



Ndungu v Safaricom PLC; Martin Mwaniki t/a Anfield Auctioneers (Interested Party) (Cause E012 of 2022) [2025] KEELRC 2234 (KLR) (25 July 2025) (Ruling)

Neutral citation: [2025] KEELRC 2234 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E012 OF 2022**

**AK NZEI, J
JULY 25, 2025**

BETWEEN

CYRUS WANJOHI NDUNGU CLAIMANT

AND

SAFARICOM PLC RESPONDENT

AND

MARTIN MWANIKI T/A ANFIELD AUCTIONEERS INTERESTED PARTY

RULING

1. This Court (Dr. Jacob Gakeri, J) delivered its Judgment on 11th July, 2024 and pronounced itself thus:-
 - “ 128. In the upshot, Judgment is entered in favour of the Claimant against the Respondent as follows:-
 - a. Declaration that termination of employment was unfair.
 - b. Equivalent of two (2) months’ salary.
 129. In the circumstances, parties shall bear their own costs.”
2. According to the Court’s record, a decree was subsequently issued and thereafter the Claimant filed an application for execution of the Court’s decree. A Warrant of Attachment of movable property in execution of a Money Decree was on 12th November, 2024 issued to Anfield Auctioneers to realize a sum of Kshs.1,716,481/=.
3. On 20th January, 2025, the Respondent filed an evenly dated Notice of Motion seeking the following Orders:-
 - a. That the application be certified urgent.



- b. That pending inter-partes hearing of the application, an order do issue for the stay of execution of the Judgment and decree of this Honourable Court issued on 11th July, 2024 in this suit.
 - c. That pending inter-partes hearing of the application, the Honourable Court be pleased to lift the warrants of attachment of the Respondent's movable property dated 18th December, 2024 and the proclamation notice dated 17th January, 2025 issued by Martin Mwaniki trading as Anfield Auctioneers Limited in execution of the decree herein.
 - d. An order be made that the Judgment and decree of this Court issued on 11th July, 2024 is fully satisfied.
 - e. An order be made that the execution of decree, and in particular the Warrants of Attachment and Sale and Proclamation of goods by Martin Mwaniki trading as Anfield Auctioneers on 17th January, 2025 is illegal and wantonly irregular.
 - f. That this Court do grant any other order that it may deem just and expedient to grant in the circumstances.
 - g. That costs of the application be provided for.
4. The application, expressed to be brought under Order 22 Rule 49 of the Civil Procedure Rules, Section 3 of the *Employment and Labour Relations Court Act*, Rules 21, 45 and 47 of the Employment and Labour Relations Court (Procedure) Rules 2024 and Sections 1A, 1B, 3A and 63(e) of the *Civil Procedure Act*, sets out on its face the grounds on which it founded. The grounds are substantially restated in the affidavit of Cerere Kihoro sworn on 20th January, 2025 in support of the application.
 5. It is deponed in the said supporting affidavit:-
 - a. that the Court entered Judgment in favour of the Claimant on 11th July, 2024 and awarded the Claimant two months' gross salary as compensation for unfair termination of employment. That the Claimant's gross salary at the time of termination was Kshs.856,628.45, hence the decretal sum was Kshs.1,713,256/=.
 - b. that the Claimant instructed Martin Mwaniki t/a Anfield Auctioneers (the Interested Party) who obtained warrants of attachment dated 12th November, 2024 and on 13th November, 2024 proclaimed the Respondent's movable property, including motor vehicles, assorted furniture, assorted electronics, computer servers and other attachable assets belonging to the Respondent.
 - c. that upon being served with a proclamation notice, the Respondent instructed its Advocates, Munyao Muthama and Kashindi Advocates, to pay the decretal sum to the Claimant's Advocates' bank account in full and final settlement of the decree.
 - d. that on 15th November, 2024, the Respondent's Advocates transferred a sum of Kshs.1,193,850/= to the Claimant's Advocates' bank account; and on the same date wrote a letter to the Claimant's Advocates attaching proof of payment and a breakdown of the amount paid; and in the letter explained that Kshs.519,406.62/= from the decretal sum had been remitted to the Kenya Revenue Authority as statutory deductions, being income tax and/or Pay As You Earn (PAYE) as provided in the *Income Tax Act*, and in accordance with Section 49(2) of the *Employment Act*.
 - e. that by a letter dated 26th November, 2024, the Claimant's Advocates indicated that they had instructed the Auctioneer (the Interested Party) to recover the sum of Kshs.517,423/= from



the Respondent, and that on 18th December, 2024, the Interested Party obtained Warrants of Attachment and sale from this Court for Kshs.519,406/= in respect of the decree herein.

- f. that the decree herein is fully settled by payment of the net of taxes of the decretal sum and remittance of statutory deductions to Kenya Revenue Authority; and that the remittance is reflected in the Claimant's account on iTax platform, which the Claimant can access.
 - g. that the Respondent/Applicant stands to suffer immense loss and disruption in operations unless the stay orders sought are granted, as the Interested Party will proceed to attach and sell the proclaimed movable property.
6. Documents annexed to the said supporting affidavit are copies of a proclamation dated 13th November, 2024, a letter dated 26th November, 2024, proof of payment (transfer) of Kshs.1,193,850.30/=-, a warrant of attachment to recover Kshs.523,406/= and a proclamation dated 17th January, 2025.
 7. The application was placed before this Court under a certificate of urgency on 21st January, 2025, and having found urgency in the same, I granted interim orders of stay of execution pending hearing and determination of the application.
 8. The application is opposed by the Claimant/Respondent vide a replying affidavit sworn by himself on 21st February, 2025. It is deponed in the replying affidavit:-
 - a. that subjecting the decretal amount to statutory deductions amounts to a review of the orders that the trial Court gave, and that the Respondent has not met the threshold for review of the Court's Orders.
 - b. that the Court did not give an order either expressly or impliedly directing that the sum awarded be subject to mandatory statutory deductions.
 - c. that if the Court intended that the awarded sum be subjected to statutory deductions, nothing would have prevented it from saying so.
 - d. that tax deductions by the Respondent was erroneous as there was no employer/employee relationship between the Claimant and the Respondent, the same having been extinguished when the Claimant was dismissed; hence the Respondent cannot purport to act as an agent of the Claimant in respect of PAYE.
 - e. that PAYE is only chargeable on income earned in the course of employment, and compensation accruing out of a Court award is not income within the meaning on the *Income Tax Act*.
 - f. that even if PAYE was chargeable, it would be based on monthly salary, less tax relief, and that charging PAYE on the entire sum was a perpetuation of unfair treatment of the Claimant by the Respondent.
 - g. that the trial Court did not give directions on taxation, and the Respondent not having pleaded the same, this Court should find the Respondent's application to be frivolous, vexatious, misconceived and as having been filed in bad faith.
 9. Both parties filed written submissions on the application pursuant to the Court's directions in that regard.



10. Section 49(2) of the *Employment Act* provides as follows:-
- “(2) Any payments made by the employer under this Section shall be subject to statutory deductions.”
11. Section 49(1) of the *Employment Act* on the other hand provides for remedies that may be available to an employee whose employment is terminated wrongfully and unfairly. Pursuant to Section 49(1) (c) of the Act, such remedies include:-
- “(c) the equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal.”
12. In the present case, the Court found and declared in its Judgment, delivered on 11th July, 2024, that termination of the Claimant’s employment was unfair, and awarded him the equivalent of two (2) months’ salary. By dint of Section 49(2) of the Act, the awarded sum was subject to statutory deductions as mandatorily provided for in the said sub-section. The Claimant/Respondent’s argument in the present case is that the Court did not, in its said Judgment, subject the awarded sum to statutory deductions; and that subjecting the same to statutory deductions (PAYE) would amount to a review of the Court’s Judgment.
13. In my view, failure by the trial Judge to specifically state in his Judgment that the awarded sum would be subject to statutory deductions did not exclude the awarded sum from such deductions. Section 49(2) of the *Employment Act* is couched in mandatory terms, and does not appear to give room for exercise of Judicial discretion. There is no indication in the Court’s Judgment that the awarded sum would be excluded and/or exempted from statutory deductions, for whatever reason.
14. Further, it has not been alleged and/or demonstrated that the Claimant/Respondent was exempted from statutory deductions (PAYE) by dint of any written law; and that he was not subject to such deductions at the time of termination of his employment.
15. The Claimant/Respondent has not alleged deviation by the Respondent/Applicant from the applicable law in calculating the amount payable as PAYE, and has not given any particulars and/or specifics of tax reliefs which he enjoyed at the time of termination of his employment, and which the Respondent/Applicant did not consider in calculating the amount of tax (PAYE) payable. Further, the Claimant has not disputed the Respondent/Applicant’s deposition that the deducted tax (PAYE) has since been remitted to the Kenya Revenue Authority and is reflected in his iTax account.
16. It is to be noted that Section 49 of the *Employment Act* makes reference to “employer” and “employee” in relation to a terminated employee and his erstwhile employer. The Claimant’s argument that there does not exist an employer/employee relationship between the Claimant and the Respondent/Applicant and that the latter could not purport to act as the Claimant’s agent in matters relating to tax cannot, in my view, hold.
17. Regarding subjection of awards by this Court to statutory deductions, the Court of Appeal stated as follows in the case of *Directline Assurance Co. Ltd – vs- Jeremiah Wachira Ichaura* [2016] KECA 118 (KLR):-
- “How about the need to subject the award to the mandatory statutory deductions? Surprisingly, the Respondent did not submit on this aspect of the appeal. It is trite law that any lump sum payment for say, terminal dues, is subject to statutory deductions for the



years taken into account. Indeed, in Simon Deakin and Gelian S. Morris, Labour Law at page 405, the writers observe that it is the net salary, salary after deduction of income tax, National Insurance contributions and contribution to pension schemes or similar benefits, that is used to compute any damages due to an employee. Accordingly the Court erred in not subjecting the award to the mandatory statutory deductions.”

18. Further, the Court of Appeal stated as follows in the case of Andrew Mukite Saisi – vs Tracker Group of Companies Limited [2020] KECA 852 (KLR):-

“ 21. We are guided on this finding by the authority of this Court in Kioko Joseph (suing as the legal representative of the Estate of Joseph Kilinda – vs – Bamburi Cement Ltd [2017] eKLR (Civil Appeal No. 69 of 2016) when dealing with an appeal where arguments similar to those that have been advanced in this appeal had been made. The Court referred to KRA’s Employer Guide on PAYE, which states that every employer has an obligation to recover the appropriate tax from any lump sum amount, and that the liability for taxation extends to any payment, whether voluntary or obligatory, made to a person to compensate him for the termination of his employment or services. It therefore follows that even though the consent entered between the parties did not make provision, in express terms, for the payment of tax, any amount that was paid to the appellant was therefore subject to taxation. The appellant’s complain that this would amount to variation of the consent Judgment is therefore baseless, and this ground fails.

22. With respect to Party and Party Costs, the position is different. Party and Party Costs are awarded to refund a successful litigant for the costs that he bears in filing suit. See Judicial Hints on Civil Procedure 2nd Edition, Law Africa Publishing at page 94 which states . . .”

19. The Claimant in the present case has not denied having received payment of the sum awarded by the Court in its Judgment delivered on 11th July, 2024, net of tax (PAYE). That being the position, the Claimant was not within the law when he took out execution proceedings against the Respondent/Applicant after the date of the undisputed payment to him, and instructed auctioneers to attach the Respondent’s movable property in execution of a decree that had already been fully settled. Payment of Kshs.1,193,850.30/= is shown to have been made into the Claimant’s Advocates’ bank account on 15th November, 2024. Any attachment and/or proclamation of the Respondent/Applicant’s properties in execution of this Court’s decree occurring after the aforesaid date of payment was not only irregular, but illegal as well.

20. Consequently, and having considered written submissions filed herein, the Notice of Motion dated 20th January, 2025 hereby succeeds in the following terms:-

a. The warrants of attachment of the Respondent’s movable property dated 18th December, 2024 and the Proclamation Notice dated 17th January, 2025 and issued by Martin Mwaniki trading as Anfield Auctioneers Limited in execution of the Court’s decree herein are hereby lifted, the decree issued on 11th July, 2024 having been fully satisfied.

b. Each party will bear its own costs of the application.

21. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 25TH DAY OF JULY 2025



AGNES KITIKU NZEI

JUDGE

Order

This Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

Mr. Marriatte for the Claimant/Respondent

Miss Ngei for the Respondent/Applicant

