



Kenya National Union of Nurses (Knun v Kenya Commercial Bank Group Limited & 7 others (Employment and Labour Relations Cause 50 of 2018) [2023] KEELRC 2935 (KLR) (17 November 2023) (Ruling)

Neutral citation: [2023] KEELRC 2935 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 50 OF 2018
B ONGAYA, J
NOVEMBER 17, 2023**

BETWEEN

KENYA NATIONAL UNION OF NURSES (KNUN CLAIMANT

AND

KENYA COMMERCIAL BANK GROUP LIMITED 1ST RESPONDENT

REGISTRAR OF TRADE UNIONS 2ND RESPONDENT

SIMON KIBII 3RD RESPONDENT

JOHN K BIIY 4TH RESPONDENT

LUCY J TANUI 5TH RESPONDENT

ALICE YAHUMA 6TH RESPONDENT

GRACE KINYANJUI MUTHONI 7TH RESPONDENT

ALI GABOW ABDULAHI 8TH RESPONDENT

RULING

1. The Court delivered judgment on February 21, 2020. The Court found that the claimant had proved its case on a balance of probabilities and was entitled to the following reliefs:
 - a. An order of permanent closure of the bank account numbers xxxx and xxxx held at the 1st and 2nd respondent banks respectively.
 - b. An order that the funds held in the two accounts being xxxx and xxxx be transferred forthwith to the claimant’s gazetted bank account whose details are:
Kenya National Union of Nurses Bank;



Barclays Bank of Kenya

Branch: Queensway Branch Nairobi

Account Number No. xxxx

- c. An order be and is hereby issued quashing the instruments used in account opening for the account numbers xxxx and xxxx held at the 1st and 2nd respondent banks
 - d. An order be and is hereby issued to the 4th to 7th respondents to jointly account for all the funds transacted in respect with bank account number xxxx held at the 1st respondent's Uasin Gishu branch being Kshs 9,686,463.15/- and to refund any money not properly spend in accordance with the union's constitution.
 - e. An order be and is hereby issued to the 8th to 9th respondents to jointly account for all the funds transacted in respect with bank account number xxxx held at the 2nd respondent's Lamu branch being Kshs.840,000/=
 - f. The claimant is also entitled to costs of this claim to be paid by the 3rd to 9th respondents.
 - g. The claim against the 1st and 2nd respondents stands dismissed with no order for costs for the 1st and 2nd respondents as they had a responsibility to open accounts for the branches only in compliance with the union constitution which they had a responsibility to call for in addition to all other account opening documents.
2. Subsequently, the claimant filed an application dated August 27, 2020, which by a Ruling made on April 30, 2021, the court held:

“The prayers sought in the application at prayers 2 and 3 were granted in the judgment while the other prayers are new matters that did not feature during the hearing of this case and which would require to be proved by evidence.

Specifically, the averments at paragraph 6 to 8 of the application to the effect that the 4th to 9th respondents bought motor vehicle registration no. KCL xxxx which operates under Eldoret shuttle sacco for public transport and that the proceeds thereof are not used for the benefit of union members as prescribed in the union constitution are matters that did not transpire during the hearing and that must be strictly proved by the applicant.

It is for the foregoing reasons that the application is found to be bereft of merit and is accordingly dismissed with no orders for costs.”

3. The claimant then filed its bill of costs dated June 20, 2021, which was taxed by the Deputy Registrar of the Court and a taxation ruling made on May 12, 2022 allowing the same at Kshs 473,207/=.
4. Thereafter, the claimant filed an application for notice to show cause why the 4th to the 9th respondents should not be committed to civil jail for failure to satisfy the decree amounting to Kshs 10,999,670.15.
5. The Senior Principal Deputy Registrar by a taxation ruling delivered on March 14, 2023 found as follows:
 - a. It is my considered finding that the respondents were granted an opportunity to respond to the NTSC but they never bothered to do so. They were ordered in the decree herein to account for the funds held in the 1st and 2nd respondents bank accounts that was properly spent on the claimant or applicant's activities and refund the amounts but they have not done so.



- b. My interpretation of the decree herein is that failure to account for the decreed amounts in respect of bank account number xxxxx held at the 1st respondent's Uasin Gishu branch and bank account number xxxx held at the 2nd respondents Lamu branch and to refund the amounts not properly spent on the claimant's activities, means that the respondents shall refund the entire decretal sums plus the taxed costs.

In view of the above, I find that the respondents have failed or are unable to account for the decreed amounts as ordered and I am therefore inclined to make the following orders:

- i. That the 4th to 7th respondents shall jointly refund Kshs 9,686,463.15 plus half of the taxed costs i.e. Kshs 236,603.50 making the sum total of Kshs 9,923,066.65 within 30 days in default to be committed to civil jail in execution the decree.
 - ii. That the 8th and 9th respondents shall jointly refund Kshs 840,000 plus half of the taxed costs i.e. Kshs 236,603.50 making the sum total of Kshs 1,076,603.50 within 30 days in default to be committed to civil jail in execution the decree.
 - iii. That the matter be mentioned on April 19, 2023 to confirm compliance or for further orders.
6. The 4th to 9th respondents have filed an application dated 17.04.2023 through M'Njau & Mageto Advocates. It is brought under rule 17(1), (2) (3) (4) (7) and 33 of the [Employment and Labour Relations Court \(Procedure\) Rules 2016](#) and all other enabling provisions of law. It is prayed that the honourable Court be pleased to grant the following orders:
- a. Spent
 - b. That pending the hearing and determination of this application the Honourable Court be pleased to issue an order for stay of execution of the decree given on 21.02.2020 and any subsequent proceedings.
 - c. That the Honourable Court be pleased to review, discharge, vary, set aside and or discharge the orders given on March 14, 2023 and the preceding notice to show cause given on November 23, 2023.
 - d. That the costs of the application be provided for.
7. The application was based upon the annexed affidavit of John K. Biiy, the 5th respondent, sworn on April 17, 2023 and upon the following grounds:
- a. The 4th and 7th respondents are former members and officials while the 5th respondent and 6th respondents are members and former officials of Kenya National Union of Nurses Uasin Gishu branch.
 - b. The 8th respondents is a member and former official while the 9th respondent is a former member and official of Kenya National Union of Nurses Lamu Branch.
 - c. The Honourable Court entered judgment on 21.02.2020 against the 4th to 7th respondents specific to the current proceedings orders 4 and 5 of the judgment proving:

Order 4

That an order be and is hereby issued to the 4th to 7th respondents to jointly account for all the funds transferred in respect with bank account no 007320502643901 held at the first respondent's Uasin Gishu branch being Kshs 9,686,463.15/= and to refund any money not properly spent in accordance with the union's constitution.



Order 5

That an order be and is hereby issued to the 8th to 9th respondents to jointly account for all the funds transacted in respect with bank account no. 1177568497 held at the 2nd respondent's Lamu branch being Kshs 840,000/=

- d. The judgment granted was in exact terms with the manner in which the claimant pleaded in its memorandum of claim.
- e. After realizing that the judgment and decree given on 21.02.2020 was not executable, the claimant filed an application dated 27.08.2020 seeking for among other prayers issuance of a judgment in favour of the claimant and against the 4th to 7th respondents jointly and severally for Kshs 9,686,463.15/= and against the 8th and 9th respondents jointly and severally for Kshs 840,000/=.
- f. The claimant's application for review dated 27.08.2020 was dismissed in the ruling dated 30.04.2021.
- g. Despite the fact that the judgment given on 21.02.2020 was not conclusive and capable of being executed the claimant subsequently extracted a decree issued on 18.05.2022 in line with the judgment given on 21.02.2020 for execution though without approval of the 4th to 9th respondents.
- h. On 23.11.2022 the claimant in a clear abuse of court process and with intent for unfair enrichment and a deliberate misrepresentation of the contents of the judgment and decree issued by the court, irregularly and or illegally extracted notices to show cause in execution that directed for payment of a whopping total sum of Kshs.46,625,094.60 with the 4th to 7th respondent each paying Kshs.10,999,670.15 and the 8th and 9th respondents each paying Kshs.1,313,207.00/=.
- i. The 4th to 9th respondents opposed the defective notices to show cause and instead of the matter being referred to the judge for a decision as the matters raised were weighty the Deputy Registrar whose jurisdiction ended at the level of unchallenged notices to show cause proceeded to deliver an order dated 14.03.2023 which amounted to setting aside of the judgment of this court given on 21.02.2020 and the ruling of this court dated 30.04.2021 thereby permitted execution by an order of court complete with a compliance order.
- j. In the said order of 14.03.2023 the deputy registrar purported to have been delivering a ruling on taxation without a bill of costs which in any case was not before him for determination.
- k. In the said order the deputy registrar prematurely ordered for committal to civil jail even as the notice to show cause were challenged and the 4th to 9th respondents had not defaulted and or warrants of arrest issued.



- l. The orders granted by the deputy registrar on 14.03.2023 were granted in excess of jurisdiction and were null and void.
 - m. The 4th to 9th respondents are apprehensive that the claimant will proceed to execute the said orders by way of contempt outside the normal execution process for a judgment that was not conclusive and incapable of execution in which case they are likely to be arrested and detained in the civil jail and they will suffer substantial loss.
 - n. The 4th to 9th respondents have not filed nay appeal against the judgment given on 21.02.2020 and or the orders issued by the deputy registrar on 14.03.2023.
 - o. There is an error apparent on the face of the record and both the judgment given on 21.02.2020 and the order dated 14.03.2023 require clarification.
 - p. The entire execution process is unlawful, illegal, wrongful and an abuse of court process and ought to be set aside and or reviewed.
 - q. It is fair and just that the order given on 14.03.2023 be set aside and or vacated for irregularity and the judgment and decree given on 21.01.2020 be clarified on the issue of execution.
8. The claimant opposed the application and filed the Replying Affidavit of Seth Panyako sworn on 12.06.2023 through Mayende & Busiega Advocate. The application was opposed upon the following grounds:
- a. That the impugned application is unmeritorious, defective and incompetent.
 - b. That no new evidence has been discovered, no mistake or error apparent on the face of the record.
 - c. That the application was made with delay.
 - d. That no security for due performance has been deposited.
 - e. That the requisite conditions for grant of stay of execution have not been met.
9. The parties filed their respective submissions on the application. The Court has considered parties' respective positions and returns as follows.
10. First, it is correct, as submitted for the 4th to 9th respondents that the final orders in the Judgment delivered on 21.02.2020 was for an account at order 4 by 4th to 7th respondents and at order 5 an account by 8th to 9th respondents and any money found not properly spent be refunded to the union. However, it is not correct, as submitted for the applicants, that the orders were incapable of execution. The terms of the orders are that the applicants render an account as was ordered and then any money not properly spent, if any, be refunded to the claimant. Thus, it cannot be that without the compliance with the orders to account, the applicants are deemed liable to refund. The applicants must render an account as was ordered in the Judgment.
11. Second, it appears that consequential to the applicants' failure to render an account as was ordered, the claimant took out notices to show cause why execution should not issue and the matter appears to have proceeded before Hon. Fredrick M. Nyamora, Senior Principal Deputy Registrar who delivered



a ruling on 14.03.2023 titled “Taxation Ruling”. As urged for the applicants, there was no bill for taxation before the Hon. Nyamora and the ruling does not refer or mention any bill for taxation. Instead, the ruling mentions the notices to show cause coming up for hearing on 30.11.2022. It should be obvious that the ruling delivered 14.03.2023 was without jurisdiction and based upon a misdirection that it was about a taxation of a bill. It is also correct for the applicants to submit that the ruling amounted to setting aside or varying the final orders in the Judgment on record. The applicants’ submission that the ruling of 14.03.2023 prematurely and unfairly ordered their committal to civil jail is also upheld. The ruling must be set aside as null and void. The Court has found that the 4th to 9th applicants must render an account in terms of the judgment and failing, the claimant would be at liberty to execute for compliance accordingly.

In conclusion the application dated 17.04.2023 is hereby determined with orders:

1. The ruling given herein on 14.03.2023 and orders flowing therefrom together will all consequential processes therefrom are hereby set aside as null and void.
2. The parties to extract the decree flowing from the Judgment delivered on 21.02.2020 in accordance with the rules on extraction of orders or decrees and the applicants to comply with the terms of the orders in the judgment to render an account and file the same in Court by 31.12.2023 failing, the claimant at liberty to apply as may be just and appropriate.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS FRIDAY 17TH NOVEMBER, 2023.

BYRAM ONGAYA

PRINCIPAL JUDGE

