



REPUBLIC OF KENYA

IN THE CO-OPERATIVE TRIBUNAL

AT NAIROBI

TRIBUNAL CASE NO. 249 OF 2020

JOSEPH WAMBURU GATHOGO.....CLAIMANT

-VERSUS-

KENYA QATAR DIASPORA SACCO SOCIETY.....RESPONDENT

RULING

1. This Claim was instituted by way of a Statement of Claim dated 10th August, 2020. The Claimant alleges that he issued a Notice of withdrawal of membership to the Respondent, and further sought a refund of his savings, totalling to Kshs. **216,800/=**, together with costs and interests. Annexed thereto is a letter via email dated **29th June 2019**, from the Claimant to the Respondent, wherein the Claimant was resigning from the SACCO and applying for a refund of all his contribution in full. There is also a demand letter dated **25th April 2020**. The Claimant contends that the Respondent has refused to refund his share contributions, even after issuing proper notice.

2. The Respondents filed a Statement of Defence, dated **28th September 2020**, where they deny that the Claimant ever withdrew from the SACCO. They also aver that the amount due to the Claimant would be **Kshs. 196,000/=** had he properly withdrawn from the SACCO, arguing that the remaining amount consists of share capital [**Kshs. 18,000/=**] and Benevolent Fund [**Kshs. 2,800/=**], which amounts are non-refundable. The Respondent further posits that the Claimant has been malicious by declining to supply with the SACCO's bylaws, which would be harmful to the Claimant's case. The Respondents themselves have not produced the By-laws to this Tribunal.

3. The parties proceeded by way of written Submissions, which we have carefully considered. We find that the following are the issues needful of determination:

ISSUES FOR DETERMINATION:

The following are the issues that this Tribunal finds necessary for Determination:

- (a) Whether the Claimant issued a proper Notice of withdrawal from the SACCO;
- (b) Whether the Claimant is entitled to a refund of **Kshs. 216,800/=**;
- (c) Who bears the costs of the suit?

We shall hereafter analyse the issues as follows:

4. ANALYSIS OF ISSUES

(i) Whether the Claimant issued a proper Notice of withdrawal from the SACCO

From the evidence on record, we note that the Claimant did properly withdraw from the Respondent, and sent an email to the Respondents on **29th June 2019** for a refund of his savings formally. This is the crux of the email:

"I, Joseph Wamburu Gathogo Membership Number 3690 I [sic] would like to inform you that I have come to a conclusion about my resignation as a member, i had planned to acquire a loan from you but all will stop here, I have other pressing matters that need to be attended to, I appreciate your services from 2017 until [sic] this day.

Here is my bank account.... For cash refund after you do the necessary deduction.”

If this is not a clear case of withdrawal from the SACCO, nothing can ever be. The letter consists of a hybrid of resignation and request for funds.

This letter was received, and was responded to on **29th June 2019** by the Respondent’s Administrator, one **Omollo Dennis**. The Respondent has not produced anything to show that there is a standard format for notice of withdrawal from the SACCO, and as such, the said letter by the Claimant constitutes a proper Notice of Withdrawal and request for refund.

As a matter of fact, the response by the Respondent to the Claimant’s email connotes that all that the Claimant was required to do was to wait for 60 days incubation period, and the Respondent would send an Acceptance Form, indicating the Claimant’s dues and thereafter credit the Claimant’s account. The Claimant, evidently, was not required to do any other thing once this withdrawal from the SACCO was done.

The Respondent has cited unspecified provisions of the SACCO’s bylaws, and managed to not produce them for probation before this Tribunal. It is the Respondent’s allegation that the Claimant did not follow the process of withdrawal, and it was subsequently the Respondent’s burden to prove this assertion, but the Respondent failed to do so.

Section 107(1) of the Evidence Act Cap 80 of the Laws of Kenya casts the burden of proving a fact on the one that alleges: *affirmantis est pro bare*. This burden has not been discharged by the Respondents in view of the withdrawal process, and it must thus fail. We therefore find and do hold in favour of the Claimant that indeed the Claimant properly withdrew from the SACCO, and after 60 days, the Claimant was entitled to his refunds in full.

(ii) Whether the Respondent is entitled to a refund of Kshs. 216,800/=

The Respondent has not pleaded any liability on the part of the Claimant in terms of loans and guarantees to other members. The Respondent has admitted to owing the Claimant **Kshs. 216,800/=**. However, the Respondents have pleaded that the amount due to the Claimant is **Kshs. 196,000/=**, arguing that the balance of **Kshs. 20,800/=** is non-refundable. On this premise, we first invoke the provisions of **Order 13 Rule 2** of the **Civil Procedure Rules 2010**, and accordingly enter a partial judgment on the admitted sum of **Kshs. 196,000/=**.

The balance of **Kshs. 20,800/=** is the contested amount, that forms the basis of this limb. On their part, the Respondents argue that arguing that the remaining amount consists of non-refundables for share capital [**Kshs. 18,000/=**] and Benevolent Fund [**Kshs. 2,800/=**]. This Tribunal has been invited to assume this fact, as there was no proof of this provision in the SACCO’s bylaws. The Respondent has failed to furnish proof of this affirmation of theirs, and it must thus fail. We thus find that the Claimant is entitled to his full deposit of **Kshs. 216,800/=**.

(iii) Who bears the costs of the suit?

The position of the law, and this Tribunal is bound therewith, is that costs follow the event. **Section 27(1) of the Civil Procedure Act** bestows this Tribunal with discretion to apportion costs, and on the basis of the foregoing, we find that the Claimant is entitled thereto, and we thus so order.

We therefore proceed to issue the following Orders:

ORDERS

- (a) The Claimant’s Statement of Claim dated **10th August 2020** succeeds;
- (b) Judgment be and is hereby entered for the Claimant, for **Kshs. 216,800/=** together with costs and interest at Tribunal rates.

Ruling signed, dated and delivered *virtually* at **Nairobi** this **19th** day of **November**, 2021.

Hon. B. Kimemia Chairperson Signed 19.11.2021

Hon. J. Mwatsama Deputy Chairperson Signed 19.11.2021

Ms. M. Mbeneka Member Signed 19.11.2021

Mr. Gitonga Kamiti Member Signed 19.11.2021

Mr. B. Akusala Member Signed 19.11.2021

Mr. P. Gichuki Member Signed 19.11.2021

Tribunal Clerk R. Leweri

Ms. Muiruri for the Claimant.

Macharia holding brief for Muthia for the Respondent.

Hon. J. Mwatsama Deputy Chairperson Signed 19.11.2021