



**Shop & Deliver Limited t/a Betika v Njagi (Miscellaneous Case E145 of 2022) [2023] KEELRC 228 (KLR) (31 January 2023) (Ruling)**

Neutral citation: [2023] KEELRC 228 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
MISCELLANEOUS CASE E145 OF 2022  
JK GAKERI, J  
JANUARY 31, 2023**

**BETWEEN**

**SHOP & DELIVER LIMITED T/A BETIKA ..... APPLICANT**

**AND**

**FRED GITONGA NJAGI ..... RESPONDENT**

**RULING**

1. Before the court for determination is a notice of motion application by the applicant dated September 23, 2022 seeking orders that;
  1. Spent.
  2. This Honourable court affirms the applicant's decision to withhold two thirds ( $\frac{2}{3}$ ) of the terminal dues owed to the respondent pending the hearing and determination of Criminal Case No E429 of 2022 R v Gitonga Njagi.
  3. The honourable court be pleased to issue such further orders as it may deem fit, appropriate and expedient to grant in the circumstances of this matter for protection of the rights of the Applicant.
  4. Costs be proved for.
2. The application, filed under certificate of urgency is expressed under section 19(3) of the *Employment Act, 2007*, section 12(3) of the *Employment and Labour Relations Court Act*, order 51 rule 10 of the *Civil Procedure Rules, 2010* and all enabling provisions of law.
3. The application is based on the grounds set out on its face and supported by the affidavit of Ellina Kabiru dated September 23, 2022 who deposes that the applicant appointed the respondent as head of technology on December 27, 2017 and confirmed the same on May 2, 2018.



4. That between January 13, 2022 and February 3, 2022, the respondent allegedly stole Kshs 11,007,393/= belonging to the applicant and was arrested for stealing by servant and the criminal case was ongoing.
5. That the applicant conducted internal investigations and took disciplinary action against the Respondent and terminated his employment for gross misconduct.
6. The affiant further deposes that the applicant is obligated to pay Kshs 12,562,575.65 to the respondent as terminal dues but owing to the charges facing the respondent, the applicant withheld two-thirds of the total sum due of Kshs 8,375,050.43 pending hearing and determination of the ongoing criminal case.
7. That the applicant is apprehensive that it may not recover the money stolen from it and believes it would be best to withhold part of the respondent's terminal dues pending the hearing and determination of the criminal case and the deduction was explained to the respondent.
8. Finally, the affiant deposes that the applicant has the right to withhold or deduct wages in accordance with section 19 of the [Employment Act, 2007](#).

### **Respondent's grounds of opposition**

9. The respondent opposes the applicant's notice of motion on the ground that it is incompetent for lack of a claim on which the prayer sought may be anchored.
10. That the application was superfluous, fatally defective, lacked merit and was an abuse of court process as the applicant was seeking leave to do what it had already done.
11. It is the respondent's case that he was an employee of the appellant at monthly salary of Kshs 1,980,000/= and his employment was terminated unfairly and unjustly as the Applicant had no justifiable grounds to terminate the Respondent's employment and the same was malicious, capricious, in bad faith and unfair and offended clause 13.1.4 of the contract of employment as the respondent is yet to be convicted.
12. The respondent avers that he has the right to fair trial by dint of article 50(2)(a) of the [Constitution](#) and the applicant condemned him contrary to the law.
13. That sections 17, 18 and 19 of the [Employment Act](#) obligated the applicant to pay the respondent's dues.
14. The respondent further avers he was arrested at the instigation of the applicant and incarcerated at the central police station for 10 days and unlawfully and maliciously charged with stealing by servant and admitted to bail of Kshs 200,000/= but cannot access the applicant's office.
15. It is the respondent's case that the summary dismissal letter dated July 20, 2022 purported to surcharge him unlawfully since the criminal case is pending determination.
16. That the applicant had no leave to withhold the Respondent's dues.
17. The applicant filed a further affidavit by Ellina Kabiru sworn on October 26, 2022 deposing that the criminal case was scheduled for hearing on December 14, 2022.
18. That affiant states that section 44(4)(g) of the [Employment Act](#) empowered the applicant to summarily dismiss the respondent if there were reasonable and sufficient grounds to suspect that the respondent had committed an offence against or to the substantial detriment of the applicant.



19. The affiant further states that section 12(3)(viii) of the *Employment and Labour Relations Court Act*, 2011 empowered the court to issue any other appropriate relief as it may deem fit to grant including affirmation and/or endorsement of the decision made by the applicant to withhold <sup>2</sup>/<sub>3</sub> of the respondent's terminal dues on the ground that it suspects that the respondent was responsible for the theft of Kshs 11,007,393.
20. That section 19(1)(b) of the *Employment Act* gave the applicant the statutory right to deduct and withhold <sup>2</sup>/<sub>3</sub> of the respondent's terminal dues.
21. The court was invited to affirm and/or endorse the applicant's decision pending the hearing and determination of the criminal case.

### **Applicant's submissions**

22. The applicant's counsel submitted on two issues relating to the court's jurisdiction to hear and determine the application and whether the deduction from the respondent's dues was lawful.
23. As regards jurisdiction, counsel relied on the provisions of article 162(2) of the *Constitution of Kenya, 2010* and 12(1) of the *Employment and Labour Relations Court Act* to demarcate the court's jurisdiction generally and urge that the court had expansive original and appellate jurisdiction.
24. Reliance was also made on the provisions of section 12(3)(viii) of the *Act* on the reliefs the court has jurisdiction to grant.
25. Similarly, the decision in *Clive Ogwora v Governor Nyamira County & 2 others* [2021] eKLR was relied upon to urge that the court had jurisdiction to entertain the matter before it.
26. As to the lawfulness of the deductions, reliance was made on the provisions of section 19(1)(b) and 19(3) of the *Employment Act, 2007* to urge that the law permitted deductions up to <sup>2</sup>/<sub>3</sub> since the Respondent was arrested and charged with the offence of stealing by servant and the facts of the alleged theft had not been controverted. The charge therefore gave the applicant a legal basis to deduct the sum from the claimant's wages (Kshs 8,375,050.43).
27. In conclusion, it was submitted that failure to file a replying affidavit signified that the applicant's averments were uncontroverted.
28. Deductions in *Faustina Njeru Njoka v Kimunye Tea Factory Ltd* [2022] eKLR and *Daniel Kibet Mutai & 9 others v Attorney General* [2019] eKLR among others were cited in support of the submission on failure of the respondent to file a replying affidavit as required by rule 17(a) of the *Employment and Labour Relations Court (Procedure) Rules, 2016*.
29. Counsel urged that it was in the interest of justice that the deductions be affirmed and/or endorsed by the court.
30. The applicant prayed that the application be allowed as prayed.

### **Respondent's submissions**

31. The respondent's counsel submitted on the competence of the application before the court, whether the application had merit, grounds of opposition and the notice of preliminary objection dated October 12, 2022 and jurisdiction of the court.
32. As regards the competency or otherwise of the application, it was submitted that it was trite law that the substantive reliefs sought by the applicant could not be granted vide a miscellaneous application,



- that the party seeking such orders is required to file the main pleading upon which to anchor the orders sought in the miscellaneous application. That a petition or statement of claim would have sufficed. It was urged that the application was incompetent for lack of a substantive pleading in this case a petition.
33. The decisions in *Witmore Investment Ltd v County Government of Kirinyaga & others* [2016] eKLR and *Anastacia Wagiciengo v Ezekiel Wafula* [2018] eKLR were relied upon to urge that courts had adopted the foregoing position. Counsel urged that the applicant had not complied with the procedure as it had not filed a petition.
  34. Reliance was also made on the decisions in *Anarita Karimi Njeru v R* [1980] eKLR, *Leonida Aloo Odhiambo v Attorney General & another* [2020] eKLR and *Communications Commission of Kenya & 5 others v Royal Media Services Ltd & 5 others* [2014] eKLR to underscore the need for precision in constitutional petitions and the doctrine of constitutional avoidance.
  35. The respondent's counsel further submitted that the application lacked merit in that it lacked a substantive pleading.
  36. Counsel urged that although article 50(2) of the *Constitution* guaranteed every person the right to a fair trial and presumption of innocence, the applicant had already condemned the respondent thereby violating his rights, as he has not been convicted as envisaged by clause 13.1.4 of the contract of employment.
  37. The decisions in *Shadrack Mutia Muiu v National Police Service Commission & 2 others* [2020] eKLR and *Prisca Nyamwaya v MP Shab Hospital* [2016] eKLR were relied upon to urge that holding of the respondent's terminal dues was unfair.
  38. It was further submitted that the application was premature and superfluous and was based on speculation, conjecture, assumption, opinion and surmising as a charge sheet was not proof of theft.
  39. It was further urged that the applicant had no leave to withhold the respondent's dues.
  40. The respondent submitted that the preliminary objection was merited.
  41. Finally, on jurisdiction of the court, it was urged that the court had no jurisdiction to entertain the application before it in its current form and tenor as the court was being invited to consider and determine the merits of a matter before the magistrate's court without following due procedure.
  42. The court was urged to find that the respondent had not been convicted and was therefore innocent as ordained by article 50(2) of the *Constitution of Kenya, 2010*.

### **Determination**

43. The issues for determination are;
  - i. Whether withholding of the Respondent's terminal dues is lawful.
  - ii. Whether the application before the court is competent for determination.
44. As to whether the withholding of the respondent's terminal dues is lawful, the starting point is a recapitulation of the reliefs sought by the application and the justification.
45. It is common ground that the respondent was an employee of the applicant from December 27, 2017 at a salary of Kshs 1,980,000/= per month until August 12, 2022 when his employment was terminated.



46. It is not in contest that by a charge sheet dated April 21, 2022, the respondent was charged before the Chief Magistrate’s Court at Milimani for the offence of stealing by servant contrary to section 281 of the Penal Code and the case is pending hearing and determination. The Claimant was released on bond.
47. Finally, it is also common ground that the Applicant computed the respondent’s terminal dues of Kshs 17,938,800.00, translating to a net of Kshs 12,562,575.6 but withheld <sup>2</sup>/<sub>3</sub> of the sum on the ground that the respondent had a pending criminal case and at any rate the provisions of the Employment Act gave it the right to do so, specifically section 19(3) of the Act which provides that;
- Without prejudice to any right of recovery of any debt due, and notwithstanding the provisions of any other written law, the total amount of all deductions which under the provisions of sub-section (1) may be made by an employer from the wages of his employee at any one time shall not exceed two-thirds of such wages or such additional or other amount as may be prescribed by the minister either generally or in relation to a specified employer or employee or class of employers or employees or any trade or industry.
48. The applicant additionally cited the provisions of section 19(b) of the Employment Act to justify the withholding of Kshs 12,562,575.60 from the respondent’s terminal dues which provides that;
- (i) Notwithstanding section 17(1), an employer may deduct from the wages of his employee –
    - (a) . . .
    - (b) a reasonable amount for any damage done to, or loss of, any property lawfully in the possession or custody of the employer occasioned by the wilful default of the employee.
49. Puzzlingly, the applicant is seeking the court’s affirmation or adoption of its exercise of statutory power as an order of the court. In the court’s view, that cannot be a relief for the court to affirm after the event.
50. To the court’s mind, section 19 of the Employment Act, 2007 entitles the employer to deduct certain amounts from the employee’s wages or salary for the specified purposes and section 19(3) of the Act prescribes the outer limit.
51. The applicant urged that these provisions empowered it to withhold the respondent’s dues because he had a pending criminal case on stealing by servant.
52. Evidently, none of the nine (9) situations mentioned by section 19(1) of the Act include being charged in a court of law for any offence.
53. The provisions of section 19(1)(b) of the Employment Act cited by the applicant refers to “any damage done to or loss of property wilfully in . . .”
54. It is clear to the court that the legislature did not envision money as property and including it would be overstretching imagination.
55. Relatedly, the provision is based on a conclusion that the employee was culpable for the damage or loss. The respondent’s criminal case is awaiting determination.
56. Similarly, if the foregoing statutory provisions gave the applicant the right to withhold the respondent’s dues, why did it file the instant application? is it not a misuse of judicial time? Why would the court be called upon to affirm or adopt a unilateral decision already implemented by the applicant if the



- applicant verily believed it was doing the right thing. At any rate the respondent invoked statutory provisions that do not require leave of the court to invoke adoption or affirmation.
57. It is unclear whether the applicant sought the respondent's concurrence before implementing its unilateral decision to withhold his dues.
  58. Needless to emphasize, withholding of salary or wages is only sanctioned in specifically defined instances such as where the employee has taken an advance or is on suspension, surcharge, or other legitimate cause.
  59. Relatedly, a criminal case analogous to the one facing the Respondent is not a civil recovery. It is a case instituted by the state to ascertain whether or not the respondent committed the offence he is charged with and even if he was found guilty the conviction would not on its own justify the withholding of the respondent's terminal dues.
  60. For the above-stated reasons, it is the finding of the court the applicant's unilateral act of withholding the respondent's terminal dues on the premise that the respondent had a pending criminal case was unjustified and unlawful.
  61. The court is in agreement with the respondent's counsel's submissions that a charge sheet was neither a conviction nor an indication of culpability. It is allegation awaiting substantiation through cogent evidence and the requisite standard of proof was beyond any reasonable or shadow of doubt.
  62. The applicant appear to have convicted the respondent already and was awaiting the court's confirmation. Needless to emphasize, the respondent remains a suspect or accused person and is entitled all the constitutional rights of an accused person including presumption of innocence and fair trial before an impartial court.
  63. As to whether there was a competent application before the court, the court proceeds as follows;
  64. It is common ground that the application herein is grounded on the provisions of section 19(3) of the [\*Employment Act, 2007\*](#) paraphrased above and section 12(3) of the [\*Employment and Labour Relations Court Act, 2011\*](#) and order 51 rule 1 of the [\*Civil Procedure Rules, 2010\*](#).
  65. Order 51 rule 1 of the [\*Civil Procedure Rules, 2010\*](#) makes reference to notice of motion in the filing of applications but is reticent on whether it is by miscellaneous application. Neither the provisions of section 19(3) of the [\*Employment Act\*](#) nor section 12(3) of the [\*Employment and Labour Relations Act\*](#) make reference on how the suit should be filed or instituted. The two provisions address substantive issues of law.
  66. Section 12(3) confers upon the Employment and Labour Relations Court jurisdiction to make the orders catalogued thereunder including "any other appropriate relief as the court may deem fit to grant."
  67. The court is of the view that interpreted ejusdem generis, the phrase in section 12(3)(viii) of the [\*Employment and Labour Relations Court Act, 2011\*](#) would not include affirming or adopting a unilateral decision by an employer to withhold terminal dues of an employee purportedly in accordance with the provisions of section 19(1)(b) and 19(3) of the [\*Employment Act, 2007\*](#).
  68. Relatedly, and as submitted by the respondent's counsel, the application before the court raises substantive issues and seeks a substantive relief which ordinarily are not granted in miscellaneous applications. The remedy sought ought to be decreed by the court after adjudicating on the substantive rights and obligations of the parties. The applicant chose the easier route of filing a miscellaneous application as opposed to filing a suit on which to ground the current application which is typical.



69. As the respondent counsel submits, the instant application lacks anchorage as it has no substantive suit. The applicant ought to have filed a claim or petition to set out the foundation of the rights it was seeking to enforce and since it did not do so, the court cannot ameliorate its situation but to decline the prayers sought.
70. This position finds support in the decision in *Tatecob Housing & Co-operative Sacco Ltd v Qwetu Sacco Ltd* [2021] eKLR where the court expressed itself as follows;
- “Without much a do, I agree with the position of the respondent that the appellant cannot seek the orders sought in a miscellaneous application without going through the process of filing suit. . . What the appellant needed to do was therefore to file a substantive suit. It is upon the hearing of such suit and if successful, that an order of eviction would issue.”
71. These sentiments apply on all fours to the facts of the instant suit.
72. Similar sentiments were expressed by Limo J. in *Witmore Investment Ltd v County Government of Kirinyaga & 3 others* (Supra) where the petitioner/applicant had sought substantive orders through a notice of motion.
73. In the end, having found that withholding of the respondent’s terminal dues by the applicant was unjustifiable in law, and the avenue used to seek relief lacked the necessary anchorage, the application is unsustainable and is accordingly dismissed with costs.
74. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 31<sup>ST</sup> DAY OF JANUARY 2023**

**DR. JACOB GAKERI**

**JUDGE**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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 has 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.

**DR. JACOB GAKERI**

**JUDGE**

**DRAFT**

