



**Mwambui v Tken Society Limited (MSET Nairobi E005 of 2024)  
[2024] KEMSET 1061 (KLR) (2 August 2024) (Judgment)**

Neutral citation: [2024] KEMSET 1061 (KLR)

**REPUBLIC OF KENYA  
IN THE MICRO AND SMALL ENTERPRISES TRIBUNAL  
MSET NAIROBI E005 OF 2024  
J.BETT, CHAIR, R.KATINA, VICE CHAIR, J.WERE & A GIKUYA, MEMBERS  
AUGUST 2, 2024**

**BETWEEN**

**GEOFFREY MWANZIA MWAMBUI ..... CLAIMANT**

**AND**

**TKEN SOCIETY LIMITED ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. This claim dated 15<sup>th</sup> April 2024, was filed through the e filing platform on 25<sup>th</sup> April 2024 The Claimant, Geoffrey Mwanzia Mwambui was represented by Mr. Patrick Makau of P.K Makau and Company Advocates situated at Kenda House 4<sup>th</sup> Floor Room D10, Tom Mboya Street, P.O.BOX 72664-00200 Nairobi.

The Claimant states that he was a member of Tken Sacco Society limited upto 31<sup>st</sup> march 2023 when he ceased to be an employee of CFAO motors limited. The claim herein is for recovery of savings totalling Ksh224,000/= which he contributed monthly with the Respondent, the Tken Sacco Society Limited. The Claim has been pending and never been settled since 31<sup>st</sup> March 2023.

2. The Respondent is described as a SACCO carrying on business of savings and credit and other financial services for its members who are employees of CFAO motors limited.

3. Upon the filing of this Cause on 25<sup>th</sup> April 2024, the Tribunal issued Directions on 26<sup>th</sup> April 2024 and set the Cause for a mention on 12<sup>th</sup> June 2024 to confirm compliance. Further mention On 21 June .2024, when Tribunal was informed by the Claimant that despite service of the claim having been effected as directed the Respondent had not complied nor even entered appearance. The Cause was subsequently fixed for hearing and on 10<sup>th</sup> July 2024.



4. The Tribunal was informed by the Claimant on 10<sup>th</sup> July 2024 that since the Respondent had been duly served with all the pleadings and annexures, and they failed to Respond the Counsel for the claimant wished to apply for Judgment in default since the claim was now uncontested. The Tribunal however gave directions to the claimant to go the formal proof way. The matter then proceeded by way of formal proof.
5. The matter had to proceed by way of formal proof as Tribunal was convinced that it was proper in the circumstances to allow the matter to proceed since the claimant had sufficiently demonstrated to the Tribunal that it had made every effort to duly serve the Respondent at every stage of the proceedings to no avail.

### **The Claimant's Case**

6. The learned Counsel for the Claimant made an opening statement before calling one witness. He stated that the claim was for refund of for savings which the claimant had been depositing with the Tken sacco society limited. But since the claimant ceased to be a member of the sacco he requested to get his savings back as he was leaving his employment. A demand notice dated 23<sup>rd</sup> November was written addressed to the Respondent, but there has never been any response to. The learned Counsel stated "We have filed an affidavit of service dated 9/5/2024 and thus they are aware that this claim has been lodged. The Responded has not entered appearance nor responded to the claim."
7. The claimant produced his statement of claim dated 15/4/2024 as evidence.
8. The claimant has filed before the Tribunal a copy demand letter dated 23<sup>rd</sup> November 2023, for refund of 224,000/=, Witness written statement, Letter confirming termination of employment, verifying affidavit and claimants list of witnesses. The Claimant sought to rely on those documents.
9. He further stated that upon service of the Claim and all supporting documents, the Respondent did not make any response to the Claim and that it has not made any payment in response.
10. He finally prayed that the Tribunal to order the respondent to pay back his savings as prayed for in the statement of claim

### **Issues For Determination**

11. Arising from the claim and the oral evidence at the formal proof hearing on 10<sup>th</sup> July 2024, the following issues presented themselves for the determination by this Tribunal;
  - a. Whether the Respondent was served with the claim.
  - b. Whether the Respondent has an outstanding debt of Ksh 224,000/= being savings paid by Claimant to the Sacco, society Limited.
  - c. Who bears the cost of this claim?

### **Determination and Final Orders**

#### **The right to be heard**

12. The first issue is whether the Respondent was granted the right to be heard. The Tribunal considered this issue as it is a Constitutional right for the Respondent to be accorded the right to be heard.
13. The Tribunal notes that the Claim was served upon the Respondent. Further, the hearing notice was also served upon the Claimant. The Respondent however did not file the Response nor attended the



hearing of the suit. No explanation was given for failure to file the Response and no explanation was given for failure to attend the hearing of this suit by the Respondent or its Representative.

14. The Tribunal heard that the Claimant served the statement of claim and all the documents upon the Respondent. Corresponding affidavit of service were filed by the Claimant.
15. The Tribunal underscores the right to be heard as was held by the Supreme Court of India in Sangram Singh v Election Tribunal Kotah 1955 AIR 425 thus:-

“ [T]here must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them. Of course, there must be exceptions and where they are clearly defined they must be given effect to. But taken by and large, and subject to that proviso, our laws of procedure should be construed, wherever that is reasonably possible, in the light of that principle.”

16. Every party in a case has a right to be heard and subsequently, that right should not be denied unless there are very good reasons for doing so. The Tribunal having considered the facts and prevailing circumstances set the suit for formal proof hearing after it was convinced that Respondent was served with the claim and was accorded reasonable time to file and serve the Response. It cannot therefore be said that the Respondent was denied the Constitutional right to be heard.
17. In the case of Mungai –vs- Gachuhi and Another [2005] eKLR cited with approval in the case of Signature Tours & Travel Limited -V- National Bank of Kenya Limited [2017] eKLR This position is further emphasised by Ojwang, J (as he then was) in when he stated as follows:

“ a court decision stands as a final decision only when a proper hearing has taken place and the parties and those who ought to be enjoined as parties have been fully heard and their representations concluded, unless they elect to forgo the opportunity.”

18. The Tribunal is guided by the Constitutional principles of the right of a party to be heard while noting that this right should not create injustice and prejudice to others. Having found that there was proper service and that there was no justification for the failure to file the Response and attend the hearing of the suit, the Tribunal was convinced that it was proper and justifiable in the circumstances to allow the matter to proceed to formal proof as it did on 10<sup>th</sup> July 2024.

### **Savings Deposited with the Sacco**

19. As to whether the Respondent owes the claimant the claimed amount being savings from the Claimant, the Claimant relied on the termination letter dated 22<sup>nd</sup> March 2023 signed by one William Wambugu - under scored as Human Resources Manager which was advising the claimant to liaise with the SACCO regarding his account. Together with demand notice that was received by the Respondent and remains uncontroverted. No evidence was produced to the contrary.



## **Outstanding debt**

20. Having considered the evidence tendered by the Claimant in its totality, the Tribunal finds that the relevant law that will govern it in coming up with its judgment is found under the provisions of Order 10 Rule 4 (1) of the Civil Procedure Rules, 2010 which provide as follows:

“4(1) Where the plaintiff makes a liquidated demand only and the defendant fails to appear on or before the day fixed in the summons or all the defendants fail so to appear, the court shall, on request in Form No. 13 of Appendix A, enter judgment against the defendant or defendants for any sum not exceeding the liquidated demand together with interest thereon from the filing of the suit, at such rate as the court thinks reasonable, to the date of the judgment, and costs.

21. No evidence was given on any part payment of refund by the respondent on or before the filing of this suit. Thus the Claimant claims that the outstanding amount of Ksh. 224,000/=. No evidence was presented to the contrary. We therefore find that the Claimant is owed Ksh. 224,000/ by the Respondent in the absence of evidence to the contrary.

## **Costs**

22. On the issue of costs, the Tribunal notes that the Claimant has encountered considerable cost in sustaining this claim. We find that it is fair and just to award costs to the Claimant.

## **Orders**

23. Flowing from the findings, we find that in the interest of justice, the Respondent should pay the Claimant:-
- a. The pay back the savings of Ksh. 224,000/=
  - b. Costs of the Claim of Ksh 50,000/=
  - c. Interest on (a) and (b) above at prevailing court rates.

Those then are the Orders of the Tribunal.

**DELIVERED AND DATED THIS 2<sup>ND</sup> DAY OF AUGUST 2024 IN NAIROBI**

**Dr. J. BETT [CHAIRMAN]**

**R. KATINA [VICE-CHAIR]**

**Hon. J. WERE [MEMBER]**

**A. GIKUYA [MEMBER}**

**A. KIBET [MEMBER]**

Judgement delivered virtually in the presence of:

1. Claimant
2. –Tribunal Administrator
3. –Tribunal Administrator
4. –Tribunal Assistant

