



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 126 OF 2014

ROSEMARY KARUTHU..... CLAIMANT

VERSUS

**MERU MULTIPURPOSE COOPERATIVE SOCIETY
LIMITED.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday, 18th November, 2016)

RULING

The parties entered a consent judgment in favour of the claimant on 26.07.2016 in the following terms:

1. Terminal benefits Kshs. 577, 760.50.
2. Costs of the suit Kshs. 100, 000.00.
3. Total is Kshs. 677, 760.50.
4. Kshs. 70,000.00 be deducted from terminal benefits to be paid directly to Capital Sacco Limited by respondent.
5. Balance of a sum of Kshs.607, 760.50 to be paid in monthly instalment of Kshs. 100,000.00 first instalment falling due on 30.08.2016 and remainder of instalments to fall due on every 30th day of the following months till payment in full.

On 28.10.2016 the respondent filed a notice of motion brought under sections 1A, 1B, 3 and 3A of the Civil Procedure Act Cap. 21 Laws of Kenya, and all enabling provisions of the law. The prayers were as follows:

1. That this matter be certified urgent and be heard ex-parte in the first instance.
2. That there be stay of execution over the decree or judgment herein and dated 26th July 2016 pending the hearing and determination of the application inter-partes.
3. That the honourable court to declare that the decree herein is fully satisfied.
4. That the honourable court to declare the execution herein unlawful and proceed to lift the same with the respondent (claimant) meeting the Auctioneers' costs.
5. That the honourable court do make such further or better orders as will meet the ends of justice.
6. Costs of the application be provided for.

The application was supported with the affidavit of Luke Kinoti Kirimiania attached to the application and was urged upon the following grounds:

1. The claimant is a former employee of the respondent, the applicant in the current application.
2. While in employment of the applicant the claimant obtained a loan from Capital Sacco Limited

guaranteed by the applicant by remission of the claimant's salary through the claimant's account held with the said Capital Sacco Limited.

3. It was the condition of the said tripartite guarantee agreement that the claimant's salary and benefits should not be remitted through any other financial institution but Capital Sacco Limited.
4. The claim herein was concluded on 26.07.2016.
5. On 13.10.2016 the applicant paid into the claimant's account held with the said Capital Sacco Limited Kshs. 584, 757.06.
6. On 21.10.2016 the applicant paid the claimant's advocates agreed costs of Kshs. 100, 000.00 and Kshs. 23, 003.45 on account of the claimant.
7. Thus the claimant's claim is fully settled.
8. The proclamation by M/S Viewline Auctioneers on 17.10.2016 is therefore unwarranted and is unlawful because the decree has been fully settled.
9. Is only fair and just that the present application is allowed.

The applicant filed the further supporting affidavit of Luke Kinoti Kirimania on 10.11.2016.

The claimant filed the replying affidavit of Charles Mokuia Advocate on 02.11.2016 to oppose the application. Mokuia Obiria & Company Advocates acted for the claimant. The claimant's case is that on 30.08.2016 (or by September 2016) the applicant had failed to make payments per the decree. The applicant's advocates were reminded by letter to advise the applicant to comply with the decree. The applicant failed to comply and the execution proceedings issued. It was after the proclamation issued that the applicant attempted to make payment in settlement on 13.10.2016. Thus, the execution proceedings were not unlawful as alleged for the applicant. Further there was no counterclaim or setoff in the decree or the suit generally and the payments to Capital Sacco must be made strictly as provided for in the decree.

The court has considered the parties' respective submissions. The judgment by consent and then the decree flowing there-from is on record and has not been set aside in any manner. There is no application for review or setting aside of the judgment or the decree. Parties agreed on the terms of settlement of the decree and they are bound accordingly. There is no material on record to suggest that the applicant complied as per the terms of the decree and then, despite such compliance, execution issued. The material on record show that as at the time the execution issued the applicant had not complied with the terms of the judgment by consent and the ensuing decree.

As submitted for the claimant, the tripartite guarantee agreement was not an issue before the court and in any event, the parties entered the judgment by consent conscious of the terms of that tripartite agreement. In the court's opinion, the parties to the suit consciously agreed to the terms of the judgment thereby overriding the tripartite agreement or thereby modifying the same. It was submitted that if the applicant complied with the terms of the decree then a suit may issue against the applicant by the said Capital Sacco Limited in the event the terminal dues are not paid to the said Capital Sacco Limited. The court finds that the applicant's duty under the decree was to pay the judgment sum per the terms of the decree and it was extraneous for the applicant to invoke the tripartite agreement under which the evolving rights and obligations were not strictly provided for in the decree and the same would constitute a separate cause of action – including a consideration whether the applicant can be liable except if the claimant fails to pay the loan as advanced by Capital Sacco Limited.

Accordingly the court returns that the execution proceedings were not unlawful and the application will therefore fail.

In conclusion the application dated 28.10.2016 and filed on 28.10.2016 for the respondent in the suit, the applicant, is hereby dismissed with costs.

Signed, dated and delivered in court at Nyeri this **Friday, 18th November, 2016.**

BYRAM ONGAYA

JUDGE