



Ludaava v Bonito Hotels Limited (Employment and Labour Relations Cause 3 of 2020) [2023] KEELRC 892 (KLR) (14 April 2023) (Ruling)

Neutral citation: [2023] KEELRC 892 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
EMPLOYMENT AND LABOUR RELATIONS CAUSE 3 OF 2020**

**JW KELI, J
APRIL 14, 2023**

BETWEEN

PETER ADAMS LUDAAVA CLAIMANT

AND

BONITO HOTELS LIMITED RESPONDENT

RULING

1. Respondent/Applicant/Judgement debtor brought the instant Notice of Motion dated December 27, 2022 through the law Firm of Agutu & Company Advocates seeking substantive Order of stay of execution of warrant of attachment of movable property in execution of a decree for money issued by this Honourable court on November 29, 2022.
2. The Application was brought under substantive provision of the law Order 42 Rule 6 of the *Civil Procedure Rules* and premised on ground that the Claimant had threatened to attach the Applicants office equipment and tools of trade in execution of decree for sum of KES 3,219,692.2 issued on November 29, 2022. That the Applicant had lodged Notice of Appeal and had not been supplied with certified typed proceedings despite paying for same. That the intended appeal would be rendered nugatory if the execution proceeds.
3. That it was not in dispute the decretal sum stated in the decree being KES 3,219,692.21 was incorrect as it was subject to PAYE only as statutory deduction.
4. That the Applicant would suffer no prejudice as hearing directions by court of Appeal will be prompt . That the Claimant has no known income and Applicant would suffer irreparable damages if their appeal succeeds. The application is supported by Affidavit of Alfred Agengo the General Manager of the Applicant sworn on the December 27, 2022 which annexes the decree, letter requesting for typed proceedings, copy of the proclamation notice and warrant of attachment and copy draft of memorandum of appeal and his further affidavit sworn on the February 8, 2023.



5. The Application was opposed by the Claimant *vide* his replying affidavit sworn on the January 9, 2023 who stated the application was frivolous and defective having been filed by Agutu & Company Advocates without leave or consent of Lumumba & Ayieko Advocates on record at trial court Contrary to provision of Order 9 Rule 9 of the [Civil Procedure Rules](#), that the Application was tainted by inordinate delay of 10 months post delivery of judgement and there was no security for the decretal amount. That there was no prove of substantial loss as the Applicant was still in business yet he was suffering being unemployed. That the application was prompted by the execution hence delay not justified. That the Applicant ought to pay his awarded money less PAYE only as per judgement which tax they should remit to the government.
6. The application was canvassed by way of written submissions . The Applicant’s submission drawn by Agutu & co. Advocates were dated February 8, 2023. The Claimant’s submissions drawn by Gabriel Fwaya & Co. Advocates were dated March 15, 2023.

Decision .

Issues For Determination

7. Having read the Application and the response as well as the written submissions the court opined the issues for determination in the application were as follows:-
 - a. Whether the Application was competent
 - b. Whether the Application met the threshold of Order 42 Rule 6 (2) of the [Civil Procedure Rules](#).
 - c. What amount should be deducted as PAYE.
 - d. Costs.

Whether the Application was competent

8. The Claimant challenged the Application for being filed by a different Law firm after judgement stating the same was in violation with provisions Order 9 Rule 9 of the [Civil Procedure Rules](#) . The said Rule reads:-‘ 9. Change to be effected by order of court or consent of parties [Order 9, rule 9.] When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court— (a) upon an application with notice to all the parties; or (b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.’
9. The Applicant submits the Order 9 Rule 9 (*supra*) does not apply in the instant case as Mr. Agutu was the same Advocate who was at trial court the difference being he was under a different law firm. The applicant relied on decision in [S.K Tawardi -vs- Veronica Mue blmannn](#)(2019) eKLR where the court observed “ in my view the essence of Order 9 Rule 9 of the CPR was to protect advocates from mischievous clients who will wait until a judgement is delivered and then sack the Advocate and either replace him.”
10. The Claimant /respondent submits that the firm of Lumumba & Ayieko Advocates entered appearance *vide* memo of appearance dated February 28, 2020 and filed defence. That Mr. Boaz Agutu held brief for Lumumba & Ayieko for respondent throughout the proceedings. That there is no notice of change of Advocates to Agutu & company Advocate. That todate no such notice has been filed.



That the law firm of Agutu & company advocates are thus strangers in the center. No leave of court on consent by Lumumba & Ayieko Advocates on record in violation of Order 9 Rule 9 of the civil procedure Rules.

Decision

11. The Court finds that from the court proceedings during trial Mr. Agutu was holding brief for Lumumba & Ayieko Advocates. The Respondents, applicant appointed the law firm of Lumumba & Ayieko who entered appearance on March 3, 2020. Mr Agutu was not the owner of the brief but acting for the law firm hence not the advocate under Order 9 Rule 9 of the CPR. There is no notice of change of Advocates. The court finds that indeed the law firm that brought the instant application being Agutu & Company Advocates are strangers in the cause. After judgment delivery change of advocates must be in compliance with Order 9 Rule 9 of CPR and to make matters worse there is no filed notice of change of Advocates. The court finds and determines that the Application dated December 27, 2022 is fatally defective for being filed by a stranger in the proceedings and has no leg to stand on. The court finds that the mischief envisaged in S.K. Tarwadi v Veronica Muelmann(2019)eKLR (*supra*) could happen in the instant case and rejects the audience of the said lawfirm of Agutu & Company Advocates until there is compliance with Order 9 Rule 9 of the Civil Procured Rules.
12. On the Decretal sum payable the same is per the judgment and to simply for the parties 70% of the award amount to the Claimant with 30% PAYE being retained by employer for remittance to government.
13. The Respondent is free to comply with the law and institute the Application afresh as the same has not been determined on merit. The stay orders in place are vacated having been granted under an incompetent application.
14. Costs of the Application to the Respondent/Claimant.
15. It is so ordered

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 14TH DAY OF APRIL, 2023.

JEMIMAH KELL,

JUDGE.

In the presence of :-

Court Assistant : Lucy Macheso

Respondent /Applicant:-

Claimant/Respondent:-

RULING IN BGM ELRC CAUSE NO.3 OF 2020	0
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