



**Kitheka & another v Harambee Sacco Society (Cause 669 & 670 of 2019 (Consolidated)) [2025] KEELRC 2460 (KLR) (19 September 2025) (Ruling)**

Neutral citation: [2025] KEELRC 2460 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 669 & 670 OF 2019 (CONSOLIDATED)**

**AK NZEI, J  
SEPTEMBER 19, 2025**

**BETWEEN**

**MARY KITHEKA ..... CLAIMANT**

**AND**

**HARAMBEE SACCO SOCIETY ..... RESPONDENT**

**AS CONSOLIDATED WITH  
CAUSE 670 OF 2019**

**BETWEEN**

**ALICE NJERI WANUTHI ..... CLAIMANT**

**AND**

**HARAMBEE SACCO SOCIETY ..... RESPONDENT**

**RULING**

**Background**

1. The suit herein is a consolidated suit, the consolidated suits being Cause No. 669 of 2019 (Mary Kitheka – vs – Harambee Sacco Society Ltd) and Cause No. 670 of 2019 (Alice Njeri Wanuthi – vs – Harambee Sacco Society Ltd). According to the Court’s record, the two (2) suits were consolidated by an order of the Court made on 24<sup>th</sup> November, 2020 (Mbaru, J). Hearing is shown to have proceeded before Hon. Justice Dr. Jacob Gakeri. The Court delivered a consolidated Judgment in favour of the Claimants on 27<sup>th</sup> May, 2024. The Claimants were also awarded 50% of costs of the suit.



2. Judgment is shown to have been delivered in the presence of Counsel for both parties. The Court's record for 24<sup>th</sup> May, 2024 reads as follows:-

- “ 1. Judgment delivered in court virtually.
2. Stay of execution for 30 days granted in 669/670 and 671.”

3. The Claimants are shown to have taken out execution proceedings in or about September 2024, long after the lapse of the 30 days' stay order granted on 27<sup>th</sup> May, 2024, and Warrants of Attachment of movable property in execution of a Money Decree and a warrant of sale are shown to have been issued to Betabase Auctioneers (by the Court's Deputy Registrar) on 3<sup>rd</sup> October, 2024.

4. Subsequently, the Respondent moved back to Court vide an urgent Notice of Motion dated 4<sup>th</sup> October, 2024 seeking, inter-alia, an order staying execution of the Court's decree.

5. The Notice of Motion dated 4<sup>th</sup> October, 2024

The Respondent/Applicants sought the following Orders:-

- a. That the application be certified urgent and heard ex-parte in the first instance.
- b. That pending hearing and determination of the application inter-partes, the Court do stay execution of the Warrants of Attachment and Sale issued by the Court on 3<sup>rd</sup> October, 2024 to M/s Betabase Auctioneers.
- c. That the Court do set aside the Warrants of Attachment and Sale of the Applicant's property issued by the Court on 3<sup>rd</sup> October, 2024 and the Proclamation of Attachment of even date with the resultant invoice dated 4<sup>th</sup> October, 2024 as the same were taken out pre-maturely and contrary to the relevant provisions of law.
- d. That costs occasioned by the application be provided for.

6. The application, filed under a certificate of urgency, sets out on its face the grounds on which it is founded, and is anchored on the supporting affidavit of Tikoishi Naikumi Koitaat, a Legal Officer at the Respondent/Applicant society, sworn on 4<sup>th</sup> October, 2024. It is deponed in the said supporting affidavit that upon delivery of the Court's consolidated Judgment, both parties filed their respective Notices of Appeal to reserve their right of appeal against the Court's decision, that the Claimants never taxed their costs although taxation of costs ordinarily comes before execution, that no leave was sought to execute before taxation, that the Claimants proceeded to instruct M/s Betabase Auctioneers to execute the decree without any colour of right and in contravention of the law, that no draft decree was sent to the Respondent/Applicant for their approval within the statutory period; and that the Respondent/Applicant has remained ready and willing to satisfy the Court's Judgment save that it was awaiting taxation and/or an agreement on costs to enable it to settle the matter holistically.

7. Documents annexed to the said replying affidavit include copies of the Court's consolidated Judgment delivered on 27<sup>th</sup> May, 2024, the decree, warrant of attachment, proclamation of attachment and the Auctioneer's invoice for Kshs.210,500/=, dated 4<sup>th</sup> October, 2024.

8. The application, having been filed under a certificate of urgency, was placed before me on 8<sup>th</sup> October, 2024, and I granted an interim order of stay of execution of the Courts' decree and directed that the application be served.



9. The application is opposed by the Claimant/Respondents vide their grounds of opposition and a replying affidavit of Alice Njeri Wanuthi sworn on 18<sup>th</sup> October, 2024. The crux of the Claimants' response is that the 30 days' stay granted by the trial Judge on 27<sup>th</sup> May, 2024 had lapsed on 26<sup>th</sup> June, 2024 and that the issue of stay of execution had become res-judicata, that the Respondent had not paid the decretal sum despite having had sufficient time to do so, that the Claimants followed due process in instructing an auctioneer, that Section 94 of the *Civil Procedure Act* is not mandatory; while Order 21 Rule 8 of the Civil Procedure Rules 2010 uses the modal verb "may".
10. It is further deponed by the Claimant/Respondents that the Respondent/Applicant paid the decretal sum of Kshs.806,356/= on 16<sup>th</sup> October, 2024, but deliberately failed to settle the Auctioneer's reasonable fees that were incurred by the Auctioneer under instructions to recover the decretal sum; and that the application is an abuse of the Court's process and ought to be struck off. The fact of payment of the decretal sum and interest thereon by the Respondent/Applicant on 16<sup>th</sup> October, 2024 was confirmed in Court by Counsel for both parties herein on 22<sup>nd</sup> October, 2024 and 5<sup>th</sup> December, 2024 respectively. Indeed, Counsel for the Respondent/Applicant submitted that the decretal sum and interest having been paid, the application herein stood spent, and that the Auctioneer could file his bill for taxation by the Deputy Registrar under the *Auctioneers Act*.
11. On his part, however, Counsel for the Claimant/Respondent urged the Court to determine the application so that the Auctioneers and the Claimant/Respondents could get their costs. Both parties have filed skeletal submissions pursuant to the Court's directions in that regard.
12. The decretal sum and interest thereon having been fully paid during the pendency of the Respondent/Applicant's application herein and after proclamation of the Respondent/Applicant's movable properties by an Auctioneer duly instructed by the decree holders to execute the Court's decree, issues that fall for determination, in my view, are:-
  - a. Whether execution proceedings taken out by the Claimant herein were regular.
  - b. Whether the Warrant of Attachment and Warrant of Sale issued by this Court's Deputy Registrar on 3<sup>rd</sup> October, 2024 should be re-called, proclamation of the Respondent/Applicant's movable properties lifted and execution stayed.
  - c. Whether the Respondent/Applicant is obligated to pay the Auctioneer's lawful fees.
  - d. Who pays costs of the application?
13. On the first issue, Section 13 of the *Employment and Labour Relations Court Act* provides as follows;

"A Judgment, award, order or decree of the Court shall be enforceable in accordance with the rules made under the *Civil Procedure Act*."
14. Order 21 Rule 8(2) of the Civil Procedure Rules provides as follows:-

"(2) Any Party to a suit in the High Court may prepare a draft decree and submit it for the approval of the other parties to the suit, who shall approve it with or without amendment, or reject it without undue delay; and if the draft is approved by the parties, it shall be submitted to the registrar who, if satisfied



that it is drawn up in accordance with the Judgment, shall sign and seal the decree accordingly.”

15. Reference to the High Court in the foregoing provision, in my view, refers to this Court as well, in view of Article 162(2)(a) of *the Constitution* of Kenya 2010.
16. The provisions of Order 21 Rule 8(2) of the Civil Procedure Rules 2010 are substantially replicated in Rule 72(4) of the Employment and Labour Relations Court (Procedure) Rules 2024, which provides as follows:-
  - “(4) Any party to a suit may prepare a draft decree and submit it for approval by the other party to the suit, who shall approve it with or without amendment, or reject it, within seven days of service and if the draft is approved by the other party, it shall be submitted to the Registrar who, if satisfied that it is drawn in accordance with the Judgment, shall sign and seal the decree accordingly.”
17. It is a decree signed as per the foregoing provisions of the law that the decree holder is required under Order 22 Rule 6 of the Civil Procedure Rules to apply to the Court that passed it for its execution. The said Rule provides as follows:-
  - “Where the holder of a decree desires to execute it, he shall apply to the Court that passed the decree, or, if the decree has been sent under the provisions herein before contained to another then to such court or to the proper officer thereof . . .”
18. I have perused the Court’s record herein and I have not seen any indication of a draft decree having been submitted by either party to the other for approval, with or without amendment. All that I have seen on record regarding the Court’s decree is the Claimant’s Advocates’ letters dated 3<sup>rd</sup> July, 2024 requesting the Court’s Deputy Registrar to issue them with a decree of the Court for their further action. I have also seen on record a signed and sealed decree issued on 9<sup>th</sup> September, 2024. There is on record an application for execution of the Court’s decree, and a warrant of attachment and a warrant of sale issued by the Court’s Deputy Registrar on 3<sup>rd</sup> October, 2024 as already stated elsewhere in this Ruling.
19. The Respondent/Applicant has faulted the execution taken out by the Claimants for failure to submit a draft decree to it for approval before taking out execution proceedings, and for taking out execution proceedings before taxation of party and party costs and/or agreement on those costs. The Respondent/Applicant relied on Section 94 of the *Civil Procedure Act* on the issue of non-taxation of awarded Party and Party Costs before execution of a Court’s decree. The said Section provides as follows:-
  - “Where the High Court considers it necessary that a decree passed in the exercise of its original civil jurisdiction should be executed before the amount of the costs incurred in the suit can be ascertained by taxation, the Court may order that the decree shall be executed forthwith, except as to so much thereof as relates to the costs; and as to so much thereof as relates to the costs that the decree may be executed as soon as the amount of the costs shall be ascertained by taxation.”
20. On their part, the Claimants have maintained that the legal provisions cited and relied on by the Respondent/Applicant are not couched in mandatory terms, that the same are worded in a permissive language as the word “may” is used.



21. It is to be noted that Order 22 Rule 6 of the Civil Procedure Rules is couched in mandatory terms. In my view, the permissive language used in Order 21 Rule 8(2) of the Civil Procedure Rules and Rule 72(4) of the Employment and Labour Relations Court (Procedure) Rules 2024 is in relation to the liberty given to any party to the suit to originate a draft decree. The word “may” as used in Section 94 of the *Civil Procedure Act* relates to the exercise of the Court’s discretion in allowing or disallowing execution of the Court’s decree before taxation.
22. Where there is a specific procedure provided by the law for doing something or for addressing a grievance, that procedure must be strictly complied with. In my view, substantive procedure does not amount to a procedural technicality. It was stated as follows in *Gacau Kariuki & Co. Advocates – vs – Allan Mbugua Ng’ang’a* [2012] eKLR:-
- “ . . . It has been said time and again that where a specific procedure is provided for addressing a grievance, that procedure should be strictly complied with.”
23. The requirement that a draft decree be subjected to scrutiny by all parties to a suit before it is finally submitted to the Court’s Registrar for final scrutiny before signing and sealing is neither a hollow requirement nor a procedural technicality. After all, a decree is a formal expression of the Court’s Judgment and all parties to the suit and the Court’s Registrar should be involved in its approval. A party who is not called upon to approve a draft decree, with or without amendment as by law provided, may lawfully and validly call to question the legal validity of any execution proceedings based on such decree when finally issued; and more so if he disputes any element thereof.
24. Likewise, the statutory requirement that execution of a Court’s decree before taxation of costs be authorised by the Court by Order cannot be wished away, and cannot be said to be a procedural technicality. It was stated as follows in *Mercedes Sanchez Rau Tussel – vs – Samken Ltd, Abercrobie & 2 Others* [2002] eKLR:-

“ Execution of a decree of the High Court before costs are ascertained is provided for under Section 94 of the *Civil Procedure Act* (Cap. 21). That Section provides that where the High Court considers it necessary that a decree passed in the exercise of its original civil jurisdiction should be executed before the amount of the costs incurred in the suit can be ascertained by taxation, the Court may order that the decree shall be executed forthwith, except as to so much thereof as relates to the costs; and as to so much thereof as relates to the costs that the decree may be executed as soon as the amount of the costs shall be ascertained by taxation.

The principle behind this section is not far to search. When awarded costs are not agreed, it often takes a considerable time before the costs are taxed by a taxing officer. In order not to permit a Judgment-debtor to hold up execution of a decree for a known sum or a sum to which there can be no sensible contest, Section 94 provides that the Court may permit the execution of a decree except as to so much thereof as relates to unsettled costs.

The need to have Section 94 is equally obvious. As it is well known from the definition in the *Civil Procedure Act*, a “decree” is a formal expression of the adjudication made by the Court with regard to the questions which arose for determination and so, when a Judge . . . passes a Judgment in favour of a party and awards costs to him, the decree being the formal expression of the Judgment must normally embody the whole of that Judgment. Accordingly, to proceed to execute an aspect only of that Judgment necessarily requires the



permission of the Court if the decree holder is afterwards going to pursue the remaining portion. That is why we have this provision with regard to costs.”

25. The Claimants have not demonstrated, or even alleged that they sought and obtained the Court’s leave to execute the Court’s decree before taxation and or ascertainment of the costs awarded to them by the Court in its Judgment, neither have they demonstrated that they formally waived their right to pursue taxation and recovery of the costs awarded to them. To that extend, the execution proceedings taken out by the Claimants cannot be said to have been legally valid and regular.
26. Although the Respondent/Applicant was, in my view, initially within its right to challenge the validity of the execution proceedings herein and to seek the orders sought in the application herein, it subsequently validated and regularised the said proceedings by paying the Judgment sum and interest thereon as stated in the decree and warrant of attachment to the Claimants on 16<sup>th</sup> October, 2024 during the pendency of its application. As rightly submitted by the Respondent/Applicant’s Counsel in Court on 5<sup>th</sup> December, 2024, the application is long spent; in view of the said payment. The Warrants of Attachment and Warrants of Sale issued on 3<sup>rd</sup> October, 2024 now serve no useful purpose, and can rightly be re-called and proclamation of the Respondent/Applicant’s movable properties lifted. This determines the second issue.
27. On the third issue, and based on validation by the Respondent/Applicant of otherwise irregular execution proceedings, I make a finding that the Respondent/Applicant is obligated to pay the Auctioneer’s lawful charges, to be agreed or taxed.
28. On the fourth issue, each party will bear its own costs of the application, in view of the circumstances of the matter.
29. In sum, and having considered written submissions filed on behalf of the parties herein, the Notice of Motion dated 4<sup>th</sup> October, 2024 is hereby determined in the following terms:-
  - a. The Warrant of Attachment and Warrant of Sale, both issued on 3<sup>rd</sup> October, 2024, are hereby re-called; and Proclamation of the Respondent/Applicant’s movable properties dated 4<sup>th</sup> October, 2024 is hereby lifted.
  - b. The Respondent/Applicant shall pay the Auctioneer’s lawful fees, to be agreed and paid within 30 days of this Ruling or taxed as by law provided.
  - c. Each party will bear its own costs of the application.
30. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19<sup>TH</sup> DAY OF SEPTEMBER 2025**

**AGNES KITIKU NZEI**

**JUDGE**

Order

This Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

**AGNES KITIKU NZEI**

**JUDGE**

Appearance:



Mr. Mutisya for the Claimants/Respondent

Miss Kavagi for the Respondent/Applicant

