



**Kamau v Kenya Union of Post Primary Education Teachers (KUPPET)  
& 4 others; Teachers Service Commission (Interested Party) (Cause  
980 of 2012) [2023] KEELRC 3431 (KLR) (10 February 2023) (Ruling)**

Neutral citation: [2023] KEELRC 3431 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 980 OF 2012  
MA ONYANGO, J  
FEBRUARY 10, 2023**

**BETWEEN**

**PETER MWAURA KAMAU ..... CLAIMANT**

**AND**

**KENYA UNION OF POST PRIMARY EDUCATION TEACHERS  
(KUPPET) ..... 1<sup>ST</sup> RESPONDENT  
SECRETARY GENERAL, KUPPET ..... 2<sup>ND</sup> RESPONDENT  
NATIONAL CHAIRMAN, KUPPET ..... 3<sup>RD</sup> RESPONDENT  
NATIONAL TREASURER, KUPPET ..... 4<sup>TH</sup> RESPONDENT  
REGISTRAR OF TRADE UNIONS ..... 5<sup>TH</sup> RESPONDENT**

**AND**

**TEACHERS SERVICE COMMISSION ..... INTERESTED PARTY**

**RULING**

1. Judgment in this suit was delivered on 24<sup>th</sup> July 2020 in favour of the Claimant. The Court however did not tabulate the decretal sum as the documents provided by the Interested Party who had custody of the same were incomplete. The Court therefore directed that the documents be supplied to the parties for purposes of tabulation of the correct sum due to the Claimant.
2. Since then, there have been several applications by both the Claimant and that Respondents. The first was the Claimant’s application seeking adoption of his tabulation, the Respondents having failed to file their tabulation. The application was not responded to and the Court by a ruling dated 13<sup>th</sup> May 2021 adopted the sum of Kshs.9,892,722.90 as the decretal sum.



3. Aggrieved by the ruling, the Respondent filed 29<sup>th</sup> June 2021, seeking stay of execution and setting aside of the decree arising from the ruling of 13<sup>th</sup> May 2021. On 12<sup>th</sup> July 2021 the Court directed the parties to meet and discuss the matter with a view to reaching an amicable settlement.
4. Following the discussions, the Court on 29<sup>th</sup> July 2021 directed the Respondents to pay the undisputed sum of Kshs.2,400,000 by 15<sup>th</sup> August 2021. The balance was to be determined by the Court. The matter was fixed for mention on 27<sup>th</sup> July 2021.
5. The Claimant's Counsel appeared on 27<sup>th</sup> July 2021 but there was no appearance for the Respondents. As a consequence, the application dated 29<sup>th</sup> June 2021 was dismissed for want of prosecution.
6. Thereafter the Respondent filed other applications dated 14<sup>th</sup> October 2021, 13<sup>th</sup> October 2021, 21<sup>st</sup> October 2021, 2<sup>nd</sup> November 2021, 12<sup>th</sup> January 2022, 14<sup>th</sup> May 2022 and 31<sup>st</sup> May 2022. All these applications were dispensed with.
7. The applications now before the Court for determination are the Claimant's application dated 11<sup>th</sup> May 2022 seeking the following orders:
  - i. Spent.
  - ii. The Honourable Court be pleased to appoint the Interested Party as garnishee in these proceedings.
  - iii. Pending the hearing and determination of this application, garnishee ORDER NISI do issue for the attachment of the debt of Kshs.24,357,973.7/- owed by the Judgment Debtors to the Decree Holder owing and accruing from this Honourable Court's decree issued on 31/5/2021 together with interest awarded to the Decree Holder as contained in the Warrant of Attachment of movable property in execution of Decree of money dated 30/9/2021, by deducting the sum of Kshs.24,357,973.7/- from the funds held by the Garnishee.
  - iv. This Honourable Court be pleased to order the Garnishee to appear before this Court on an appointed date and time to show cause why the garnishee ORDER NISI so issued should not be made ABSOLUTE and that the sum of Kshs.24,357,973.7/- be released to the Decree Holder's KCB bank account number 1213719062 Githunguri Branch.
  - v. This Honourable Court be pleased to make the Order NISI Absolute.
  - vi. The Court be pleased to make such other consequential orders as are necessary for the execution of the decree.
  - vii. The costs of these Garnishee proceedings be borne by the Judgment Debtors.
8. The second application filed by the Respondents is dated 27<sup>th</sup> July 2022 which seeks the following reliefs following orders:
  - i. Spent.
  - ii. That this Honourable Court do issue a stay of execution of the Decree issued in favour of the Claimant on 31<sup>st</sup> May, 2021, all consequential Orders arising therefrom, including the Orders issued against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents dated 29<sup>th</sup> July, 2021 and 30<sup>th</sup> November 2021, pending the hearing and determination of this Application.



- iii. That this Honourable Court do set aside the Decree dated 31<sup>st</sup> May 2021, Order dated 29<sup>th</sup> July 2021, and Order dated 30<sup>th</sup> November 2021, pending the hearing and determination of this Application.
  - iv. That this Honourable Court be pleased to direct the Parties to appear before the Deputy Registrar immediately on an agreed date to determine the actual sums due under the Decree.
  - v. That the Applicants be granted the costs of this Application.
9. The garnishee application was responded to by affidavits of both the garnishee and the Respondent. The second application was responded to by the Claimant. All the parties filed submissions which were highlighted in Court on 17<sup>th</sup> November 2022.
10. The issues rising for determination from the two applications are:
- i. Whether garnishee proceedings can issue against the garnishee;
  - ii. Whether the Respondents are entitled to the orders sought in the application.
- Whether garnishee proceedings can issue against the garnishee herein (Teachers Service Commission)
11. There is no doubt that the Claimant is a decree holder with an unsatisfied decree. He is thus entitled to file garnishee proceedings under Order 23 Rule 1 of the Civil Procedure Rules. The said Rule provides –
- [Order 23, rule 1.]Order for the attachment of debts
- 1. A court may, upon the ex parte application of a decree- holder, and either before or after an oral examination of the judgment- debtor, and upon affidavit by the decree holder or his advocate, stating that a decree has been issued and that it is still unsatisfied and to what amount, and that another person is indebted to the judgment-debtor and is within the jurisdiction, order that all debts (other than the salary or allowance coming within the provisions of Order 22, rule 42 owing from such third person (hereinafter called the “garnishee”) to the judgment-debtor shall be attached to answer the decree together with the costs of the garnishee proceedings; and by the same or any subsequent order it may be ordered that the garnishee shall appear before the court to show cause why he should not pay to the decree- holder the debt due from him to the judgment debtor or so much thereof as may be sufficient to satisfy the decree together with the costs aforesaid.
  - 2. At least seven days before the day of hearing the order nisi shall be served on the garnishee, and, unless otherwise ordered, on the judgment-debtor.
  - 3. Service on the judgment-debtor may be made either at the address for service if the judgment-debtor has appeared in the suit and given an address for service, or on his advocate if he has appeared by advocate, or if there has been no appearance then by leaving the order at his usual residence or place of business or in such manner as the court may direct.
  - 4. An order nisi shall be in Form No. 16 of Appendix A.
12. In the affidavit filed by the garnishee in the response to the application dated 17<sup>th</sup> June 2022 and in the written submissions of the garnishee who is also the Interested Party in the proceedings, it is the position of the garnishee that being a constitutional commission established under Article 237(1) of *the Constitution*, its principal functions are to recruit and employ teachers. That the 1<sup>st</sup> Respondent is a union whose members are teachers employed by the Garnishee/Interested Party.



13. That the relationship between the garnishee and the 1<sup>st</sup> Respondent is governed by the [Labour Relations Act](#) which under Section 48 provides for the manner in which union dues are to be deducted and remitted. That Section 50 of the Act stipulated that the deductions are to be paid into the trade union's account within 10 days of the deductions being made and prohibits an employer from paying the said sums into any account other than the designated account in the notice issued by the minister. That contravention of these provisions is an offence.
14. It is the garnishee's position that it has a statutory duty to remit union dues deducted from the individual members of the union into the gazetted union account.
15. It is further the garnishee's position that in the discharge of its financial obligations, all transactions are conducted through the Government Exchequer under the Integrated Financial Management and Information (IFMIS) platform which was instituted about 2016. That under the platform, all third party remittances are deducted through the check off system and directly disbursed by the Central Bank of Kenya on the basis of the payroll data generated by the garnishee.
16. It is therefore the garnishee's position that it does not hold any third party funds in any of its accounts as the same is directly distributed from Central Bank to the beneficiaries once documentation is done. That the Interested Party does not have an account with any of the Respondents from which it can recover the decretal sum under the proviso to Order 23 of the Civil Procedure Rules.
17. The garnishee also submits that there is no legal procedure of altering the character of a party to a suit from an Interested Party to a Garnishee.
18. It prays that the application be dismissed.
19. The Respondents through the replying affidavit of Akelo M. T. Misori, the Secretary General of the 1<sup>st</sup> Respondent and 2<sup>nd</sup> Respondent in the suit, which is sworn on 18<sup>th</sup> July 2022 states that the Teachers Service Commission is prohibited by Sections 48 and 50 from taking the role of Garnishee as presented in the Claimant's application.
20. Mr. Akelo avers that on 28<sup>th</sup> July 2021 the Claimant served the Respondent's advocates submissions in which he had tabulated his dues at Kshs.2,401,459/- which the Respondents settled in good faith in full and final settlement.
21. Mr. Akelo states that the decree extracted by the Claimant on 31<sup>st</sup> May 2021 was erroneous and exaggerated, giving a figure of Kshs.9,892,722.90 instead of Kshs.2,401,549 which is the correct amount. He tabulated the sums due to the Claimant as follows:

June to December 2011	Kshs.44,940.20
January to September 2021	Kshs.678,467.40
October to December 2021	Kshs.238,966
January to March 2013	Kshs.243,360
Total from June 2021 to March 2013 – Kshs.1,366,767.60	
22. Mr. Akelo states that the Claimant having been paid Kshs.2,402,000 has been overpaid to the tune of Kshs.1,035,232.40.
23. It is Mr. Akelo's averment that the Claimant arrived at the mindboggling sum of Kshs.9,892,722.90 without proof.
24. For the Claimant/Decree Holder it is submitted that Section 50(10) of the [Labour Relations Act](#) was enacted to protect unions from employers who deducted union dues but failed to remit. That the Section cannot aid a union that has deliberately refused to comply with Court orders. That the Court is clothed with powers under Section 13 of the [Employment and Labour Relations Court Act](#) to enforce its judgments, awards, orders and decrees in accordance with the [Civil Procedure Act](#).



25. Further, that Section 38(c) of the *Civil Procedure Act* authorizes attachment of debts. That Section 50 of the *Labour Relations Act* does not exempt the Garnishee from complying with enforcement orders issued by this Court if it is established that the Garnishee holds money belonging to the judgment debtor capable of satisfying the decree.
26. That Order 23 Rule 8 of the Civil Procedure Rules provides that payment made by a garnishee shall be a valid discharge against the judgment debtor in respect of the amount paid or levied.
27. It is further the submission of the Claimant that the use of IFMIS does not hinder the garnishee from attaching and transferring the decretal sum to the decree holder. That Section 36 of the *Teachers Service Commission Act* provides that its funds shall consist of –
1. The funds of the Commission shall consist of—
    - a. monies allocated by Parliament for purposes of the Commission;
    - b. grants, gifts, donations or other endowments given to the Commission;
    - c. such funds as may vest in or accrue to the Commission in the performance of its functions under this Act or under any other written law.
  2. The receipts, earnings or accruals of the Commission and the balances at the close of each financial year shall not be paid into the Consolidated Fund, but shall be retained for purposes of the Commission under this Act.
28. It is submitted that once monies are allocated to the Garnishee by Parliament, whether the same is held by Central Bank of Kenya or a commercial bank, the funds belong to the Garnishee to utilize in compliance with the law. That the garnishee deducts the union dues owed to the 1<sup>st</sup> Judgment Debtor and instructs its bank to transfer the dues. That the platform used cannot hinder the Court from granting a Garnishee Order Absolute under the Civil Procedure Rules. The Claimant refers to the case of *Njeru Kanyamba v Kenya Union of Post Primary Education Teachers* [2013] eKLR where the Teachers Service Commission attached funds belonging to the 1<sup>st</sup> Respondent in compliance with a Garnishee Order Absolute issued on 6<sup>th</sup> December 2012.
29. With respect to the response and submissions of the judgment debtors, it is submitted that no leave has been granted by this Court for the judgment debtor to participate in the garnishee proceedings as it is not a party to the garnishee proceedings. The Claimant/Decree Holder relies on the decision in *Ngaywa Ngigi & Kibet Advocates v Invesco Assurance Co Ltd; Diamond Trust Bank (Garnishee)* [2020] eKLR;
30. Order 23 Rules 1 and 2 of the Civil Procedure Rules which govern the attachment of debts provides as follows:
1. A court may, upon the ex parte application of a decree- holder, and either before or after an oral examination of the judgment- debtor, and upon affidavit by the decree holder or his advocate, stating that a decree has been issued and that it is still unsatisfied and to what amount, and that another person is indebted to the judgment-debtor and is within the jurisdiction, order that all debts (other than the salary or allowance coming within the provisions of Order 22, rule 42 owing from such third person (hereinafter called the “garnishee”) to the judgment-debtor shall be attached to answer the decree together with the costs of the garnishee proceedings; and by the same or any subsequent order it may be ordered that the garnishee shall appear before the court to show cause why he should not pay to the decree- holder the debt due from him



to the judgment debtor or so much thereof as may be sufficient to satisfy the decree together with the costs aforesaid.

2. At least seven days before the day of hearing the order nisi shall be served on the garnishee, and, unless otherwise ordered, on the judgment-debtor.
31. Order 23 Rule 1 provides for attachment of debts. The decree holder is expected to prove that another person is indebted to the judgment debtor and it is such debt that can be the subject of a garnishee order. Obviously this does not apply to the circumstances herein as there is no debt owed by the garnishee to the judgment debtor.
32. Rule 2 on the other hand provides for attachment of deposits in an account in the bank or other financial institution. Again, the garnishee herein is not a bank or financial institution and does not hold any money on account of the judgment debtors.
33. As explained by the Garnishee, the money deducted from the members of the 1<sup>st</sup> judgment Debtor do not come into the hands of the Interested Party. All that the Interested Party does is the paperwork which is then acted upon by Central Bank by debiting the union dues and remitting directly to the account of the 1<sup>st</sup> Respondent in accordance with the order of the Minister. The Garnishee does not hold any monies or an account for union dues.
34. For these reasons, I find that a garnishee order cannot issue against the Interested Party herein as it is not indebted to the 1<sup>st</sup> Judgment Debtor and neither does it hold any monies belonging to the Judgment Debtor in an account that is capable of being attached. The orders sought in the garnishee application are therefore not capable of being granted by this Court with the result that the application fails and is accordingly dismissed.
35. On the second application dated 27<sup>th</sup> July 2022, filed by the Respondent, the grounds in support of the application are that the draft decree was never shared with the Applicant's Counsel for consensus or approval, that the tabulation by the Claimant is grossly exaggerated being Kshs.9,892,722.90 instead of Kshs.2,400,000. Further, that the warrants of attachment exaggerated the figures to Kshs.24,357,973.70, that the Applicants have not refused to pay but only wish to pay the correct amount.
36. For the Decree Holder who filed a replying affidavit dated 20<sup>th</sup> September 2022 opposing the application, it is contended that the application seeks to review the decree and had been previously made by the Respondents in the application dated 29<sup>th</sup> June 2021 which was dismissed on 27<sup>th</sup> September 2021.
37. The Respondent contends that the application is prohibited under Rule 33(6) of the Employment and Labour Relations Court (Procedure) Rules, and the principles of res judicata. That the issues of computation were already addressed and dismissed.
38. The Decree Holder contends that since the dismissal of its application the Judgment Debtor has filed seven applications seeking in one way or other to review the decree dated 21<sup>st</sup> May 2021, conduct that is frowned upon by the Courts. He referred to and relied on the decision in *Heritage Insurance Company v Patrick Kasena*.
39. The Decree Holder further objected to the application on grounds that the Applicants had misrepresented the facts as highlighted in paragraphs 14 to 16 of the replying affidavit. The Decree Holder denied that he had admitted to being owed a sum of Kshs.2,400,000. It is averred that the Claimant/Decree Holder was seeking payment of over Kshs.50 million. That the Kshs.2.4 million arose from the Respondent's application for review dated 29<sup>th</sup> June 2021. That the said sum was



- paid to the Claimant as a condition for grant of orders of stay of execution. That the Claimant's computation was contained in his affidavit of 9<sup>th</sup> November 2021. That the Claimant's submissions on the computations is dated 23<sup>rd</sup> March 2021.
40. It is submitted that in their computation the Applicants have only computed the Decree Holder's basic salary yet the circular referred to provided for allowances.
41. It is a matter of common knowledge that Courts have wide powers to set aside ex parte orders or judgments. The only condition is that the discretion must be exercised judiciously.
42. In the case of *Wachira Karani v Bildad Wachira* [2016] eKLR as quoted in *David Gicheru v Gicheha Farms Limited & Another* [2020] eKLR the Court held:
- “The fundamental duty of the Court is to do justice between the parties. It is in turn, fundamental that to that duty, those parties should each be allowed a proper opportunity to put their cases upon the merits of the matter...”
43. Again in the case of *Philip Chemwolo & ANothr v Augustine Kubede* [1982–88] KAR 103 at 1040 Apoloo JA (as he then was) stated –
- “Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case determined on its merits. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court, as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline.”
44. In the instant case, it is the submission of the Decree Holder that similar applications have been filed after the dismissal of the first application on 6<sup>th</sup> May 2022. The reason for the dismissal of the previous applications was that the Counsel who filed the applications was not properly on record and the applications were therefore incurably defective. The applications were indeed not dismissed, but struck out. This means that the applications were not decided on the merits.
45. The filing of the many applications after that is also explainable. The applications are not all the same. One was for leave to change advocates, another for leave to act in person, and another one was for setting aside of the orders of 24<sup>th</sup> July 2020. All of them were dispensed with one way or another, and the only application that is now before Court is for substantive determination of the issues in dispute is the present application. The application is now prosecuted by the Applicant in person and is not expected to be as concise or succinct as if prosecuted by Counsel. The Applicants ought not to be denied an opportunity to be vindicated because they are not represented by Counsel or because they have not represented their case as a professional counsel would.
46. It is for the foregoing reason that I will allow the application for setting aside of the ex parte orders granted on 27<sup>th</sup> September 2021.
47. Another reason why I must set aside the orders of 27<sup>th</sup> September 2021, which is more compelling, and which none of the parties have so far raised, is that 27<sup>th</sup> September 2021 was a date for mention and not hearing of the application dated 29<sup>th</sup> June 2021. It was therefore an error on the part of the Court to dismiss the application on that date.
48. Having disposed of the preliminary issues, the substantive issue for determination is the exact amount the Claimant/Decree Holder is entitled to.



49. The data produced by the Interested Party shows the number of members in Kiambu County as follows:

2011

June 1353 65% for Kiambu Branch

July 1362 327340

August 1355 327470

September 1347

October 1447

November 2767

December 2969

2012

January 2773

February 2657

March 2568

April 2508

May 2468

June 2446

July 2409

August 2724

September 2801

October 5617

November 2915

December 2947

2013

January 2933

February 2960

March 2908

50. The Court will tabulate the final judgment based on the numbers above.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 10<sup>TH</sup> DAY OF  
FEBRUARY 2023**

**MAUREEN ONYANGO**

**JUDGE**

