



**Oteng'o & 9 others v Girish Kumar Patel t/a Tej Dip Hardware Stores
(Cause 452 of 2016) [2023] KEELRC 2 (KLR) (17 January 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 452 OF 2016
HS WASILWA, J
JANUARY 17, 2023**

BETWEEN

**PAUL OCHESO OTENG'O 1ST CLAIMANT
HEZRON MMBAGO KHAKALI 2ND CLAIMANT
MORRIS LUGADO KANILI 3RD CLAIMANT
DAVID MAHERO MUKAISI 4TH CLAIMANT
DAVID ATEKA GARDI 5TH CLAIMANT
ROBERT KIPYEGON BETT 6TH CLAIMANT
KELVIN ODHIAMBO 7TH CLAIMANT
NICHOLAS KIPKOECH BETT 8TH CLAIMANT
STANLY WANYOIKE KAMAU 9TH CLAIMANT
FREDRICK O. WALUANGA 10TH CLAIMANT**

AND

GIRISH KUMAR PATEL T/A TEJ DIP HARDWARE STORES RESPONDENT

RULING

1. Before this court for determination is the respondent/applicant's notice of motion dated July 25, 2022, filed pursuant to order 22 rule 22 and order 51 (1) of the [Civil Procedure Rules](#) and all other enabling provision of law, seeking the following Orders; -
 1. Spent.



2. That pending the hearing and determination of this application interpartes, this Honourable Court be pleased to issue an order of injunction restraining the Claimant through Direct "O" Auctioneers from executing the notification of sale dated July 18, 2022 by way of advertisement, offering for sale and or selling the motor vehicles registration numbers KCC 272G FH Lorry and KAX 272 S FH Lorry.
 3. That the said motor vehicles registration numbers KCC 272G FH Lorry and KAX 272 S FH Lorry be released to the Respondent forthwith.
 4. That the attachment. Seizing and notification of sale by the Claimants through Direct "O" Auctioneers be declared a nullity, malicious and fraudulent.
 5. That the Respondent be paid damages for the illegal attachment.
 6. That costs of their Application be provided for.
2. The grounds upon which the application is premised is as follows; -
- a. The parties herein entered into a consent judgement dated March 30, 2022 for a decretal sum of Kshs 2,158,242 exclusive of costs which costs were to be either agreed upon or assessed by the Court.
 - b. It is alleged that the Respondent/Applicant herein has settled the decretal sum leaving costs which have not yet been agreed upon by the parties or assessed by this Court.
 - c. The applicant avers that even though he has paid the entire decretal sum, it discovered that one of the Claimants who was due for payment is in active employment with it yet money had been dispersed towards their payment.
 - d. The Applicant states that despite compliance, the Respondent had instructed Direct "O" Auctioneers to proclaim, attach and seize the Respondent's motor vehicles for sale on allegation that there is a balance of Kshs 1,358,242 and alleged agreed costs of Kshs 1,350,955 together with auctioneer's costs, which moneys the applicant is a stranger to.
 - e. It is averred that the said vehicles are the Applicant's tools of trade which they use for their daily transportation. Further that the Respondent had seized the said vehicles when it was loaded with goods which they ended up losing business.
3. The application is supported by the Affidavit of Girish Patel, the Applicant herein which is sworn on the July 26, 2022. The affidavit basically reiterated the grounds of the Application and in addition stated that the total amount which has been paid to the Respondent is Kshs 1,558,242 and the balance of Kshs 600,000 was withheld as the parties discuss the payment of the David Mahero Mukaisi who inadvertently was indicated as a Claimant but still works for the Applicant.
 4. It added that another Claimant being, David Ateka Gardi died and the family approached him to introduce them to the Claimant's advocates in order to get their benefits of the deceased, who are yet to be compensated.
 5. He finally urged this Court to allow the application and undertook to pay the balance of Kshs 600,000 upon the issues raised with regard to the deceased David Ateka and the Claimant David Mahero being addressed conclusively.



6. The application is opposed by the Respondents who swore a replying affidavit through their advocate, Ebby Juma deposed upon on the August 5, 2022. According to the affiant, the application is frivolous, lacks merit and ought to be dismissed with costs.
7. She states that the parties herein indeed entered into a consent judgement dated March 30, 2022 for payment of decretal sum of Kshs 2,158,242 which was to be paid within 60 days from the date of the consent.
8. About two months later, she served the Applicant's advocates with the decree dated May 26, 2022 and on July 5, 2022, Mr. Maina advocate, acting for the Applicant visited their office and orally agreed to pay cost of Kshs 1,350,955 untaxed.
9. It is averred that the Respondent tried on several occasions to seek for the said decretal sum together with costs in vain leading to them instructing Direct "O" Auctioneers to pursue the said sum of money.
10. The affiant avers that the Auctioneers followed due process of the law in recovering the said money and upon attachment, the Applicant wired Kshs 1,558,00 only and refused to pay the balance and costs.
11. It is averred that after the consent was adopted, the Applicant who had fired David Mahero Mukaisi, lured him back to employment sometimes in June, 2022, therefore the said employment is new and he ought to be compelled to pay the earlier decretal sum.
12. With regard to the David Ateka Gardi(Deceased), the affiant avers that they are in communication with the wife of the deceased one Millicent Ateka Gardi and they are awaiting the decretal sum to be paid in order to disperse the said money to them.
13. It is stated that the Applicant reneged on the consent and only paid half of the decretal sum, which was not part of the consent and therefore the execution done was in accordance with the law and procedure and not illegal as alleged. In any case that the Applicant could have filed objection proceedings if the attachment was illegal.
14. It is stated further that the Applicant had even pleaded with them to release only one vehicle KAX 272 S in return settle the decretal sum which the Respondent complied as evidenced by the letters marked POO3, POO4 & POO5.
15. The affiant in conclusion urged this Court to disallow the application because the Applicant is using it as a delay tactic which is meant to frustrate the Respondent from enjoying fruits of their judgement.
16. Directions were taken for the application to be disposed of by written submissions with the applicant filing on the November 21, 2022 and the Respondent on October 17, 2022.

Applicant's Submissions.

17. The applicant submitted on four issues; whether the attachment and notification of sale should be declared a nullity, whether the subject motor vehicles should be released to the Applicant, whether the Applicant should be paid damages for the illegal attachment and who should pay costs of the application.
18. On the first issue, it was submitted that this Court is empowered under order 22 rule 22 of the [*Civil Procedure Rules*](#) to make the said Orders. It was argued that the Applicant paid a total sum of Kshs 1,558,242 leaving a balance of Kshs 600,000 which is pending deliberation of employment status of one of the Claimant being David Mahero Mukaisi who has been in active employment all along with them. He added that the withholding of the said money was in good faith. Further that the Respondent have attached its motor vehicles in execution of strange sums of money including costs



which have never been agreed upon or assessed by the Court as per the consent judgement. To support this argument, the Applicant relied on the case of *Karuri Stores Pharmaceuticals Limited and another v Acacia Medical Centre Limited* [2021] eKLR where warrant of attachment was found to be illegal for miscalculation of payment made.

19. On the second issue, it was argued that since the execution was in satisfaction of costs which have not been assessed or taxed, the entire execution proceedings was an illegality and therefore the vehicles held by the Auctioneers ought to be released to the Applicant forthwith.
20. On whether compensation should be made to the Applicant, counsel submitted that the attachment was premised on costs which had not been agreed upon by parties of assessed by the Court and therefore the attachment of the Applicant's property was malicious. Further that the applicant is operating at a loss of Kshs 70,000 on each vehicle daily due to the said attachment. In this they relied on the case of *David Njuguna Ngotho v Family Bank Limited and another* [2018] eKLR and the case of *Great Lakes Transport Co. Limited v Kenya Revenue Authority* [2009] eKLR where the Court held that; -

“... noting that Equity would not allow a wrong to be suffered without a remedy, we hold that the appellants were entitled to an award of general damages.”
21. With regard to costs, the applicant submitted that costs follow the event and urged this Court to award him costs of this application.

Respondent's Submissions.

22. The Respondent on the other hand identified three issues for determination; whether the proclamation and warrant of attachment dated July 18, 2022 were illegal, whether the Applicant is entitled to injunctive orders sought and whether he is entitled to costs.
23. On the first issue, it was submitted that the parties entered into a consent agreement on the decretal sum which was to be paid in 60 days. Soon thereafter Mr. Maina, the Applicant's advocates verbally agreed with the Respondent's advocates on costs and requested for their Bill of costs. It was argued that time within which the parties agreed to have the decretal sum paid lapsed and despite reminders, the applicant failed to pay the decretal sum till when auctioneers were instructed to execute the said decretal sum and costs that the Applicant paid part payment of Kshs 1,558,242 and withholding a balance of Kshs 600,000 on allegation that one of the Claimant's David Mahero Mukaisi was still in their employment when in fact he was reinstated in June, 2022 after judgement. Therefore, that the entire process followed by the auctioneers in recovering the decretal sum and costs was lawful and in accordance with the law.
24. On whether injunctive orders should issue, it was submitted that the Applicant has failed to meet the threshold provided for in the celebrated case of *Giella V Cassman Brown* on issuance of injunctive Orders. It was argued that the Applicant has failed to pay the entire decretal sum as per the consent Judgement entered into on March 30, 2022, therefore that the balance of probability tilts in favour of the Respondents who are yet to be paid their decretal sum.
25. On costs, it was submitted that costs are paid to the successful litigant and in this case, the Respondent's application lacks merit and therefore costs ought to be awarded to the Respondents. They then cited the case of *Bonface Bandari Chipa v Mwadzombo Jumbale and 3 others* [2016] eKLR.



26. I have examined all the averments and submissions of the parties herein. The issue herein relates to execution of the decretal sum and costs which the applicants aver they have paid save for costs which have not been agreed upon or taxed.
27. The Respondents on the other hand aver that the applicants have not paid the decretal sum as per the consent and they only paid some part of the decree when execution had commenced.
28. Having considered these averments, I note that it is indeed true that the applicants have not fully settled the decretal sum and they have no business withholding any money to pay other Claimants when the Judgment and decree has already been passed.
29. The applicant is therefore obliged to pay the entire decretal sum of Kshs2,158,242/= plus costs.
30. Since costs have neither been agreed upon or taxed, I will stay the execution and order release of the attached motor vehicles on condition that the applicants pay the auctioneers costs.
31. Execution may proceed for the balance plus costs unless the applicant pays up or costs are agreed upon or taxed accordingly.
32. Costs in the cause.

RULING DELIVERED VIRTUALLY THIS 17TH DAY OF JANUARY, 2023.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Kairu Maina for the Applicant – present

Miss Juma for the Respondent – present

Court Assistant – Fred

