



**Ouko v Kenya Chemical Workers Union (Cause E014 of 2022)  
[2025] KEELRC 1750 (KLR) (17 June 2025) (Ruling)**

Neutral citation: [2025] KEELRC 1750 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
CAUSE E014 OF 2022**

**JK GAKERI, J**

**JUNE 17, 2025**

**BETWEEN**

**CALEB OTIENO OUKO ..... CLAIMANT**

**AND**

**KENYA CHEMICAL WORKERS UNION ..... RESPONDENT**

**RULING**

1. Before the court for determination is the Applicant's Notice of Motion dated 21<sup>st</sup> May, 2025 filed under Certificate of Urgency seeking orders that –
  1. Spent.
  2. The Garnishee Order Nisi be made absolute and the monies attached be released to the Claimant/Decree Holder's Advocates M/s Omondi Obande & Co. Advocates to satisfy the Decree outstanding at the time of the determination of these proceedings.
  3. The costs of this Application be provided for.
2. The Notice of Motion is expressed under Section 1A, 1B, 3A, 38(c) and 63(e) of the *Civil Procedure Act* and Order 23 Rule 1, 4 and 10 and Order 50 Rule I of the Civil Procedure Rules and is based on the grounds set out on its face and the Supporting Affidavit sworn by Caleb Otienu Ouko on 21<sup>st</sup> May, 2025 who deposes Judgment was entered in favour of the Claimant/Applicant on 27<sup>th</sup> July, 2023 as follows: Service gratuity of Kshs.2,640,000, four months salary Kshs.300,000, salary in lieu of notice Kshs.88,000, certificate of service and costs of the suit and costs were subsequently taxed at Kshs.387,537 and a decree issued on 5<sup>th</sup> December, 2023.
3. The affiant further deposes that the respondent paid the sum of Kshs.2,187,537 in reduction of the decretal debt.



4. That the amount owing as at 21<sup>st</sup> May, 2023 was Kshs.1,459,143.00 which remained unsatisfied and the Judgment Debtor operated an account with the Garnishee Bank with sufficient funds to satisfy the decree.
5. That bank account number 1107XXXX84 and 110XXXX076 held certain funds and it was in the interest of justice that the funds be turned over the decree holder's advocates in satisfaction of the decretal sum and in default execution be ordered against the Garnishee.

#### **Garnishee's response**

6. By a Replying Affidavit sworn on 28<sup>th</sup> May, 2025, Elizabeth Nyambu deposes that she is the Manager Accounts and Administration with the Garnishee Bank, Moi Avenue Branch and had authority to swear the Affidavit.
7. She deposes that the Judgment Debtor operated two (2) accounts with the Garnishee and as at 28<sup>th</sup> May, 2025 Account Number 1107XXXX84 had a balance of Kshs.1,328,306.30 while Account Number 110XXXX076 had a balance of Kshs.130,836.70 and the Garnishee was ready and willing to comply with orders of the Court subject to payment of the Garnishee's costs of Kshs.50,000.00 which should be considered and deducted from the Judgment Debtor's accounts 1107XXXX84 and 110XXXX076.

#### **Respondent's case**

8. By a Replying Affidavit sworn by Peter Ouko Onyango on 27<sup>th</sup> May, 2025, the affiant deposes that he is the General Secretary of the Respondent.
9. That the applicant had not disclosed all material facts on payment of the decretal sum and costs and the sum of Kshs.1,459,143.00 alleged to be outstanding was incorrect as the sum of Kshs.3,467,537 was awarded inclusive of costs which was subject to statutory deductions of Kshs.596,780.00 and the net payable was Kshs.2,870,757.00 and the sum of Kshs.2,287,537 had already been paid leaving a balance of Kshs.583,220 and the applicants advocate had agreed that the sum be settled vide instalments and on 23<sup>rd</sup> November, 2023 the respondent paid Kshs.900,000 to the applicant's advocates and a further Kshs.100,000 on 26<sup>th</sup> July, 2024 and Kshs.193,768.00 on 3<sup>rd</sup> July, 2024 and Kshs.100,000 on 23/8/2024, 4/10/2024, 13/11/2024, 18/12/2024, 17/01/2024, 14/02/2024 and 23/5/2024.
10. The affiant deposes that it had paid a huge portion of the decretal sum and the outstanding amount was Kshs.583,220 which it was willing to pay by instalments, Kshs.300,000.00 on lifting of the Garnishee Order Nisi and Kshs.100,000 on 30/06/2025.
11. That the claim for 1,459,143 had no basis.
12. The affiant deposes that the applicant's claim ignores the fact that the sum was subject to statutory deductions as stated by the court and Kshs.596,780 was deducted.
13. The affiant maintains that the respondent has been committed to settle the balance and at no time did it refuse to do so and the Garnishee Order Nisi had greatly affected its ability to meet daily obligations.
14. In a Further Affidavit sworn by Peter Ouko Onyango on 3<sup>rd</sup> June, 2025 contesting the figures given by the Garnishee, according to the affiant, the respondent's accounts have Kshs.1,467,208.5 and 1,636,161.47 respectively as at 28<sup>th</sup> May, 2025 and the amount sought as costs, Kshs.50,000 was exorbitant..



### **Applicant's submissions**

15. The Applicant had not filed submissions by 9<sup>th</sup> June, 2025.

### **Respondent's submissions**

16. Counsel submitted that the applicant's claim that the sum of Kshs.1,459,143 was outstanding was incorrect on account that the applicant had factored in interest of Kshs.179,443, not awarded by the court in its Judgment and omitted the sum of Kshs.100,000 paid vide the advocates account as evidenced by the bank payment slips and had equally not factored in statutory deductions of Kshs.596,789 and the respondent believed that only the sum of Kshs.583,220 was outstanding and was paid on 3<sup>rd</sup> June, 2025 and the decree was fully settled.
17. On service gratuity, counsel submitted that the court's judgment was emphatic on statutory deductions and the applicant's claim for tax exemption on tax gratuity had no legal basis.
18. Reliance was made on the provisions of Section 5 of the *Income Tax Act*.
19. Counsel submitted that the respondent's accounts subject to garnishment ought to be discharged and be accessible by the respondent.

### **Analysis and determination**

20. When the applicant's ex parte application for Garnishee Order Nisi came up on 22<sup>nd</sup> May, 2025, the court certified the same urgent and granted Garnishee Order Nisi in respect of all monies in Account No.1107XXXX84 and 110XXXX076.
21. When the matter came up for hearing on 28<sup>th</sup> May, 2025 Mr. Omondi for the applicant and M/s Wavinya for the respondent were in agreement that the matter was a simple one and were optimistic that they would agree and Garnishee Order nisi in force was extended to 29<sup>th</sup> May, 2025 for a status update on the agreement but no settlement had been reached and according to counsel for the respondent, the only outstanding issue was whether gratuity is subject to income tax.
22. As regards the lifting of the Garnishee Order Nisi to enable the respondent transact business, the applicant's counsel permitted that the order be discharged in respect of the Account Number 110XXXX076 which the Garnishee reported had the sum of Kshs.130,836.70, a figure the respondent contested in its Further Affidavit. The court discharged the Garnishee order nisi on the account as agreed upon by the parties directions on the filing of submissions were issued and a ruling date fixed.
23. The only issue for determination is whether the amount earned by an employee as gratuity is taxable.
24. It requires neither emphasis nor belabouring and as correctly submitted by the respondent's counsel, under Section 49(2) of the *Employment Act* any payments made by the employer under this Section shall be subject to statutory deductions.
25. More significantly, Section 3 of the *Income Tax Act*
  1. Subject to, and in accordance with this Act, a tax to be known as income tax shall be charged for each year of income upon all the income of a person, whether resident or non-resident, which accrued in or was derived from Kenya.
  2. Subject to this Act, income upon which tax is chargeable under this Act is income in respect of—



- (a) gains or profits from—
  - (i) any business, for whatever period of time carried on;
  - (ii) any employment or services rendered;
  - (iii) any right granted to any other person for use or occupation of property;

Similarly, under Section 5, under the heading Income from employment, etc;

1. For the purposes of section 3(2)(a)(ii) of this Act, an amount paid to—

- (a) a person who is, or was at the time of the employment or when the services were rendered, a resident person in respect of any employment or services rendered by him in Kenya or outside Kenya; or
- (b) a non-resident person in respect of any employment with or services rendered to an employer who is resident in Kenya or the permanent establishment in Kenya of an employer who is not so resident, shall be deemed to have accrued in or to have been derived from Kenya.

26. For the purposes of section 3(2)(a)(ii) "gains or profits" includes—

- a. any wages, salary, leave pay, sick pay, payment in lieu of leave, fees, commission, bonus, gratuity, or subsistence, travelling, entertainment or other allowance received in respect of employment or services rendered, and any amount so received in respect of employment or services rendered in a year of income other than the year of income in which it is received shall be deemed to be income in respect of that other year of income.

27. The foregoing provisions establish beyond peradventure that gratuity is deemed to part of the income of the employee in respect of employment or services rendered in a particular year when the employment or rendering of services took place.

28. In *Kioko Joseph suing as the Legal representative of the Estate of Joseph Kihinda V Bamburi Cement Ltd* [2017] eKLR the Court of Appeal stated:

"Furthermore, Section 37(1) of the *Income Tax Act* requires an employer paying emoluments to an employee to deduct there from and account for income tax thereon, to such extent and in such manner as may be prescribed. Such tax is delineated under Section 3(1) of the Income Tax in the following manner.

In *Directline Assurance Co. Ltd V Jeremiah Wachira Ichaura* [2016] eKLR the Court of Appeal held:

"It is trite law that any lumpsum payment for say, terminal dues, is subject to statutory deductions for the years taken into account.

Indeed, in *Simon Deaken & Gillan S. Morris Labour Law* at page 465, the writers observe that it is the net salary. Salary after deduction of Income tax, National Insurance contribution and contributions to pension schemes or similar benefits, that is used to compute any damages due to any employee. Accordingly, the court erred in not subjecting the award to the mandatory statutory deduction".



29. Finally, the Kenya Revenue Authority's Employers Guide on P.A.Y.E states inter alia
- "Every employer has an obligation under Section 37 of the *Income Tax Act* to recover appropriate tax from any lump sum amount before releasing the difference/balance to the employee".
30. Relatedly, in *Andrew Mukite Saisi V Tracker Group of Companies Ltd* [2020] eKLR, the Court of Appeal expressed itself as follows:
31. The regime as regards income tax in Kenya is not ambiguous. Section 3(1) of the *Income Tax Act* (the Act) requires each person who earns any income within Kenya to pay tax. For the purposes of this Act, section 3(2)(a)(ii) of the Act defines income as the gains or profits from employment or services rendered. This is repeated at section 5(1) of the Act which provides that:...
- Section 37(1) of the *Income Tax Act* provides for the deduction of tax from any emoluments that are paid from an employer to an employee. This section, read together with Section 19(1) (f) of the *Employment Act* requires employers to deduct tax due to KRA from any emoluments and benefits that are due to KRA. The import of these provisions is clear: for any money paid to the appellant as a result of a gain from him rendering professional services to the respondent were subject to tax..."
32. The foregoing sentiments of the Court of Appeal, High Court and the Tax Appeals tribunal place beyond doubt the principle that any income accruing to an employee on account of the employment relationship or from rendering of services is subject to income tax.
33. In the instant case the amount awarded by the court as gratuity, salary in lieu of notice and compensation was subject to statutory deductions.
34. In its Replying Affidavit sworn on 27<sup>th</sup> May, 2025, the respondent deposed that it subjected the sum of Kshs.3,467,573.00 to statutory deductions hence the sum of Kshs.596,780 and the outstanding balance of Kshs.583,220 which counsel for the respondent admitted vide her submissions had already been paid. However, no particulars were furnished as evidence of payment. More significantly, submissions are not pleadings.
35. Strangely, the applicant stated that the sum of Kshs.1,459,143 was outstanding but tendered no computation as to how the amount was arrived at or contradict the respondents computation.
36. A clear tabulation of the total amount payable inclusive of costs and the amounts paid and when would have validated the applicant's claim which is not the case in this instance; and ought to have factored in statutory deductions.
37. As it is, the figure of Kshs.1,459,143 lacks any supportive basis and thus unsubstantiated for the Garnishee Order nisi to be made absolute.
- Consequently,
- a. The respondent shall pay the outstanding amount as per its computation Kshs.583,220.00 in a single instalment within 7 days.
  - b. The respondent shall bear the costs of the Garnishee, Kshs.20,000.00
  - c. The Garnishee Order nisi granted on 22<sup>nd</sup> May, 2025 is hereby discharged.
- Parties shall bear own costs of this application.



**DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 17<sup>TH</sup> DAY OF JUNE, 2025.**

**DR. JACOB GAKERI**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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 *Civil 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.

**DR. JACOB GAKERI**

**JUDGE**

