



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA
AT NAIROBI

CAUSE NO.2358 OF 2016

KIVI SAVINGS AND CREDIT

CO-OPERATIVE SOCIETY LIMITED.....CLAIMANT

VERSUS

KIVI LIMITED.....RESPONDENT

RULING

1. The claimant, by application and Notice of Motion filed on 19th December, 2016 made under the provisions of section 35(2) of the Co-operative Societies Act, section 12(4) of the Industrial Court Act and Rule 27(1) of the Industrial Court (Procedure) Rules, 2010 [the Employment and Labour Relations Court Act and its Rules thereto] and seeking for orders that;

Judgement be entered for the claimant for the sum of Kshs.28, 223, 09.57 as prayed in the claim;

Compound interest be applied to the sum above at the rate of 5% per month accruing from 30th October until payment in full pursuant to section 35 of the Co-operative Societies Act.

Costs of this application be provided for.

2. The application is supported by the Affidavit of Kazungu Masha the Vice-Chair of the claimant. The grounds are that the sum of kshs.28, 223,090.57 is a lawful debt due and owing from the respondent to the claimant and the commissioner for Co-operative Societies being satisfied that the amount is due issued agency notices to various banks seeking to recover. The amounts due have not been disputed by the respondent. The law allow for summary recovery of debts certified being owing to co-operative societies and interest is dictated by the law as section 35 of the Act as 5%.

3. In the affidavit Masha avers that the claimant was registered on 13th October, 2008 drawing membership from the respondent employees. To facilitate the Sacco a check off system was adopted and the respondent was to remit the same. In 2011 the respondent began retaining deductions which as at 28th October, 2011 amounted to kshs.723, 44.80. On 22nd December, 2012 the claimant demanded the withheld amounts which by then had increased to Kshs.857, 442.00. This was not paid.

4. On 19th October, 2012 the claimant wrote to the Commissioner for Co-operatives seeking government intervention. The reason for this is because Sacco's are highly regulated and the claimant is required to remit annual returns to the ministry for oversight on its operations. Upon demand by the Ministry, the

respondent admitted the due sums but denied the entire amounts. However the respondent payroll is clear on the owing dues. The ministry issued agency notices of amounts held by the respondent as the claimed amounts were found to be correct.

5. In a letter dated 7th August, 2012 the respondent purported to revoke the name of the claimant but in an inspection report by the Ministry the respondent was found at fault having withheld deductions. By October, 2016 the amounts owing stand at Kshs.28, 223,090.57 confirmed by the ministry vide letter dated 22nd November, 2016. The interest on the due amounts is also payable. Such withholding of deductions is not denied and is recoverable in a summary. Due to the long period the amounts have been withheld this amounts to economic sabotage and interests are due.

6. In an effort to avoid paying the owing dues, the respondent opted to dismiss the claimant members who were officials and so as to cripple the claimant operations but such members are keen to seek justice.

7. In reply, the respondent filed **Replying Affidavit of Onkar Sing Dogra**, a director of the respondent and who avers that summary proceedings under section 35 of the Co-operative Societies Act can only be instituted by the Commissioner of Societies and not a Co-operative Society such as the claimant has done and thus has no locus to make this application. The application is misconceived and irregular.

8. The effected deduction is not due to the claimant. The employees have not instructed the respondent to effect such deductions from their emoluments and to remit to the claimant. The claimant is an illegal society formed on the basis of misrepresentation that it is an employee co-operative society sanctioned by the respondent whereas no approval was sought or obtained from the respondent. There was no approval to effect deductions. The respondent directors were never informed of the registration of the claimant and did not give consent to the same. The letter of approval signed by one Herbert Olango as Financial Controller of Kivi Milimani Hotel is invalid an illegal as the exponent never gave approval and was not aware of the claimant Sacco. He employees proposing the Sacco were in a position to ascertain the authority of the respondent's officers and seek legitimate consent from the respondent directors.

9. The claimant was formed by the respondent employees without the involvement of the respondent. Such was to facilitate deduction of fellow employees' salaries without the involvement of the respondent. The financial controller was one employee among claimant members and not part of the respondent directors. The deductions made were illegal and the claimant cannot benefit from such illegal deductions.

10. Following intervention by the Ministry, the respondent conducted investigations and has since established that the Sacco was an idea conceived and executed by some employees without the respondent involvement. To require the respondent to effect deductions from its employees is to affect the employment relationship. The respondent did not effect any deduction from employee salaries.

11. Mr Dogra also avers that justice demands that the respondent should not be condemned unheard and there is a good defence to the claimant. The matter should be heard on its merits.

Submissions

12. Both parties filed written submissions.

13. The claimant submits that they have *locus* to file the claim as a registered entity with the Commissioner for Co-operative and a certificate issued. The matter has been before the commissioner for Co-operative which conform the fact of claimant's registration. The claimant is also properly before this court noting the relationship between the parties and the deduction of employee salaries.

14. The respondent effected salary deductions and failed to remit to the claimant are required. This fact is evident from the payroll. The Ministry has interrogated the matter and established the fact of deduction and the non-remittance of the same to the claimant. There is certification by the ministry that the monies owe and thus summary judgment is due. The respondent does not have a bona fide defence and judgement ought to issue in summary.

15. The claimant has replied on the following cases – **Orthodox Towers Management Co td versus AG & 2 Others [2015] eKLR; Paul Irungu Mwangi & 32 Others versus Orthodox Archbishopric of Kenya & Irinoupolis & 2 others [2014] eKLR; Anne Kinyua versus Nyayo Tea Zone Development Corporation & 3 others [2012] eKLR.**

16. The respondent submit that the application by the claimant is irregular and unlawful as summary procedure under section 35 of the Co-operative Societies act should be instituted by the Commissioner of Co-operative Societies. The agency notice was issued without verification of the claimant’s claims and registration. Such notice has been challenged in Judicial Review Misc. Appl. No.2541 of 2016 where the respondent is seeking to quash the same.

17. The claimant has no lawful claim again the respondent to warrant the summary judgement sought as they are an illegal outfit. The respondent never gave its employees consent to join the claimant. There is no legal obligation assumed by the respondent to deduct and remit to the claimant nay dues. The respondent has relied on the case of **Suleiman Said Shabhal versus IEBC & others [2013] eKLR.**

Determination

18. The respondent has not denied that the claimant members are its employees. What is not clarified in the defence is whether the respondent made any deceptions from its employees’ salaries. In the Affidavit of Mr Dogra at paragraph 15 he avers that no deductions were made by the respondent. On the material records filed, the question thus remains as to whether the respondent made salary deductions and if so where such deductions were remitted to and if not, what became of the deductions effected from the claimant members’ salaries.

19. From the application by the claimant, what emerges is the question as to whether the respondent employees have had their deductions effected by the respondent and if so, where such deductions are remitted to and if not, where such deductions are.

20. Claimant is a Sacco registered as indicated in the Certificate of registration.

21. Formation of a Sacco is at the option of an employee. Pay deductions is also an employee’s choice. Where an employee joins and becomes a member of a Sacco on their own choice and decide to make a payment thereto, the employer is not allowed to limit such right under the provisions of section 17(11) of the Employment Act which provides that;

(11) No employer shall limit or attempt to limit the right of an employee to dispose of his wages in a manner which the employee deems fit, nor by a contract of service or otherwise seek to compel an employee to dispose of his wages or a portion thereof in a particular place or for a particular purpose in which the employer has a direct or indirect beneficial interest.

22. However, where the employee, out of their own choice decides to offset such payment of Sacco due through a check off from their salaries, the same must be communicated to the employer in writing. This is to ensure that the employer complies with the mandatory provisions of section 19 of the Employment Act. Such communication in writing is to shield the employer against any claims that a deduction has been made from the salary that is not authorised by the employee and thus illegal and when there is such an unauthorised deduction, the employer is to be made to pay for the same from its accounts to compensate the employee.

23. Once such deductions have been effected, the employer must address the provisions of section 19 as follows;

19. *Deduction of wages*

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

(a) any amount due from the employee as a contribution to any provident fund or superannuation scheme or any other scheme approved by the Commissioner for Labour to which the employee has agreed to contribute;

...

(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) any amount in which the employer has no direct or indirect beneficial interest, and which the employee has requested the employer in writing to deduct from his wages;

...

(2) No employer shall make a deduction from the wages payable to an employee as an advance of wages in consideration of, or as a reward for, the provision of employment for that employee, or for retaining the employee in employment.

(3) ...

(4) An employer who deducts an amount from an employee's remuneration in accordance with subsection (1)(a), (f), (g) and (h) shall pay the amount so deducted in accordance with the time period and other requirements specified in the law, agreement court order or arbitration as the case may be.

(5) An employer who fails to comply with the provisions of subsection (4) commits an offence and shall on conviction be liable to a fine not exceeding one hundred thousand shillings or to imprisonment for a term not exceeding two years, or to both.

(6) Where proceedings are brought under subsection (5) in respect of failure by the employer to remit deductions from an employee's remuneration, the court may, in addition to fining the employer order the employer to refund to the employee the amount deducted from the employee's wages and pay the intended beneficiary on behalf of the employee with the employer's own funds.

24. In this regard, noting the communications between the parties, the involvement of the Commissioner for co-operatives and the ministry, save for the affidavit of Kazungu Masha as the vice-chair of the claimant, not written letter of authority to the respondent has been attached directing the respondent to deduct and remit dues to the claimant. In light of the contestations herein, to proceed and award the orders sought for summary judgement without more interrogations of the matters herein and without clear and unchallenged evidence; and on the facts submitted at this stage as they are, for the court to proceed would be to leave out grey areas not addressed to the satisfaction of all parties and to the court.

25. It is therefore necessary for the call of evidence. Such will enable the court address all matters herein between the parties effectively and in full before rendering a decision.

On the application dated 16th December, 2016 the orders sought shall not issue at this instance. Costs shall be in the cause.

Dated and delivered in open court at Nairobi this 6th day of April, 2017

M. MBARU

JUDGE

In the presence of:

.....

.....