



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI
CAUSE NO. 121 OF 2014

SAMUEL GIKUNDI..... CLAIMANT

VERSUS

MERU MULTIPURPOSE COOPERATIVE SOCIETY LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday, 16th December, 2016)

RULING

The parties entered a consent judgment in favour of the claimant on 22.09.2016 in the following terms:

- 1) Judgment be entered for the claimant against the respondent in the sum of Kshs.711, 792.90.
- 2) Kshs. 115, 806.00 to be paid by the respondent to Capital Sacco Limited on the claimant's loan account.
- 3) The balance of the decretal sum of Kshs.595, 986.90 be paid to the claimant's advocates in monthly instalment of Kshs. 100,000.00 commencing 31.09.2016 and remainder on every 30th day of every succeeding month till payment in full.
- 4) In default of payment of any of the instalments the claimant to execute for the entire remainder of the balance.

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 14th 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 a further supporting affidavit by the said Luke filed on 10.11.2016. The application 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 14.07.2016.
- 5) On 13.10.2016 the applicant paid into the claimant's account held with the said Capital Sacco Limited Kshs. 234, 585.90.
- 6) On 21.10.2016 the applicant paid the claimant's advocates agreed costs of Kshs. 100, 000.00 plus Kshs. 64, 414.10 to cover the Kshs. 100, 000.00 monthly instalment till November 2016.
- 7) The applicant is complying with the consent on settlement of the decretal sum filed herein.
- 8) It is only fair and just that the present application is allowed.

The claimant filed the replying affidavit by the claimant on 09.11.2016 to oppose the application. Mokuia Obiria & Company Advocates acted for the claimant. The claimant's case is that the applicant has failed to comply with the consent as recorded in court. In particular the 1st instalment was due on 31.09.2016 it was not until 21.10.2016 that the same was paid. The applicant had come before the court with unclean hands and did not therefore deserve the discretion of the court.

The applicant filed on 18.11.2016 the further supporting affidavit of Luke Kinoti Kirimiania. It was stated at paragraph 15 that when the consent was recorded the amount to be paid to Capital Sacco Limited was Kshs. 70, 000.00 but the figure was revised to Kshs. 113, 395.45 by Capital Sacco Limited and paid to the claimant's account.

The court has considered the parties' respective cases. The judgment by consent 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 shows 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 urged 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 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, 16th December, 2016.**

BYRAM ONGAYA

JUDGE