



**Ngari v Kenya Meat Commission (Cause 64 of 2019)
[2023] KEELRC 3139 (KLR) (24 November 2023) (Ruling)**

Neutral citation: [2023] KEELRC 3139 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 64 OF 2019
SC RUTTO, J
NOVEMBER 24, 2023**

BETWEEN

ESTHER NJERI NGARI APPLICANT

AND

KENYA MEAT COMMISSION RESPONDENT

RULING

1. What comes up for determination is the Claimant's Notice of Motion Application dated 28th June 2023, brought under Rule 32(2) of the *Employment and Labour Relations Court (Procedure) Rules* and Sections 94 and 99 of the *Civil Procedure Act*. The Claimant seeks the following orders: -
 1. Spent
 2. Spent
 3. That this Honourable Court be pleased to grant the Claimant leave to execute the decree/ judgment before taxation of costs.
 4. Spent.
 5. Spent.
 6. That each party bears its own costs.
2. The Motion is premised on the grounds appearing on its face and on the Supporting Affidavit sworn on 28th June 2023 by the Claimant.
3. The Claimant deposes that the Respondent withheld her half salary for the period between June 2015 and April 2018 and her full salary for the period between April 2018 and 15th April 2019. She avers that as a consequence, of withholding her half salaries and full salaries, her family was deprived of the



said resources for 8 years now. She further states that hardship was inflicted on her and her family by the deprivation of the said salaries.

4. The Claimant further avers that she is advised by her Counsel on record and she verily believes to be true that this is a suitable case for leave to be granted for her to execute the decree before taxation as it will take a while before the assessment of costs takes place.
5. In response to the Application, the Respondent filed a Replying Affidavit sworn on 23rd October 2023 by Mr. Anthony Ademba, its Chief Legal Officer. Mr. Ademba deposes that this Honourable Court ought not to grant orders of execution of the decree/judgment as prayed because the Respondent has filed a Notice of Appeal which will be rendered nugatory if the orders sought are granted. According to Mr. Ademba, the Respondent is intent on prosecuting its appeal and believes that the same has a high chance of succeeding.

Submissions

6. The matter was canvassed by way of written submissions. On the Claimant's part, it was submitted that this Court is empowered to hear the Application herein for execution prior to the taxation of her party and party bill of costs. It was the Claimant's further submission that she has met the requirements for the granting of the Application under Section 94 of the *Civil Procedure Act*. In support of the Claimant's arguments, the cases of *Hosea Sitienei & another vs University of Eldoret & 11 Others (2019)* eKLR and *Mercedes Sanchez Rau Tussel vs Samken Ltd & 2 Others [2002]* eKLR were cited.
7. With regards to the Respondent's argument that it had lodged an Appeal at the Court of Appeal, the Claimant referenced the case of *African Commuter Services Ltd vs Kenya Civil Aviation Authority & 2 Others (2014)* eKLR and maintained that the said Appeal cannot be a bar to the decree-holder as a successful litigant from seeking to enforce her right to enjoy the fruits of her litigation.
8. The Claimant further argued that she is seeking payment of her dues that were withheld from 2015-eight years ago and there is no reason why the same is not paid to her immediately as she awaits taxation of her intended bill of costs.
9. On its part, the Respondent submitted that the Claimant has not taken reasonable steps to pursue costs in the matter as she has not filed her bill of costs. In the same breath, the Respondent argued that without a show of good faith to pursue costs and evidence that the same has taken an unreasonably long time to obtain, the Claimant is acting in bad faith by seeking leave to execute before the costs are ascertained. The Respondent maintained that it is not necessary for the Claimant to be granted leave to execute prior to the taxation of costs.
10. It was further submitted that it is in the public domain that the Claimant took a job with the Kenya Bureau of Standards shortly after the end of her employment with the Respondent. That therefore, she has not suffered from financial hardship as has been portrayed.
11. The Respondent further contended that granting the Claimant leave to execute the Judgment will subject it to multiple execution proceedings which are unnecessarily prejudicial to its interests.

Analysis and determination

12. Before delving further, it is worth mentioning that on 11th July 2023, the Court allowed the Application in terms of prayer 5 thereby correcting the typographical errors contained in orders (a) and (c) of the Judgment delivered on 9th June 2023 as follows:



- a. A declaration that the Claimant’s contract of service was extended beyond 18th June 2015 up to 15th April 2019 when she resigned.
 - b.
 - c. The Claimant is entitled to gratuity for 82 months (from 18th June 2012 upto 15th April 2019) being the sum of Kshs 3,916,075.00.
13. Therefore, the prayers with regards to correction of the typographical errors are spent, hence the residual issue for determination at this juncture is whether the Claimant ought to be granted leave to execute the decree/judgment before taxation of costs.
14. The Claimant has filed the Application pursuant to Section 94 of the Civil Procedure Act which provides as follows:
- “Where the High Court considers it necessary that a decree passed in the exercise of its original civil jurisdiction should be executed before the amount of the costs incurred in the suit can be ascertained by taxation, the court may order that the decree shall be executed forthwith, except as to so much thereof as relates to the costs; and as to so much thereof as relates to the costs that the decree may be executed as soon as the amount of the costs shall be ascertained by taxation”.
15. The Court of Appeal, while interpreting the said provision in the case of *Bamburi Portland Cement Co. Ltd vs Hussein* (1995) LLR 1870 (CAK) observed as follows: -
- “Section 94 of the Civil Procedure Act requires that for execution of a decree before taxation leave must be obtained from the High Court, such leave may be sought informally at the time judgment is delivered but if that is not done then it must be made by way of a notice of motion.”
16. As per Section 94 and as amplified by the Court in the holding of the Court in *Mercedes Sanchez Rau Tussel vs Samken & 2 Others* [2002] eKLR (*Supra*), the ordering of execution to be done forthwith is a matter in the sound discretion of the Court when the Court considers it necessary that in all the circumstances of the case, the decree should be executed before awarded costs are ascertained by taxation.
17. It is therefore clear that the determination as to whether execution should proceed before costs are ascertained by taxation is a question of discretion of the Court and where the Court considers it necessary. It is my considered view that the use of the term “where necessary” under Section 94, connotes the existence of compelling reasons and exceptional circumstances as to warrant the Court to exercise its discretion.
18. In this case, the main ground advanced by the Claimant in support of her Application is that by the Respondent withholding her salaries, her family was deprived of the said resources for 8 years and consequently, she suffered hardship.
19. With due respect, it is my view, the Claimant has not given a proper justification or compelling reason to warrant the exercise of the Court’s discretion in her favour so as to grant her leave to execute the decree/judgment before the assessment of costs.
20. Besides, it is notable, that Judgment in the matter was delivered on 9th June 2023 and upon filing the instant Application, the Court allowed the Application in terms of prayer 5, on 11th July 2023.



Therefore, at that point, the Claimant was in a position to extract the decree and commence taxation proceedings.

21. Be that as it may, the Claimant has yet to institute taxation proceedings and has not given a plausible reason for not doing as much.
22. In light of the above, I am inclined to decline the Claimant's Application dated 28th June 2023 with an order that each party bears its own costs.

DATED, SIGNED and DELIVERED at NAIROBI this 24th day of November, 2023.

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STELLA RUTTO

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 15th March 2020 and subsequent directions of 21st 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 had 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 *Civil 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.

Stella Rutto

Judge

