



**George v Pollman's Tours & Safaris (Cause 271 of 2017)
[2023] KEELRC 3347 (KLR) (19 December 2023) (Ruling)**

Neutral citation: [2023] KEELRC 3347 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 271 OF 2017
K OCHARO, J
DECEMBER 19, 2023**

BETWEEN

PAUL NZUKI GEORGE CLAIMANT

AND

POLLMAN'S TOURS & SAFARIS RESPONDENT

RULING

1. Through a Notice of Motion Application dated 6th March 2023, expressed to be under the provision of sections 12 of the [Employment and Labour Relations Court Act](#), 2011, Section 49 of the [Employment Act](#), 2007, Rule 17 of the Employment and Labour Relations Court (Procedure) Rules, 2016 and all the enabling provisions of the Law, the Respondent/Applicant seeks:
 - a. That this application be heard exparte in the first instance and as a matter of urgency and any contemplated execution of the decree in the matter be stayed pending the hearing and determination of the application.
 - b. That this honourable court do order a stay of execution of the judgment delivered on 22nd March 2022 by Hon. K. Ocharo, J and the consequential orders/decrees pending the hearing and determination of the application.
 - c. That upon service of the application, the honourable court do direct the Claimant/Respondent by himself or his authorized representatives to permanently stop execution in respect of this judgment and to relieve payment of the decretal sum subject to the provisions of section 49(2) of the [Employment Act](#), 2007.
 - d. That the honourable court to issue such other orders as may be just under the circumstances to meet the ends of justice.



- e. That the costs of this application be provided for.
2. The application is supported by the grounds set forth on the face of it and those on the supporting affidavit sworn by GERSHOM ODHIAMBO, sworn on 6th March 2023.
3. The Claimant/Respondent resists the application upon premise of the grounds obtaining on the answering affidavit he swore on 17th March 2023.
4. On the 30th May 2023, this court directed that the application be canvassed by way of written submissions. The directions were obliged by the parties. Their respective submissions are on record.

The Application

5. The Applicant states that through its judgment herein, delivered on 22nd March 2022, this court awarded the Claimant/Respondent inter alia one month's salary in lieu of notice, unpaid salary, compensation under section 49(1)(c) of the *Employment Act*, interest, and costs.
6. The Claimant/Decree Holder without legally extracting a decree commenced an irregular execution by proclaiming the Applicant's movable property at a time the Applicant had issued a cheque in full settlement of the judgment sum.
7. The Applicant further states that the Claimant/Respondent refused to accept a cheque drawn in their favour in full and final settlement of the judgment amount, contending that the value of the cheque as drawn was inadequate.
8. The Claimant further states that the cheque was accurately drawn after subjecting the decretal amount to the mandatory statutory deductions as provided for in Section 49(2) of the *Employment Act*.
9. The Claimant/Respondent proceeded to instruct Carnetian Enterprises Auctioneers who moved in to proclaim the Applicant's movable property. The proclamation was done on the 1st March 2023, the very same time Counsel for the judgment debtor was transmitting the settlement cheque to Counsel for Claimant/Decree Holder.
10. The cheque was transmitted under cover of the letter dated 1st March 2023, by the representatives of the Applicant. The cheque amount took care of the judgment sum, the party as and party costs (which had been taxed), and interest. They subjected the same to the statutory deductions.
11. The Claimant/Respondent purported to proclaim on an exaggerated figure of KShs.428,993.90.
12. Upon the cheque being presented to the Claimant's Counsel, he refused to accept the same and instead instructed that the cheque be taken to his authorized agent, the auctioneer, who in turn refused to accept the cheque stating that the value of the cheque was less and did not factor in their fees.
13. The Applicant contends that the execution was irregular, as it had already satisfied the judgment amount by issuing a cheque in respect thereof; the execution process was commenced without extraction of a decree as required; and there was no valid reason for the Claimant's/Respondent's Counsel to refuse to accept the cheque.

The Response

14. The Claimant/Respondent contends that the instant application is bad in law, devoid of merit, incompetent, misconceived and an abuse of the court process.



15. That the execution process was regularly commenced following an application for execution of the decree and issuance of warrants of attachment.
16. Subsequently, execution was finalized and proclamation and attachment against the applicant was done by Carnetian Auctioneers on 27th February 2023.
17. The Claimant/Respondent further states that Rule 12(6) of the Auctioneers Rules provides that once the attachment process kicks off, the auctioneers get entitled to charge their commission. The Applicant's letter dated 1st March 2023 was done after attachment and therefore the auctioneers fees incurred in an execution of the judgment must be paid.
18. The Claimant contends further, that it is trite law that Auctioneer's charges are to be paid by the debtor except in the circumstances where the debtor cannot be found or has no goods upon which execution has been levied or where proceeds are insufficient. That is not the case in the instant matter.
19. Further, the Applicant has refused to settle auctioneer's charges and the decretal sum. Consequently, the warrants of attachment are proper, lawful, regular and valid.

Submissions by the Parties

20. The court has considered the submissions filed herein by the parties. Largely they are a restatement of the contents of their respective affidavits. I find it unnecessary therefore to recap them here.

Analysis and determination

21. I have considered the notice of motion application herein, the grounds thereof, the supporting affidavit, and the Claimant's replying affidavit. Only one prime issue, emerge for determination, thus, whether this court should grant the orders sought in the notice of motion application.
22. It is not in dispute that this court delivered judgment herein on 22nd March 2022 and awarded the Claimant/Respondent:-
 - a. One month's salary in lieu of notice, Kshs.32,354.00.
 - b. Unpaid salary, Kshs.1,200.00.
 - c. Compensation pursuant to section 49(1)(c) of the *Employment Act*, KShs.129,416.00
 - d. Interest on the sum awarded at court rates from the date of filing of this suit till full payment.
 - e. Costs of this suit.
23. The Applicant contends that the execution commenced by Claimant was irregular and contrary to the law as it was not preceded a decree extracted in the manner provided for in by the civil procedure rules. The court notes that the Claimant has neither addressed the issue in the replying affidavit nor submissions.
24. I am obligated to examine the purpose of a decree in court proceedings.
25. The law on the preparation and contents of a decree is contained in Order 21 Rule 7 – 9 of the Civil Procedure Rules 2010 which state:

“7. Contents of decree [Order 21, rule 7.]



- (1) The decree shall agree with the judgment; it shall contain the number of the suit, the names and descriptions of the parties, and particulars of the claim, and shall specify clearly the relief granted or other determination of the suit.
- (2) The decree shall also state by whom or out of what property or in what proportion the costs incurred in the suit are to be paid.
- (3) The court may direct that the costs payable to one party by the other shall be set-off against any sum which is admitted or found to be due from the former to the latter.

8. Preparation and dating of decrees and orders [Order 21, rule 8.]

- (1) A decree shall bear the date of the day on which the judgment was delivered.
- (2) Any party in a suit in the High Court may prepare a draft decree and submit it for the approval of the other parties to the suit, who shall approve it with or without amendment, or reject it, without undue delay; and if the draft is approved by the parties, it shall be submitted to the registrar who, if satisfied that it is drawn up in accordance with the judgment, shall sign and seal the decree accordingly.
- (3) If no approval of or disagreement with the draft decree is received within seven days after delivery thereof to the other parties, the registrar, on receipt of notice in writing to that effect, if satisfied that the draft decree is drawn up in accordance with the judgment, shall sign and seal the decree accordingly.
- (4) On any disagreement with the draft decree any party may file the draft decree marked as “for settlement” and the registrar shall thereupon list the same in chambers before the judge who heard the case or, if he is not available, before any other judge, and shall give notice thereof to the parties.
- (5) The provisions of sub-rules 2, 3 and 4 shall apply to a subordinate court and reference to the registrar and judge in the subrules shall refer to magistrate.
- (6) Any order, whether in the High Court or in a subordinate court, which is required to be drawn up, shall be prepared and signed in like manner as a decree.
- (7) Nothing in this rule shall limit the power of the court to approve a draft decree at the time of pronouncing judgment in the suit, or the power of the court to approve a draft order at the time of making the order.

9. Costs [Order 21, rule 9.]

- (1) Where the amount of costs has been—
 - (a) agreed between the parties;
 - (b) fixed by the judge or magistrate before the decree is drawn;
 - (c) certified by the registrar (Sub. Leg. Cap. 16); or
 - (d) taxed by the court, the amount of costs may be stated in the decree or order.



- (2) In all other cases, and where the costs have not in fact been stated in the decree or order in accordance with subrule (1), after the amount of the costs has been taxed or otherwise ascertained, it shall be stated in a separate certificate to be signed by the taxing officer, or, in a subordinate court, by the magistrate.
- (3) In this rule, “taxing officer” means a taxing officer qualified under paragraph 10 of the Advocates (Remuneration) Order (Sub. Leg. Cap. 16).”
26. Per the above provision of the law, it is evident that a decree will specify the relief granted by the court, costs to be paid and by whom they should be paid. Further, where interest is awarded the decree will specify the interest payable and the period of tabulation of interest.
27. The extraction of a decree once judgment has been delivered in a suit and prior to execution is therefore not optional.
28. The Applicant contends that an execution process that flows from a decree which has not been extracted in the manner contemplated in sub rule 8 mentioned above shall be irregular.
29. In the present case there is no argument that the draft decree was not forwarded to the Applicant for approval or rejection, neither was the final decree served to the Applicant prior to execution.
30. Is the failure to seek approval of the draft decree from the judgment debtor fatal to execution proceedings?
31. This court returns that it is not. The court considered this very issue in the case of *Eco Bank Limited vs. Elsek & Elsek (Kenya) Limited & Others* [2015] eKLR and found: -
- “ 16. Order 21 Rule 8(2) (3) and (4) of the Procedure Rules sets out the steps to be followed when a decree is drawn. Under sub rule (2) of that order it requires a draft decree be sent to the opposite party for approval. If it is approved and the registrar of the High Court is satisfied that it is drawn up in accordance with the court’s judgment, the registrar shall sign and seal the decree. Sub-rule (3) provides that where the opposite party fails to approve the draft decree within seven days of delivery, the registrar on being notified of that failure shall sign and seal it once he confirms that it conforms to the judgment.
17. The plaintiff, has not denied it did not forward the draft decree for approval as provided under the above-mentioned Rules. What is the effect of that failure? In my view that failure cannot lead to the setting aside of execution. It would only lead to the setting aside of the execution if the decree was shown not to conform to the judgment. In this case I have perused the consent and I do not find there to be any deviation of that consent with the decree drawn, signed and sealed by the registrar. In that regard the fourth issue is answered in the negative.”
32. The courts have agreed with this position in *Joshua Munywoki v Patrick Mukonza Nzioki* [2019] eKLR; *Lochab Transporters Ltd v Fanuel Kambona Mutesa* [2017] eKLR; *Florence Cherugut v Cheptum Murei Annah* [2022] eKLR,; and have posited that the failure to forward a decree to the one party for approval is not fatal to execution proceedings, as long as the decree is drawn in accordance with the judgement.



33. The circumstances of the present case are that the decree appears to have been drawn according to the judgment delivered by this court on 22nd March 2022, only that it did not bring forth the specific interest amount earned as at its date.
34. The court notes that the Claimant applied for execution of the decree and under item 8 of the application indicated that the total amount for which warrants of execution was being sought as Kshs.301,337.00. However, the application did not bring forth the interest earned as per item 5 of the reliefs section of the judgment.
35. The court notes that on the 27th February 2023, the Deputy Registrar of this court issued warrants of attachment for a sum of kshs. 428,993.90 inclusive of the figures of kshs.128,706,90 as interest. According to the judgment of this court interest was to accrue on the awarded sum, (Kshs.177,947) at court rates from the date of filing of this suit till full payment. For purposes of this application the tabulation period could therefore be 14th February 2011 to 27th February 2023, (six and half years). Therefore $(177,947 \times 12\%) \times 6.5 = \text{ksh.}138,798.40$. Consequently, I hold that the sum of the warrants issued was not exaggerated as alleged by the Applicant.
36. The Applicant contended that the amount of the cheque that was issued, ksh.322,837.00 was net of statutory deductions. While it is true that the sums payable to the claimant could be less statutory deductions, the applicant has totally failed to demonstrate how the figure was arrived at, and how much was deducted for each statutory requirement.
37. I have keenly considered the applicant's letters dated 1st March 2023, and 2nd March 2023, proclamation dated 1st March 2023 and the warrants of execution, and in my view, there can be no doubt that the proclamation was done prior to the issuance of the cheque.
38. However, the Claimant/Respondent herein has deliberately not explained why the final decree was not served on the Applicant. In absence of the service, the applicant may have not been able to ascertain the final sum that it was required to pay. In particular, it may not have been sure of the exact interest payable to the matter.
39. In my view, sub -rule 8 above mentioned was purposely designed by the framers, to prevent unnecessary disputes over amounts payable under a decree, and ambushes on Judgment Debtors occasioning them unnecessary inconvenience and expenses. As much as this Court agrees with the holding in the above-mentioned cases, that a failure to extract a decree in the manner prescribed may not be fatal on execution proceedings commenced, this court's view is that it will be remiss of a court to allow a prejudicial consequence out of the failure to visit on a Judgment Debtor, when it is so clear that the reason for the failure is unexplained.
40. Having considered the conduct of the claimant as set out hereinabove, this court returns that the claimant ought to settle the auctioneers' fees. I am guided by the finding of Justice Thurania Jaden in Landmark Holdings Ltd versus Robert Mecems Kinyua (2018) eKLR, where it was held: -

“ 13. What is the import of the above scenario? The provision for the forwarding of the draft decree to the other party for approval serves a purpose. Even in the cases where the decree is correctly drawn, the preparation of the decree signals readiness of the Decree Holder to commence the execution process. The Applicant would have been alerted of the preparation of the decree and probably taken steps to secure his interests. I therefore agree with the Applicant's counsel's submissions that the decree was irregularly obtained without due process being followed.



14. It is noted that there is no complaint that the decree does not agree with the judgment. The setting aside of the decree will therefore serve no useful purpose. In this regard I am in agreement with the decision in Eco Bank Limited case (supra) that failure to forward the decree to the other party for approval should not lead to the setting aside of the execution process. The Respondent should however bear the costs occasioned by the irregularity.”

41. By reason of the foregoing premises, I direct that parties to mutually compute the settlement amount, within 7 days of today. In the defaulting, the Deputy Registrar of this court to compute the same and in the computation consider statutory deductions.

42. Orders accordingly.

READ, DELIVERED AND SIGNED THIS 19th DAY OF DECEMBER, 2023.

OCHARO, KEBIRA

JUDGE

In the presence of:

Ms Kisiangani for the Claimant

No appearance for the Respondent/Applicant

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 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.

OCHARO KEBIRA

JUDGE

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