



**Kitua v Kenwan Services Limited (Employment and Labour Relations Cause
1753 of 2016) [2024] KEELRC 205 (KLR) (9 February 2024) (Ruling)**

Neutral citation: [2024] KEELRC 205 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 1753 OF 2016**

**SC RUTTO, J
FEBRUARY 9, 2024**

BETWEEN

RAPHAEL MUTISO KITUA CLAIMANT

AND

KENWAN SERVICES LIMITED RESPONDENT

RULING

1. The Respondent/Applicant has moved this Court vide a Notice of Motion Application dated 29th June 2023, brought under a Certificate of Urgency. The Motion seeks the following main orders:
 - a. That pending the hearing and determination of this application inter-parties, the Honorable Court be pleased to set aside the warrants of Attachment dated 22nd June 2023.
 - b. That the Honorable Court be pleased to set aside the ruling by the Deputy Registrar of the Employment and Labour Relations Court dated 4th April 2023 on the Respondent's Bill of Costs dated 19th December 2022.
 - c. That the costs of the Application be provided for.
2. The Application is supported by the grounds appearing on its face and the Affidavit of the Applicant's Director, Mr. Eliud Kungu Ngugi. Briefly that:
 - a. The Claimant did not share with the Applicant the draft decree for approval or at all following the Judgement delivered on 9th December 2022.
 - b. The Applicant has never been served with any mention date, judgment date or court's directions in regards to this matter since he last attended court in July 2018.



- c. A Ruling delivered on 4th April 2023 by Hon. Noella Kyanya (DR) awarded costs of Kenya Shillings One Hundred and Forty Thousand Four Hundred and Sixty (Ksh. 140,460/=) to the Claimant as against the Applicant.
 - d. To date, the Applicant has not been served with any Decree, Bill of Costs, Taxation Notice or any Certificate of Taxation or notice/demand or at all in respect to the said costs.
 - e. The Applicant was denied its constitutional right to a fair hearing in regard to the Taxation of the Claimant's Bill of Costs.
 - f. On or about 22nd June 2023, the Betabase Auctioneers on instructions of the Claimant served the Applicant with Warrants of Attachment dated 22nd June 2023 to attach its movable property.
 - g. The Claimant obtained a decree and Certificate of Taxation on the concealment of facts as no service at all was effected upon the Applicant.
 - h. The Decree and Certificate of Taxation entered is irregular and ought to be set aside. The Applicant was only made aware that the proceedings in the matter had proceeded since the last time he was in court in 2018 upon service of the Warrants of Attachments by the 2nd Respondent on 26th June 2023.
 - i. The Applicant faces unfair execution proceedings based on costs awarded after taxation proceedings whose Bill of Costs and Taxation Notice was never served upon the Applicant.
 - j. The entire execution is full of illegality and irregularities thus cannot stand.
 - k. The Applicant will be grossly prejudiced should the execution be allowed to proceed as presently intended.
3. The Claimant opposed the Application through a Replying Affidavit sworn on 18th July 2023 by Mr. Namada Simoni, his Counsel on record. Briefly, he avers that:
- a. The Applicant and especially their Director, Mr. Eliud Kungu Ngugi the deponent of the Supporting Affidavit is lying on oath and actually misleading the Court to grant interim orders and therefore not deserving any further discretion from this Court.
 - b. To the contrary well before this case, on 7th February 2023 at around 11.00am, a copy of Taxation Notice dated 6th February 2023 and party to party bill of costs dated 19th December 2022 was served and received on behalf of the Respondent by one Ms. Shiro, shop attendant who accepted service of the aforesaid documents but declined to stamp and sign on the principal copy as a sign of acknowledgment of service.
 - c. On 29th March 2023 a copy of Ruling Notice dated 23rd March 2023 was served upon one Mr. Eliud Kungu Ngugi in person, who accepted service of the aforesaid ruling notice but declined to stamp and sign on the principle copy as a sign of acknowledgment of service.
 - d. On 7th June 2022, Mr. Eliud Kungu Ngugi served them with a Notice to act in person dated 6th May 2022.
 - e. On 15th June 2022 the case proceeded for hearing and Mr. Eliud Kungu Ngugi was present and even cross-examined the Claimant and gave his own evidence thereafter a mention date of 19th July 2022, was taken on consent to confirm filing of submissions.



- f. Mr. Eliud Kungu Ngugi was present during the hearing and his allegations of the matter progressing without his knowledge is nothing but a total lie which should not be entertained by this court.
- g. Despite serving the above mentioned notice upon the Respondent's Director and to his knowledge and acceptance to act in person in this matter, he declined to attend court sessions and never served the Claimant with his submissions despite being served with the Claimant's submissions on 7th October 2022 as per the court's directions.
- h. It is clear that the Respondent's Director one Mr. Eliud Kungu Ngugi personally chose not to attend and appoint an advocate to act on his behalf.
- i. From the evidence, it is clear that the Respondent's director is lying and cunning. He personally decided not to proceed with the matter just after the hearing and went quiet until 29th June 2023 when he decided to appoint the firm of Ndalila Simiyu & Associates Advocates to act on his behalf in this matter in trying to delay justice.
- j. This Court cannot and should not grant the stay or set aside a lawful ruling for one who comes to equity must come with clean hands and equity cannot aid one who deliberately ignores court process only to run to the same court upon execution for a remedy meant to reverse the lawful court decision.

Submissions

- 4. The Application was canvassed through written submissions which I have considered. On its part, the Applicant submitted that under article 159 (2) (d) of *the Constitution* and sections 1A and 1B of the *Civil Procedure Act*, focus should be substantive justice rather than procedural technicalities and the just, efficient and expeditious disposal of cases. It was further submitted that the Applicant was never served with the Bill of Costs and Notice of Taxation hence the Deputy Registrar proceeded and taxed the Bill of Costs without a response by the Applicant.
- 5. The Claimant did not file written submissions.

Analysis and determination

- 6. To my mind, the main issue for determination at this juncture is whether the Court should set aside the Ruling delivered by the Deputy Registrar on 4th April 2023 with respect to the Claimant's Party and Party Bill of Costs.
- 7. The Applicant in this case avers that it was never served with any mention date, judgment date or the court's directions since he last attended Court in July 2018. He further avers that he was never served with the Decree, Bill of Costs and Taxation Notice. This position has been refuted by the Claimant.
- 8. The record bears that the matter proceeded for hearing on 15th June 2022 in the presence of the Respondent which was represented by its Director Mr. Eliud Ngugi. Upon close of the hearing, the Court directed parties to file written submissions and to that end, a mention date of 19th July 2022, was issued for purposes of confirming compliance and taking a Judgment date. On the said 19th July 2022, the Respondent was absent from Court and had not filed written submissions as earlier directed. Subsequently, the Court gave a judgment date. In this regard, Judgment was delivered on 9th December 2022 in the absence of the Respondent.



9. To that extent, it is apparent that the Applicant through its Director, is being economical with the truth by stating that he has never been served with any mention date, judgment date or court's directions in regards to this matter since he last attended court in July 2018.
10. Further to the foregoing, the Claimant in his Replying Affidavit exhibited two copies of Affidavits of Service sworn by Owuor Reen on 13th February 2023 and 3rd April 2023.
11. In the first Affidavit of Service sworn on 13th February 2023, Ms. Owuor avers that on 7th February 2023, she served the Notice of Taxation and Party and Party Bill of Costs upon the Respondent through one Ms. Shiro, the shop attendant who accepted service but declined to sign on her copy.
12. In the second Affidavit of Service sworn on 3rd April 2023, Ms. Owuor further avers that on 29th March 2023, she proceeded to the Respondent's shop and met one Mrs. Eliud who accepted service of the Ruling Notice but declined to stamp and sign on her copy.
13. It is worth pointing out that the Applicant has not controverted the averments contained in the Claimant's Replying Affidavit. Specifically, the Applicant's Director has not challenged Ms. Owuor's averments as contained in the two Affidavits of Service exhibited by the Claimant.
14. In light of the foregoing, I have no reason to doubt that the Applicant was duly served with the Notice of Taxation, the Party and Party Bill of Costs and the Ruling Notice as per the Claimant's return of service.
15. The Applicant has further stated that it was not served with a draft decree for approval. Despite its assertions, it is notable that the Applicant has not indicated or suggested that the decree is at variance with the Judgment of the Court delivered on 9th December 2022. I have had the occasion to peruse the said decree and note that it accords with the Judgment of the Court.
16. As I see it, the Applicant's only contention appears to be the manner in which the decree was extracted and not its substance.
17. On this issue, my thinking accords with the Court in *Eco Bank Ltd v Elsek (Kenya) Limited & 3 Others* [2015] eKLR where it was held as follows:

“The Plaintiff has not denied it did not forward the draft Decree for approval as provided under the above mentioned Rules. What is the effect of that failure? In my view that failure cannot lead to the setting aside of execution. it would only lead to the setting aside of the execution if the Decree was shown not to conform the judgment....”
18. I am therefore of the view that failure by the Claimant to forward a draft copy of the decree to the Applicant is a procedural issue and is not so grave as to invalidate the said Decree.
19. I further subscribe to the sentiments of the Court in the case of *Florence Cherugut v Cheptum Murei Annah* [2022] eKLR where it was held that:

“It is not every other failure to forward a decree for approval by learned counsel results in setting aside execution. For a party to rely on such a failure to challenge execution and pray that it be set aside for skipping the step, particularly where the decree corresponds with the terms of the judgment, it in my view amounts to nothing except a fine technicality which Article 159(2)(d) of the 2010 Constitution came in to cure perfectly.”
20. Moreover, it is instructive to note that a decree is a document emanating from the Court as it has to be duly signed by the Registrar for it to be valid.



- 21. In light of the foregoing, I find no reason to set aside the Ruling delivered on 4th April 2023 by the Deputy Registrar.
- 22. To this end, the Application dated 29th June 2023 is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 9TH DAY OF FEBRUARY 2024.

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STELLA RUTTO

JUDGE

Appearance:

Mr. Simiyu for the Applicant/Respondent

Mr. Ebirundu instructed by Mr. Namada for the Claimant

Abdimalik Hussein Court Assistant

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 had 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.

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STELLA RUTTO

JUDGE

