



**Ochieng v Kenya National Hospital Board (Employment and Labour Relations Cause 41 of 2020) [2023] KEELRC 2324 (KLR) (29 September 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2324 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE 41 OF 2020  
AN MWAURE, J  
SEPTEMBER 29, 2023**

**BETWEEN**

**WILSON OWUOR OCHIENG ..... CLAIMANT**

**AND**

**KENYA NATIONAL HOSPITAL BOARD ..... RESPONDENT**

**RULING**

1. The applicant filed a notice of motion vide the application dated March 9, 2023 in which he sought orders that this honourable court: -
  1. spent
  2. hear and determine this matter in the first instance and service of the Application be dispensed with.
  3. be pleased to grant temporary injunction restraining the claimant/respondent whether by himself, his agents and/or servants from dealing, interfering, alienating or otherwise disposing of the applicant's assets and goods pending the determination of this application.
  4. be pleased to stay execution of the court orders of July 13, 2022 and the court's certificate of taxation dated January 12, 2023 and all consequential orders and restrain the claimant/respondent whether by himself, his agents and/or servants from dealing, interfering, alienating or otherwise disposing of the applicant's assets and goods pending the determination of this application.
  5. be pleased to order that the proclaimed assets and goods of the applicant be returned in their original and good state to the applicant.
  6. be pleased to order that the amount payable to the claimant is subject to taxation on pay as you earn as provided by the law.



7. the costs of this application be borne by the respondent.
8. be pleased to make such further or other orders as it may deem just and expedient in the circumstances of this case.

### **Applicant's Case**

2. The application was supported by an affidavit dated March 9, 2023 sworn by the applicant's corporation secretary, Calvin Nyachoti.
3. The applicant avers that it is a state corporation established under the *State Corporations Act* cap 445, Laws of Kenya and section 21 (4) prohibits execution against government and its agencies as established under the Act.
4. The applicant further avers that it is charged with the responsibility of providing crucial healthcare services within or outside Kenya and the claimant/respondent has attached its assets and goods using warrants of attachment and proclamation issued in this suit dated 3<sup>rd</sup> and March 6, 2023 respectively in execution of alleged balance of judgment sum and unpaid costs of taxation.
5. The applicant avers that it uses the listed items in execution of its statutory mandate in provision of healthcare as a national referral hospital.
6. The applicant further avers pursuant to section 3(2)(a)(ii) of the *Income Tax Act*, the judgment sum awarded to the claimant of Kshs 885,492.20 was payable salary earned by him which is taxable.
7. The applicant avers that it paid Kshs 624,486.02 to the claimant's advocates but deducted 261,005.98 as statutory deduction of Pay As You Earn. And paid Kshs 423,095 in full pursuant to the certificate of taxation dated 12<sup>th</sup> January 2023.
8. The applicant avers that the claimant seeks to execute amounts already paid and imposed interest on amounts already paid and therefore it is grossly exaggerated and the execution is irregular and unlawful.
9. The applicant therefore avers that the claimant/respondent /decree holder has unlawfully, illegally, wrongly and irregularly proclaimed against the applicant and its assets notwithstanding it being a state corporation.
10. The applicant further avers that it is in the interest of justice that a stay for warrants of attachment dated 3<sup>rd</sup> March 2023 and sale of the applicant's assets and goods of trade as listed in the proclamation dated 6<sup>th</sup> March 2023 is granted and the auctioneers directed to return and release the assets and goods.

### **Claimant/Respondent Case**

11. The claimant/respondent contested the application vide a replying affidavit dated March 22, 2023.
12. The claimant/respondent avers that vide a judgment by this court delivered on March 31, 2022, judgment was entered in his favour against the respondent/applicant and thereafter payslips were filed and produced before the court and subsequently the court made a ruling on July 13, 2022 awarding him a total decretal sum of Kshs 885,495 against the applicant
13. The respondent further avers that the judgment dated 31/03/2022 awarded him interest on the principal decretal sum of Kshs 885,492.20 on court rates of 12%p.a from 31/03/2023 until full payment.



14. The claimant/respondent admits that his advocate Mr. W. Oluoch of Ochieng Ochieng Advocates was paid through EFT to the firm's bank account on 29/09/2022 a sum of Kshs 624,306 receipt which was acknowledged vide a letter date 04/10/2022 and the letter further requested for the balance of Kshs 261,186.20.
15. The claimant/respondent avers that despite making inquiries about the balance of the principal decretal sum no explanation was given to him by the respondent/applicant and neither was any reason or basis provided for withholding the said sum of Kshs.261,186.20.
16. The claimant/respondent avers that interest accrued on the principal sum of Kshs 885,49.20 in accordance with the judgment and decree herein interest being Kshs 53,008.62
17. The claimant/respondent avers that the applicant has not provided any evidence that it remitted Kshs 261,186.20 to KRA being PAYE as he has never been issued with a Tax Remittance Certificate and annexure CN-5 attached to the applicant's supporting affidavit is merely an internally generated payment voucher for Kshs 261,186.20.
18. The claimant/respondent avers that his party to party bill of costs dated 15<sup>th</sup> August 2022 was taxed at Kshs 423,095 on 19/12/2022 in the presence of the applicant's advocate who applied and obtained stay of execution for 30 days and the respondent/applicant only remitted Kshs 422,915 to the claimant's advocate bank account on 06/03/2023.
19. The claimant/respondent avers that interest accrued on the principal taxed cost in accordance with the judgment and decree dated 31/03/2022 was Kshs 47,235.95 which is due and payable to the judgment-creditor.
20. The claimant/respondent avers that vide a letter dated 12/01/2023 his advocate wrote to the respondent/applicant demanding settlement of the decretal sums and costs plus interest thereon in full but the respondent/applicant failed to provide evidence of remittance of the withheld sum nor was payment made prompting the respondent herein to file an application for execution of the decree and taxed costs against the applicant.
21. The claimant/ respondent avers that pursuant to the application for execution, the court issued warrant of attachment of moveable property in execution of decree money dated 4/03/2023 to Nexttgen Auctioneers who proceeded to execute the warrants by proclaiming the respondent/applicant's moveable property on 6/03/2023, the same day the applicant remitted part of the tax costs at Kshs 622,915.
22. The respondent's advocates immediately thereupon informed the auctioneers of the payment and instructed them to execute the balance of the decretal sums as per the warrants of attachment dated 4/03/2023 which he holds are valid, regular and lawful and ought to be enforced and executed by the auctioneer whose cost and charges are also due to the judgment debtor/applicant.
23. The claimant/respondent avers that in the absence of evidence of actual remittance of Kshs 261,182 and issuance of a tax remittance certificate to himself this court should find the sums are due and payable to the judgment creditor/respondent herein by the applicant.
24. The claimant/respondent avers that the sums due and payable by the applicant/judgment debtor is Kshs 103,054.28 as described below:
  - i. Interest on principal sum of Kshs 885,492.20 at court rates of 12% pa from 31/03/2022-29/09/2022 – 53,008.23



- ii. Interest on tax cost of Kshs 423,095 from 31/03/2022-06/03/2023 at court rates of 12% pa – 47,235.95
  - iii. Outstanding costs (423,095-422,915) – kshs 180
  - iv. Outstanding net payment after alleged PAYE deductions (885,492-261,006)=624,486-624,3026)- kshs 180
  - v. Further court costs – kshs 950
  - vi. Court collection cost – kshs 1,500
25. The claimant/respondent avers that section 21(4) of the *State Corporation Act* does not protect the applicant and any state corporation from execution proceedings of this court.

### **Respondent/Applicant Submissions**

26. The respondent submitted that this court is enjoined to consider the principles in the case of *Giella v Cassman Brown and Company* (1973) EA 358 when granting stay of execution.
27. The respondent submitted that the claimant served with warrants of attachment and proclamation notwithstanding that it is obligated under section 3(2)(a)(ii) of the *Income Tax Act* to charge and remit income tax on all persons where income is accrued and derived in Kenya and it has adduced evidence to demonstrate that the withheld sum of Kshs. 261,006.98 was remitted to KRA and has therefore shown sufficient reason for seeking stay of execution.
28. The respondent/applicant submitted that if stay of execution is not granted the claimant/respondent will proceed to alienate, sell and dispose its goods as listed in the proclamation and it is likely to suffer irreparable loss and as execution will greatly hamper and/or disturb its operations as a major hospital and health care provider and the attachment of its property would be against the national and public interest and would cause indescribable hardship and suffering to the wider public who rely on the respondent/applicant functions.
29. The respondent/applicant submitted that it explained the delay in payment on grounds that state corporation payments cannot be made singlehandedly but require inter departmental processes on approvals and signatures.
30. The respondent/applicant submitted that it has discharged its burden of proof on proving remittance of the deduction to KRA vide the voucher and the claimant has not disapproved the remittance by adducing his itax account ledger to show remittance is not reflected therein.

### **Claimant/Respondent Submissions**

31. The claimant submitted that this application is misconceived as the auctioneer had not taken possession and removed the attached goods from the custody of the respondent.
32. The claimant submitted that the law obligates the Respondent to issue him with a tax remittance certificate immediately upon making the tax payment to KRA and it is not the responsibility of the claimant to confirm remittance of the withheld PAYE to KRA, therefore in absence of the tax remittance certificate the sum of Kshs 261,186.20 is still due and owing and payable to the claimant.
33. The claimant submitted that the respondent/applicant cannot challenge the rate of interest awarded to the claimant in the judgment through a notice of motion or interlocutory application before this court, the only open avenue to challenge the rate of interest awarded is an appeal to the appellate court.



## Analysis and Determination

34. The applicant seeks a temporary injunction restraining the claimant/respondent whether by himself, his agents and/or servants from dealing, interfering, alienating or otherwise disposing of the applicant's assets and goods pending the determination of this application.
35. The court is guided by the principles in *Giella v. Cassman Brown (supra)* which include: whether the applicant has shown prima facie case with a probability of success; whether the applicant shall suffer irreparable injury which cannot be compensated by damages; and if the court is in doubt then it can decide the application on a balance of convenience.
36. The applicant avers that the balance of the decretal sum was remitted to KRA as PAYE and produced before this court a voucher payment of 261,186.20 allegedly made to KRA.

37. In *Charles Muthama v Wananchi Group (K) Limited* [2019] eKLR the court held:-

“I have examined all the averments and submissions of both Parties. What is evident is that the Parties argument is whether or not tax is payable on a Court's decretal amount especially in relation to an employee's terminal benefits.

28. Section 49(2) of *Employment Act* 2007 states as follows:-

“Any payments made by the employer under this section shall be subject to statutory deductions”.

Other than this provision of law, In *Kioko Joseph Kilinda (supra)*, it was held that under section 49 of *Employment Act*, the employer is obligated to deduct statutory deductions for all payments made.

I agree with the above proposition entirely and find that the respondent herein was mandated by law to deduct tax and remit to Kenya Revenue Authority for any payments due to the claimant. Whether the Respondent has made the remittance or not that is his problem with the Kenya Revenue Authority so long as the respondent remits to the claimant a Certificate of Tax remittance commonly called form P9.”

38. In view of the foregoing, the voucher produced before this court is not sufficient to confirm the said remittance of PAYE, therefore, the applicant should forward to the claimant/respondent a Certificate of Tax remittance commonly called form P9 but otherwise it is obvious statutory deductions are payable on all dues from the employer.
39. The claimant has pegged his allegation that he is owed dues by the respondent from the statutory dues which the court has established is payable by the employer as provided in law and in other decided authorities. That therefore would in my view mean that there is no interest due and owing to the claimant from the principal sum. The respondent/applicant has only to provide the claimant with the P9 form.
40. This follows therefore that interest on principal sum is not payable as interest in the judgment. Interest on costs is however payable till full payment as ordered in the judgment. The other prayers being outstanding costs and court collection costs are not payable because the respondent had settled the decretal sum and there was no reason to result to filing documents again.
41. The respondent/applicant should pay the kshs 47,235/90 as interest on costs and issue the tax certificate to the claimant.



42. The claimant/respondent is ordered to stop the execution process forthwith and if there are any payments to the auctioneers he must take care of the same.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 29<sup>TH</sup> DAY OF SEPTEMBER, 2023.**

**ANNA NGIBUINI MWAURE**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

**ANNA NGIBUINI MWAURE**

**JUDGE**

