



**Kenya Union of Savings and Credit Co-operatives Limited v Kencom Co-operative Savings & Credit Society Limited & another (Tribunal Case 157 of 2020) [2020] KECPT 156 (KLR) (Civ) (22 July 2020) (Ruling)**

*Kenya Union of Savings & Credit Co-operatives Limited v Kencom Co-operative Savings & Credit Society Limited & Kenya Commercial Bank Limited [2020] eKLR*

Neutral citation: [2020] KECPT 156 (KLR)

**REPUBLIC OF KENYA  
IN THE COOPERATIVE TRIBUNAL  
CIVIL  
TRIBUNAL CASE 157 OF 2020  
BM KIMEMIA, CHAIR, F TERER, VICE CHAIR & P. GICHUKI, MEMBER  
JULY 22, 2020**

**BETWEEN**

**KENYA UNION OF SAVINGS AND CREDIT CO-OPERATIVES LIMITED ..... CLAIMANT**

**AND**

**KENCOM CO-OPERATIVE SAVINGS & CREDIT SOCIETY LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**KENYA COMMERCIAL BANK LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. Vide the Application dated 24/5/2020, the Claimant has moved the Tribunal seeking for the following orders;
  1. That this Application be Certified as Urgent, service of the same be dispensed and that the same be heard ex-parte in the first instance;
  2. That an order of attachment before judgment be and is hereby made attaching the funds belonging to the 1<sup>st</sup> Respondent held by the 2<sup>nd</sup> Respondent in account Numbers 1114355208 and 1104134071 both at Kipande house branch pending the interparties hearing and determination of this Application or further orders of the Tribunal;



3. That this Honourable Tribunal be pleased to issue summons to the Chairman, Secretary and Treasurer of the 1<sup>st</sup> Respondent for them to appear before court to show cause why they should not furnish security for their appearance pending the hearing and determination of this claim;
  4. That upon hearing the said officials of the 1<sup>st</sup> Respondent, this Honourable Tribunal be pleased to order them to deposit with the Tribunal money, bank bond, title documents in respect in respect to Villa Numbers 63 and 25 situated on LR. No. 12825/195 or other sufficient properties to answer the claim as against the 1<sup>st</sup> Respondent pending the hearing and determination of the claim filed herein;
  5. That the 2<sup>nd</sup> Respondent be stayed from remittance of any money to the 1<sup>st</sup> Respondent or to the 1<sup>st</sup> Respondent's nominees from their accounts mention in prayer 2 above;
  6. That the Honourable Tribunal be pleased to direct the time limit within which the Respondents ought to comply with its orders, in default of which the Honourable Tribunal do order the arrest and committal to civil jail of the Respondents officials and/or Directors until this suit is determined or any Decree passed against the 1<sup>st</sup> Respondent is satisfied; and
  7. That the costs of this Application be provided for.
2. The Application is supported by the grounds on its face and the following Affidavits sworn by Grace Muiruri, its Central Finance Fund Manager;
    - a. Supporting Affidavit sworn on 21/5/2020 ; and
    - b. Further Affidavit sworn on 22/6/2020.
  3. The 1<sup>st</sup> Respondent has opposed the Application by filing grounds of opposition dated 21/6/2020 and a Replying Affidavit sworn by Roselyn Jituti on 10/6/2020.
  4. The 2<sup>nd</sup> Respondent has opposed the Application by filing a Replying Affidavit sworn by Lilian Sogo on 29/6/2020.

#### Claimant's Contention

5. Vide the instant Application, the Claimant contend that it advanced the 1<sup>st</sup> Respondent financial facilities as follows;
  - a. A loan of Kshs. 83,000,000.00 in January, 2018; and
  - b. A second loan of Kshs. 100,000,000.00 in May, 2018.
6. That the said amounts were deposited in the 1<sup>st</sup> Respondents account numbers [...] and [...] held by the 2<sup>nd</sup> Respondent.
7. That the 1<sup>st</sup> Respondent has defaulted in repayment of the said loans and that as at now, the outstanding balance is Kshs. 246,829,584.
8. That it has come to the knowledge of the Claimant that the 1<sup>st</sup> Respondent is currently disposing of its properties developed in Runda Estate and applying the proceeds for other purposes without giving consideration to repayment of the loan.
9. That the 1<sup>st</sup> Respondent also seeks to sell its 84 acres of land situated in Athi River.
10. That if the 1<sup>st</sup> Respondent sells the aforesaid properties, it will be exposed immensely yet it has no knowledge of the 1<sup>st</sup> Respondent's other properties.



11. That it is on this basis that it is necessary for it to be compelled to deposit the title documents to the said properties with the Tribunal so as to secure the hearing and determination of the claim.
12. That, further it is necessary for the funds held by the 2<sup>nd</sup> Respondent in the two accounts to be attached pending the hearing and determination of the claim.

### **1<sup>st</sup> Respondent's Case**

13. Vide the statement of grounds of opposition dated 2/6/2020 and the Replying Affidavit sworn by Roselyn Jituti on 10/6/2020, the 2<sup>nd</sup> Respondent has opposed the Application on grounds that it carries on business as a Co-operative Society with majority of its members being employee of the 2<sup>nd</sup> Respondent thus is not a flight risk. That the properties sought to be attached before judgment are charged to other financial institutions as securities for loans. That the Runda property is charged to National Bank while the Athi River property is charged to the 2<sup>nd</sup> Respondent. That the loans advanced to it by the Claimant were secured by savings and monthly repayments. That the Claimant's claim is a commercial one and that it is necessary for it to be processed through the usual legal process before any attachment can be done.

### **2<sup>nd</sup> Respondent's Case**

14. Vide Replying Affidavit sworn by Lilian Sogomo its principal legal officer on 29/6/2020, the 2<sup>nd</sup> Respondent contend that it also advanced the 1<sup>st</sup> Respondent financial accommodation. That one of such facilities is a loan of Kshs. 302, 400,000. That this facility was secured by way of a charge over properties known as Mavoko Block 3/2326 and Mavoko Town Block 3/2327.
15. That the it also has continuing banking facilities with the 1<sup>st</sup> Respondent to an aggregate sum of Kshs. 1,006,403,768.29 which is secured as follows;
  - a. Debenture for Kshs. 271,784,954, assets of the 1<sup>st</sup> Respondent;
  - b. Undertaking to channel future earns flows through the 1<sup>st</sup> Respondent Bank Accounts had with the 2<sup>nd</sup> Respondent; and
  - c. Undertaking to assign to the 2<sup>nd</sup> Respondent sale proceed from the property known as Mavoko Town Block 3/2326 and Mavoko Town Block 3/2327.
16. That the 1<sup>st</sup> Respondent is currently indebted to the 2<sup>nd</sup> Respondent to the tune of Ksh. 978,867,000.
17. That in view of the foregoing, the Claimant's debt does not rank in priority to its secured facilities.

### **Claimant's further Affidavit**

18. Vide the further Affidavit it sworn by Grace Muiruri on 22/6/2020, the Claimant has controverted the averment in the 1<sup>st</sup> Respondent's Replying Affidavit sworn by Roselyn Jituti on 10/6/2020 as follows;
19. That based on the said response, it is manifest that the 1<sup>st</sup> Respondent is not willing to settle the debt owed to it. That the 1<sup>st</sup> Respondent is feigning ignorance of how its assets are being disputed off by third parties. That no existing rights will be extinguished if the Application is allowed as the existing charges will not be defeated.



## Disposal of the Application

20. Vide the directions given on 4/6/2020, the Application was canvassed by way of written submissions. Parties filed their respective submissions as follows;
- a. Claimant – 25/6/2020;
  - b. 1<sup>st</sup> Respondent – 26/6/2020; and
  - c. 2<sup>nd</sup> Respondent – 9/7/2020.
21. We will consider the said submissions whilst determining the issues raised by the Application.

## Issues for Determination

22. We have framed the flowing issues for determination;
- a. Whether the Claimant has laid a proper basis for an order of attachment of the 1<sup>st</sup> Respondent funds contained in account No. [...] and [...] before judgment;
  - b. Whether the Claimant has laid a proper basis to warrant an order to issue against the 1<sup>st</sup> Respondent’s Chairman, Secretary and Treasurer to show cause why they should not furnish security for their appearance or deposit money, bank bond, title documents in respect of villa Nos. 63 and 28 situated in LR. NO. 12825/195 or other properties to answer to the claim; and
  - c. Who should bear the cost of the Application.

### Attachment before Judgment

23. Order 39 of the *Civil Procedure Rules* donates to us the jurisdiction to make an order for attachment before judgment Order 39 Rule 2 provides in this regard thus;

“Where the Defendant fails to show such cause, the court shall order him either to deposit in court money or other property sufficient to answer the claim against him, or to furnish security for his appearance at any time when called upon while the suit is pending and until satisfaction of the decree that may be passed against him in the suit or make such order as it thinks fit in regard to the sum which may have been paid by the Defendant”

24. As regards the principles, to be considered before we can make an order regarding attachment before judgment, we agree with all the parties that the correct legal position was pronounced by the court of Appeal in the celebrated case of *Kuria Kanyokonba Amigos Ban and Restaurant v Francis Kinuthia Nderu & others* (1988)eKLR, 126, in the pertinent part, the court held thus;

“The power to attach before judgment must not be exercised lightly and only upon clear proof of the mischief aimed at by order 38 Rules 5 (currently order 39) namely that the Defendant was about to dispose of his property or to remove it from the jurisdiction with intent to obstruct or delay any decree that may be passed against him.”

25. It follows therefore that for an order of attachment before judgment to be granted, a party must satisfy the following conditions;
- a. That the Defendant is about to dispose of his property or remove it from the jurisdiction of the court; and
  - b. That the Defendant intends to obstruct or delay any decree that may be passed against him.



26. Further, it is manifest that the said power must be exercised with some degree of circumspection.
27. What we gather from the foregoing legal principles is that the remedy of attachment before judgment is designed to guarantee a party who subsequently succeeds in a case to enjoy the fruits of its judgment. Put it the other way round, the remedy is designed to prevent a party against whom judgment may be entered from avoiding it by concealing or disposing of property.
28. On the basis of the foregoing the question arises as to whether the 1<sup>st</sup> Respondent has handled its property in a manner that suggests that it wants to avoid judgment that may be passed against it. It is the Claimants case that the 1<sup>st</sup> Respondent is currently disposing of its properties developed in Runda Estate and applying the proceeds to purposes other than settling the debt due and owing to it. That the 1<sup>st</sup> Respondent is also in the process of selling its 84 acre parcel of land located in Athi River.
29. On its part, the 1<sup>st</sup> Respondent contend that it has no intention of leaving the jurisdiction of the Tribunal. That the properties sought to be attached are charged to other financial institutions. That the Runda property is charged to National Bank of Kenya whereas the Athi River property is charged to the 2<sup>nd</sup> Respondent. That the loan with the Claimant is secured vide its savings and monthly repayments. That the transaction it has with the Claimant is a commercial one and that it ought to be processed through the usual legal means before execution can issue.
30. On its parts the 2<sup>nd</sup> Respondent has put up a case that it also has interest in the properties of the 1<sup>st</sup> Respondent as a financier. That it has over time granted the 1<sup>st</sup> Respondent financial accommodation and as it stands, the 1<sup>st</sup> Respondent has an outstanding debt amounting to Kshs. 978,867,000.00.

### **Determination**

31. We have considered the material presented in support for and against the Application. We have also considered the legal position on the issues presented. It is our finding that the properties the Claimant allege to be in the process of being disposed of are in fact encumbered to other financial institutions. We have particularly perused annexure "LS-I" of the annexures to the Affidavit sworn by Lilian Sogomo on behalf of the 2<sup>nd</sup> Respondent on 29/6/2020. It is a charge over properties LR. No. Mavoko Town Block 3/2326 and 2327 respectively. This is the Athi River property the Claimant contend, is in the process of being sold to defeat the decree that may be passed against the 1<sup>st</sup> Respondent.
32. There is thus nothing on record to demonstrate that the 1<sup>st</sup> Respondent has handled its properties in a manner to suggest that it wants to avoid the decree that may be passed against it. To the Contrary, it is apparent that the properties the Claimant contend are in the process of being disposed of are charged to National Bank and the 2<sup>nd</sup> Respondent respectively. The import of this is that the Claimant has not laid a proper basis to warrant the issuance of an order for attachment of the 1<sup>st</sup> Respondent's properties before judgment.

### **Summons Against the 1<sup>st</sup> Respondent, Chairman, Secretary and Treasurer**

33. In view of our finding above, we find that this issue stands determined as well. No basis has been laid to warrant issuance of summons against the said officials at this stage.

### **Conclusion**

34. In light of the foregoing is that we do not find merit in the Claimant's Application dated 24/5/2020 and hereby disallow it with costs in the cause.
35. In order to secure speedy of resolution of the claim, we give the following directions;



- a. The Respondents to file and serve their respective responses including their witness statements and documents within 14 days herein;
- b. The Claimant to file and sever a reply to the response if need be within 7 days of receipt thereof; and
- c. Mention (virtually) to confirm compliance and to fixing a hearing date on 24/8/2020.

**RULING READ, DATED AND DELIVERED ONLINE THIS 22<sup>ND</sup> DAY OF JULY, 2020.**

**HON. B. KIMEMIA SIGNED**

**CHAIRMAN**

Hon. F. Terer Signed

Deputy Chairman

Gichuki Signed

Member

