



**Matheka v Nyaga & another (Constitutional Petition E015 of 2022)
[2023] KEELRC 2458 (KLR) (5 October 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2458 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CONSTITUTIONAL PETITION E015 OF 2022
MN NDUMA, J
OCTOBER 5, 2023**

BETWEEN

JOHN BOSCO MATHEKA PETITIONER

AND

MURITHI NYAGA 1ST RESPONDENT

KENYA AIRLINE PILOTS ASSOCIATION 2ND RESPONDENT

RULING

1. The applicant in a Notice of Motion dated 15th May, 2023 seeks an Order in the following terms:-
 1. Spent
 2. Spent
 3. That the Honourable Court be pleased to make a Garnishee Order Nisi against N.C.B.A Bank, Embakasi Branch, the Garnishee herein, being the “Accounts Numbers (Business Saver Account – Account Number 17930xxxxx, Current account – Account Number 17930xxxxx, Business saver account – Account Number 78521xxxxx, Golf account – Account Number 7852130017, Fixed deposit account – Account Number 7852130038” Ordering that all monies deposited, lying and being held in deposit by the Garnishee respectively to the credit of Kenya Airline Pilots Association the Respondent/Judgment Debtor herein be attached to answer the Decree for the sum of Kenya Shillings one million, two hundred and one thousand, six hundred and sixty three (1,201,663/=) being the amount in respect of compensation/salary/allowances and costs for the Decree-holder /Applicant.
 4. That a Garnishee Order Nisi upon the Garnishee do issue and the same be served on the Garnishee before being served on the Respondent/Judgment Debtor.



5. That the Garnishee do appear before this Honourable Court on an appointed date and time to show cause why it should not pay the Applicant's Advocates the sum of Kenya Shillings one million, two hundred and one thousand, six hundred and sixty-three (Kshs.1,201,663/=, being the amount in respect of compensation/salary/allowances and costs for the Decree-holder/Applicant.
 6. That there be a monthly standing order against the Judgment Debtor's Accounts, satisfying the monthly salary/allowance of the Decree Holder of Kenya Shillings thirty-five thousand (35,000) until the month of April 2026 when the Petitioner/Decree-Holder is expected to leave office after elections for the 2nd Respondent's officials have been carried out.
 7. That the Garnishee Orders Nisi be made Absolute and the Garnishee, NCBA Bank Kenya PLC to release and/or remit to the Decree-Holder, the sum of Kshs.1,201,663/= in order to satisfy the Decree and Certificate of Taxation together with costs of this application.
 8. That the Advocate be at liberty to apply for any such further orders/or directions as the Honourable Court may deem fit and just to grant.
 9. That costs of this application be provided for.
2. The application is premised on grounds 1 to 13 set out on the face of the notice of motion and buttressed in the supporting affidavit of Mr. Achola Michael Odhiambo, Advocate of the High Court in conduct of this matter. The grounds aforesaid may be summarized that the applicant got a judgment in his favour on 27/10/2022 and the applicant took out a decree issued on 3/11/2022. That the advocate filed the petitioner's amended Party and Party Bills of Costs on 23/3/2023 and a taxation of Kshs.231,663 was done.
 3. That the respondent filed an application for stay of execution pending Appeal dated 10/11/2022 but same was dismissed with costs to the applicant on 23/3/2023.
 4. That the judgment debtor/respondents have completely refused to comply with the Court judgment, decree and Orders and have proceeded to again expel the petitioner/Decree holder from office of Treasurer and Member of the Association on 6/2/2023 without any stay orders from Court and are thus in contempt of Court orders.
 5. That the respondents have never filed an Appeal and/or served the applicant with an Appeal.
 6. That the Petitioner is owed monthly salary/allowances of Kshs.630,000 for the month of December, 2021 through to May, 2023 at the rate of Kshs.35,000 for 18 months and the same continues to accrue.
 7. That the applicant is owed monthly sitting allowances of Kshs.340,000 for the month of December, 2021 through to April, 2023 for 68 meetings held over the said duration by the Executive Council of the respondent in absence of the applicant.
 8. That the applicants were awarded costs of Kshs.231,663 which is yet to be settled.
 9. That the total amount owed and/or decretal sum stand at Kshs.1,201,663.
 10. That the applicant has written to the respondent demanding payment but same has not been paid. That the applicant is likely to suffer irreparable loss unless payment is done. That the application be granted.
 11. That Garnishee nisi, was issued by Byram Ongaya, J. on 21/6/2023 for the sum of Kshs.1,201,663 and that the same be confirmed.



12. The respondents filed a notice of motion application dated 4/6/2023 seeking to have the Garnishee nisi orders issued on 2/6/2023 be stayed in the interim and that the Court be pleased to set aside and/or vary the Garnishee order nisi issued on 2/6/2023 or the notice of motion dated 5/5/2023 be heard de novo with the participation of the respondent applicant.
13. The application dated 4/6/2023 was filed in lieu of a response to the application dated 15/5/2023 and the Court shall treat it as such. It is supported by an affidavit of Daniel Kabata who deposes in the main that the judgment debtor, the respondent in the application of 15/5/2023 has settled the entire decretal sum pursuant to the judgment/decreed of the Court dated 2/10/2022 together with the Certificate of costs for Kshs.231,646 as follows:-
 - (a) The sum of Kshs.525,000 being payment of the allowances due to the Decree holder from December, 2021 to February, 2023 remitted through Cheque No. 052 dated 23/5/2023 and received by one Trevor Liachuma, Advocate on behalf of the Decree holder's Advocates on record on the same date.
 - (b) The sum of Kshs.231,646, being payment of taxed costs as per the Certificate of Taxation marked as annexure AMO -2 in the supporting affidavit sworn on 15th May, 2023. That both amounts were duly acknowledged.
 - (c) That on 15/5/2023, the Garnishee nisi was issued for a sum of Kshs.1,201,663 against the accounts of the judgment debtor/respondent. That the difference between this sum and the amount already paid is Kshs.444,999.
 - (d) That the application of 15/5/2023 was brought without material disclosure of the aforesaid payments.
 - (e) That the judgment debtor/respondent were served with the application on 18/5/2023 and matter was scheduled for hearing on 2/6/2023 but inadvertently did not diarise the matter. That this error should not be visited on the respondent.
 - (f) That the Garnishee Order Nisi issued on 2/6/2023 by the Court attaching the respondent's account will cripple the entire day to day operations of the respondent.
 - (g) That the additional sum of Kshs.444,999 claimed by the applicant has no basis and is the subject of abandoned application dated 21/12/2022 for contempt of Court.
 - (h) That the Garnishee Order Nisi be stayed and/or be set aside.
14. The respondents also replied to the application *vide* a replying affidavit deposed to on 4/6/2023 by Captain Nyaga who has extensively set out the facts already set out herein before deposed to in the supporting affidavit of Daniel Kabata.
15. The crux of the response is that the respondent has fully settled the decretal sum upto the month of February, 2023 and the Certificate of Costs *vide* two cheques referred to earlier for the sum of Kshs.525,000 and Kshs.231,604 respectively and the claimed sum of Kshs.1,201,663 is not justified and the Decree Order Nisi be therefore set aside and not be confirmed.
16. That the applicant ceased to be National Treasurer of the 1st respondent upon being lawfully removed from office and has not challenged the decision to remove him. That therefore, the applicant is not candid by claiming further payment of allowances after February, 2023 since the applicant no longer holds the office of Treasurer. That the additional money sought in the application has not been justified and is not owed to the applicant by the respondent. That the application be dismissed.



17. The applicant filed further affidavit on 5/6/2023 restating the facts set out in the application. They reiterate that the claimed sum of Kshs.1,201,663 is due and owing. That there is a balance of Kshs.449,999 due and owing upon payment of the cheques, which the applicants duly acknowledged in the further affidavit (Kshs.525,000 and Kshs.231,664).
18. That the Court reinstated the applicant and the respondent has proceeded to remove the applicant from office with effect from February, 2023 in contempt of the Court Orders. That the claimed sums are lawfully due to the applicant and continue to accrue in terms of the judgment of the Court which has not been appealed against to date.
19. The parties made oral submissions before Court which the Court duly considered together with the depositions by the parties.
20. It is not in dispute that the respondent paid on 15/5/2023 the decretal sum in two cheques in the sum of Kshs.525,000 being the decretal sum due and Kshs.231,644 being the taxed costs in the matter.
21. The application before Court was filed on the same day 15/5/2023 and it is not clear whether the said payment had been received by the time the application was filed.
22. Clearly, the amounts paid cover the decretal sum up to the month of February, 2023 the month when the applicant was again removed from the office of Treasurer and according to the respondent not entitled to any further payments thereafter.
23. It is also clear that part of the sum claimed by the applicant relate to alleged sitting allowance while the applicant admits that the applicant did not sit in the alleged Executive Council Meetings.
24. The issue as to the removal of the applicant from office of Treasurer in February, 2023 has not been the subject of any litigation, and therefore, the Court finds that it is improper for the applicant to enforce any payments of monthly allowance after February, 2023 until the lawfulness or otherwise of the removal from office of the Applicant in February, 2023 has been determined.
25. The application in the Court's view lack merit by fact of the payment already made to the applicant
26. The application is therefore dismissed and the decree Order Nisi discharged. Each party to bear their own costs of the application.

DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 5TH DAY OF OCTOBER, 2023.

MATHEWS N. NDUMA

JUDGE

Appearance

Mr. Achola

M/s Oloo for respondent

Mr. Ekale – Court Assistant

