



**REPUBLIC OF KENYA**

**IN THE INDUSTRIAL COURT AT KISUMU**

**INDUSTRIAL CAUSE NO. 287 OF 2013**

**(Before Hon. Lady Justice Maureen Onyango)**

**PHILIP N. ONCHWARI .....CLAIMANT**

**VERSUS**

**GUSII MWALIMU SACCO LIMITED ..... APPLICANT**

**RULING**

The application before me is dated 26th March 2015. It is filed by the Respondent/Judgement Debtor seeking the following orders:-

- a) THAT this application be certified as extremely urgent service thereof be dispensed with in the first instance.
- b) THAT there be a temporary stay of execution of the Judgement decision dated 18th day of September, 2014 herein and all consequential orders emanating therefrom pending the hearing and determination of this application inter-parties.
- c) THAT there be a stay of execution of the Judgement/decision dated 18th day of September 2014 herein and all consequential orders emanating therefrom pending the final compliance with the decree terms between the parties herein.
- d) Costs of the application be provided for.

The grounds in support of the application are the following:-

- i) That the judgement/decision in favour of the claimant/respondent was delivered on the 18th September, 2014.
- ii) That the applicant has already paid the Claimant all his dues as ordered by the court, yet he has proceeded to execute.
- iii) That the despite having been paid his dues as the court had decreed the Claimant has proceeded to obtain warrants of attachment against the applicant.
- iv) That there is no stay of execution in place and there is likelihood and danger that the Claimant may at any time proceed with execution.

In the supporting affidavit of Francis Mong'are it is deponed that Judgement was entered against the applicant in favour of the Claimant in the sum of Shs.224,000 on 18th September, 2014 and costs taxed at shs.190,000 making a total of Shs.414,000. The applicant subjected the said sum to statutory deductions of Shs.11,957 leaving a balance of Shs.212,043.

Mr. Mong'are deponed that the Claimant was a member of the Respondent, a co-operative society and at the time of termination of his employment, owed the Respondent a co-operative loan of Shs.116,739.50 after crediting payments made and recovery from his shares.

The Respondent avers that the Claimant owed a further shs.164,260 which the Respondent alleges was a loan owing to guarantors which it deducted. The Respondent then forwarded the balance of Shs.237,782.50 to the Claimants advocates by cheque dated 5th December, 2014.

The Claimant having not received the full decretal sum of Shs.414,000 instructed auctioneers to execute for the balance by way of attachment and sale of movable properties of the Respondent.

The application herein is against the said execution.

The Claimant opposed this application and filed a replying affidavit on 10th April, 2015 in which he deposes that the Respondent had no authority to make deductions and to offset the loan allegedly owed by the Claimant to the Respondent as there was no counterclaim for the same.

When the parties appeared before me for inter parties hearing of the application they agreed to argue the application by way of written submissions.

In the applicant/Respondents written submissions it contends that it has a right to set off moneys owed to the Respondent from the decretal sum.

The Claimant however contends in the submissions that no mention is made in the decree of any deductions. The Claimant relies on the case of William James Baker vs Joseph Peter Rush (1964) EA 602 in which the court of Appeal held that;

*"Under the definition in the Kenya Act it is sufficient that it (decree) conclusively determined the rights of the parties."*

The Claimant prays that the application be dismissed with costs.

I have considered the application together with the grounds in support thereof and the supporting affidavit. I have also considered the replying affidavit and submissions by the parties as well as the authorities cited. I have also read the judgement pronounced on 18th September, 2014.

During the hearing the issue of moneys owed to the Respondent by the Claimant featured. However the Respondent did not file any Counter-Claim and in the judgement the court made a specific finding in respect thereof when it stated;

*"As for claims from Co-operative SACCO, the Claimant shall deal directly with the SACCO."*

The foregoing being the case, the Respondent had no authority to make deductions from the decretal sum. The only legitimate deduction is statutory deductions as provided in section 49(2) of the Employment Act which provides that ;

*"Any payments made by the employer under this section shall be subject to statutory deductions."*

In this case, this would constitute only Pay As You Earn for which the Respondent must submit proof of remittance to the Income Tax Department failing which it will not be absolved from responsibility to pay the Claimant the said statutory deduction.

For the foregoing reasons, I find no merit in the application herein and dismiss it with costs.

**Dated ,signed and delivered this 17th day of December, 2015**

**MAUREEN ONYANGO**

**JUDGE**