



**Union of Kenya Civil Servants v Kenya County Government Workers Union
& another; Kenya County Government Workers Union (Client); Mbuvi t/
a Katunga Mbuvi & Co Advocates (Advocate) (Miscellaneous Application
E216 of 2021) [2023] KEELRC 145 (KLR) (24 January 2023) (Ruling)**

Neutral citation: [2023] KEELRC 145 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
MISCELLANEOUS APPLICATION E216 OF 2021**

**JK GAKERI, J
JANUARY 24, 2023**

BETWEEN

UNION OF KENYA CIVIL SERVANTS CLAIMANT

AND

KENYA COUNTY GOVERNMENT WORKERS UNION 1ST RESPONDENT

COUNTY GOVERNMENT OF NAIROBI 2ND RESPONDENT

AND

KENYA COUNTY GOVERNMENT WORKERS UNION CLIENT

AND

LEONARD K MBUVI T/A KATUNGA MBUVI & CO

ADVOCATES ADVOCATE

RULING

1. Before the court for determination is a notice of motion application by the respondent/applicant dated July 22, 2022 seeking orders that:
 1. Spent.
 2. This court be pleased to grant an order of stay of execution of attachment dated July 20, 2022 and proclamation dated July 21, 2022 by the Advocate respondent pending the hearing and determination of this application.
 3. This court be pleased to stay set aside, and/or annul warrant of attachment dated July 20, 2022 and the proclamation dated July 21, 2022 by the Advocate respondent who has now



proclaimed the client's/applicant's properties which are tools of trade pending the hearing and determination of this application.

4. This court be pleased to issue a declaration that the warrant and proclamation issued by Racksam Auctioneers are premature, illegal, unprocedural and unlawful as the same were obtained fraudulently and arose from a non-existent judgement and/or decree of this court.
 5. The court be pleased to grant any other order and/or directions as it deems fit, just and fair.
 6. The Advocate/respondent be condemned to pay costs of the application together with auctioneer's charges.
2. The application is expressed under article 159(2) of the *Constitution* of Kenya, 2010, sections 1A, 1B and 63(e) of the *Civil Procedure Act*, order 22 rule 22 of the *Civil Procedure Rules*, 2010, order 51 rule 1 of the rules, section 51(2) of the Advocate's Act and all other enabling provisions of the law and is based on the grounds set forth on its face and the Affidavit sworn by Roba Duba dated July 22, 2022.
 3. The affiant deposes that on May 31, 2022, the Taxing Master taxed the Advocates bill of costs at Kshs 6,938,875.56 from the client herein as costs for instructions and being dissatisfied, the client/applicant lodged a reference on June 10, 2022 which is pending.
 4. That the advocate/respondent without judgement and/or decree of this court fraudulently and/or prematurely obtained warrants of attachment and instructed auctioneers to proclaim the applicant's tools of trade illegally.
 5. That the warrants of attachment and the proclamation are premature, illegal and/or null as the Advocate had not obtained judgement or decree of the court.
 6. That the certificate of taxation was not a court judgement and/or decree for purposes of execution and it was suspect how the Advocate obtained warrants of attachment.
 7. That the certificate of costs was not an executable legal instrument and was not capable of being executed and warrants of attachment cannot be issued on its basis.
 8. That there must be a decree from a judgement.
 9. The affiant further states that the proclamation on the clients tools of trade was illegal and unlawful and it was only fair that the reliefs sought be granted.
 10. That the applicant stands to suffer irreparable loss and damage if the orders sought are not granted and the reference has high chances of success.
 11. That it is in the interest of justice and fairness that the orders sought be granted.

Respondent/Advocate's Response

12. The respondent filed a replying affidavit dated July 28, 2022 stating that application herein is in bad faith, an abuse of the court process and waste of court's time as it contains false averments and material non-disclosure that the applicant was ordered to deposit the decretal sum in a joint interest earning bank account opened by both parties herein and this was the 3rd application or stay in 3 weeks.
13. The affiant states that on May 31, 2022, the Taxing Officer delivered a ruling on the bill of costs taxed at Kshs 6,938,875.56 and a certificate of costs dated June 13, 2022 issued.



14. That the applicant aggrieved by the ruling, filed a reference dated June 10, 2022 for a stay of the ruling and conditional stay was granted provided the decretal sum was deposited in an interest earning bank account opened by both parties within 14 days of June 27, 2022.
15. The affiant further states that an invitation to open the said account at ABSA City market branch on June 28, 2022 was not responded to and the decretal sum was not deposited as the court had directed.
16. That the applicant filed an application dated July 12, 2022 seeking a review and stay orders of the court issued on June 27, 2022 on the ground that they had no cash and were in debts and broke.
17. The application was struck out on July 19, 2022 and warrants were applied for on July 20, 2022 more than 14 days after the orders made on June 27, 2022 and no fraud was involved.
18. It is the respondent's case that there is a valid judgement and order in the matter and all parties had equal opportunity and time to litigate and it was disrespectful for the applicant to call a judgement of the court irregular, fraudulent or illegal.
19. That the warrants of attachment were issued on the strength of the orders issued on June 27, 2022 and the proclaimed goods were not tools of trade but 4 wheel drive Land Cruisers.
20. The affiant states that a panoramic view of the pleadings show that the applicant was not ready to pay for the good legal services it enjoyed and its intention is to drag the case as it had done previously.
21. That the applicant has not denied that services were rendered or faulted its quality.
22. Finally, it is the affiant's case that the application herein is baseless, frivolous and a clear abuse of the court's process and should be dismissed.

Applicant's Submissions

23. According to the applicant, one of the issues for determination is whether execution proceedings can commence before there is a formal judgement and/or decree made by a judge and where there is an active reference.
24. It was urged that execution proceedings could only commence once the certificate of cost was adopted as a judgement of the court by a formal application by counsel.
25. Reliance was made on the decision in *Rubo Kimngetich Arap Cheruiyot V Peter Kiprop Rotich* Civil case 193 of 1993 as were the provisions of section 51(2) of the *Advocates Act*.
26. That once a certificate of costs is issued, the court must enter judgement on it for execution to proceed.
27. That in this case, there was no judgement adopting the certificate of costs as a judgement of the court.
28. The applicant questions the basis on which the Warrants of Attachment were issued as there was no decree.
29. Reliance was also made on the decision in *Njuguna Matiri & Co. Advocates V National Bank of Kenya* Misc 148 of 2014 to urge that a certificate of costs must be adopted as a judgement of the court for a decree to issue.
30. It was urged that the applicable procedure was to move the judge by way of a motion to enter judgement for purposes of execution.
31. Finally, it was urged that a conditional stay order was not a judgement and/or decree and failure by the applicant should have precipitated contempt proceedings.



32. That the Advocate/respondent Did not move the court to adopt the certificate.
33. That a reference acts as an automatic stay of execution proceedings as stated in [Njuguna Matiri & Co Advocates V National Bank of Kenya \(Supra\)](#).

Respondent/Advocate's Submissions

34. The respondent identified three issues for determination, namely; material non-disclosure, the attachment and proclamation and whether the attachment and proclamation were unprocedural, illegal and unlawful.
35. On material non-disclosure, it was submitted that the applicant failed to disclose that there were existing orders issued on June 27, 2022. The non-compliance with which triggered the warrants of attachment and proclamation by the respondent/Advocate. That non-disclosure of material facts has consequences as explained in [Bahadurali Ebrahim Shamji V Al Noor Jamal & 2 others](#) Civil Appeal No 210 of 1997.
36. As regards the attachment and proclamation, it was urged that under the orders made on June 27, 2022, the stay would lapse and the respondent had liberty to execute.
37. Reliance was equally made on the decision in [Kwacha Group Companies V Pindoria Holdings Ltd](#) (2022) eKLR to demonstrate that failure to meet the condition given by the judge gave the respondent an automatic remedy of execution.
38. The decisions in [Lavington Security Ltd, Hildegard Ndelut V Letkina Diaries Ltd & another](#) and [Elena Doudoladova Korir V Kenyatta University](#) (2014) eKLR were relied upon to buttress the submission.
39. It was also urged that the application was *res judicata*.
40. It is further urged that the applicant has not denied that services were rendered by the respondent advocate.
41. On the last issue, it was submitted that since the orders made on June 27, 2022 had not been set aside or varied at the time proclamation was conducted, or the warrants of attachment were extracted, neither the warrants of attachment nor the proclamation was premature, illegal, unprocedural or unlawful.

Determination

42. The issues for determination are;
 - i. Whether the certificate of costs was executable in the circumstances of this case.
 - ii. Whether the warrants of attachment dated July 20, 2022 and proclamation dated July 21, 2022 were obtained prematurely.
43. As regards a certificate of costs issued by a Taxing Officer, the parties have adopted opposing positions. While the applicant urges that there was neither a judgement nor decree capable of execution, the respondent submitted that the court orders issued on June 27, 2022 was specific that in the event of default, the stay would be vacated and execution would follow.
44. It is trite law that a certificate of costs is not an executable instrument, as explained in [Rubo Kimngetich Arap Cheruiyot V Peter Kiprof Rotich \(Supra\)](#) where Ibrahim J (as he then was) stated as follows;

“As far as the parties in a suit are concerned, a certificate of costs is not an executable legal instrument. A certificate of costs is not capable of being executed. Warrants of attachment



and sale cannot in law be issued on the basis of a certificate of costs. There must be a decree first.”

45. Similarly, section 51 of the *Advocates Act* provides;
1. Every application for an order for the taxation of an advocate’s bill or for the delivery of such a bill and the delivering up of any deeds, documents and papers by an advocate shall be made in the matter of that advocate.
 2. The certificate of the taxing officer by whom any bill has been taxed shall, unless it is set aside or altered by the court, be final as to the amount of the costs covered thereby, and the court may make such order in relation thereto as it thinks fit, including, in a case where the retainer is not disputed, an order that judgement be entered for the sum certified to be due with costs.
46. Finally, in *Ndungu Githuka Advocates V Geoffrey Moriaso Ole Mailoy* (2019) eKLR, Mwita J stated as follows;
- “ . . . subsection (2) is clear that the certificate of costs once issued by the Taxing Officer is final unless set aside or altered by the court. The court may also make an order that judgement be entered in terms of the amount in the certificate of costs.”
47. The provisions and propositions of law above would appear to be in consonance with the applicant’s position.
48. The respondent on the other hand relied on the decision in *Kwacha Group of Companies V Pindoria Holdings Ltd* (Supra), where the learned judge is quoted as having stated as follows;
- “ . . . There is a proviso to the stay orders which is that failure to deposit the decretal sum in the joint interest earning account within 45 days rendered the orders staying execution to have lapsed. The effect of that condition is that the respondent is at liberty to execute. The failure to comply with the court orders has the automatic remedy of execution.”
49. Suffice it to underline, the fact that the respondent/Advocate did not avail the circumstances in which the words of the learned judge were made as to what was being stayed whether a decree or a certificate of costs.
50. Typically, after the certificate of costs dated June 13, 2022 was issued by the Deputy Registrar, it was the duty of the respondent/Advocate to have the same adopt as judgment of the court.
51. By letter dated July 19, 2022, the respondent/Advocate’s counsel applied for warrants of attachment on the ground that the applicant had failed or refused to comply with the orders dated June 27, 2022, the Respondent’s counsel should have at this point sought the adoption of the certificate of costs as an order of the court for purposes of execution.
52. There is no evidence on record that the requisite application was made.
53. In *Lubullellah & Associates Advocates V NK Brothers Ltd* (2014) eKLR, the court observed that;
- “ The law is very clear that once a taxing master has taxed the costs, issued a certificate of costs and there is no reference against his ruling or there has been a ruling and a determination made and not set aside and/or altered, no other action would be required from the court save to enter judgement. An applicant is not required to file suit for the recovery of costs.”



54. These observations are elemental in that in the instant case, the Applicant filed a reference dated June 10, 2022 seeking to have the decision/ruling of the Taxing Officer overturned or vacated.
55. The respondent/Advocate was aware of the reference by the time it applied for warrants of attachment and proclamation.
56. It is unclear why the respondent/Advocate appear to have been in a hurry to proceed with execution yet the decision of the Taxing Officer had been challenged in court.
57. For the above stated reasons, it is the finding of the court that the applicant has sustainably demonstrated that the certificate of costs issued by the Deputy Registrar was not executable in the circumstances of this case.
58. As to whether the warrants of attachment and proclamation were obtained prematurely, it is evident that they were obtained in July 2022 before the certificate of costs had been adopted as a judgement of the court for purposes of execution proceedings.
59. Relatedly and as indicated elsewhere in this judgment, the applicant herein had by then filed a reference seeking various orders.
60. Flowing directly from the findings on the 1st issue above, the court is satisfied that the respondent/Advocate obtained the warrants of attachment and proclamation prematurely as he had neither a judgement nor a decree that was executable and a reference was pending determination and still is.
61. In the upshot, the notice of motion dated July 22, 2022 is merited and is granted in the following terms;
 - i. There shall be a stay of execution of the attachment dated July 20, 2022 and the proclamation dated July 21, 2022 pending determination of the reference dated June 10, 2022.
 - ii. Parties shall bear own costs.
62. These orders shall apply to Misc No E246, Misc No E247 and Misc No E218.
63. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 24TH 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 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 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

