



Kenya Medical Practitioners, & Dentists’ (KMPDU) v Moi University & another; Cabinet Secretary, Ministry of Labour & Social Protection (Interested Party); National Bank of Kenya (Garnishee) (Petition E191 of 2021) [2025] KEELRC 23 (KLR) (16 January 2025) (Ruling)

Neutral citation: [2025] KEELRC 23 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E191 OF 2021
HS WASILWA, J
JANUARY 16, 2025**

BETWEEN

**KENYA MEDICAL PRACTITIONERS, &
DENTISTS’ (KMPDU) PETITIONER**

AND

MOI UNIVERSITY 1ST RESPONDENT

CABINET SECRETARY, MINISTRY OF HEALTH 2ND RESPONDENT

AND

**CABINET SECRETARY, MINISTRY OF LABOUR & SOCIAL
PROTECTION INTERESTED PARTY**

AND

NATIONAL BANK OF KENYA GARNISHEE

RULING

1. The application before this Court is an application dated 8th November 2024, brought by the Applicant, through their Advocate, Henry Kurauka, seeking various orders against the Respondents, including Garnishee Orders Nisi and Absolute to recover a sum of Kshs. 53,550,000 from Account No. xxxxxxx held at National Bank of Kenya, Eldoret Branch, belonging to Moi University. The Applicant contends that this Court has the jurisdiction to grant the orders sought under Order 23 of the Civil Procedure Rules, Sections 1A, 1B, 3, and 3A of the *Civil Procedure Act*, Order 51 of the Civil Procedure Rules, and all other enabling provisions of the law.



2. The urgency of the application is predicated on the need to safeguard the rule of law and prevent irreparable harm to the members of the Petitioner, occasioned by the Respondents' non-compliance with court orders.
3. The application arises from a Return to Work Formula dated 11th February 2022, which was duly signed, filed, and approved by Hon. Lady Justice Ngibuini Mwaure on 26th July 2024. In the same Ruling, the Court granted the Applicant leave to proceed with execution if the Respondents failed to settle the decretal sum within 60 days from the date of the order. The Respondents, despite being served with the Ruling on 22nd August 2024, have failed to comply, prompted the Applicant to seek enforcement through Garnishee orders. The Applicant asserts that the sum of Kshs. 53,550,000 remains outstanding as per the tabulation provided by Dr. Kamonzi Mulei, the Petitioner's Branch Secretary, North Rift, and the letter dated 4th September 2024.
4. The Applicant further submits that the Respondents' failure to comply with the Court's orders constitutes contempt of court, which is apparent on record. This failure undermines the dignity of the Court and the rule of law, warranting judicial intervention. The application emphasizes that compliance with court orders is a constitutional obligation, pursuant to Articles 10, 159, and 259 of the Constitution of Kenya, which enshrine the principles of the rule of law, justice, and good governance.
5. The Applicant argues that unless the application is determined urgently and the Garnishee orders granted, the members of the Petitioner and the public will suffer substantial loss and damage. The orders sought are necessary to uphold the integrity of the Court and to prevent impunity and abuse of power by the Respondents. The Applicant prays for the intervention of the Court to enforce the orders and ensure compliance in the interest of justice.
6. The application is supported by an affidavit dated 8th November 2024, sworn by Henry Kurauka, an Advocate of the High Court of Kenya, acting on behalf of the Applicant/Petitioner. The affiant avers that the deponent is duly authorized by Dr. Kamonzi Mulei, the Petitioner's Branch Secretary, North Rift, to swear the affidavit in this matter. The affidavit highlights that a Return to Work Formula dated 11th February 2022 was signed, filed, and approved by Hon. Lady Justice Ngibuini Mwaure on 26th July 2024. In the same ruling, the Court granted leave for execution should the Respondents fail to settle the decretal sum within 60 days from the date of the order. Despite service of the ruling and court orders on 22nd August 2024, the Respondents have failed to comply.
7. The affidavit asserts that the Judgment Debtor, Moi University, owes Kshs. 53,550,000 as confirmed by a letter and tabulation dated 4th September 2024 from Dr. Kamonzi Mulei. The deponent contends that the Respondents' failure to comply with the court orders constitutes contempt of court and undermines the rule of law and judicial authority. Reference is made to Articles 10, 159, and 259 of the Constitution of Kenya, which obligate all parties to uphold the principles of justice and good governance. The affidavit argues that the dignity of the Court and the administration of justice are at stake, necessitating immediate intervention.
8. The urgency of the application is emphasized, with the deponent asserting that the failure to grant the Garnishee orders will result in irreparable harm to the members of the Petitioner and the public. The Court is urged to exercise its jurisdiction under Order 23 and Order 51 of the Civil Procedure Rules, Sections 1A, 1B, 3, and 3A of the Civil Procedure Act, and all other enabling provisions of the law to issue the orders sought. The affiant annexes supporting documents marked as HK 1, which include the Court Order issued on 7th August 2024, the Ruling delivered on 26th July 2024, the Affidavit of Service sworn on 26th September 2024, and the tabulation of the outstanding amount. The deponent



concludes by affirming that the contents of the affidavit are true to the best of his knowledge, belief, and disclosed sources of information.

Petitioner/Applicant's Written Submissions

9. The Petitioner, in their written submissions dated 8th November 2024, contends that the Respondent has failed to comply with lawful court orders issued by Hon. Lady Justice Ngibuini Mwaure on 26th July 2024, granting the Applicant leave to proceed with execution if the decretal sum was not settled within 60 days. Despite service of the ruling and subsequent follow-ups, the Respondent has not paid the sum of Kshs. 53,550,000 as stipulated in the tabulation provided by the Petitioner's Branch Secretary, North Rift, Dr. Kamonzi Mulei. This failure to comply, the Petitioner argues, is contemptuous and undermines the authority and dignity of the court.
10. The Petitioner invokes Article 159 of *the Constitution* of Kenya, emphasizing that judicial authority is derived from the people and must promote the principles of justice, while Articles 47 and 50 guarantee the right to fair administrative action and a fair hearing. Article 10 binds all persons to the national values and principles of governance, including adherence to the rule of law and accountability. The Petitioner submits that the Respondent's actions contravene these constitutional provisions by demonstrating impunity and disregard for lawful orders.
11. Relying on Order 23 of the Civil Procedure Rules and Sections 1A, 3, and 3A of the *Civil Procedure Act*, the Petitioner seeks garnishee orders to attach funds in Account No. 01020062992200 at the National Bank of Kenya, Eldoret Branch, belonging to Moi University, to satisfy the judgment debt. The Petitioner cites *Nyandoro & Company Advocates v National Water Conservation & Pipeline Corporation* [2021] eKLR, where it was held that a successful litigant is entitled to the fruits of their judgment, and garnishee orders provide a clear remedy.
12. The Petitioner further relies on several authorities, including *Teachers Service Commission v Kenya National Union of Teachers & 2 others* (2013) eKLR and *Econet Wireless Ltd v Minister for Information & Communication of Kenya* (2005) eKLR, which underscore the court's power to ensure compliance with its orders and punish contempt to uphold the rule of law. Additionally, reference is made to *Mukisa Biscuits Manufacturing Co. Limited v West End Distributors Limited* (1966) EA 696, asserting that the Respondent's preliminary objection lacks merit as it does not raise pure points of law and should therefore be dismissed with costs.
13. The Petitioner submits that the Respondent's conduct is inconsistent with Articles 3(1), 50(1), 75, and 232 of *the Constitution*, which collectively obligate public officers to uphold integrity, fairness, and efficiency in discharging their duties. By failing to honour the court's decree, the Respondent has breached its constitutional responsibilities, causing prejudice to the Applicant and undermining public confidence in the judiciary.
14. In conclusion, the Petitioner urges the court to allow the Application dated 8th November 2024 and order the immediate release of the attached funds to the Petitioner. They also pray for the dismissal of the Respondent's preliminary objection dated 25th November 2024, with costs awarded to the Applicant, in the interest of justice and to safeguard the rule of law.

1st Respondent's Case

15. The 1st Respondent filed a Notice of Preliminary Objection dated 25th November 2024, contending that the Honourable Court lacks jurisdiction to hear and grant the orders sought under Order 23 of the Civil Procedure Rules, 2010, as the claims raised in the petition are indeterminate and highly contested. The 1st Respondent argues that the Notice of Motion dated 8th November 2024 constitutes



- an abuse of the court process and represents an attempt at unjust enrichment, warranting striking out or dismissal with costs to the 1st Respondent.
16. They further submit that it is in alignment with the overriding objectives of Article 159(2) of *the Constitution* of Kenya, 2010, and the corresponding Rules to ensure the timely disposal of proceedings, that the Notice of Motion be struck out as an abuse of process. The 1st Respondent urges the Court to uphold these objections in limine.
 17. The 1st Respondent further filed Grounds of Opposition to the Notice of Motion dated 8th November 2024, asserting that the Court lacks jurisdiction to hear and determine the application under the cited legal provisions. The Respondent contended that the application is incurably defective, relying on an affidavit sworn by an advocate on contested factual matters that require evidence for determination. It was argued that the two doctors and three pharmaceutical technologists in the health services department of the Respondent are not entitled to the allowances sought, as per advice from the Salaries and Remuneration Commission and directives from the Ministry of Education.
 18. The Respondent maintained that the garnishee proceedings are premature, as the substantive claim regarding entitlement to the allowances is indeterminate and remains unresolved. Without a decree emanating from a determination of the main petition and ascertainment of the amounts payable, if any, the Court lacks jurisdiction to grant the orders sought. The Respondent argued that the return-to-work formula dated 11th February 2022 does not apply to the individuals in question, and the execution sought is a burden on the Respondent's limited financial resources, intended to harass and cause financial hardship.
 19. Further, the Respondent stated that the claim for doctors' allowances is untenable since the individuals concerned are not on call and already receive their monthly salaries, making the claim an attempt at unjust enrichment. Similarly, the claim for non-practicing allowances is alleged to lack any basis, being contrary to the terms and conditions of the employment contracts. The Respondent asserted that the individuals receive their due allowances, including risk and extraneous allowances, as per their terms of service, and cannot import extraneous terms into their contracts to justify execution proceedings.
 20. It was submitted that the application is premature, based on indeterminate issues, and lacks both legal and factual foundation. The Respondent invoked Article 159(2) of *the Constitution* of Kenya, 2010, emphasizing the need for timely disposal of proceedings and urging the Court to strike out the application as an abuse of the court process with costs to the 1st Respondent.
 21. The 1st Respondent filed a Replying Affidavit in opposition to the Notice of Motion dated 8th November 2024, sworn by Prof. Simeon Mining on behalf of Moi University. Prof. Mining, acting as Registrar for Administration, Planning, and Strategy, stated that he was well-versed in the facts and competent to swear the affidavit.
 22. The 1st Respondent contended that the application was incurably defective as it was premised on an affidavit by an advocate who purportedly is indeposed to highly contested factual matters. It was also argued that the court lacked jurisdiction to hear and determine the application, which purportedly offended the provisions of Order 23 of the Civil Procedure Rules, 2010.
 23. The Respondent outlined that on 14th March 2017, the Petitioner signed a return-to-work formula with both the National and County Governments to end a strike. This agreement pertained only to medical practitioners, pharmacists, and dentists and excluded doctors-lecturers at Moi University due to the absence of a recognition agreement with the Petitioner.



24. The Salaries and Remuneration Commission (SRC), through a letter dated 6th September 2019, advised that the allowances in the return-to-work formula applied only to dual-role doctors-lecturers at the specified rates. The Respondent further noted that agitation by other doctors and pharmaceutical technologists at Moi University led to a new return-to-work formula signed on 11th February 2022, which is now the subject of the garnishee proceedings.
25. Prof. Mining explained that Moi University, as a public institution, relies entirely on government funding allocated through the National Treasury, which administers the Consolidated Fund under Article 206 of *the Constitution* and the *Public Finance Management Act*, 2012. He stated that compliance with the 2022 return-to-work formula and payment of arrears depended on budgetary allocations from the National Treasury.
26. The Respondent made an initial payment of 24 months' arrears to two doctors and three pharmaceutical technologists on 3rd March 2022 using internal funds. However, subsequent payments were not supported by the National Treasury due to clarification from the SRC and the Ministry of Education that the allowances applied only to dual-role doctors-lecturers. Correspondence from the Ministry dated 24th October 2022 and 21st February 2023 reaffirmed this position.
27. The Respondent referred to a Memorandum of Understanding dated 12th February 2021 between Moi University and Moi Teaching and Referral Hospital (MTRH), which outlined the dual roles of doctors-lecturers. It was asserted that the two doctors and three pharmaceutical technologists did not perform dual roles and were therefore not entitled to the enhanced allowances claimed.
28. The Respondent emphasized that SRC, constitutionally mandated under Article 230 of *the Constitution*, determines salaries and allowances for public officers, and Moi University could not unilaterally determine or pay the claimed allowances.
29. The Respondent argued that the application was premature and defective, asserting that execution proceedings could not proceed in the absence of a final determination on whether the two doctors and three pharmaceutical technologists were entitled to the claimed allowances. They relied on Order 23 of the Civil Procedure Rules, 2010, and case law to argue that garnishee proceedings should not be granted where there is a bona fide dispute regarding the entitlement to the sums claimed.
30. It was further stated that the garnishment of the Respondent's main payment account had paralyzed operations, including payment of salaries, student-related payments, and other critical obligations. The Respondent prayed for the court to set aside the order nisi and unfreeze the account to allow resumption of operations.
31. The Respondent concluded by denying the averments in the Notice of Motion and praying for its dismissal with costs. Prof. Mining swore that the affidavit contained facts true to his knowledge, belief, and disclosed sources of information.
32. The 1st Respondent filed an affidavit further in opposition to the Notice of Motion dated 8th November 2024, sworn by Joshua Koech, the Acting Chief Finance Officer of Moi University, on 13th November 2024. The deponent avers that the allowances claimed by the Petitioner under the return-to-work formula of 11th February 2022 are payable by the Ministry of Health through the Ministry of Education, with the 1st Respondent merely acting as a remitting agent upon receipt of funds from the Ministry.
33. The deponent confirms that the 1st Respondent paid arrears for 24 months to two doctors and three pharmaceutical technologists in its Health Services Department from internal funds on 3rd March 2022 to resolve the then-ongoing strike. It is stated that the Ministry of Education subsequently requested a



list of eligible doctors, which the 1st Respondent submitted. The Ministry, upon review and in line with advisory opinions from the Salaries and Remuneration Commission, excluded the two doctors and three pharmaceutical technologists on the basis that the allowances applied only to doctor-lecturers who perform dual roles in teaching and clinical services. The deponent annexes the list and related correspondence, including the Ministry's letter dated 21st February 2023 clarifying the ineligibility of the five individuals.

34. The deponent further avers that due to this exclusion and lack of funding from the Ministry, the 1st Respondent could not make further payments. It is argued that there is no budgetary allocation or funding from either the Ministry of Health, the Ministry of Education, or the 1st Respondent, and the claim cannot be executed in light of these circumstances. The deponent annexes a letter dated 18th July 2024 from the Ministry of Education detailing budgetary cuts affecting the 1st Respondent.
35. The affidavit asserts that the garnishment of the 1st Respondent's main payment account has paralyzed the University's operations, including payment of staff salaries, student-related payments, and other essential services. It is claimed that the garnishment has caused undue hardship, embarrassment, and prejudice, impacting third parties such as students and service providers. The deponent contends that this has hindered the 1st Respondent's constitutional and statutory mandate under Articles 10, 232, and 43 of *the Constitution* of Kenya, which include the provision of quality education and access to essential services.
36. The 1st Respondent therefore prays for the lifting of the garnishment to allow the resumption of operations and the execution of its obligations. The deponent concludes by seeking the dismissal of the Notice of Motion dated 8th November 2024 with costs, affirming that the affidavit is true to the best of their knowledge, information, and belief.

1st Respondent Written Submissions

37. The 1st Respondent filed written submissions dated 6th December 2024 in support of its Preliminary Objection dated 25th November 2024. It was submitted that the application contravened Order 23 of the Civil Procedure Rules, 2010, as no decree exists capable of execution by garnishee proceedings. The 1st Respondent argued that the application is based on a disputed amount, and the entitlement of the two doctors and three pharmaceutical technologists to the allowances claimed remains undetermined in the pending petition. The court, therefore, lacks jurisdiction to grant the orders sought, as affirmed by the Supreme Court in *Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others* [2012] eKLR, which held that a court's jurisdiction flows from *the Constitution* or written law and cannot be assumed.
38. It was further argued that Order 23 Rule 1(1) of the Civil Procedure Rules mandates the existence of a decree for garnishee proceedings to proceed, and the absence of such a decree renders the application fatally defective. Reliance was placed on *Mengich t/a Mengich & Co Advocates & Another v Joseph Mabwai & 10 Others* [2018] eKLR, where it was held that garnishee proceedings require a court decree, not a mere agreement or unsigned document. The 1st Respondent contended that the petition is yet to be heard on its merits and that one of the issues in contention is whether the two doctors and three pharmaceutical technologists are entitled to the allowances under the return-to-work formula of 11th February 2022.
39. The 1st Respondent submitted that the Salaries and Remuneration Commission (SRC), as established under Article 230(4) of *the Constitution* of Kenya, 2010, has the exclusive mandate to determine and advise on the remuneration and benefits of public officers. It relied on the SRC's advice dated 6th September 2019, which stipulated that the enhanced allowances were only payable to doctor-



lecturers performing dual roles of teaching and clinical services. This advice was further reiterated by the Ministry of Education in letters dated 24th October 2022 and 21st February 2023, which clarified that the two doctors and three pharmaceutical technologists working in the health services department of the 1st Respondent were not eligible for the allowances in question.

40. The 1st Respondent argued that the advice by the SRC and subsequent clarification by the Ministry of Education is binding and that the court should not usurp the constitutional mandate of the SRC. It further submitted that the five individuals receive their due monthly risk and extraneous allowances as per their terms of service, and the claim for additional allowances amounts to unjust enrichment. It was emphasized that any determination on remuneration outside the SRC's advice would violate Article 230(4) of *the Constitution*.
41. The 1st Respondent maintained that the absence of a decree and the contested nature of the claim negate the validity of the garnishee proceedings. It urged the court to strike out or dismiss the application with costs.
42. Further, the 1st Respondent submitted that it prepared a list of health services department staff, including two doctors and three pharmaceutical technologists, and forwarded it to the Ministry of Education for consideration of allowances. However, their names were excluded from the list by the Ministry on the advice of the Salaries and Remuneration Commission (SRC), as evidenced by annexures to the affidavit of Joshua Koech. Consequently, the two doctors and three pharmaceutical technologists are not entitled to the claimed allowances, as stated by SRC and affirmed by the Ministry of Education. Courts have consistently upheld the binding nature of SRC's advice, as demonstrated in the Court of Appeal decision in *Salaries and Remuneration Commission v National Hospital Insurance Fund Management Board & 2 Others (Civil Appeal 156 of 2016) [2024] KECA 419 (KLR) (26 April 2024)*. The Court held that SRC's constitutional mandate ensures fiscal sustainability in public compensation and cannot be disregarded. Similarly, in *Teachers Service Commission (TSC) v Kenya Union of Teachers (KNUT) & 3 Others [2015] eKLR*, the Court of Appeal underscored the binding nature of SRC's advice under Article 230(4)(b) of *the Constitution*, emphasizing that remuneration in public service must align with fiscal sustainability principles enshrined in Articles 201(c) and (d) of *the Constitution*.
43. The 1st Respondent argued that the claimed allowances are limited to doctors-lecturers performing dual roles of teaching and treating. The two doctors and three pharmaceutical technologists in the health services department do not lecture and therefore cannot claim these allowances, as clarified by SRC. Their pay slips show they already receive allowances under their terms of service, such as extraneous and medical risk allowances. Awarding the claimed allowances would result in double payment, which the law prohibits. The 1st Respondent referred to the return-to-work formula of 14th March 2017, which renamed the emergency call allowance to doctors' allowance, payable to medical practitioners, dentists, and pharmacists on call. The pharmaceutical technologists and non-lecturing doctors do not qualify for this allowance.
44. The Ministry of Education confirmed in its letter dated 18th July 2024 that there is no budget allocation for these allowances. The absence of such an allocation from the National Treasury and the Ministry renders payment impossible. The 1st Respondent further argued that the Petitioner/Applicant's reliance on the doctrine of legitimate expectation is misplaced. Although the allowances were temporarily paid from internal funds before SRC's advice, this does not create a legitimate expectation contrary to *the Constitution* or statute. The 1st Respondent cited *Republic v Public Procurement Complaints, Review and Appeals Board & Another Ex Parte Kenya Airports Authority [2005] 1 KLR 628*, which held that estoppel cannot override statutory provisions.



45. The 1st Respondent submitted that the freezing of its accounts under the garnishee proceedings has paralyzed its operations, including the payment of staff salaries, student-related expenses, and creditors. This situation has caused significant hardship and embarrassment, with service providers ceasing essential services.
46. The 1st Respondent maintained that no debt is owed to the Petitioner/Applicant, and the garnishee proceedings are premature and unwarranted. The decree nisi should be set aside to allow the 1st Respondent to resume its core functions. Continued freezing of the accounts risks further claims arising from the 1st Respondent's inability to discharge its mandate. The 1st Respondent urged the Court to dismiss the application with costs.
47. I have examined all the averments and submissions of the parties herein. In relation to the P.O filed herein, The applicant Respondents aver that this court lacks jurisdiction to handle the garnishee application. They also aver that the garnishee application is indeterminable as this petition has not been concluded on its merit.
48. From the record, it is evident that this court has all along been seized of this matter and the court already made orders allowing execution in case the respondents failed to make good the payments. Vide this court's ruling of 26.7.24, the court reaffirmed the return to work formular entered into by the parties. The jurisdiction of this court cannot therefore be faulted.
49. The applicants also raise the point of law premised on order 23 rule 1(1) which states as follows:
1. (1) A court may, upon the ex parte application of a decree- holder, and either before or after an oral examination of the judgment- debtor, and upon affidavit by the decree- holder or his advocate, stating that a decree has been issued and that it is still unsatisfied and to what amount, and that another person is indebted to the judgment-debtor and is within the jurisdiction, order that all debts (other than the salary or allowance coming within the provisions of Order 22, rule 42 owing from such third person (hereinafter called the "garnishee") to the judgment-debtor shall be attached to answer the decree together with the costs of the garnishee proceedings; and by the same or any subsequent order it may be ordered that the garnishee shall appear before the court to show cause why he should not pay to the decree- holder the debt due from him to the judgment-debtor or so much thereof as may be sufficient to satisfy the decree together with the costs aforesaid.
50. This rule is clear that indeed garnishee proceedings shall flow from a decree of the court which decree has not been extracted.
51. It is therefore clear from the provision of the law that execution proceedings are still premature and therefore contempt proceedings can not also follow.
52. I find the Preliminary objection is therefore merited and I allow it and set aside the decree nisi accordingly. The costs in the petition.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 16TH DAY OF JANUARY, 2025.

HELLEN WASILWA

JUDGE

Order



In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

HELLEN WASILWA

JUDGE

