on the case of motor vessel **Lilian's v Caltex Oil Limited 1989 KLR** states that issue of jurisdiction ought to be determined first and court to down its tools forthwith, once it finds it has no jurisdiction in the matter.
17. The 1st Respondent did not sign any contract with the 2nd Respondent to be the Guarantor of the Claimants. They simply conveyed the monthly instalments. If indeed the Claimants have any claim as against the 1st Respondent, they ought to claim specific damages without involving the 2nd Respondent.
18. The prayers to injunct the 2nd Respondent from receiving proceeds from the Claimant or the 1st Respondent towards loan repayment do not arise from any employer employee relationship.
19. 2nd Respondent further states that a prima facie case with a probability to success to warrant grant of an injunction has not been made out in terms of the celebrated case of **Giella v Cassman Brown (1973) EA 358**.
20. 2nd Respondent further stresses that an injunction is a discretionary remedy as was stated in **Moses Ngenya Kariuki v Agricultural Finance Corporation**.
21. 2nd Respondent finally submits that the Claimants are truly indebted to the 2nd Respondent and should continue to meet their obligations without hindrance
22. The 2nd Respondent prays that the suit be dismissed with costs.

Determination

23. The issues that arise for determination are as follows:-

- (i) Whether the court has jurisdiction over the dispute.
- (ii) Whether the Claimants have made out a case for permanent injunction to issue against the Respondents.
- (iii) Whether the orders to account should be granted as against the Respondents.

Issue i

24. The cause of the dispute is that Claimants allege that they obtained loans from the 2nd Respondent and being employees of the 1st Respondent they instructed the 1st Respondent to deduct loan repayment instalments from their salaries and remit to the 2nd Respondent Bank. These facts are not in dispute. What is in dispute is whether the Claimants have fully repaid their loans but the 1st Respondent failed to remit some of the deducted money to the Bank. The Claimants call for proper accounting by the 1st and 2nd Respondents so as to establish if they have indeed repaid all the loan money due and if the 1st Respondent has retained some of the deducted money, it be compelled to remit it to the 2nd Respondent with interest.

25. To this extent, the court finds it has a role to resolve the accounting issue before the Claimants and the 1st and 2nd Respondents. However the court may not interfere with the loan repayment obligations between the Claimants and the 2nd Respondent bank. That is a purely commercial arrangement between the Claimants and the 2nd Respondent, the 1st Respondent being an intermediary to facilitate easy repayment of the loan vide salary deductions on a monthly basis.

Issue ii

26. The next issue for determination is whether the Claimants have made out a case for issuance of a permanent injunction against the 1st and 2nd Respondents as set out in **Giella v Cassman Brown Case**. It is not in dispute that from October 2014, the Claimants and 1st Respondents agreed that the 1st Respondent would no longer deduct loan instalments from the salaries of the Claimants. Furthermore, no prima facie case for an injunction has been made out as against the 2nd Respondent whose relationship with the Claimants is purely commercial, even though the 2nd Respondent has a responsibility to account to the Claimants with the assistance of the 1st Respondent through whom loan repayment remittances were made.

27. Accordingly, no prima facie case has been made to warrant the court to issue a permanent injunction as against the 1st and 2nd Respondent since the 1st Respondent stopped the salary deductions by agreement with the Claimants.

Issue iii

28. With regard to the prayer by the Claimants for the 1st and 2nd Respondents to render full accounting of the monies paid by the Claimants to either of the two, the Claimants have established a case on a balance of probabilities that the orders for accounting sought are deserving to allow the 1st and 2nd Respondents to fully account to the Claimants concerning the extent to which each of the Claimants have repaid their loans and how much of deductions made by the 1st Respondents from each of the Claimants was not remitted to the 2nd Respondent. This prayer in the court's view is helpful to all parties and would enhance proper justice of the case.

29. Accordingly, the court makes the following orders:-

- (a) The 1st and 2nd Respondents do jointly and severally tender an honest, truthful and accurate statement of accounts of the proceeds of the deductions from the Claimants salary accounts of the said loans and that any excess sums paid by the Claimants be refunded to them. This exercise is to be done within 45 days and a report filed in court.
- (b) The 2nd Respondent is temporarily enjoined by the court not to take any adverse steps against the Claimants until the report of accounts is filed with the court within 30 days and further directives issued by the court on the way forward.
- (c) The 1st Respondent to pay to the 2nd Respondent any amount found to have been deducted from the salaries of the Claimants and not remitted to the 2nd Respondent with interest at 14 % from the date the money was received until payment in full.
- (d) The 1st Respondent to pay costs of the suit to the Claimants.

Dated, Delivered and Signed in Kisumu this 20th day of December, 2018

Mathews N. Nduma

Judge

Appearances

Mr. Maube for Claimant

M/s. Aron for the 1st Respondent

M/s Orege for the 2nd Respondent

Chrispo – Court Clerk