



**Mombasa Aviation Training Institute v Joseph (Appeal  
26 of 2021) [2023] KEELRC 965 (KLR) (17 April 2023) (Ruling)**

Neutral citation: [2023] KEELRC 965 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
APPEAL 26 OF 2021  
AK NZEI, J  
APRIL 17, 2023**

**BETWEEN  
MOMBASA AVIATION TRAINING INSTITUTE ..... APPELLANT  
AND  
CHARLES MAINA JOSEPH ..... RESPONDENT**

*(Being an Appeal from the judgment delivered and orders made by Hon.  
F. Nabinya – SRM on 4/3/2021 in Msa CM – ELR Case No. 102/2019)*

**RULING**

1. *Vide* this Court’s Ruling delivered on June 9, 2022, the Appellant/Applicant’s appeal herein was dismissed with costs for being statute-barred. The Court’s record shows that vide a Ruling delivered on November 30, 2022, this Court’s Deputy Registrar (Taxing Officer) taxed the Respondent’s Party and Party Bill of Costs at kshs 116,225. A Certificate of costs is shown to have been issued by the Taxing Officer on December 14, 2022.
2. There is no indication on record that any objection to the Taxing Officer’s taxation order was ever lodged pursuant to Rule 11 of the Advocates Remuneration Rules. The Respondent is shown to have taken out execution proceedings for recovery of the taxed sum and warrants of attachment of movable property in execution of a decree and warrants of sale of property in execution for money are shown to have been issued to Sure Auctioneers on December 14, 2022 for execution.
3. On December 19, 2022, the Appellant/Applicant filed an evenly dated Notice of Motion seeking orders that can be summarised as follows:-
  - a) that the application be certified as urgent and service thereof be dispensed with in the first instance.



- b) that there be interim stay of execution of the Ruling delivered on November 30, 2022 and all orders and processes consequential thereto.
  - c) that there be unconditional interim stay of attachment of the entirety of the Appellant's assets proclaimed on December 14, 2022 and orders or process consequential thereto.
  - d) that the Court do find, hold and declare that attachment of the Appellant's assets the subject of the warrants of attachment and sale dated December 14, 2022 was fatally defective, unlawful, illegal null and void ab initio.
  - e) that the entire attachment of the Appellant's assets subject of the warrants and proclamation dated December 14, 2022 be unconditionally raised/lifted.
  - f) that the Honourable Court do find, hold and declare that the Respondent, his Advocates on record herein and the Auctioneers (Sure Auctioneers) are jointly and severally liable for any / all actions, proceedings, procedures, processes, liability, claims, damages, costs and expenses incurred and/or suffered by and/or occasioned to the Appellant by virtue of the attachment of the Appellant's assets the subject of the warrants and proclamation dated December 14, 2022.
  - g) that the Honourable Court do render an assessment of any/all actions, proceedings, procedures, processes, liability, claim, damages, costs and expenses incurred and/or suffered by, and/or occasioned to the Appellant by virtue of the attachment of the Appellant's assets subject of the warrants and proclamation dated December 14, 2022.
  - h) that the Court do order the Respondent, his Advocates on record herein and the Auctioneers (Sure Auctioneers) jointly and severally (to) compensate the Appellant for any/all actions, proceedings, procedures, processes, liability, claim, damages, costs and expenses incurred and/or suffered by, or occasioned to the Appellant by virtue of the attachment of the Appellant's assets subject of the warrants and proclamation dated December 14, 2022 as assessed by the Honourable Court, within twenty one (21) days of the making of the said Order, in default whereof execution do issue as appropriate.
    - i) that costs of the application be borne by the Respondent, his Advocates on record herein and the Auctioneers (Sure Auctioneers).
4. The application is expressed to be brought under Sections 1,1A,1B,3,3A,63(e) of the Civil Procedure Act, Sections 12,13,18 and 20 of the Employment and Labour Relations Court Act, Articles 1,2,3,10,12,19,20,21,22,23,24,25,28,38,40,47,48,50,60,64,159,162,165,169,258 and 259 of the Constitution of Kenya 2010; Order 22 Rule 22, Order 42 and Order 51 Rule 1 of the Civil Procedure Rules; and is supported by a supporting affidavit of Joshua Rume, the Appellant's Principal, sworn on December 16, 2022. It is deponed in the said supporting affidavit, inter-alia:-
- a) that the Respondent's Party and Party bill of costs was on November 30, 2022 taxed at ksh. 120,225.
  - b) that whilst awaiting demand upon taxation and draft decree for approval, the Appellant was served with warrants of attachment and sale and a proclamation, all dated December 14, 2022.
  - c) that the attachment was, and remains fatally defective and/or unlawful, illegal, null and void ab initio, as todate there is no valid decree capable of execution.
5. The Respondent opposed the application vide grounds of opposition dated January 16, 2023 and filed in this Court on January 17, 2023, wherein he stated:-



- a) that the application is highly vexatious, incompetent and an abuse of this Court's process.
  - b) that the Appellant's main prayer is for stay of execution of the Taxing Master's decision on costs delivered on November 30, 2022 to which no objection was filed as per Rule 11 of the [Advocates Remuneration Rules 2014](#).
  - c) that the other obnoxious prayers made in the application are not within the purview of this Court, that damages can only be awarded through determination of a substantive suit, not when the Court is sitting on its appellate jurisdiction.
  - d) that the Appellant has not shown what the Respondent and his legal representative did ultra vires the warrants of attachment issued by the Court.
  - e) that the Appellant is an habitual litigant and should be nipped in the bud, and that the current application is tantamount to taking this Court and the justice system for a circus.
6. The application was filed under a certificate of urgency and on December 20, 2022, the Court certified the application as urgent and granted an interim stay of execution on condition that the Appellant deposited the amount in the warrants dated December 14, 2022 (ksh. 120,225) in Court within seven (7) days of the date of the order. The deposit is shown to have been made on December 28, 2022.
  7. Both parties subsequently filed written submissions for and against the application, which I have considered.
  8. As already stated in this ruling, the Appellant's appeal herein was dismissed with costs vide this Court's Ruling delivered on June 9, 2022, and with that the appeal came to an end and the Court downed its tools thereon. Assessment of awarded costs, certification of such costs and issuance of execution proceedings towards the recovery thereof is within the province of the Court's Deputy Registrar/ Taxing Officer. This Court can only get involved in the matter if there has been an objection to taxation pursuant to Rule 11 of the [Advocates Remuneration Rules](#) and a Reference has been lodged in this Court in accordance with the aforesaid Rules.
  9. The Appellant/Applicant, who is shown to have participated in the taxation of the Respondent's Party and Party bill of costs, is not shown to have objected to the Taxing Officer's taxation Order, and no reference has been referred to this Court. What then will be the basis of the stay of execution Order that the Appellant/Applicant seeks."
  10. Although the Appellant/Applicant appears to challenge the legality of the execution process leading to proclamation of its assets on allegation that no formal demand for payment of the taxed costs had been made and no draft decree had been sent to the Appellant/Applicant for approval, it is to be noted that no decree is issuable from a Ruling. This is an elementary issue, regarding which the Court has to delve into the [Employment and Labour Relations Court Act](#) and the [Civil Procedure Act](#). Section 13 of the [Employment and Labour Relations Court Act](#) (No 11 of 2011 -2016 Edition) provides as follows:-
 

"A judgment, award, or Order of the Court shall be enforceable in accordance with the rules made under the [Civil Procedure Act](#)."
  11. Section 2 of the [Civil Procedure Act](#) and Order 21 Rule 7(1) are clear on the fact that a decree is a formal expression of a Judgment. In the present case, no judgment was delivered. The Appellant's appeal was dismissed vide a Ruling delivered pursuant to the Respondent's Notice of Motion dated September 13,



2021. No decree was issuable in the circumstances. For record purposes, a decree is defined in Section 2 of the [Civil procedure Act](#) as:-

“a formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final; it includes the striking out of a plaint and the determination of any question within Section 32 or Section 91, but does not include:-

- a) Any adjudication from which an appeal lies as an appeal from an order;
- b) An order of dismissal for default.

Provided that for the purposes of appeal, “decree” includes judgment, and a judgment shall be appellable notwithstanding the fact that a formal decree in pursuance of such judgment may not have been drawn up or may not be capable of being drawn up.”

12. On the other hand, Section 2 of the [Civil procedure Act](#) defines an Order as:-

“a formal expression of any decision of a Court which is not a decree, and includes a r.nisi.”

13. In view of the foregoing, what is capable of being drawn up from this Court’s Ruling delivered on June 9, 2022 is an order. This Court was not referred to any law that outlaws execution on recovery of taxed and certified costs until the Court’s order awarding such costs has been extracted and served. As already stated in this Ruling, the Appellant participated in the taxation process, and the taxed costs have since been certified. The alleged illegality of the execution proceedings has not been demonstrated.

14. Further, the prayer for assessment of damages for alleged unlawful and/or unprocedural execution is, in my view, without any legal basis. First and foremost damages, on whatever actionable wrong, can only be assessed in a primary suit (action) and by a trial Court upon taking evidence or by an appellate Court where assessment of damages by a trial Court is a subject of appeal. A wrongful attachment of a person’s property or goods is actionable in tort or trespass, and the instigator or the Applicant for such an attachment is liable in damages payable to the wronged party. This position was aptly stated by the Court in the case of [Boston Wachira Kamangu vs Taifa Society Ltd & Another](#) [2016] eKLR, cited by the Appellant, as follows:-

“in my own research, I came across the Court of Appeal decision in Civil Appeal No 94 of 1986, [Aroni Sure & 8 Others vs Gesare Nyamaiko](#) where the Court reiterated that wrongful attachment of goods was actionable in tort and trespass and the instigator or the Applicant for such an attachment was liable in damages payable to the wronged party...”

15. In [Simiyu v Samino](#) [1985] eKLR, also cited by the Appellant, the Court stated:-

“.....on the same principles, it is an actionable wrong maliciously and without reasonable and probable cause to issue execution against the property of a judgment debtor....

If a judgment debt has been satisfied without the creditor’s knowledge and he proceeds to levy execution he may still be liable in trespass, though in the absence of malice he cannot be liable for malicious abuse of process....



An execution is also wrongful where the endorsement on the writ directs the sheriff to levy at a wrong address or on the goods of a person other than the execution debtor *Morris vs Salbert* [1880] 22 QBD 224.”

16. As already stated, the Appellant has not demonstrated the occurrence of a wrongful attachment, and even if it did, an action would lie in tort or in trespass by way of suit instituted in a Court of first instance.
17. Having said that, I find no merit in the Appellant/Applicant’s Notice of Motion dated December 19, 2022, which I hereby dismiss with costs. Accordingly, the interim order of stay of execution dated December 20, 2022 is hereby vacated.
18. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 17<sup>TH</sup> APRIL 2023**

**AGNES KITIKU NZEI**

**JUDGE**

**ORDER**

This Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

**AGNES KITIKU NZEI**

**JUDGE**

**Appearance:**

.....for Appellant/Applicant

..... for Respondent

