

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 125 OF 2014

ELIAS GATIMBA.....CLAIMANT

-VERSUS-

**MERU MULTIPURPOSE CO-OPERATIVE SOCIETY
LIMITED.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 24th March, 2017)

RULING

The respondent filed an application on 20.12.2016 through Kiautha Arithi & Company Advocates. The application invoked section 1A, 1B, 3A, 3B, of the Civil Procedure Act, Order 45, 22 of the Civil Procedure Rules and all other enabling provisions of the law. The respondent prayed for stay of execution of the decree or judgment dated 26.07.2016 pending the hearing and determination of the application, and, for review and setting aside of the consent decree issued by the court on 23.09.2016 to vary the amount payable to Capital Sacco Limited from Kshs.70,000.00 to Kshs.113, 395.55. It was further prayed that there be such further or better orders as will meet the ends of justice and, costs of the application be met by the claimant. The application was supported by the affidavit of Luke Kinoti Kirima and the following grounds:

- a) The claimant while still an employee of the respondent obtained a loan from Capital Sacco Limited and which loan was guaranteed by the respondent whereby the claimant's salary was paid through the claimant's account held at Capital Sacco Limited. The guarantee arrangement was by a tripartite agreement binding the three parties.
- b) The claim in the suit was concluded by a consent judgment entered into on 26.07.2016.
- c) By reason of bank confidentiality, only the claimant knew the amount of outstanding loan as at the time the consent judgment was recorded in court. The respondent has since discovered that the amount owed was Kshs. 113, 395.55 and not Kshs.70, 000.00 which the respondent has already paid to Capital Sacco Limited.
- d) Since the claimant misrepresented the amount owed to capital Sacco as at the time of the consent judgment, the judgment should be reviewed as prayed for. Allowing a review will therefore be just and fair.

The claimant opposed the application by filing on 10.03.2017 the replying affidavit of his advocates, Charles Mokuu Advocate. The claimant's points in opposition are as follows:

- a) The claimant made no misrepresentation at the time of the consent judgment because the sum of Kshs.70, 000.00 payable to Capital Sacco Limited came from the respondent's advocates, Kiautha Arithi Advocate.
- b) The claimant's position is that the outstanding loan due to the Capital Sacco Limited was Kshs.70, 000.00 as factored in the judgment so that the respondent must honour the consent decree as entered into.

c) The execution proceedings have been taken out because the decree has not been satisfied.

The court has considered the material on record and the parties' respective cases. The applicant has not disputed the claimant's assertion that the Kshs.70, 000.00 due to Capital Sacco Limited came from the applicant's advocate and further, the court finds that in view of the tripartite agreement relied upon by the applicant, the applicant must have known, with due diligence, the outstanding loan amount due from the claimant to the Capital Sacco Limited as at the time of recording the consent judgment. In such circumstances, the court returns that misrepresentation as a ground for setting aside or reviewing the consent judgment or decree as prayed for has not been established by the applicant. Accordingly, the application will be dismissed with costs. While making the findings, the court observes that the applicant failed to invoke the rules of the court on applications for review and that serves as an impetus to dismissal of the application.

In conclusion, the application filed for the respondent on 20.12.2016 is hereby dismissed with costs.

Signed, dated and delivered in court at **Nyeri** this **Friday, 24th March, 2017**.

BYRAM ONGAYA

JUDGE