



**Omondi v Danish Refugee Council (Cause E147 of 2023)
[2024] KEELRC 13512 (KLR) (20 December 2024) (Ruling)**

Neutral citation: [2024] KEELRC 13512 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E147 OF 2023
SC RUTTO, J
DECEMBER 20, 2024**

BETWEEN

PAMELAH MUSUNDI OMONDI APPLICANT

AND

DANISH REFUGEE COUNCIL RESPONDENT

RULING

1. The Respondent/Applicant has moved this Court vide a Notice of Motion Application dated 31st July 2024, in which it seeks the following orders:
 1. Spent.
 2. Spent.
 3. Spent.
 4. That the warrants of attachment dated 24th July 2024 and the proclamation notice of even date be lifted, set aside and/or vacated.
 5. That the Claimant bears the auctioneer's costs.
 6. That this Honourable Court makes further orders and issue further directions as it may deem just and expedient.
 7. That the costs of this application be borne by the Claimant.
2. The Application is premised on the grounds set out on its face and is supported by the Affidavit sworn on 31st July 2024 by Zeeshan Pirzada, the Respondent's Regional Head of Support Services East Africa and Great Lakes.
3. Grounds in support of the Motion are that:



- a. The Claimant's agents - M/S Moran Auctioneers proclaimed the Judgement Debtor's movable property of 24th July 2024 vide a proclamation notice of even date.
 - b. The said Proclamation was issued allegedly on the strength of warrants of attachment issued by this Honorable Court dated 24th July 2024, copies of which were never and have never been served on the Applicant.
 - c. As far as the Applicant is aware, the decree and/or certificate of costs was never sent for approval of the Respondent/Judgement Debtor.
 - d. The said execution proceedings have also been brought in bad faith as the parties herein had discussions and an agreement with the Judgement Debtor undertaking to the Counsel for the Claimant to make the payment of the Decretal sum including interest and costs on or before the 29th July 2024.
 - e. The Judgement Debtor has since paid to the Judgement Debtor (sic) the entire decretal sum as is due to it and costs and the execution by the Claimant is therefore an attempt at unjust enrichment.
 - f. The warrants of attachment and proclamation notice that the Claimant is relying on and any subsequent steps in execution are illegal and an abuse of the Court's process and ought to be recalled and set aside accordingly.
 - g. The Claimant ought to be condemned to pay the costs of this Application as well as the Auctioneer's fees.
 - h. Counsel for the Claimant has failed to act with honesty and integrity towards opposing counsel and the Court by not disclosing the actual circumstances of the matter before execution. This constitutes unethical conduct rendering the execution proceedings null and void.
 - i. The Judgement Debtor remains unaware of the particulars of the monies claimed in the decree and/or warrants of attachments having never been served with either of these documents to their great prejudice as they are now under threat of attachment and sale.
 - j. The Respondent/Judgement Debtor stands to suffer irreparably if the application is not allowed.
4. In response to the Application, the Claimant filed a Replying Affidavit dated 5th August 2024 in which she avers that:
- a. At no point did the Applicant's advocates ever reach an agreement with her advocates on record not to pursue execution proceedings. She is aware that when the Respondent's advocates sought to obtain such an undertaking, her advocates expressly informed them that they could not provide the same and this was based on the delay in which the Judgement debtor had taken to settle the decretal amounts in full since Judgement was delivered on the 3rd of May, 2024.
 - b. She has been advised by her advocates on record that under Order 21 Rule 8 of the Civil Procedure Rules, the Decree having been prepared and issued by the Court itself, and no draft decree was prepared by her advocates for approval and endorsement it was not mandatory/necessary for her advocates to prepare a draft decree or seek the Respondent's concurrence on that front.



- c. To date, the Respondent has not paid the decretal sum of Kshs. 3,209,928.75 together with costs and interests in full as ordered by the court but has rather paid a sum of Kshs.2,535,968.05 only.
- d. The Respondent has instead, without seeking approval of the Court or review of the judgment and decree issued in the matter, unilaterally and unlawfully subjected the decretal sums to purported illegal statutory deductions.
- e. It is trite that decretal amounts do not constitute taxable income within the meaning of the provisions of the *Income Tax Act* as the same is compensation for a legal wrong and as such, the purported statutory deductions as levied by the Respondent on the decretal amounts herein are illegal especially taking into account some of the statutory deductions like the Housing Levy that has since been declared unconstitutional and an unlawful subjection of the taxed party and party costs to withholding tax.
- f. As such, she is entitled to the fruits of the Judgment rendered in her favour and she was at all material times entitled to levy execution against the Respondent as she has through Moran Auctioneers because the decretal amount had not and has not been settled in full to date.
- g. That without prejudice, even if it was correct that the decretal amounts were subject to statutory deductions, the Respondent has not provided evidence of remittance of the said deductions to the Kenya Revenue Authority. As such, she verily believes the Respondent is unlawfully attempting to deny her what has been decreed by the court to be due and rightfully owing.
- h. She verily believes that the proclamation notices and warrants of attachment were lawfully issued and served upon the Respondent on the 24th of July, 2024. That this was way before it made any attempts to settle the Judgment and Decree herein.
- i. The execution against the Respondent was justified as it had not settled and it has not yet settled the Judgment and Decree issued by this Honourable Court against it.
- j. She verily believes the application dated the 31st of July, 2024 is totally devoid of merit and an abuse of the Court's process. She urged this Honourable Court to dismiss the same with costs.

Analysis and Determination

- 5. Central to this Application, is the enforcement of this Court's orders as contained in the Judgment delivered on 3rd May 2024. On its part, the Applicant contends that it has since paid the entire decretal amount to the Claimant together with costs and that the execution is an attempt at unjust enrichment.
- 6. On the other hand, the Claimant has refuted the Applicant's assertions and is categorical that the Applicant has not paid the decretal sum of Kshs 3,209,928.75 together with costs and interests in full but has rather paid a sum of Kshs 2,535,968.05 only, hence the execution is justified.
- 7. The Claimant further contends that the Applicant without seeking the approval of this court or review of the judgment, unilaterally subjected the decretal sums to purported illegal statutory deductions.
- 8. According to the Claimant, the decretal amount does not constitute taxable income within the meaning of the provisions of the *Income Tax Act* as the same is compensation for a legal wrong. The Claimant has termed the said deductions illegal.



9. In its judgment dated 3rd May 2024, this Court allowed the Claim by the Claimant thereby awarding her the sum of Kshs 3,209,928.75. Further, the court awarded the Claimant the costs of the suit and interests on the total award from the date of judgment until payment in full. From the record, the party and party costs were taxed at Kshs 413,430.58.
10. In support of the Application, the Applicant annexed to the Affidavit of Zeeshan Pirzada, a copy of the Payee Advice confirming that the Applicant made payments in the sum of Kshs 2,535,968.05 to the Claimant through the firm of Bryan Khaemba, Kamau Kamau & Co. Advocates, her Advocates on record.
11. From the record, the Claimant commenced execution proceedings for the recovery of the sum of Kshs 3,633,968.93 which includes the taxed costs as well as interest.
12. Thus, the question is whether the Applicant acted within the law in subjecting the Claimant's award to statutory deductions.
13. 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.”
14. The Court of Appeal in *Rift Valley Railways (K) Limited vs Kiya Kalakhe Boru* [2015] eKLR, addressed itself on the import of the aforementioned statutory provision and held as follows;
 - “We do not therefore discern injudicious exercise of discretion nor consideration of extraneous factors. In which event then, the amount awarded was fair. This is of course subject to the statutory deductions that were to apply as at the time of the award. Section 49(2) *Employment Act* provides that “Any payments made by the employer under this section shall be subject to statutory deductions”
15. The court adopts the above precedent which is binding and returns that any award made by the Court under Section 49 of the *Employment Act*, is subject to statutory deductions which are ordinarily withheld and deducted at source by the employer and remitted to the relevant agency which in this case, is the Kenya Revenue Authority. Such statutory deductions include Pay As You Earn (PAYE) and such other statutory deductions as may be in force at the material time. Worthy to note is that Section 49(2) is couched in an express and mandatory form.
16. What's more the aforementioned Section 49(2), is also in consonance with the provisions of Section 37(1) of the *Income Tax Act* which provides as follows;
 - “An employer paying emoluments to an employee shall deduct therefrom, and account for tax thereon, to such extent and in such manner as may be prescribed.”
17. Notably, Section 37(2) of the *Income Tax Act*, provides for a penalty against an employer in the event of non-compliance with the provisions of (1). As such, it follows that the Applicant was under a legal obligation to effect deductions from the Claimant's award.
18. To this end, the Application dated 31st July 2024 is found to be meritorious and consequently, the Warrants of Attachment dated 24th July 2024 and the Proclamation Notice of even date issued by Moran Auctioneers are hereby lifted and set aside.



19. Finally, and to bring the matter to a close, the Applicant shall within 7 days from the delivery of this Ruling, furnish the Claimant with evidence confirming remittance of the statutory deductions to the Kenya Revenue Authority.

20. There will be no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER 2024

.....

STELLA RUTTO

JUDGE

In the presence of:

Mr. Otieno instructed by Mr. Weru for the Respondent/Applicant

Mr. Bulowa instructed by Mr. Khaemba for the Claimant/ Respondent

Millicent 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.

STELLA RUTTO

JUDGE

4

