



Vittone v SOS Children’s Villages International (Cause 295 of 2019) [2024] KEELRC 1103 (KLR) (9 May 2024) (Ruling)

Neutral citation: [2024] KEELRC 1103 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 295 OF 2019
NJ ABUODHA, J
MAY 9, 2024**

BETWEEN

LUISA VITONE CLAIMANT

AND

SOS CHILDREN’S VILLAGES INTERNATIONAL RESPONDENT

RULING

1. This ruling is in regard to two application one dated 10th November,2023 filed by the Respondent and the other dated 14th November,2023 filed by the Claimant.

Respondent’s Application dated 10th November,2023

2. The Respondent’s Application is seeking for the following orders:-

- a. Spent.
- b. Spent.
- c. This Honourable Court be pleased to declare that the Warrants of Attachment dated 2 November 2023, the Proclamation Notice by Compliance Auctioneers dated 6 November 2023 and the execution commenced by the Claimant pursuant to the said warrants and proclamation notice, are irregular, null and void.
- d. This Honourable Court be pleased to set aside and cancel the Warrants of Attachment drawn and extracted by the Claimant dated 2 November 2023 and the Proclamation Notice dated 6 November 2023 by Compliance Auctioneers.
- e. This Honourable Court be pleased to order that as result of the irregular attachment of the Respondent’s movable property pursuant to the Warrants of Attachment dated 2 November 2023 and the Proclamation Notice dated 6 November 2023, the Respondent is not under



any obligation to pay any auctioneer fees to Compliance Auctioneers as indicated in the Proclamation Notice dated 6 November 2023 as well as the court collection fees and further costs provided in the Warrants of Attachment dated 2 November 2023.

- f. This Honourable Court be pleased to order the Deputy Registrar to draw a decree in strict compliance with the terms of the judgement delivered by this court on 17 January 2023 by Hon. Lady Justice Monica Mbaru.
 - g. This Honourable Court be pleased to order that no interest was awarded in the judgement delivered on 17 January 2023 by Hon. Lady Justice Monica Mbaru.
 - h. The costs of this application and the unlawful execution commenced by the Claimant, to be borne by the Claimant or as the court deems fit.
3. The Respondent's application was supported by the Affidavit of Anushka Gopaul Cvi Representative of the Respondent's Eastern and Southern Africa branch herein who averred that on 17th January 2023, Hon. Lady Justice Monica Mbaru delivered her judgement in favour of the Claimant ordering that the termination was unlawful and awarded the Claimant Compensation at KES 4,640,000; Notice pay KES 1,160,000 and Costs of the suit.
 4. The Respondent averred that the Claimant commenced taxation proceedings pursuant to a Bill of Costs dated 6th March, 2023 (the Bill of Costs) to pursue the costs of the suit. That on 13th October, 2023, the Deputy Registrar of this Court rendered a ruling and taxed the Bill of Costs at KES 808,351.67/=. That the total compensation payable to the Claimant pursuant to the Judgment was Kes 6,608,351.67 being Kes 5,800,000/- (8 months' salary and 1 months' notice pay) as well as the Tabulated Costs, subject to the relevant statutory deductions and taxes.
 5. The Respondent further averred that Claimant's counsel sent a letter dated 24th October, 2023 (the Claimant's Letter) to them tabulating the amounts payable to the Claimant pursuant to the Judgment together with the sum of Kes 676,666/- as purported accrued interest from 17th January 2023 to 17th October 2023.
 6. The Respondent averred that this court never awarded any interest in the Judgment. That in addition, as at the time of the issuance of the Claimant's Letter, the Claimant had not served or extracted a decree. That consequently, they wrote to the Claimant through a letter dated 31st October, 2023 refuting the inclusion of the interest and requested the Claimant to rectify this error to enable them to settle the Judgment Sum, as provided in the Judgment.
 7. The Respondent averred that the Claimant rejected their objection through a letter dated 31st October 2023 and threatened to commence execution proceedings against the Respondent if they failed to settle the Judgment Sum and the purported interest.
 8. The Respondent further averred that on 1st November 2023, being the next day after the issuance of the Claimant's Response and without giving the them an opportunity to respond, the Claimant served them with an application for execution of a decree that was allegedly issued on 17th January 2023. That the Claimant never served the Respondent with a draft decree for approval or a final extracted decree, as required by the *Civil Procedure Rules* and the *Civil Procedure Act*.
 9. The Respondent further averred that no execution of any decree can take place without a duly drawn, approved and signed decree by the court.



10. The Respondent averred that on 6th November 2023, they were served with a Proclamation Notice from Compliance Auctioneers for purposes of attachment of the Respondent's assets based on warrants of attachment that were allegedly issued by this court on 2nd November 2023.
11. The Respondent averred that the Proclamation Notice provided that unless the Respondent paid the sum of Kes 6,610,801.67 together with auctioneers' fees of Kes 780,000/- within 7 days from the date of the said notice, the Respondent's goods that were listed in the Proclamation Notice would be auctioned.
12. The Respondent further averred that they wrote a complaint to the Principal Judge of this court through a letter dated 6th November, 2023 to inquire about the circumstances that led to the irregular issuance of the Warrants of Attachment in the absence of a signed and approved decree.
13. The Respondent averred they never refused to settle the Judgment Sum. They only requested the Claimant to remove the accrued interest it included in the Claimant's Letter since it was not awarded by the court and went ahead to pay the Claimant the judgment sum on 8th November 2023. That the Claimant's dues stemming from the Judgment have already been settled.
14. The Respondent averred that on 9th November 2023, they wrote to the Claimant confirming settlement of the Judgment Sum and requesting a confirmation from the Claimant that she will proceed to instruct the Auctioneer to withdraw the illegal Proclamation Notice in light of the settlement of the Judgement sum. That they are yet to receive a response on this letter from the Claimant.
15. The Respondent averred that due to the failure to extract and serve a decree, the Claimant had no basis to instruct the Auctioneer to proclaim the Respondent's goods. That in addition, the Warrants of Attachment were irregularly and unprocedurally procured as no decree was extracted, approved, and signed by the court as required by law, prior to the commencement of the execution process.
16. The Respondent averred that they would suffer substantial loss as its goods will be sold by auction despite having settled the Judgment Sum if stay orders are not issued. That further their goods would be sold on the basis of their alleged failure to pay the Auctioneer's fees of Kes 789,000/- and court collection fees and further costs of Kes 2,450/-, even though the Warrants of Attachment were premature and irregularly acquired as they were not based on any decree. That the Claimant has no basis for seeking the court collection fees, further costs and the Auctioneer's fees.
17. In reply the Claimant filed her reply sworn on 8th Decembewr,2023 and opposed the Respondent's Application.
18. The Claimant averred that she got a judgment against the Respondent as illustrated above and the Respondent neglected and refused to pay hence she instructed her advocates to start the execution process.
19. The Claimant averred that the proclamation process began on 6th November,2023 when Compliance Auctioneers attached the Respondent's property. That she got aware of the Respondent's complain to the Presiding Judge as she waited for the process to be finalized where her advocates responded to the complaint on 14th November,2023.
20. The Claimant averred that the prayer by the Respondent to cancel the warrants and proclamation notice has no basis in law and the same is made maliciously. That the issue of interest was not factored in in the said warrants.



21. The Claimant further averred that the court awarded her costs of the suit and the same were payable by the Respondent.
22. The Claimant in response to the Respondent's supporting affidavit averred that the judgment sum accrued interest from Judgment date to the time of settlement. That the execution was lawful and procedural after the Respondent refused to settle the decretal sum. That they were served with execution application which they never commented hence the warrants being issued.
23. The Claimant further averred that the protest by the Respondent to the presiding judge was made to taint her image and that of her advocates and as a tactic to avoid satisfying the court's decree.
24. The Claimant averred that the Respondent's goods were proclaimed but never attached and the Respondent should pay the Auctioneers and her costs.
25. The Claimant urged the court to dismiss the Respondent's application to enable her finalize the execution process.
26. The Respondent filed a supplementary affidavit where it averred that the warrants of attachment of 2nd November,2023 were subsequently recalled for cancellation by the Deputy Registrar after their complaint on their irregularities. That the Deputy registrar noted that the same were improperly issued and not endorsed by the court.
27. The Respondent averred that the Deputy Registrar noted that the Claimant was never awarded costs hence why the Claimant rushed to court on 14th November,2023 seeking review to have interest included on the decretal sum.
28. The Respondent averred that it has never refused to settle the decretal sum since it has already paid the said sum to the Claimant save for the amounts in question as interest. That it should not be compelled to pay costs for an unlawful process undertaken by the Claimant as execution.

Claimant's Application dated 14th November,2023

29. The Claimant on the other hand filed her application dated 14th November,2023 seeking for orders of review of Judgment delivered on 17th January,2023 and to vary it by awarding the Claimant interest on decretal sum from 17th January,2023 to 9th November,2023.
30. The Application was supported by the affidavit of Luisa Vittone the Claimant herein who averred that the court inadvertently and by error omitted to award interest to the successful litigant.
31. The Claimant averred that she was the successful litigant herein hence entitled to the interest on the decretal sum since she had prayed for the same in her claim but the court did not expressly award her the same.
32. The Claimant averred that the Respondent refused to pay the said interest claiming that the court did not award her interest. That the Respondent wants to bar the Claimant from interest which she is legally entitled and also a legal expectation.
33. The Claimant prayed that her application be allowed as prayed by the court reviewing its judgment to award her interest on decretal sum.
34. The Respondent in reply by a replying Affidavit sworn on 24th January,2024 averred that after their complaint to the Presiding Judge on 6th November,2023 the Deputy registrar through a letter dated 9th November 2023 acknowledged that no interest was awarded. That they confirmed that the Warrants



- of Attachment were issued inadvertently and irregularly as neither had a decree been extracted and subsequently issued by the Court nor was interest awarded by the Court.
35. The Respondent further averred that the Deputy Registrar directed the Claimant to return the Warrants of Attachment for their cancellation.
 36. The Respondent averred that it is on this basis and upon receipt of the Deputy Registrar's Letter that the Claimant in a bid to sanitise their actions, proceeded to file the Application seeking this court's discretion to review the Judgement and include an award for interest.
 37. The Respondent averred that the Court is not duty bound to award interest, as stated by the Claimant in the Application, as it is upon the Court's discretion to award interest to a party. That failure to award interest to a party does not constitute an error on the face of the record that would warrant this Court to review its judgement within the provisions of Section 16 of the *Employment and Labour Relations Court Act*, 2011 and Rule 33 of the *Employment and Labour Relations Court (Procedure) Rules*, 2016.
 38. The Respondent further averred that the grounds on the face of the Application are grounds of appeal and not review.
 39. The Respondent averred that the Application has been filed ten (10) months after the Judgement was delivered. That the Claimant did not explain this inordinate delay in filing the Application.
 40. The Respondent averred that they did not deny the Claimant what is due to them in accordance with the Judgement. The Respondent, in an effort to give the Claimant what is due to them, promptly settled the Judgement Sum as directed.
 41. The Respondent prayed that this application be dismissed with costs.
 42. The two Applications were disposed of by written submissions.

Determination

43. I have perused the two applications and what is not in dispute as at the time of writing this ruling is that the Respondent paid the Claimant the decretal sum less the amount in dispute which is the accrued interest from 17th January, 2023 to 9th November, 2023.
44. I also note that most issues in the Respondent's application are now overtaken by events save for the issues of whether the warrants of Attachment were procedurally acquired and if the Respondent is bound to pay the Auctioneers fees.
45. On the issue of the legality of the Warrants of attachment I am guided by section 13 of the *Employment and Labour Relations Act* which provides as follows:

“ A judgment, award, order of decree of the Court shall be enforceable in accordance with the rules made under the *Civil Procedure Act*.”
46. In addition, Rules 31 and 32 of the *Employment and Labour Relations Rules*, 2016 provide for Decrees and Execution and Warrants. Most specifically Rule 31 of *Employment and Labour Relations Rules*, 2016 states the decree shall be drawn in accordance with the decision of the Court. Order 21 rule 7 of the *Civil Procedure Rules* goes in tandem with this rule on a decree agreeing with the judgment.
47. Further Order 21 rule 8 of the *Civil Procedure Rules* further provides for the preparation of decrees. Order 21 rule 8(2) of the *Civil Procedure Rules* specifically provides for the process of preparation and approval of a draft decree by parties to the suit which includes seeking comments and/or approval by



the other parties. In case of disagreement by parties, Order 21 rule 8(4) of the Civil Procedure Rules provides that the matter shall be placed before the judge.

48. The irregularity of the warrants of attachment were confirmed by the Deputy Registrar *vide* the letter dated 9th November,2023 who noted that the Warrants of attachment dated 2nd November 2023 were inadvertently issued by the Deputy Registrar before extraction of the decree..... By a copy of this letter the Claimant is directed to return the signed Warrants of Attachment for cancellation and regularizing the anomaly.”
49. I have perused the said warrants of attachment and I note that they did not include the accrued interests as claimed by the Respondent. The Amounts in the disputed warrants are now settled. The Deputy registrar was therefore mistaken ordering the warrants to be corrected to remove interests which were never included in the first place.
50. In the circumstances I find that the said warrants of attachment were issued irregularly and unprocedurally and should be set aside to the extent only of there being no decree in place.
51. On the issue of costs of the Auctioneers having found that the process was illegal and unprocedural I proceed to find that the Respondent is not liable to pay for such a flawed process.
52. On the Claimant’s application for review of the Judgment of the court to award her interest from 17th January to 9th November,2023 I proceed as follows.
53. Section 16 of the Labour Relations Act, 2011 is the guiding law on review of the Employment and Labour Relations court Judgments. It provides as follows;

The Court shall have power to review its judgements, awards, orders or decrees in accordance with the Rules.

54. Further Rule 33 of the Employment and Labour Relations Court (Procedure) Rules, 2016 provides for review as follows:-
 - (1) A person who is aggrieved by a decree or an order from which an appeal is allowed but from which no appeal is preferred or from which no appeal is allowed, may within reasonable time, apply for a review of the judgment or ruling—
 - (a) if there is discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made;
 - (b) on account of some mistake or error apparent on the face of the record;
 - (c) if the judgment or ruling requires clarification; or
 - (d) for any other sufficient reason.
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 - (b) on account of some mistake or error apparent on the face of the record;
 - (c) if the judgment or ruling requires clarification; or
 - (d) for any other sufficient reason.



55. When it comes to the grounds of review the Claimant rely on mistake or error on face of record when the court did not award her interest.

56. In *Zablon Mokuva v Solomon M. Choti & 3 others* [2016] eKLR while relying on Court of Appeal decisions held that: - The Court of Appeal had the following to say in an application for review in the case of *National Bank of Kenya Ltd v Ndungu Njau*.

“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.

58. The court is tasked to discern if the failure by the court to award the Claimant interest forms a ground of review as an error or mistake or if it is within the discretion of the court to award the same or not. Is this discretion then subject to review?

59. This court before venturing in this issue notes that parties are bound by their pleadings and proceeds to peruse the Claimant’s claim herein to see if the said interest was pleaded. Upon perusal of the said claim I note that last prayer of the claim is ‘costs of the suit with interests thereon’.

60. I note that this prayer is not clear if it was on costs or all prayers sought.

61. It is the common ground that an award of interest by court is discretionary. In *Kenya Planters Co-operative Union Limited v Interchem Co. Limited & 6 others* (Civil Appeal 341 of 2018) [2024] KECA 178 (KLR) (23 February 2024) (Judgment) the court of Appeal held as follows:—

In doing so, we start from the common ground by the parties that the award of interest remains at the discretion of the court.

62. The court went on to clarify this issue as follows:-

Section 26 of the *Civil Procedure Act* is the guiding principle in respect of interest and it provides:

- (1) Where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit.
- (2) Where such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the court shall be deemed to have ordered interest at 6 per cent per annum.”



- 21 Manifestly, the trial judge construed section 26(2) of the *Civil Procedure Act*, disjunctively from section 26(1). In this regard, we agree with the trial court that section 26(2) applies where no other interest is specified.
63. From the above holding it is clear that even though the court has discretion to award interest or not the same court is guided by the law in such that where the court does not mention the issue of interest Rule 26(2) as seen above applies. That it goes without saying that interest will be at the court rates from the date of Judgment to payment in full.
64. I note that most courts go silent on this issue but as a practice most parties apply interest at court rates until full payment of the decretal sum. This is an issue the court can correct itself without going for rigorous process of an appeal.
65. On the issue of the Claimant coming to court without unreasonable delay I find that from the correspondence's parties were disputing this issue and the Claimant did not unreasonably delay in seeking this prayer since it is not deemed as of right where a court goes mute.
66. In the circumstances both applications partially succeed as follows: -
- a. The Warrants of attachment dated 2nd November, 2023 are set aside.
 - b. The Deputy registrar herein is ordered to prepare a decree and include accrued interest on the decretal sum from 17th January, 2023 to 9th November, 2023 at the court rates.
 - c. The Claimant shall cater for the costs of the Auctioneers for the process was flawed.
 - d. Each party shall bear their own costs for these Applications.
67. It is so ordered.

DATED THIS 9TH DAY OF MAY, 2024 DELIVERED THIS 9TH DAY OF MAY, 2024

ABUODHA NELSON JORUM

JUDGE

