



**Soni v Gudka & 2 others (Office bearers of the Board of Management of the Pandya Memorial Society); Kinyua t/a Makini Auctioneers Agencies (Interested Party) (Cause E114 of 2023) [2024] KEELRC 2791 (KLR) (14 November 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2791 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE E114 OF 2023  
M MBARŪ, J  
NOVEMBER 14, 2024**

**BETWEEN**

**DR DINESH JAMNADAS SONI ..... CLAIMANT**

**AND**

**SHOBHAG GUDKA ..... 1<sup>ST</sup> RESPONDENT**

**RAMAN PATEL ..... 2<sup>ND</sup> RESPONDENT**

**VINESH VAGHELA ..... 3<sup>RD</sup> RESPONDENT**

**OFFICE BEARERS OF THE BOARD OF MANAGEMENT OF THE PANDYA MEMORIAL SOCIETY**

**AND**

**GEORGE MUNYAMBU KINYUA T/A MAKINI AUCTIONEERS AGENCIES ..... INTERESTED PARTY**

**RULING**

1. The respondents, Raman Patel, Shoghag Gudka, and Vinesh Vaghela, office hearers of the Board of Management of the Pandya Memorial Society filed an application dated 14 October 2024 under the provisions of Section 12(2) of the *Employment and Labour Relations Court Act*, Rules 45 and 74 of the Employment and Labour Relations Court (Procedure) Rules seeking orders;

This court be pleased to render a ruling clarifying its judgment dated 11 July 2024 and/or Decree made pursuant thereto on the same date, particularly on the issue of whether by virtue of the provisions of Section 49(2) of the *Employment Act*, the awards made in favour of the claimant are subject to statutory deductions.



Upon such clarification, this court be pleased to quash and set aside the warrants of attachment of the respondent's property issued to Makini Auctioneers on 09 October 2024 or any other warrants that may be issued subsequently.

The costs of this application be awarded to the applicants.

2. The application is supported by the affidavit of Dr Vinesh Vaghela and on the grounds that the respondents have settled the decretal sum of Ksh.2, 404,887.08 paid to the claimant. This is the decretal sum net of PAYE and Affordable Housing Levy (AHL) and ksh.245, 000 being costs agreed by consent. The Sum of Ksh.1, 116,650.99 to KRA as PAYE and the sum of Ksh.49, 896.53 to KRA as AHL.
3. Despite the settlement of the decretal sum, the claimant has moved with execution proceedings, adamant that the award was not to be subjected to statutory deductions. Under Sections 49(2) and 50 of the *Employment Act*, in making payments to an employee, statutory deductions are deducted.
4. In his Supporting Affidavit, Dr Vaghela aver that the awards by the court are subject to statutory deduction. If the respondents fail to address such matters, there is a penalty in law.
5. The claimant has since been paid and the parties, by consent settled the matter. However, the claimant has proceeded and obtained warrants of attachment for hospital equipment which will disrupt operations if allowed to proceed. Upon payment, proceeding with the attachment will lead to a double payment of the sum of Ksh.1, 168,988.52 already settled.
6. There will be prejudice against the respondents if the execution proceedings are allowed to proceed while there is the full settlement of the decretal sum.
7. In reply, the claimant filed his Replying Affidavit and aver that the judgment herein was not inclusive of statutory deductions. The court exercised its discretion in assessing the compensation and hence was not subject to any deductions as alleged by the respondent. The respondents did not seek to review, vary or clarify the judgment before subjecting the awards to statutory deductions. The unilateral review is not justified.
8. The court is now functus officio and the claimant should be allowed to execute. Where the judgment is silent on the issue of interest in the decretal sum, section 26(2) of the *Civil Procedure Act* comes into play. Such interests are due at court rates. The Warrants of Attachment applied a rate of 12% which is lawful and should be settled with costs to the auctioneers and the claimant.
9. The interested party filed the Replying Affidavit of George Munyamu Kinyua who aver that he is the proprietor of Makini Auctioneers Agencies and under the Warrants of Attachment and Warrant of Sale of Property issued by the Court on 9 October 2024 he was given powers to execute by attachment the judgment herein delivered on 16 September 2024 which allowed the Decree Holder's claim against the respondent at ksh.9, 298,128.40
10. Acting on the instructions, on 5 September 2024 the interested party proceeded to the respondent premises and informed the management of the proclamation but before the seizure of the listed properties, he was served with Orders issued on 16 October 2024 stopping the execution. In the circumstance, the costs due should be settled based on the request made to the court for;
  - a. Auctioneer fees of Ksh.116,340;
  - b. 16% VAT Ksh.22,160;
  - c. Transport charges during proclamation Ksh.5,500;



d. Legal fees Ksh.11,634

Total ksh.155, 634.

Parties attended oral submissions in court.

11. The respondent as the applicant submitted that under Section 49(2) of the *Employment Act*, the court award is subject to statutory deductions as held in the case of Andrew Mukite Saisi v Tracker Group of Companies Limited [2020] KECA 852 (KLR) that all payments to an employee should be subjected to statutory deductions.
12. Parties went before the Deputy Registrar on 3 October 2024 and recorded a consent on costs. The case was marked closed and the decretal sum was paid to the claimant. The claimant, with malice applied for warrants of attachment despite knowing the consent and settlement. The application should be allowed with costs.
13. The auctioneers joined in these proceedings without leave or filing separate proceedings and therefore ineligible to participate and seek costs.  
The claimant relied on his affidavit.
14. The interested party submitted that the court issued the proclamation and the respondent should pay its costs herein. The interested party already visited the respondent's premises and proclaimed various goods, advocates have been instructed to attend to these proceedings and the respondent should pay the due costs. The auctioneer is the agent of the court. Where there is a decree, the judgment debtor should demonstrate it has settled otherwise the same is subject to execution with costs.

### **Determination**

15. The issues which emerge for determination in this application are;
16. Whether the auctioneers are properly on record as interested parties herein;
17. Whether the awards by the court should be subject to statutory deductions;

### **Who should pay the costs?**

18. The ordinary practice for enforcement and execution of judgment is for the court to issue an auctioneer with Warrants of Attachment and Warrants of Sale of Property. These are separate and distinct procedures addressed by the Taxing Officer/Deputy Registrar and not for this court to address in terms of costs due. Through a miscellaneous application, auctioneers can move the court as appropriate.
19. The entry into proceedings as an interested party is regulated and should not be abused. Auctioneers seeking to execute a decree are not interested parties as dined by various courts including the case of Mumo Matemu v Trusted Society of Human Rights Alliance, Attorney General, and Minister of Justice & Constitutional Affairs, Director of Public Prosecutions, and Kenyan Section of the International Commission of Jurists & Kenya Human Rights Commission [2013] KECA 445 (KLR).
20. The claim for costs by the auctioneers herein as interested parties is irregular. Such proceedings should be addressed separately.
21. On the above, parties attended before the Deputy Registrar on 3 October 2024 and recorded consent on settlement of the costs and essentially the claim. The claimant has since been paid the decretal sum save for the contested statutory deductions.



22. Upon the consent on 3 October 2024, the Deputy Registrar signed the Warrants of Attachment and Warrants of Sale for the benefit of the auctioneers on 9 October 2024. I have made enquiry about this procedures and the Deputy Registrar asserts that this is procedural and regular practice of the office. Where there is a decree that is not settled, such a warrant can be issued.

Regrettably, such practice is not proper and legitimate.

23. The rationale of a consent order will be negated if parties settle a matter but the court through its functions proceeds to circumvent such consent order to allow execution proceedings. Where the claimant was not satisfied with the amounts paid, recourse was not execution but clarity. Where the auctioneers were issued with Warrants of Attachment, the decree was not for the sum of Ksh.9, 298,128.40 as George Munyambu Kinyua avers in his Replying Affidavit. The amounts due to the claimant are well set out in the decree to include;

a. Decretal sum Ksh.3,326,434.60

b. Less paid Ksh.2,404,887.08

c. Balance Ksh.921,548.52

d. Taxed costs ksh.245,000

Total due ksh.1, 168,998.52.

24. The basis of the attachment is lost where the proclaimed property is for an amount separate from the judgment sum. Such should not be allowed to take root.

25. The office of the Deputy Registrar and Taxing Officer is meant to assist the court in its functions. Upon a Consent Order settling a matter, the office is seized of the proper procedure to follow, closing the file and not commencing execution proceedings negating the Consent Order.

26. In this regard, the entry of the interested party is irregular, and the process of execution is invalid. It cannot be sanctioned with an award of costs.

27. On the application of Section 49(2) of the *Employment Act*, all payments to an employee are subject to statutory deductions. Whether this is noted in the body of the judgment or final orders or not, before payment to an employee, the employer is under a legal duty to deduct all statutory dues.

28. Where the computation of terminal dues relates to the gross monthly wage of the employee section 49(2) of the *Employment Act* applies automatically. This is not at the option of the employer and where the court specifically prescribes or is silent, section 49(2) of the *Employment Act* is mandatory as the statutory deduction payable by the employer to the relevant body must be deducted based on the gross wage.

(2) payments made by the employer under this section shall be subject to statutory deductions.

29. In *Wilson Sibiyu v Kenya National Examination Council, Cause No.1659 of 2014*; the court held that;

On the principal sum, the court award of kshs.947, 575.00, section 49(2) of the *Employment Act* apply. Such provisions of section 49(2) are not discretionary and are mandatory.

(2) Any payments made by the employer under this section shall be subject to statutory deductions.

...



Reference to various court cases where statutory deductions were not ordered is not relevant herein. The law does not change simply because there is a lapse in compliance with mandatory provisions of the law. Section 49(2) of the Employment Act is stated in mandatory terms and not subject to court discretion.

30. In John Kinyanjui Gateru v The Family Bank Ltd, Cause No.743 of 2013; on the issue of the payment of terminal dues owing to an employee upon dismissal, the court held that;

....Equally section 49(2) of the Employment Act requires an employer to deduct all statutory dues and deductions such as the taxes due before paying an employee. Such deduction applies to terminal dues as well.

31. Accordingly, in this case, the claimant cannot claim from the respondent what is deductible at source in statutory deductions. The application of Section 49(2) of the Employment Act is not optional to the respondent. The mandatory nature of these provisions carries a severe penalty and where not adhered to, the employer who fails to address should pay such owing stator dues from its accounts.

32. Accordingly, the application dated 14 October 2024 is with merit and is hereby allowed;

- a. Upon the judgment herein, the awards due to the claimant are subject to the mandatory requirements of Section 49(2) of the Employment Act for the deduction of statutory dues;
- b. The Warrants for Attachment dated 9 October 2024 are hereby quashed;
- c. The claimant is to pay the respondent's costs herein.

The ruling is to be placed with the Deputy Registrar, Mombasa ELRC to address as outlined above.

Orders accordingly.

**DELIVERED VIA TEAMS VIRTUAL PLATFORM THIS 14<sup>TH</sup> DAY OF NOVEMBER 2024.**

**M. MBARŪ**

**JUDGE**

