



Wasike v Nzoia Sugar Company Limited; Diamond Trust Bank Kenya Limited & 2 others (Garnishee) (Employment and Labour Relations Cause 90 of 2017) [2023] KEELRC 596 (KLR) (2 March 2023) (Ruling)

Neutral citation: [2023] KEELRC 596 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
EMPLOYMENT AND LABOUR RELATIONS CAUSE 90 OF 2017**

**JW KELL, J
MARCH 2, 2023**

BETWEEN

CHRISTOPHER MUNG'OMA WASIKE CLAIMANT

AND

NZOA SUGAR COMPANY LIMITED RESPONDENT

AND

DIAMOND TRUST BANK KENYA LIMITED GARNISHEE

KENYA COMMERCIAL BANK LIMITED GARNISHEE

NATIONAL BANK OF KENYA LIMITED GARNISHEE

RULING

1. The Applicant upon obtaining judgment in his favour brought the notice of motion dated January 12, 2023, under section 1A,3A and section 38(c) of the [Civil Procedure Act](#)(CAP 21 laws of Kenya) Order 23 Rules 1(1), 2, 9 & 10 Order 51 [Civil Procedure rules](#) and all enabling rules seeking following reliefs:-
 - a. Spent
 - b. That pending the inter-partes hearing and determination of the application , the monies held by the following 1st , 2nd and 3rd Garnishees of behalf of the judgement debtor herein Nzoia Sugar Company Limited in the following Bank accounts be and are hereby attached to answer the decree herein , the amount unsatisfied being for the sum of Kes 4,457,388.00 plus costs of the suit and interest at Court rates from the date of judgment until payment in full plus costs of the garnishee proceedings:-
 1. Diamond Trust Bank Kenya limited



Branch: Bungoma Branch

Account No 0267XXXXXX

2. Kenya Commercial Bank Limited

Branch: Bungoma Branch

Account No 1107XXXXXX

3. National Bank Kenya Limited

Branch: Bungoma Branch

Account No 01001054XXXXXX

- c. That the 1st, 2nd and 3rd Garnishees do appear before the honourable court to show cause why they should not pay to the decree holder the debt due from the judgment debtor, being the money held in the 1st, 2nd and 3rd Garnishee's accounts aforesaid or so much thereof as may be sufficient to satisfy the sum of Kes 4,457,388.00 plus costs of the suit and interest at Court rates from the date of judgment until payment in full plus costs of the garnishee proceedings.
 - d. That costs be provided for.
2. The application was based on the ground that the court entered judgment in favour of the Claimant/Applicant for the sum of Kes 4,457,388.00 plus costs of the suit and interest at Court rates from the date of judgment until payment in full
 3. That the Respondent had not paid the judgment sum.
 4. That the judgment debtor bank accounts with the 1st, 2nd and 3rd garnishees are by its own circular to the members of public for the payment and settlement of high value transactions.
 5. The application was supported by the affidavit of the applicant which produced annexures to extent that respondent had been listed as insolvent by the Auditor General in December 2022 and advert by the judgment debtor of its high value transaction bank accounts which the applicant sought to attach.
 6. The Applicant was not heard in the first instant and as such no order was issued exparte.
 7. The Respondent filed response to the application vide replying affidavit of Rita Mukhongo who stated she was its Company Secretary acknowledging their knowledge of the judgment and decretal sum and stating they had advised their counsel to appeal and had lodged notice of appeal and requested for typed proceedings (RM-1- a and b). That the proceedings had not been availed to their counsel to file appeal. That the applicant had no capacity to repay the money in the event the intended appeal succeeds and that if the orders are granted the company will come to halt.
 8. The 3rd Garnishee, National Bank of Kenya, Bungoma Branch, filed response vide replying affidavit of Crispinus Anyangu who stated he was the branch manager of the Garnishee bank and confirmed that the judgement debtor was their customer of the branch operating current account number 01xxxxx which account as at January 17, 2023 had a credit balance of KES 96,398.68/= which customer cannot be able to satisfy the decree herein (CA-1 was the bank statement)
 9. The court directed the application be canvassed by way of written submissions. The applicant's written submissions drawn by Liko & Anam Advocates were dated February 3 and received in court on February 7, 2023. The respondent's written submissions drawn by M/S J O Makali & Company advocates were dated February 8 and received in court on the February 9, 2023.



Determination

Issues for determination

10. The Applicant addressed the following issues under their submissions:-Effect of intended appeal
Taxation of costs before execution
Means of the judgment creditor
11. The garnishee did not file written submissions.
12. The Respondent in their written submission addressed the question of whether the application was premature for lack of taxation of costs.
13. The court having read the pleadings by all the parties and taking into account the issues addressed in their written submissions the issues for determination in the instant application were as follows:-
 - a. Whether the application was premature for lack of taxation of costs.
 - b. If the application was not premature whether it was merited.

a. Whether the application was premature for lack of taxation of costs

14. The Respondent submitted that the application was premature as costs of the suit had not been taxed. It was not in dispute that the application had been brought before taxation of the costs awarded in the judgment.

Respondent's submissions

15. The Respondent submits that section 94 of the *Civil Procedure Act* provides:-

94. Execution of decree of High Court before costs ascertained

“Where the High Court considers it necessary that a decree passed in the exercise of its original civil jurisdiction should be executed before the amount of the costs incurred in the suit can be ascertained by taxation, the court may order that the decree shall be executed forthwith, except as to so much thereof as relates to the costs; and as to so much thereof as relates to the costs that the decree may be executed as soon as the amount of the costs shall be ascertained by taxation”.

16. That under the said provisions of section 94 of the *Civil Procedure Act* a party cannot execute a decree of the court without taxation unless with the leave of the court. That under prayer b and c of the Application it was clear the applicant desired to execute the judgment fully to wit: Kes 4,457,388.00 plus costs of the suit and interest at Court rates. That it was preposterous for the applicant's counsel from the bar to the effect that the applicant had waived costs. To buttress its submissions the respondent relied on the decision in *African Commuter Services Ltd v Kenya Civil Aviation Authority & 2 others* (2014) where Mabeya stated :

‘My view of the matter is, the mischief sought to be addressed by Section 94 was to protect a judgment debtor from suffering multiple executions in respect of the same suit; i.e one in respect of the principal sum and the other for the costs after ascertainment. In this regard, if it is shown to the satisfaction of the court that the judgment creditor has foregone or waived costs and that the execution is for the principal sum and interest only, there is nothing in law, in my view, that bars the court to record such a fact and make an order accordingly.’
The Respondent submits that the applicant in the instant case is claiming principal sum ,



costs and interest and therefore it will not be prudent to allow the application as the same is premature and cause unnecessary prejudice to the respondent who will be subjected to several executions.

Applicant's submissions.

17. The Applicant submits that under section 94 of the *Civil Procedure Act* (*supra*) it was clear that the decree holder must obtain leave of the court to execute a decree if costs have not been ascertained. That the provision of Section 94 of *Civil Procedure Act* must be strictly followed if the judgment creditor still wishes to pursue costs. The court finds that the parties concurred on the position of the law.
18. The Applicant submits that the by filing the garnishee application the judgment creditor waived his right to costs. That for the record this is the position taken by the judgment creditor that he shall not pursue costs and accordingly the provisions of section 94 of the *Civil Procedure Act* does not apply with such a waiver.
19. The Applicant relied on the same decision as the applicant in *African Commuter Services Ltd v Kenya Civil Aviation Authority & 2 others* (2014) where Mabeya stated:-
 - “22 However, even if leave was required, would it be necessary in the circumstances? I do not think so. The Applicant’s Counsel informed the Court that the Applicant had foregone its costs. It was contended for the Respondent that there was no evidence of such a waiver. That there had to be an order of leave before the application could be filed.
 23. My view of the matter is, the mischief sought to be addressed by Section 94 was to protect a judgment debtor from suffering multiple executions in respect of the same suit; i.e one in respect of the principal sum and the other for the costs after ascertainment. In this regard, if it is shown to the satisfaction of the court that the judgment creditor has foregone or waived costs and that the execution is for the principal sum and interest only, there is nothing in law, in my view, that bars the court to record such a fact and make an order accordingly. It will not be necessary in my view for the Applicant in the circumstances to make such application formally. Under Sections 1A and 1B of the *Civil Procedure Act* and Article 159 (2) (b) and (d) of the , the court will be perfectly entitled to record such waiver and make an order for the Applicant to waive costs and at the same time allow execution to proceed.”
20. The Applicant submits that in paragraph 11 of the submission the judgment creditor waived his right to costs of the suit and that is why he is executing for the principal sum and interest from date of judgment. Section 94 of the *Civil Procedure Act* was thus not applicable and relies on the same decision by Mabeya J in *African Commuter Services Ltd* where he also stated:
 - ‘24 When faced with a similar case in *Erad Suppliers & General Contractors –Vs- NCPB* (*Supra*), Odunga Judge held:-

“If a party can abandon a whole claim I do not see why the same party if he feels sufficiently Philanthropic, cannot forego the costs, can it be argued that even in cases where a party has abandoned costs , leave to execute before costs are taxed is still necessary? In my view, the necessity for leave to be obtained where a party intends to execute before taxation is to obviate situations where a judgment debtor is likely to be confronted with two sets of execution proceedings. In respect of the same decree i.e. for the principal sum and for costs. This is a recognition of the fact that in a civil action the main aim is compensation and the process should not be turned into a punitive voyage. Therefore where there are no costs to be paid or where a



party entitled to costs has abandoned or waived the same, in my view, Section 94 of the Civil Procedure Act does not apply. If the Respondent was not aware that the claimant was not keen on the said costs now it is aware and that would render that ground unnecessary.” (Emphasis supplied)

21. I agree with that exposition of the law and accordingly apply the same here. Since the Counsel for the Applicant intimated both to the Court and the Respondent at the hearing of the application, that the Applicant had waived its claim to costs, the Respondent is notified accordingly and in my view, there will be no prejudice to be suffered or has been suffered by the Respondent if that order is accordingly endorsed on the record. In this regard, I reject the Respondent’s submission that the decision of Erad Suppliers & General Contracts (*Supra*) on the point was made obiter and that the Court was not referred to the decisions of the Court of Appeal on that point. I further reject the submission that interpreting Section 94 as was in the Erad Case (*Supra*) would lead to legislation by the Courts.
22. In view of the foregoing I reject and dismiss the Preliminary Objection by the Respondent to the application.”

Decision

23. The court in the instant case finds that the applicant under prayers (b) and (c) of the application sought to attach the accounts to satisfy the sum of Kes 4,457,388.00 plus costs of the suit and interest at court rates from the date of judgment until payment in full plus costs of the garnishee proceedings. The application was supported by the judgment creditor affidavit dated January 12, 2023 where in paragraph 2 and 3 sought for the judgment sum of sum of Kes 4,457,388.00 plus costs of the suit and interest at court rates from the date of judgment until payment in full.
24. The counsel for the applicant submits under paragraph 11 that the applicant by filing the garnishee application the judgment creditor waived his right to costs. That for the record this is the position taken by the judgment creditor that he shall not pursue costs and accordingly the provisions of section 94 of the Civil Procedure Act does not apply with such a waiver.

The court finds in the African Commuter Services Ltd v Kenya Civil Aviation Authority & 2 others (2014) relied on by both parties in paragraph 25 it was stated ‘Since the Counsel for the Applicant intimated both to the Court and the Respondent at the hearing of the application, that the Applicant had waived its claim to costs, the Respondent is notified accordingly and in my view, there will be no prejudice to be suffered or has been suffered by the Respondent if that order is accordingly endorsed on the record.’ The court finds that cases are decided by pleadings of the parties and that submissions are not pleadings. The court cannot rely on the submission of the counsel to oust the express prayers in the orders sought being (b). ‘That pending the inter-parties hearing and determination of the application, the monies held by the following 1st, 2nd and 3rd Garnishees of behalf of the judgement debtor herein Nzoia Sugar Company Limited in the following Bank accounts be and are hereby attached to answer the decree herein, the amount unsatisfied being for the sum of Kes 4,457,388.00 plus costs of the suit and interest at Court rates from the date of judgment until payment in full plus costs of the garnishee proceedings (c). That the 1st, 2nd and 3rd Garnishees do appear before the honourable court to show cause why they should not pay to the decree holder the debt due from the judgement debtor, being the money held in the 1st, 2nd and 3rd Garnishee’s accounts aforesaid or so much thereof as may be sufficient to satisfy the sum of Kes 4,457,388.00 plus costs of the suit and interest at Court rates from the date of judgment until payment in full plus costs of the garnishee proceedings.

25. The court is not satisfied that the applicant waived his right to costs taking into consideration he sought for the said costs in Orders b and c of the application and in his supporting affidavit. The court found



in *African Commuter Services Ltd v Kenya Civil Aviation Authority & 2 others* (2014) paragraph 25 the applicant intimated to court and respondent in court that they had waived the right to costs. The court assumed that it was thus on court record that the applicant in that case had waived payment of costs. That was not the case in the instant case where the allegation of waiving the costs was raised by counsel in the written submissions contradicting the pleadings by the applicant. The court holds that submissions are not pleadings and thus evidence cannot be produced vide submissions as was held by the Court of appeal in a decision cited by Justice Odunga in *Robert Ngande Kathathi v Francis Kivuva Kitonde* [2020] eKLR to wit: ‘22. The Court of Appeal in *Avenue Car Hire & Another vs. Slipha Wanjiru Muthegu* Civil Appeal No. 302 of 1997 held that no judgement can be based on written submissions and that such a judgement is a nullity since written submissions is not a mode of receiving evidence set out under Order 17 Rule 2 of the Civil Procedure Rules [now Order 18 rule 2 of the *Civil Procedure Rules*]. The same Court in *Muchami Mugeni vs. Elizabeth Wanjugu Mungara & Another* Civil Appeal No. 141 of 1998 found the practice of making awards on the basis of the submissions rather than the evidence deplorable.’ Submissions are statements akin to marketing gimmicks of a product. The court holds that submissions statements statement are not evidence. The court rejects the invitation to find that the applicant had waived costs as submitted when he pleaded otherwise guided by the afore cited decisions of the Court of Appeal.

26. Consequently, the court holds that section 94 of the *Civil Procedure Act* had to be strictly complied with before execution by taxation of costs or by express waiver of costs. The taxation of costs not having been done and for lack of evidence of waiver of the costs by the judgment creditor, the court finds the instant application was premature and dismisses the same with costs. The applicant is free to comply with the law to proceed with execution the same having not been stayed and as long as the decree is not satisfied.

27. It is so ordered.

WRITTEN, SIGNED AND DELIVERED IN OPEN COURT AT BUNGOMA THIS 2ND MARCH 2023.

J. W. KELI,

JUDGE.

In the presence of:-

Court Assistant – Brenda Wesonga

Applicant:- Absent

Respondent:- Masiga holding brief for J.O. Makali Advocates

