



Ashubwe v Kwale International Sugar Company Limited; Nyandwat Odundo t/a Nyandwat Odundo & Company Advocates (Interested Party) (Cause 877 of 2017) [2025] KEELRC 1256 (KLR) (5 May 2025) (Ruling)

Neutral citation: [2025] KEELRC 1256 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA**

CAUSE 877 OF 2017

M MBARŪ, J

MAY 5, 2025

BETWEEN

HUMPHREY ASHUBWE CLAIMANT

AND

KWALE INTERNATIONAL SUGAR COMPANY LIMITED RESPONDENT

AND

**NYANDWAT ODUNDO T/A NYANDWAT ODUNDO & COMPANY
ADVOCATES INTERESTED PARTY**

RULING

1. The claimant, acting in person, filed an application dated 28 November 2024 under the provisions of Order 22 rule 22, Order 45 rule 1 of the Civil Procedure Rules and section 10 of the *Advocates Act* and articles 25, 47, 50 and 159(2) of the *Constitution*. He is seeking,
 1. Spent.
 2. Spent.
 3. This court would be pleased to set aside or vary the orders issued on 20 September 2023 and/or 23 October 2023, together with the resultant decree, as the orders were issued in the claimant applicant's absence.
 4. The court be pleased to direct the interested party to account for and reimburse the respondent the sum of Ksh. 388,876 together with accrued interests from such date as the court may direct.



5. This court is pleased to declare that the claimant applicant is liable to reimburse the respondent the sum of Ksh. 510,892, which is the legally recoverable amount from the claimant out of the Ksh. 902,015 claimed by the respondent in their application dated 5 July 2023.
6. The court will be pleased to allow the claimant applicant to pay the decreed amount in monthly instalments of Ksh. 20,000 commencing from the date of determination of this application.
7. That the costs of this application are provided for.
2. The application is supported by the claim through his affidavit. On 31 July 2019, the court delivered judgment in his favour and awarded him Ksh. 1,215,500 in damages for his unlawful employment termination. The total decree sum, including costs, was Ksh. 1,821,308, which the respondent paid through the interested party.
3. From the decretal sum, the claimant only received Ksh. 1,244,312 from the interested party, who retained Ksh. 576,986. He considered the legal fees of Ksh 188. 110 paid by the respondent, yet the interested party withheld the sum of Ksh 388. 876, which has not been paid to date. This violates section 10 of the Advocates (Accounts) Rules, which requires an advocate to account for all client monies held in trust. The interested party breaches the fiduciary duty to the claimant and respondent without justification or proper accounting.
4. The respondent filed an application dated 5 July 2023 to recover Ksh. 902,018, alleging overpayment to the claimant. The claimant was not served with this application and could not respond. The claimant learnt that the interested party had filed an application dated 24 July 2023 seeking to cease acting for the claimant, which was allowed, leaving the claimant unrepresented. This resulted in the court allowing the respondent's application dated 5 July 2023, upon which the respondent issued a Notice to Show cause dated 10 September 2023 to the claimant, attaching Ksh 1,073,401.42 from his salary. The amount claimed includes Ksh. 388,876 unlawfully held by the interested party and should not be recovered from the claimant.
5. The interested party has refused to account for the Ksh. 1,821,308 received from the respondent because of the unremitted Ksh. 388,876. The claimant seeks a stay of execution for the unremitted funds, which will be recovered from the interested party.
6. In reply, the respondent filed the Replying Affidavit of Benson Nzuka, the head of the legal department, who avers that the judgment herein awarded the claimant Ksh 1,821,308, whereupon the respondent filed an appeal and, through judgment delivered on 30 September 2021, the Court of Appeal partially allowed the appeal. It substituted the 6 ½ salary compensation award with an award of 3 months, which reduced the judgment sum from Ksh. 1,215,500 to Ksh. 561,000.
7. The respondents wrote to the claimant's advocate to repay Ksh. 902, 018, which was not paid. This led to an application dated 5 July 2023 to recover the same from his salary, which the court allowed. The interested party applied to cease acting for the claimant through an application dated 24 July 2023. Both applications were heard on 20 September 2023, and the claimant was served. The applications were allowed.
8. Nzuka avers that the claimant's allegations about the interested party are outside the respondent's knowledge. The judgment sum was deposited with his advocates, and the matter should be resolved between the advocate and the client. The respondent is not privy to the same. The Advocates Disciplinary Tribunal exists to address the issues regarding payment of any monies withheld by his advocates, and the court is not the appropriate forum to address his matter.



9. Both parties attended and filed skeleton submissions and highlighted in court. The respondent has filed a list of cases.

Determination

10. It is a common cause that the claimant was awarded Ksh. 1,821,308 in judgment delivered on 31 July 2019, which the respondent paid through his advocates, the interested party.
11. It is also not disputed that the respondent filed an appeal, and on 30 September 2021, the Court of Appeal reduced the judgment sum to Ksh 561,000.
12. The respondent filed an application dated 5 July 2023 to recover the overpayment. The interested party also filed an application dated 24 July 2023 to cease acting for the claimant.
13. Both applications were heard on 20 September 2023, and the interested party indicated to the court that the claimant had been served. The court allowed both applications.
14. The claimant contests that he was never served and was not aware of the sharing of the two applications. In any event, the monies paid should be recovered from the interested party, who was fully paid by the respondent and did remit the full amount to him.
15. Indeed, as submitted by the respondent, the only recourse available to the claimant is to pay the sum claimed by the respondent against him and initiate proceedings against the interested party through the Advocates Disciplinary Tribunal. As much as the court sympathizes with the claimant, upon the judgment of the Court of Appeal, being the right-holder herein, the orders issued to recover any overpayment(s) were against him. The monies held by the interested party on his behalf were held on an undertaking that these would be available to him upon request, based on proper accounting. Where there is a breach of the fiduciary duty to render accounts, and the interested party has failed to address it, the appropriate forum is the Advocates Disciplinary Tribunal and not this court.
16. The court sees that the claimant is now forced to appear in person due to the interested party's frustrations in rendering an account.
17. The request is to offset the amounts due from the claimant to the respondent through his salary at monthly instalments of Ksh. 20,000 Upon the determination of this ruling, the sum of Ksh. 902,018 plus the additional costs would be paid, resulting in a payment plan lasting over 45 months. The claimant must seek to offset this amount at a higher rate to avoid escalating costs and interests.
18. The court cannot force the respondent to accept the proposal to pay for the instalments. The claimant has not tabled a payment statement indicative of his monthly earnings, save to urge the court that the overpayment is being recovered from his salary.
19. The application dated 28 November 2024 has been declined. Save parties are urged to discuss the modalities for payment of the due amount in instalments and report to the court within 14 days.
20. Mention on 5 June 2025.

DELIVERED IN OPEN COURT AT MOMBASA THIS 5TH DAY OF MAY 2025

M. MBARŪ

JUDGE

