



**Awino v United Millers (Employment and Labour Relations Cause 103 of 2017) [2023] KEELRC 1650 (KLR) (11 July 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1650 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
EMPLOYMENT AND LABOUR RELATIONS CAUSE 103 OF 2017**

**HS WASILWA, J  
JULY 11, 2023**

**BETWEEN**

**RICHARD CLIFFORD AWINO ..... CLAIMANT**

**AND**

**UNITED MILLERS ..... RESPONDENT**

**RULING**

1. This Ruling is in respect of the Respondent/ Applicant’s Notice of Motion dated May 15, 2023, filed under certificate of urgency pursuant to Rule 17 of the *Employment and Labour Relations (Procedure) Rules, 2016* and all other enabling provisions of the law, seeking for the following Orders; -
  1. Spent.
  2. Spent.
  3. That the Respondent/Applicant be compensated for the loss of user of its motor vehicle registration number KBL 348D, amounting to Kshs 330,000 from May 8, 2023 to May 16, 2023.
  4. That the claimant be ordered to pay costs of the Application.
2. The application is based on the fact that judgement in this case was delivered in favour of the claimant against the Respondent on January 27, 2021 ordering for the payment of Kshs 261,193 less Kshs 163,353.75 which had been paid earlier.
3. That the Respondent sought for review of that judgement because the Notice pay had been captured twice and to remove some of the sums that had already been paid. Upon delivery of the Ruling on the review on January 20, 2022, the Applicant herein issued a cheque number 087481 of Kshs 49,337 on February 1, 2022, being payment in full of the remainder of the decretal sum.



4. The claimant's Bill of costs was filed soon thereafter, which was heard and taxed at Kshs 189,209 on February 14, 2023. That the claimant's advocates demanded for the payment of the taxed costs by their letter of February 20, 2023, which Applicant herein issued Cheque number 000549 of Kshs 189,205 to the Respondent herein on May 8, 2023 being full and final payment of taxed costs.
5. It is stated that despite receiving this money, the Respondent proceeded to instruct Direct 'O' Auctioneers to attach the Applicant's goods, which Auctioneer attached their motor vehicle registration number KBL 348 D (Closed body pick up) on May 12, 2023, after receiving the decretal sum and costs in full.
6. That the attachment was illegal considering that the costs had been paid in full. He contends that unless the Orders sought are granted, the Applicant stands to suffer irreparable loss.
7. The Application is supported by the Affidavit of Yvonne Obonyo, the Applicant's Legal officer, deposed upon on May 15, 2023. The affiant herein reiterated the grounds in support of the Application.
8. The Applicant filed a further supporting affidavit deposed upon on June 26, 2023 by Richard Motito, the Applicant's Human Resource manager. In this Affidavit, the affiant stated that the motor vehicle was proclaimed on May 12, 2023 and released on May 23, 2023 and within that period, the Applicant had incurred losses of Kshs 986, 721 which he urged this Court to order for their compensation. In support of this, they attached several invoices for the period between May 13, 2023 and May 22, 2023.
9. The Application is opposed by the claimant/ Respondent who filed a replying affidavit, deposed upon on May 2, 2023 by Peter Chege, the Respondent's Advocates. In his affidavit he stated that Bill of cost was taxed on February 14, 2023, while the warrants of attachment were issued on May 4, 2023 and served on the Applicant's on the same day.
10. After serving the warrant of attachment and proclamation notice, the Applicant issued a cheque of Kshs 189,205 on May 8, 2023, Four days after the proclamation was served, which amount was less by Kshs 2,450, because the taxed costs were Kshs 191,655. Also that the auctioneer charges had accrued and had not been paid.
11. He states that they issued instructions to the auctioneer to recover the balance of this costs on May 11, 2023, leading to attachment of the Applicant's vehicle on May 12, 2023. He added that the Applicant is misleading the Court in alleging that the vehicle was attached on May 8, 2023.
12. He maintained that the loss of user of the motor vehicle cannot be burdened on their client or the auctioneer, because the proclamation was regular and legal with no fault on their side. He urged this Court to direct the Applicant to pay the balance of the decretal sum and absolve them from any wrong arising from these proceedings.
13. Directions were taken for the application to be canvassed by written submissions.

#### **Respondent's Submissions.**

14. The Respondent submitted on four issues; whether the proclamation and warrants of attachment dated May 12, 2023 should be declared null, illegal, irregular and unlawful, who should pay auctioneers charges, whether the loss is justified and who should bear costs of this Application.
15. On the first issue, the Respondent submitted that the Ruling on the Bill of costs was delivered on February 14, 2023, in presence of advocates for the parties as such that they were aware of the taxed costs. Despite knowing the exact costs, the Applicant failed to pay the said amount, forcing the Respondent to instruct Direct 'O' Auctioneers on May 4, 2023 to recoup the taxed amount, which



- auctioneers proceeded on the same day to proclaim, the Respondent's assets. As soon as proclamation was done, the Respondent issued a cheque of Kshs 189,205 on May 8, 2023, leaving a balance of Kshs 2450 and the auctioneers fees. The Respondent instructed the auctioneer to proceed with execution to recover the balance and its fees, leading to attachment of the Applicant's motor vehicle on May 12, 2023.
16. Flowing from the above events, the Respondent submitted that it followed due process in securing its costs and was in the process of recovering the balance and the auctioneer's charges in line with Rule 7 of the [Auctioneers Rules, 1997](#). Therefore, that the Applicant/Judgment debtor is the one that should pay auctioneers fees in this case.
  17. On whether the loss sought for in the application is justified, it was submitted that the attachment of the Applicant's motor vehicle was done in line with the law on execution proceedings and the said vehicle was released as soon as the Court made an order for release, therefore that the loss if any, cannot be borne by the Respondent. This he argued is because the execution emanated from the failure by the Applicant to pay the taxed costs and auctioneers fees, that necessitated the execution process. Therefore, they are the authors of their own misfortune.
  18. On costs of the Application, the Respondent submitted that costs are awarded to the successful party for trouble taken in prosecuting the suit as was stated by Retired Justice Richard Kuloba in his book 'Judicial Hints on Civil Procedure'. Similarly, that since the Application is not merited, they ought to be awarded costs of this Application.
  19. The Applicant had not filed any submissions at the time of writing this Ruling.
  20. I have examined all the averments and submissions of the parties herein. Judgment in this case was delivered on January 27, 2021. On July 19, 21 an application was filed by the respondents seeking review of the court's judgment which application was allowed leaving the total payable to be 59,259/=. The ruling was delivered on January 20, 2022.
  21. On February 23, 21, another application was filed by the applicants seeking another review to allow costs. The court directed that the application be compromised and instead a bill of costs be filed.
  22. The bill of costs was filed and a ruling delivered by the Hon. Deputy Registrar on February 14, 2023.
  23. From the record on the file on May 4, 2023, the respondent claimant herein proceeded to proclaim the respondents properties for an amount of 191,655/=. This proclamation was made by Direct "O" Auctioneers and motor vehicles KCV 955M, HINO, KCZ 249V Lorry, KBC 673K Toyota Pick up, KBL 674K Pick up and KBW 938C Isuzu Lorry were proclaimed.
  24. Vide a letter of May 8, 23 the respondents through Florence Odwako IRO of FKE wrote to the claimant's counsel herein transmitting a cheque dated May 5, 2023 of kshs 189,205/= in favour of the claimant herein to them.
  25. It is clear that this proclamation was indeed made before the payment and on May 11, 2023 the respondents claimant intimated to the respondent that there was still a shortfall of 2,450/= which they required the respondent to pay.
  26. On May 12, 23, the auctioneers now proceeded to attach motor vehicle registration No KBL 348D Toyota Hilux to recover the remaining amount with their costs.
  27. The applicants content that the subsequent attachment after payment of the cheque of kshs 189,205/= was unwarranted and that they lost business which they want the Decree Holder to pay.



28. It is true that the respondents were owed kshs 2,450/= and it was indeed unproportional for the Decree Holders to proceed and attach a motor vehicle for a debt of kshs 2,450/=.
29. That notwithstanding, there is no proof that the applicants paid the kshs 2,450/= that was owing to the Decree Holder. The attachment though unproportionate was regular and the loss occasioned cannot be loaded on the respondent.
30. The respondent applicants indeed had a duty to clear the balance however small and retrieve their vehicle which they ignored and therefore should face the consequences of their loss.
31. I find the application therefore unmerited and is dismissed accordingly.
32. There will be no order of costs.

**RULING DELIVERED VIRTUALLY THIS 11<sup>TH</sup> DAY OF JULY, 2023.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:-**

Achieng holding brief for Chege for Claimant – present

Ouma holding brief for Masese for Applicants – present

Court Assistant - Fred

