

**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MACHAKOS**

**ELRC MISC E012 OF 2025**

**DOUGLAS MAUTI ONYANGO.....APPLICANT/ RESPONDENT**

**VERSUS**

**ENDMOR STEEL MILLERS LIMITED.....RESPONDENT/APPLICANT**

**CORAM**

***Before Lady Justice J.W.Keli***

***C/A Otieno***

**RULING**

1. The application by the respondent by way of Notice of motion dated 8<sup>th</sup> July 2025 was brought Under Order 10 rule 11, Order 50 rule 6, Order 51 rule 1 of the Civil Procedure Rules, 2010; Sections 1A, 18 and 3A of the Civil Procedure Act, CAP 21; and Articles 159 (2) (a), (b), (c) & 5 (e); 27; 50 (1), 48, 47 and 25 (c) of the Constitution of Kenya, 2010) and sought for the following orders-
  - a. spent
  - b. spent

- c. THAT this Honorable Court be pleased to set aside the ex parte proceedings and ruling /judgment/order/decree.
- d. THAT this Honourable Court be pleased to struck out the principal application herein and quash all the proceedings herein.
- e. THAT this Honourable Court be pleased to call to court and quash the Warrants of Attachment of moveable properties issued to M/s. Betabase Auctioneers herein.
- f. THAT the costs of this Application be provided for.

**Grounds of the application**

2. THAT this matter proceeded ex parte and the Applicant/ Respondent obtained an ex parte ruling/order dated 25 April 2025.
3. THAT the Applicant/Respondent has consequently obtained warrants of attachment of moveable properties and in fact, through his agent, M/S. BETABASE AUCTIONEERS. proclaimed the Respondent/Applicant's properties, including its tools of trade, in execution of the ex parte judgment to the detriment of the Respondent/Applicant, who were condemned unheard.
4. THAT the Applicant's/Respondent's agents, M/S BETABASE AUCTIONEERS, herein proclaimed the applicant's goods on the 2nd July, 2025 in readiness for attachment in execution of ex parte judgment.

5. THAT the Applicant/Respondent through their duly authorized auctioneers may now proceed to attach and dispose of the Respondent/Applicant's property through auction to the detriment of the Respondent/Applicant.
6. THAT the Applicant/Respondent herein had previously filed MAVOKO MISC CAUSE 016 OF 2025 Douglas Mauti Onyango vs Sanlam Insurance Company And Endmor Steel Millers LIMITED seeking to enforce the same assessment by the Director.
7. THAT the claim was compromised vide a consent and the consent sum paid in full.
8. THAT the aforesaid assessment by the Director at Kshs. 291,571/=, which is the subject matter of this suit, was settled in full including costs of the application at Kshs. 85,000/= in the aforesaid duplicate suit; long before an ex parte ruling/order was obtained herein.
9. THAT consequently, the instant claim is res judicata and an abuse of the court process as the Applicant/Respondent seeks to unjustly recover the same sum twice.
10. THAT despite full and final settlement of the Director's assessment, the Applicant/Respondent herein continued to prosecute the instant claim whereas fully aware that the claim had been settled in full and there was no subsisting cause of action.
11. THÂT the Applicant/Respondent herein instructed auctioneers to levy execution while fully aware that he had been paid the sum in full.

12. THAT the Applicant/Respondent's attempt to levy execution after payment of the claimed amount is an attempt to unjustly enrich himself and an outright abuse of the court process.
13. THAT as a matter of law and public policy, a party cannot derive a benefit from his illegal account.
14. THAT neither the Applicant/Respondent nor his agents being the auctioneers ought to benefit from these illegal acts through payment of thrown away costs or auctioneers fees.
15. THAT consequently, the proceedings herein ought to be struck out unconditionally.
16. THAT similarly, the Warrants of Attachment of moveable properties ought to be quashed and vacated unconditionally.
17. THAT the proceedings herein were null and void ab initio and consequently no auctioneers' fees can justifiably be charged on the basis of these proceedings.
18. THAT it would amount to grave injustice to condemn the Respondent/Applicant to bear thrown away costs or auctioneers' fees on account of illegal proceedings that were null and void ab initio.
19. THAT the Respondent/Applicant having settled the decretal sum in full has a formidable defense to the instant claim.
20. THAT this Honourable Court has unfettered powers to grant the orders craved in the Application both at the ex parte stage and inter partes stage.

21. The application was supported by the affidavit of MERCY KAIMA an advocate and legal manager of Sanlam General Insurance Limited the insurer of the respondent and produced copy of the application before the lower court by the respondent in Mavoko Misc Cause 016 of 2025 Douglas Mauti Onyango v Endmor Steel Millers Limited , a copy of the consent order which compromised the application, copy of the remittance of the assessed amount by DOSH of Kshs. 291, 571 and costs of Kshs. 85,000 in the lower court way before the exparte ruling setting aside the suit was issued.

**Response**

22. The respondent swore an affidavit dated 18<sup>th</sup> September 2025 as follows-

- a) THAT my advocates on record have shown to me the applicant's application dated 8th July 2025 and wish to oppose the application as follows:-
- b) THAT the alleged sum of Ksh 291,571.00 as assessed by the director and also the alleged agreed costs of Ksh 85,000.00 was not paid to me or to my authorized advocate or an agent.
- c) THAT I instructed the firm of M/s Onesmus Masua & Company Advocates on 9th August 2024 to institute a case for adoption of the award by directorate of occupational health and safety services hereinafter referred to as DOSH award dated 9th August 2024 upon expiry of 90 days in default of settlement.(See a copy

of instructions Note dated 9th August 2024 Marked "DMO 2") THAT upon expiry of 90 days, my Advocates M/s Onesmus Masua & Company Advocates filed a miscellaneous application in Machakos ELRC No. E012 of 2025 Douglas Mauti Onyango Vs- Endmor Steel Millers Limited.(See a copy of Misc. application dated 8th January 2025 Marked "DMO 3").

- d) THAT upon service of the said miscellaneous application upon Endmor Steel Millers Limited on 11/02/2025, my advocates received an email from the respondents' insurance (Sanlam) indicating that the matter had already been concluded out of court. The insurance declined to issue further details regarding the said contents of the email and as such I was not sure whether the decretal sum had been paid or not. (See a copy of email dated 19th February 2025 Marked "DMO 4")
- e) THAT thereafter, my advocates retrieved the respective pleadings from CTS and I was extremely surprised to find that a law firm in Eldoret in the name of M/s Mwakio Kirwa & Company Advocates (Mavoko Misc. Application No. E016 of 2025) had filed a case purportedly on my behalf without my Knowledge. (See a copy of Notice of Motion application dated 28th November 2024 Marked "DMO 5")
- f) THAT I have never instructed the firm of M/s Mwakio Kirwa & Company Advocates to act on my behalf and hence the said matter (Mavoko Misc. App no. E016 of 2025) was founded on misrepresentations and fraud.
- g) THAT my advocates on record M/s Onesmus Masua & Company Advocates have shown to me the Supporting Affidavit allegedly sworn by me on 28th November

2024 in Eldoret. (See a copy of supporting Affidavit allegedly sworn on 28th November 2024 Marked "DMO 6").

- h) THAT the signature appended in the said Supporting Affidavit is a forgery. It is completely different from my usual signature. THAT Advocate MUHIA MEG WAMBUI-P.105/13510/17 dishonourably lied that I signed the said Supporting Affidavit before him or her on 28th November 2024. I have never been in Eldoret and the said Advocate is not known to me.
- i) THAT it is unconscionable that advocates of the high court (KIRWA JONAH KIPKEMEI P.105/8588/11 and MUHIA MEG WAMBUI- P.105/13510/17) can act in such a dishonorable manner.
- j) THAT on 26th February 2025, my advocates on record filed an application dated 24th February 2025 under certificate of urgency seeking the order issued by Honourable court on 13th February 2025 allowing Mwakio Kirwas' application for adoption of DOSH award to be vacated and or set aside.(See a copy of Notice of Motion application dated 24th February 2025 Marked "DMO 7")
- k) THAT on 30th June 2025, the court allowed our application in terms of prayer 2 of the said application dated 24th February 2025 in that the order issued by Honourable court on 13th February 2025 were vacated and or set aside.(See a copy of the handwritten ruling allowing prayer 2 Marked "DMO 8").
- l) THAT based on the above ruling, my advocates on record M/s Onesmus Masua & Company Advocates handled my case (Machakos ELRC Misc. No. E012 of 2025) to its conclusion.(See a copy of Decree Marked "DMO 9").

- m) THAT the applicants application dated 8th July 2025 before the court is requesting stay on grounds that the subject assessment by the director was settled in full. THAT I wish to state that M/s Mwakio Kirwa & Company Advocates recorded a Consent without my knowledge and obviously with an intent to defraud my money as follows; - Decretal amount Ksh 291,571.00 and . Cost of the Suit Ksh 85,000.00 TOTAL Ksh 376,571.00(See a copy of the Consent in Marked "DMO 10"). The agreed amount as per the Consent in the sum of Ksh 376,571.00 was allegedly fully paid to Mwakio Kirwa & Company Advocates fraudelently and without my instructions.(See a copy of Bank Transaction Marked "DMO 11").
- n) THAT the said advocate (KIRWA JONAH KIPKEMEI- P.105/8588/11 trading as Mwakio Kirwa & Company Advocates) was paid my money without my instructions and without my knowledge and since then he has not found it fit to contact me.
- o) THAT based on the above, the applicant herein allegedly paid the said amount without following due diligence and without my knowledge and instructions.
- p) THAT the applicants application is in bad faith as it only seeks to obstruct and or delay the course of Justice.
- q) THAT I am advised by my advocates on record that in the case of Shar v Mbogo (Supra), it was held that, a court should not assist a party who had "deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice"

- r) THAT I am further advised by my advocates on record that the court of Appeal in *Pithon Waweru Maina v Thuka Mugiria* held that "there are no limits or restrictions on the judge discretion except that if he does vary judgment he does so on such terms as may be just".
- s) THAT I am advised by my advocates that the second principle was laid down in the case of *Shabir Din V Ram Parkash Anand (1955) 22 EACA* where the court held that the discretion is intended so as to be exercised to avoid injustice or hardship regulating from inadvertence or excusable mistake or error but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the course of justice.

### **DECISION**

23. The origin of this case is the award by DOSH DATED 9<sup>th</sup> August 2024, where the respondent was awarded Kshs 291571/- for a work injury claim. Pursuant to the Order, an application was filed in the Chief Magistrate Court, ELRC, MISC APPLICATION NO. E016 OF 2024 in the name of the respondent against the appellant employer and DOSH instituted by the law firm of Mwakio Kirwa & Company advocates. By consent, a Decree dated 7<sup>th</sup> February 2025 was issued in favour of the respondent for payment of the award for 291571 and costs of the suit for the sum of Kshs. 85000. The consent was signed by Ivy Jepkemboi, Advocate for M/s Mwakio Kirwa & Co. advocates, and Raymond Odhiambo for Sanlam General Insurance for the applicant. Evidence of payment remittance was annexed by the applicant as **EXN4**. The consent order was adopted vide application dated 28<sup>th</sup> November 2024(**DMO5** by the respondent).The respondent filed an application dated 24<sup>th</sup> February 2025 and sought to grant Ms/ Onesmus Masua & Company advocates leave to come on record for the respondent,

and sought an order adopting the settlement consent of 13th February 2025 to be set aside. Among the grounds of the application before the lower court to set aside the consent order, the respondent denied having instructed the law firm of Mwakio Kirwa & Company advocates and stated that the supporting affidavit was a forgery. The trial court allowed the application vide a short ruling on basis it was unopposed on the 26<sup>th</sup> June 2025. The applicant filed the instant application, and among others, it was disclosed that the said consent judgment had been settled. The court noted in the application before the lower court where the Consent order was set aside the respondent indicated he was to pursue Mwakio Kirwa & Company advocates his erstwhile advocates with Law Society of Kenya and before the police. It was not in dispute that the applicant had already settled the claim.

24. The court finds that the setting aside of the consent Order before the lower court had been overtaken by events the claim having been settled. The instant execution proceedings would amount to double recovery, by condemning the applicant to settle the said award again, while the respondent knows the money was paid to an advocate acting on his behalf. The said Advocate Mwakio Kirwa is an officer of the court. The advocates are regulated by the Law Society of Kenya. The respondent has a remedy to pursue the release of funds from Mwakio Kirwa & Company Advocates. The applicant is an innocent party, and must be set free having met its obligations to the respondent under WIBA. The applicant is guilty of abuse of court process as he knows the respondent paid money pursuant to a court order, yet filed the instant case afresh without disclosure of the previous proceedings before the lower court of the Consent Order, the payment to Mwakio Kirwa & Company Advocates, and the ruling setting

aside the Order. The said application was tainted by material non-disclosure. The alleged fraud by his erstwhile advocates raised in response has not been substantiated. The respondent's supporting affidavit to the application filed by his erstwhile advocates was before the lower court when the consent order was adopted, hence it cannot be said the applicant was not diligent. There is no evidence before the court that the said signature was not the respondent's.

25. For the foregoing reasons, I find the instant application merited. The application is allowed. The application dated 8<sup>th</sup> January 2025 is held to be an abuse of court process, an act of double recovery and tainted with material non-disclosure, as the setting aside ruling by the trial magistrate was made when the Respondent was aware, as discerned from his affidavit in the application to set aside the ruling, of settlement of the consent judgment. In most common law jurisdictions like Kenya, the law follows the "One Satisfaction" rule. This means that once a plaintiff has been fully compensated for their loss through a judgment or settlement, their claim is "satisfied," and they cannot collect that same amount again from the same or another party through a subsequent judgment/Order. The applicant satisfied the claim by remittance of the DOSH award money plus costs and cannot be ordered to pay again as that would amount to double recovery. The respondent ought to have pursued his legitimate claim from the law firm of M/s Mwakio Kirwa & Company advocates, the advocates that represented him before the lower court, and who received payment on his behalf. In the upshot, the application is allowed as follows-

- a. THÁT this Honorable Court is pleased to set aside the ex parte proceedings and ruling /judgment/order/decree of the court dated 25<sup>th</sup> April 2025.

- b. THAT this Honourable Court is pleased to strike out the principal application herein dated 8<sup>th</sup> January 2025 and quash all the proceedings and Orders/Decree herein.
- c. THÂT this Honourable Court is pleased to call to court and quash the Warrants of Attachment of movable properties issued to M/s. Betabase Auctioneers herein.
- d. Costs to the applicant.

**DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 17<sup>TH</sup> DAY OF DECEMBER, 2025.**

**J.W. KELI,**

**JUDGE.**

**IN THE PRESENCE OF:**

Court Assistant: Otieno

Appellant – absent

Respondents – absent