REPUBLIC OF KENYA

IN THE CO-OPERATIVE TRIBUNAL AT NAIROBI

TRIBUNAL CASE NO. 42 OF 2019

JOHN CHEGE ……..……..……1ST CLAIMANT

JAMES AGENGO……...……..2ND CLAIMANT

ELIAS GITAU……..3RD CLAIMANT

PETER NJUGUNA ……..4TH CLAIMANT

VICTORIA NZIOKA….……..5TH CLAIMANT

OBADIAH LAGAT …….6TH CLAIMANT

DAVID KURGAT …..……..…….……7TH CLAIMANT

VERSUS

WILFRED KABAIKU MACHARIA ....…….……..1ST RESPONDENT

STIMA SACCO CO-OPERATIVE SOCIETY LTD….……..2ND RESPONDENT

RULING

The matter for determination is Notice of Motion dated 11.4.2019 seeking the following orders;-

*1. **THAT**, this application be certified as urgent and be heard Ex-parte in the first instance.*

*2. **THAT**, pending the hearing and determination of the Tribunal case No. 42 of 2019, the 2nd Respondent by itself, its servants, agents, employees and /or anybody whatsoever deriving under it be restrained from making any deductions against the applicant's accounts in a bib to offset the 1st Respondent's loan.*

*3. **THAT**, pending the hearing and determination of this application, the 2nd Respondent by itself, its servants, agents, employees and/or anybody whatsoever deriving authority under it be restrained from making any deductions against the applicant's accounts in a bid to offset the 1st Respondent's loan.*

*4. **THAT,** the costs of this application be provided for.*

Based on the grounds on the face of the application and supporting affidavit of James Agengo, 2nd applicant herein. The same is opposed vide the replying affidavit of Susan Mutali, legal officer of the 2nd Respondent filed on the 5th July, 2019. The 1st Respondent filed Replying Affidavit on 26.8.19.The Application was canvassed by way of written submission .

In general the application seeks Injunctive orders against the 2nd respondent from making any deductions against the applicants accounts in a bid to offset the 1st respondent's loan.

The brief facts as per the application is that said applicants on 23.10.2017 guaranteed a loan by the 2nd respondent to the 1st respondent of Kshs. 3.7 million which was to be repaid in 48 monthly instalment and serviced through monthly deduction from the 1st Respondent's salary who was a permanent employee at Kenya Power and Lighting Cooperation Limited.

That on or about 12/10/2018 the 2nd respondent issued demand to the applicant requiring payment of Kshs. 422,615/43 from each applicant.

That the applicants later discovered that the 1st respondent had applied for voluntary early retirement without their knowledge, yet he had four years left for his contract.

That the 2nd respondent has threatened and continued to deduct money from the applicants savings and earnings in repayment of the said loan and unless restrained they are subject to great financial risks. That the application for early retirement went through without any objection by the second respondent.

Despite the mandatory requirement that at the time of termination of an employee’s clearance relating to employee deduction was to be signed by the heads of appropriate departments. The second respondent being one of these department of heads that the 2nd respondent failed to indicate that the 1st respondent was still pending and the 1st respondent changed his pay point from his account with the 2nd respondent to an account in Barclays Bank where his pension benefits were deposited on 26.6.2018.

That the second respondent had fiduciary duty to inform the applicant of any change affecting the loan agreement or any action taken by the 1st respondent that may prejudice their position.

In response, the 2nd respondent filed their submission on 19.8.2019 and 1st respondent filed on 26.8.2019.

That the dispute arises from a loan facility of Ksh. 3.7million obtained by the 1st respondent from the 2nd respondent which was to be repaid within 48 months.

That the applicants jointly and severally guaranteed the loan and on alternative collateral was issued.

That the 1st respondent duly serviced the loan from December, 2017 to May, 2018, when he defaulted prompting first defaulters notice to issue dated 24.8.2018.

That they issued the 2nd defaulters notice dated 4.10.2018 and advised the 1st respondent to settle the outstanding loan and copied to the applicants.

That the 2nd respondent applied the 1st respondent deposit reducing the amount from 3,537,445 to 2, 958,308.

That a Notice was issued to the applicants notifying them they would be debiting 13,217 from their accounts monthly with effect from 6th January, 2019 to recover a total of Kshs. 379,355/ from each.

That due to this notice the applicants moved the tribunal for the orders. The 1st respondent submitted that it is not disputed that he obtained the loan and the applicants were his guarantors. That he was not aware of the default since he reasoned that the employer offsets the said loan from his dues.

That the 2nd respondent owed him the duty to inform him of the default .

That he never received the said default notice and if he would have received the same he could have remedied the situation.

That , since the 2nd respondent had no report to offset the loan, having not served the 1st respondent, that the applicants are entitled to the prayers sought of an interlocutory injunction.

That, further the applicants have not shown a prima facie case and they have not proved that they cannot be compensated by way of damages.

Therefore the application should be dismissed with costs to 1st respondent.

We have carefully considered the submissions of parties, the pleadings and the affidavits on the record.

The applicants seeks injunctive orders in which the key issues for determination was as held **GIELLA .VS. CASSMAN BROWN COMPANY LIMITED(1973) EA 358.**

1. The applicant must show a prima facie case with probability of success.

2. An interlocutory injunction will not issue unless the applicant might otherwise suffer irreparable injury which will not be adequately compensated by an award of damages.

3. The balance of convenience should tilt in favour of the applicant.

On the issue one, establishment of a prima facie case which is a high likelihood of success, a prima facie case is defined as a genuine and arguable case in which a court probably amounting itself will conclude that they revisit a right which has apparently been infringed.

The circumstances of this cases arises from a guarantee on a loan and default thereof. We note that where a guarantor signs a guarantee, he accepts liability to repay the loan upon default by the borrower. We have noted the annexure "SSS 1" being the loan application form and on page 8 is the signed guarantee by each of the applicants. This guarantee is not disputed by the applicants.

We note the contents and the wordings of the repayment guarantee therein **"we the undersigned, hereby accept jointly and severally, liability for the repayment of this loan in the event of the borrowers default. We understand that the amount in default may be recovered by an offset against our deposits or attachment of our property, salary, deposits and other property owed by us"**

1. **We note that the applicant have not denied that they signed the guarantee form, the validity of the guarantee or the demand notices. By signing the guarantee form it is trite law that guarantors accepted liability jointly and severally in case of default by the borrower.**

On this issue, we find that even as per the 1st respondents submissions, the applicants have not proved a prima facie case.

2. Irreparable injury incapable of not being adequately compensated by award in damages. We note that this is a liquidated claim where the amounts are known and the attracting interest is also known.

The amount to be debited from each applicant's account Kshs.379,355/= within a period of 24 months therefore any loss or injury can easily be quantified and compensated by way of damages. The case GIELLA (Supra) is binding to this tribunal.

3. balance of convenience we note that the applicants willingly guaranteed the 1st respondent and signed the guarantee and the amount proposed to be debited from their accounts Kshs.13,217/= per month and due to the guarantee agreement we note that the 2nd respondent would suffer great financially since there is no other collateral from which the defaulted amount cannot be recovered.

The 1st respondent has submitted that he is ready and willing to pay the amount of the loan hence the balance of convenience tilts in favour of the 2nd respondent. Since the inconvenience he stands to suffer for outweighs the convenience of the applicants.

The 1st respondent submitted that the application has no merits since the applicants have not shown a prima facie case and not demonstrated that they cannot be compensated by way of award in damages.

We therefore dismiss the application dated 11.4.19 with costs to be paid to the 2nd respondent.

Read and delivered in open court, this 7TH of November 2019.

In the presence of:

Claimant: Miss Ndolo holding brief for Miss Mburu.

Respondent: Miss Tanui for 2nd Respondent.

Court Assistant: Leweri and Buluma

B.Kimemia - Chairman-signed.

R.Mwambura – Member-signed.

P.Swanya - Member-signed.