



**Gatoto v Muki Sacco Limited (Cause 45 of 2021)
[2024] KEELRC 747 (KLR) (20 March 2024) (Ruling)**

Neutral citation: [2024] KEELRC 747 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 45 OF 2021
HS WASILWA, J
MARCH 20, 2024**

BETWEEN

JIMNAH KARABA GATOTO CLAIMANT

AND

MUKI SACCO LIMITED RESPONDENT

RULING

1. The Respondent filed a Notice of Motion dated November 14, 2023, pursuant to Article 159(2) of the Constitution, section IA 1B & 3A of the Civil Procedure Act, Order 51 rule 1 and Order 22 rule 22 and all other enabling Provisions of the law, seeking for the following Orders; -
 1. Spent.
 2. Pending the hearing and determination of this application, Claimant/ Respondent, and their agents Ms Direct O' Auctioneers be restrained by way of an interlocutory injunction from selling whether by public auction or otherwise and committing acts of wastage over motor vehicle registration number KCD xxxx the property of the Applicant.
 3. Pending the hearing and determination of this Application, Claimant/ Respondent, and their agents Direct O' Auctioneers be ordered to release and return motor vehicle registration number KCD xxxx to the Applicant unconditionally.
 4. This Honourable Court be pleased to grant a stay of execution of the Judgment delivered on January 24, 2023 in this matter and the decree arising from it pending hearing and final determination of this Application.
 5. The Claimant/Respondent together with its agents MS Direct 'O' Auctioneers be restrained from unlawfully demanding payment of Kshs. 506,420.87 on account of the decretal sum and costs as well as Auctioneer Fees.



6. The Claimant/Respondent be ordered to pay the daily storage charges accruing from November 10, 2023 until the date of the release of motor vehicle registration number KCD xxxx to the Applicant.
7. The costs of the application be met by the Claimant/ Respondent.
2. The Application is supported by the grounds on the face of the Application and the affidavit of Jane Rose Wangui Duncan, the Respondent/Applicant's Human Resource officer, sworn on November 14, 2023.
3. The Affiant stated that on October 24, 2023 the Claimant's Advocates on record served the Respondent's Advocates with a copy of the Decree and Certificate of Costs which, Respondent wrote to them on October 27, 2023 acknowledging receipt of the Decree and Certificate of Costs and requesting for their payment instructions. However, the Claimant's Advocates did not share the requested payment instructions.
4. While waiting to be served with the payment instruction, the Applicant herein received a proclamation notice from Direct 'O' Auctioneers on November 2, 2023 and they immediately called the Claimant's Advocates on record and requested that they share their payment instructions, which they only shared at the end of the day at 17.04 pm.
5. The Respondent's Advocates wrote to the Claimant's Advocates confirming that they had instructions to settle the decretal sum and costs less statutory deductions and provided a tabulation of the payments that were being processed to the Claimant's Advocates Account.
6. Subsequently, the Respondent's Advocates requested the Claimant's Advocates to withdraw the proclamation notice given that payment was imminent. The letter herein was duly acknowledged and on that basis the Respondent's Advocates proceeded to process the payment by RTGS.
7. On November 7, 2023 the Respondent's Advocates proceed to share the proof of remittance of payment to the Claimant's Advocates designated Bank Account and undertook to forward the proof of remittance of statutory deductions to the Kenya Revenue Authority and the National Social Security Fund.
8. Despite making these payments, on November 10, 2023, the Auctioneer proceeded to forcefully intercept the Respondent's Motor Vehicle Registration No. KCD xxxx, despite it not listed in the proclamation notice.
9. He stated that the warrants of attachment are fatally defective and not capable of execution. In addition, that the decretal sum and costs together with the agreed auctioneer charges have already been paid in full.
10. He avers that by the time payments were made that evening the yard had already been closed and therefore it was agreed that the motor vehicle would be released the next morning on Saturday November 11, 2023. However, on the next day, they were served with a copy of a letter from the Claimant's Advocates declining release of the motor vehicle on allegations that the decretal sum had not be paid in full. He added that infact, that they overpaid the claimant by Kshs 34,460 following the additional KRA assessments.
11. He stated that the interest charged in the warrants of attachment is 14% instead of 12%, as such the warrants of attachment are fatally defective. Further that the auctioneers are not entitled to fees because they have illegally and irregularly executed warrants of attachment when the decretal sum had already



- been settled in full. Nonetheless, that desperate to have the said motor vehicle released, they negotiated the auctioneer's fees and settled at Kshs 130,000, which was paid though the vehicle was not released.
12. He states that despite settlement of the decretal sum in full and settlement of the auctioneer fees the Claimant and the Auctioneer have refused to release motor vehicle registration No. KCD xxxx to the Applicant.
 13. Prior to this, the Respondent had on March 28, 2023, noted errors in arithmetical calculation of the judgment and filed a review application dated March 23, 2023, seeking *inter alia* to review the Judgment delivered on January 24, 2023 on the basis that this Court calculated the award of the claimant based on gross salary of Kshs 162, 200 instead of Kshs 126,000. Therefore, arriving at a wrong figure. He thus urged this Court to review the said Judgement and use Kshs. 126,000, which was the claimant's gross pay in calculating the award as follows; -
 - a. Withheld $\frac{1}{2}$ salary during suspension = $\frac{1}{2} \times 126,000 \times 3$ (from November 28, 2020 to February 11, 2021) = 189,000.
 - b. Compensation equivalent to 8 months' salary = $8 \times 126,000 = 1,008,000$; Total = 1,197,000.
 - c. Less statutory deductions; and
 - d. Less the awarded counterclaim of Kshs. 975,610.98.
 - e. Each party to bear their own costs of this application.
 14. The Application herein was heard on April 13, 2023 in absence of the Claimant's Advocate, where the Court agreed with the Applicant/Respondent that the error was apparent on the face of the Judgement and allowed the Application as prayed and thus the award given to the claimant was reviewed to Kshs 221, 389.02.
 15. After proclamation and attachment, on November 28, 2023 the Respondent filed an application dated November 28, 2023, under Article 159(2) of the Constitution section, 1A, 1B & 3A of the Civil Procedure Act, Order 51 Rule 1 and Order 22 Rule 22 and all other enabling provisions of the law, seeking for the following orders; -
 1. Spent.
 2. The Claimant/ Respondent, and their agents Direct 'O' Auctioneers be ordered to release and return motor vehicle registration number KCD xxxx pending the hearing and determination of the application dated November 14, 2023.
 3. The Applicant be ordered to pay the storage charges for motor vehicle registration number KCD xxxx accrued to date pending the hearing and determination of the application dated November 14, 2023.
 4. The Applicant be ordered to furnish this Honourable Court with security equivalent to the statutory deductions of Kshs. 241,400 in the form of a Bank Guarantee or any other security that this Honourable Court shall deem fit to secure the release of the motor vehicle registration number KCD xxxx.
 5. The costs of the application be provided for.
 16. The Application is based on the fact that on November 16, 2023, this Honourable Court, heard the Application *ex-parte* in chambers, having been filed under certificate of urgency and issued a temporary order of stay stopping the Claimant and the Auctioneer Direct 'O' Auctioneers from selling



motor vehicle registration No. KCD xxxx by public auction pending further orders and directions on November 23, 2023.

17. It is averred that during the mention of November 23, 2023, this Honourable Court issued further orders for the disposal of the Applicant's application dated November 14, 2023 and set it down for a further mention on December 19, 2023 and extended the interim orders.
18. The interim orders are such that, while the Claimant and Auctioneer cannot proceed with the sale of motor vehicle registration No. KCD xxxx, it remains in storage where it is wasting away and accumulating storage charges at the rate of Kshs 500 per day.
19. The Applicant herein states that it is aggrieved by the present situation because the Motor vehicle is very crucial to the running of its daily business in that the Applicant herein uses the motor vehicle daily for ferrying of business supplies and in performing other requirements of the business.
20. She contends that by the time the Application is disposed the Motor vehicle will have accumulated astronomical storage charges and the Applicant's business will continue to suffer as the Applicant is forced to source for alternative means of transport.
21. She maintained that they paid the decretal sum in full, in that on November 6, 2023 the Applicant's Advocates on record remitted by way of Bank Transfer Kshs 295,984 to the Claimant's Advocates on record on account of the decretal sum and taxed costs. Further that statutory deductions have also been remitted to the respective bodies because on November 7, 2023 the Applicant remitted to the Kenya Revenue Authority Kshs 239,800 on account of PAYE assessed on the Claimant's award. The Applicant also paid Kshs 1,600 to the NSSF. Therefore, the Applicant has paid Kshs 537,384 in full settlement, an amount that is over and above the decretal sum of 506,420.87 captured in the warrants of attachment.
22. The Affiant stated that she verily believes that the Claimant did not consider the statutory deductions applicable to his award in the tabulation of the total amount due to them and the Applicant in this case is being punished for complying with the law.
23. She states that in the bid to secure the release of the motor vehicle that had been attached, on 10 November 2023 they negotiated and paid the Auctioneer Fees. However, since the payment were made in the afternoon, it was agreed that the vehicle would be released the next day as the yard had been closed.
24. The next day on November 11, 2023, when the motor vehicle was set to be released, the Auctioneer confirmed that he had instructions from the Claimant's Advocates to not release the motor vehicle because the Applicant had not honored the decree.
25. The Applicant's Advocate on record tried to contact the Claimant's Advocate on record on 11 November 2023 through his cell phone number to resolve the issue amicably, but they were unsuccessful because their calls had been diverted to the office line. Therefore efforts to settle the issue amicable failed.
26. The Affiant stated that the Applicant herein is ready and willing to provide security equivalent to the statutory deductions of Kshs 241,400 in the form of a Bank Guarantee or any other security as this Honourable Court deems fit to secure the release of the motor vehicle pending the hearing and determination of its application dated November 14, 2023.
27. The Application is also supported by the affidavit of Janerose Wangui sworn on November 28, 2023, which basically reiterated the grounds of the Application.



28. Before responding to this Application, the Claimant, filed an application dated November 27, 2023, on November 29, 2023, seeking for the following Orders; -
 - a. That this Honourable Court be pleased to review and/or set aside the proceedings of April 13, 2023 and all consequential proceedings and Orders arising therefrom.
 - b. That the Respondent be compelled to comply with the judgment of the Honourable court.
 - c. That the costs of the Application be in the cause.
29. The Application is premised on the fact that there is an error apparent on the face of the record due to Court Orders issued on the September 2, 2023 that reviewed the judgment delivered by this Court on the 24th of January 2023.
30. He avers that the error apparent on the face of the record was occasioned by inadvertence, honest and unintended mistake of counsel who was never served with a hearing notice in respect to the application for review dated March 23, 2023. As a result, the Claimants counsel on record was unable to put in a replying affidavit hence was denied an opportunity to be heard on account on new material evidence wherein the Claimant had serviced the loan amount by a further sum of Kshs 250,000/= (Two Hundred and Fifty Thousand Shillings Only).
31. It is averred that they brought this fact to the attention of the Respondent's Advocates, but the advocate was adamant on amicably reconciling accounts. Therefore, that unless, the orders issued on the April 13, 2023 are set aside and or reviewed the Claimant will suffer irreparable damage and loss.
32. Further, that no prejudice will be suffered by the Respondent herein if the proceedings and/or decree issued on the October 17, 2023 is set aside. In any event that the Respondent is yet to comply with the honorable courts judgment as the decretal sum is yet to be settled, save for the costs of the suit that the Claimants advocates on record went at great lengths through taxation proceedings.
33. He maintained that the Respondents have not cleared the decretal sum or availed proof of any remittances to the tune Kshs. 205,339.45 allegedly paid out as statutory deductions reducing the judgment to a negligible sum Kshs 16,049.57.
34. This Application is supported by the affidavit of Peter Chege, the advocate on record on behalf of the claimant, deposed upon on the November 27, 2023. He reiterated the grounds of the Application and prayed for the Application to be allowed as prayed.
35. On December 11, 2023, when the matter was mention for directions, the Court ordered for the release of the motor vehicle attached, subject to payment of storage fees and auctioneer's costs, in effect dispensing with the Application dated November 28, 2023.
36. Subsequently, on January 25, 2024, the Respondent filed a response to the Application dated November 27, 2023 by a replying affidavit of Janerose Wangui Duncan, sworn on January 22, 2024.
37. The deponent stated that the supporting affidavit as sworn by the claimant's advocate is defective because the advocate has deposed on contentious matters that are beyond his knowledge in contravention of Order 19 Rule 3(1) of the [Civil Procedure Rules](#) and Rule 9 of the [Advocates\(Practice\) Rules](#), therefore the supporting affidavit should be struck out.
38. The deponent stated that the claimant's advocates were served with the Application herein together with Court Order issued on March 28, 2023. Hence the court was at liberty to issue the Orders as it did. She added that the Court was justified in making the said changes as the error was apparent on record.



39. She contends that the issues raised in this Application are new and have no bearing on the correction of calculations made by the Court in the Judgement.
40. It is stated that review application must be made in a formal application and not raised in a replying affidavit.
41. She confirmed that the claimant paid Kshs 250,000 into his Bosa account, however on June 3, 2023, he withdrew Kshs 101, 650 from his account and the balance was used up to clear his accrued penalties and interest.
42. She denied alleged proposal for accounts reconciliation and stated that there were no proposals made by the Claimant and that the money deposited in the said account was withdrawn by the claimant and balance used up to clear arrears in his account.
43. The affiant reiterated that they paid the decretal amount in full and even paid an extra amount of Kshs 34,460.60. she added that in paying statutory deduction, the prevailing rates were used by the statutory bodies, as such the Respondent did not have control over the said amounts.
44. The deponent stated that the Application by the Claimant is an application for review of judgement that has been disguised as review for orders issued on April 13, 2023. Therefore, that the Application is late in the day and no explanation has been given thereof.
45. In the further Affidavit sworn on February 19, 2024, the affiant stated that she subjected the decretal sum of Kshs 1,008,000 to PAYE which was assessed at Kshs. 239,800. They however did not subject Kshs. 189,000 being the withheld half pay to PAYE because the Respondent had remitted the same on claimant's full salary during the suspension period.
46. The Application herein were canvassed by written submissions with the Claimant filing on February 12, 2024 and Respondent filed on February 21, 2024.

Claimant' Submissions

47. The Claimant submitted on three issues; whether the claimant's Application dated November 27, 2023 is merited, whether the Respondent has complied with the Judgement of the Honourable Court and whether the claimant's Application is brought with inordinate delay.
48. On the first issue, the Claimant submitted that they have no issue with the mathematical errors made by the Court, however that the counterclaimed amount had reduced since the Claimant had made a further payment of Kshs 250,000 to the Sacco as such the amount ought to be factored in the calculations. He argued that they could not bring this issue to the attention of the Court because they were not served with the Notice for hearing of the Application dated March 23, 2023. Therefore, that the said amount was not factored in the final decision by the Court due to honest mistake of Counsel who was not served and thus did not file a replying affidavit raising the issue before the calculations were corrected. In this he sought solace in the case of *Philip Chemwolo & Another v Augustine Kubede* [1982-88] KLR 103 where the Court held that; -

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit.”

49. Accordingly, that the failure to raise the issue earlier was because they were not served with any hearing notice of the Application, therefore that failure to attend was a justified inadvertence. In this he cited



the case of *Gideon Mose Onchwati v Kenya Oil Co. Ltd & Another* [2017] eKLR where the Court held that; -

“Although it is an elementary principle of our legal system, that a litigant who is represented by an advocate, is bound by the acts and omissions of the advocate in the course of the representation, in applying that principle, courts must exercise care to avoid abuse of the system and or unjust or ridiculous results. A litigant ought not to bear the consequences of the advocates default, unless the litigant is privy to the default, or the default results from failure, on the part of the litigant, to give the advocate due instructions.”

50. He argued that the sum of Kshs 250,000 is not a meagre sum to be ignored in the calculation of the award and therefore urged this Court to consider this amount. In support of this, he relied on the case of *Bank of Africa Kenya Limited v Put Sarajevo General Engineering Co. Ltd & 2 Others* [2018] eKLR where the Court held that; -

“The amount involved in this suit is a very substantial sum Usd1,280,881.31 approximately Kshs.133,211,700/= based on exchange rates in the year 2017 when the suit was filed. This is not an amount to be sneezed at. Justice demands that the applicant be accorded an opportunity to present his defence before being condemned to pay such a huge sum of money. The defendant deserves to be allowed an opportunity to present his case and have the same determined on its merits.”

51. On whether the Respondent complied with the award granted by the Court, it was submitted that he claimant was paid Kshs 295,984 as decretal sum and costs, while Kshs 205,339.45 paid out as statutory deductions being PAYE & NSSF, however that no evidence is tendered in support of this allegation as is required under Section 107, 109 and 112 of the *Evidence Act*. He added that the slip tendered as evidence before this Court does not show the tax was paid on account for the claimant. To buttress its argument, the claimant relied on the case of *Anne Wambui Nderitu v Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334 where the Court held that;-

“As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107(1) of the *Evidence Act* Cap 80... There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in sections 109 and 112 of the *Act*.”

52. It was argued further that the Respondent by its letter of November 3, 2023 indicated the statutory deduction as Kshs 205,339.45 while now, it claims to have remitted Kshs 239,800, bringing more confusion than clarity. Therefore, in absence of proof of remittance of these statutory deductions, the Respondent still owes the claimant and thus they ought to be compelled to remit the same to the claimant.
53. On delay in filing the Application dated November 27, 2023, it was submitted that the decree subject of the Application is the one issued on October 17, 2023 premised on review made by the Court on May 23, 2023, therefore that the Application of November 27, 2023 was not filed on inordinate delay as alleged.
54. In conclusion, the Claimant urged this Court to reconsider all facts after the filling of the Application of April 23, 2023 to do just to both parties. In effect, he prayed for their application dated November 27, 2023 to be allowed as prayed.



Respondent' Submissions.

55. The Respondent submitted on three issues; Whether the Respondent's application dated November 14, 2023 is merited, whether the Claimant's Application dated November 27, 2023 is merited and who bears the costs of both Applications.
56. On the first issue, it was submitted that the Respondent has demonstrated that by the time the Auctioneers attached the motor vehicle on November 10, 2023, the Respondent had fully complied with the orders of this Honourable Court in that on November 6, 2023, they remitted to the Claimant's Advocates Kshs. 295,984 on account of the decretal sum and costs via RTGS and they acknowledged receipt. On the same day the Respondent remitted to the NSSF Kshs. 1,600 and Kshs 239,800 to KRA being the PAYE assessed on the lump sum award to the Claimant by this Court.
57. He argued that the Respondent had initially projected the payable statutory deductions at Kshs 205,339.45, this self-assessment was overruled by the Kenya Revenue Authority. Therefore, that the Respondent has paid Kshs 537,384 over and above the decretal sum of Kshs 506,420.87 captured in the warrants of attachment. Additionally, that the Respondent paid the negotiated auctioneer fees of Kshs. 130,000 as well as the storage charges of Kshs. 21,960 to facilitate the release of the Respondent's Motor Vehicle.
58. It was submitted that the Respondent has presented uncontroverted evidence before this Honourable Court including RTGS and NSSF remittance and proof of payment of PAYE made by the Respondent in compliance with the judgement. He argued that, it has clearly demonstrated that it amended its KRA PAYE return for October 2023 and included the Claimant as directed by the Kenya Revenue Authority and therefore there is no doubt that the PAYE was remitted directly into the Claimant's tax account and not any other employee of the Respondent. This, he argued is supported by PAYE Return capturing the Claimant's details, the acknowledgment by the KRA that the Respondent lodged the amended return on November 3, 2023 and the Bank Receipt confirming that payment was made by the Respondent against the Payment Slip generated on November 6, 2023. Therefore, that the decretal sum was paid in full before the Claimant attached the motor vehicle on November 10, 2023.
59. On whether the Claimant's Application dated November 27, 2023 is merited, it was submitted that the law on setting aside of *ex parte* orders is found under Order 12, rule 7 of the [Civil Procedure Rules](#) and amplified by Order 51, rule 15 which provides that the court may set aside an order made *ex parte*.
60. The grounds for setting aside an Order was reiterated by the Court in [PMM v NW](#) [2020] eKLR where the Court stated that in setting aside *ex parte* orders, the court must be satisfied of one of two things, namely, either that the respondent was not properly served with summons or that the respondent failed to appear in court at the hearing due to sufficient cause.
61. Accordingly, the Respondent argued that the Claimant was properly served via email address number munene.chegeadv@gmail.com.
62. On allegations that Kshs 250,000 was paid to the Respondent, it was submitted that the payment of the said money is not remotely related to the grounds for review in the application by the Respondent and the Claimant ought to have made an application to this Honourable Court for review without disguising it as an application to set aside this Honourable Courts Orders. Nevertheless, that from the evidence presented before this Honourable Court, the Claimant deposited Kshs 250,000 and subsequently withdrew Kshs 101,650 from the account on June 3, 2023 and the balance of the deposit applied to clearing the accrued penalties and interests in the usual manner. Hence the alleged new material of evidence is nothing more than a red herring and does not constitute sufficient cause for



setting aside the orders made on April 13, 2023. In any event that the delay in filing the Application is inordinate.

63. Additionally, it was submitted that the Orders made on April 13, 2023 have not prejudiced the Claimant in any way because this Honourable Court simply captured the Claimant's correct salary as pleaded by the Claimant in the tabulation of his award. On that basis, the Respondent urged this Court to find the Claimant's Application is not merited and dismiss it with costs.
64. On costs of the Applications, it was submitted that, it is settled in law that costs follow the event and despite facing numerous challenges and obstacles, the Respondent has diligently adhered to this Honourable Court's orders, promptly rectified any errors, and fulfilled their financial obligations in good faith. Conversely, that the actions of the Claimant in persistently demanding further payment and pursuing unjustified claims are unfair and unjustifiable. Therefore, that the claimant's Application should be dismissed with costs and Respondent's Application allowed with costs for both applications.
65. There are 3 applications for consideration. The 1st application dated November 27, 2023 was for the release of Motor Vehicle KCD xxxx to the applicant. This application has however been overtaken by events. On December 11, 2024, the matter was heard orally in court, the court ordered for the release of the Motor Vehicle subject to the payment of storage fees and auctioneers charges.
66. These orders are still standing and I restate the same and add that any storage and auctioneers' charges incurred after the said date, after the orders of release will be born by the Claimant Respondent himself.
67. The second application dated November 27, 2023 seeks for review and setting aside of the proceedings of April 13, 2023 and all consequential orders therein and that the Respondent be compelled to comply with the Judgment of the court. The application is premised on the orders of this court issued on 2/9/2023 that reviewed the Judgment of January 24, 2024.
68. The applicant contends that the court proceeded to hear this application without giving him a chance to be heard, since he was never served with the application for review dated March 23, 2023 and so never filed a replying affidavit hence was denied an opportunity to be heard on account of new evidence whereas he had serviced the loan by a further 250,000/=.
69. I have looked at the record of the court on 13/4/2023. When the application for review came up, the court proceeded to hear it in the absence of the Respondents. The court was not advised on whether the application had been served or not nor why the Respondent was absent.
70. It was an error of the court to presume that the Claimant had been served and was absent without good cause and proceeded to hear the application *ex-parte* and make orders reviewing the Judgment without considering the Claimant's submissions.
71. For this reason, given that the Claimant has submitted that there was need to consider their submissions, I will review the orders of 13/4/2023 further and set them aside to enable the Respondent Claimant reply to the review prayers for consideration together with the new evidence they also purport to have.
72. They aver that they had made a further payment of 250,000/= to the Sacco, which amount ought to be factored in the calculations and it would be important for this fact to be established.
73. The last application relates to payment of PAYE which the Claimants aver that there is no proof of the payment of the PAYE of Kshs 205,339.45. The Claimant aver that the Respondents had indicated payment of PAYE in different amounts and this needs to be recorded.



74. My view of all these applications is that they only need reconciliation of figures which the parties are urged to do in order to avoid further delay in the resolution of this case.
75. There are no orders of this court. Costs in the cause.

RULING DELIVERED VIRTUALLY THIS 20TH DAY OF MARCH, 2024.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of: -

Everlyne Kyama for Applicant – Present

Achieng for Respondent – Present

Court Assistant - Fred

