



**Otieno v Omya East Africa Limited & another (Cause 231 of 2020)
[2022] KEELRC 1687 (KLR) (10 June 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1687 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 231 OF 2020
SC RUTTO, J
JUNE 10, 2022**

BETWEEN

ALVIN OTIENO CLAIMANT

AND

OMYA EAST AFRICA LIMITED 1ST RESPONDENT

OMYA INTERNATIONAL AG 2ND RESPONDENT

RULING

1. The respondents/applicants have moved this court vide a Notice of Motion Application dated May 23, 2022, brought under a Certificate of Urgency and expressed to be brought under article 210 of the Constitution of Kenya, 2010, section 12 of the Employment and Labour Relations Court Act, sections 19 and 49 of the Employment Act, 2007, section 37 of the Income Tax Act, Rule 17 of the Employment and Labour Relations Court (Procedure) Rules, 2016 and all other enabling provisions of the Law.
2. The Application which is supported by the affidavit of Mr. Francis Kirema, seeks the following orders: -
 - 1) Spent.
 - 2) Spent.
 - 3) That this honorable court be(sic) set aside, quash, and/or declare null and void the Warrants of Attachment and Sale of Movable property in execution of Decree of Money issued to Moran Auctioneers on May 16, 2022 and the Proclamation Notice issued to the respondents on May 19, 2022.
 - 4) That this honorable court be pleased to order that the respondents have settled the entire Decretal Sum.
 - 5) That the costs of Auctioneers, if any, be met by the claimant.



- 6) That the claimant be ordered to forthwith legally transfer the Motor Vehicle make: Chevrolet Trail Blazer 2.8 cc bearing the Registration No. KCH 056B to the Respondent through the National Transport Safety Authority (NTSA), Transport Integrated Management System (TIMS).
 - 7) That the costs of this application be borne by the claimant.
3. The main grounds upon which the Application is premised, is that:
- a) That Judgment was delivered by this court on March 31, 2022.
 - b) That pursuant to the Judgment, on April 22, 2022, the claimant physically surrendered the Motor Vehicle make: Chevrolet Trail Blazer 2.8 cc bearing the Registration No. KCH 056B to the respondent's Counsel in part compliance to the orders issued in respect to the Respondent's Counter-claim.
 - c) That on the May 12, 2022, the respondents paid to the claimant's advocates the sum of Kshs.3,596,826.95 being the net of the total award after deducting the requisite Statutory Deductions.
 - d) That prior to the remittance of Kshs.3,596,826.95, the respondents' Counsel engaged the claimant's advocate on May 11, 2022 through email correspondence and informed the claimant's advocate that guided by the provisions of section 49(2) of the *Employment Act*, the Respondents shall be subjecting the total award of this court to statutory deductions.
 - e) That the claimant's advocate informed the respondent's Advocate that he had duly noted the deductions to be applied and indeed confirmed receipt of the payment of Kshs.3,596,826.95.
 - f) That the respondent's advocate also sought to know from the claimant, when the legal transfer of the Motor Vehicle through the National Transport Safety Authority, Transport Integrated Management System (TIMS) will be done.
 - g) That on the May 16, 2022, the claimant extracted Warrants of Attachment of Movable property for the sum of Kshs.1,541,497.23 as against the Respondents.
 - h) That on the May 19, 2022, the claimant through Moran Auctioneers proceeded to proclaim the respondent's properties.
 - i) That the sum of Kshs 1,541,497.23 seeking to be attached is the P.A.Y.E as duly deducted by the Respondents, for transmission to Kenya Revenue Authority, a fact which the claimant through his counsel is well aware of.
 - j) That the respondents have duly satisfied the owing decretal sum, save for the Kshs.1,541,497.23, which was duly withheld as P.A.Y.E payable to Kenya Revenue Authority.
 - k) That the claimant has illegally extracted warrants of attachment, as against a sum of money that is the tax, that was duly deducted by the respondents to be remitted to the Kenya Revenue Authority and not for the Respondents' gain.
4. The claimant despite being served, neither opposed the Application nor attended court for the hearing. An affidavit of Service sworn on June 2, 2022, by Counsel for the respondents Mr. Ayisi, was presented before court to evidence service.



5. Counsel on record for the applicants, Mr. Ayisi, argued the Application orally before court. He reiterated the grounds in support of the Application as contained in the supporting affidavit of Mr. Kirema. He urged the court to grant the orders sought in the Application.
6. Central to this Application, is compliance with the court's orders as contained in its Judgment of 31st March, 2022. The main issue in contention is remittance of Pay as You Earn (PAYE) from the award due to the claimant.
7. On March 31, 2022, this court awarded the claimant the sum of Kshs 5,138,324.18. Further, and in allowing the applicant's counterclaim, the court found that Motor Vehicle make: Chevrolet Trail Blazer 2.8 cc bearing the Registration No. KCH 056B is the property of the respondents hence ordered the claimant to surrender the same to the Respondents within 7 days.
8. From the record, the pending issue is the sum of Kshs 1,543,947.23 which the respondent has deducted from the total award being PAYE. It is this amount that the claimant has apparently sought to recover through the warrants of attachment extracted on May 16, 2022.
9. Section 49 (2) of the *Employment Act* is relevant herein and provides as follows;
 - “(2) Any payments made by the employer under this section shall be subject to statutory deductions.”
10. In line with this provision, the Court of Appeal in *Rift Valley Railways (K) Limited v Kiya Kalakhe Boru* [2015] eKLR, determined as follows;
 - “We do not therefore discern injudicious exercise of discretion nor consideration of extraneous factors. In which event then, the amount awarded was fair. This is of course subject to the statutory deductions that were to apply as at the time of the award. Section 49(2) *Employment Act* provides that “Any payments made by the employer under this section shall be subject to statutory deductions”
11. In light of the foregoing, it is evident that any award made by the court under section 49 of the *Employment Act*, is subject to statutory deductions. Such statutory deductions include PAYE, which is withheld and deducted at source by the employer and remitted to the relevant agency in this case, the Kenya Revenue Authority. This provision is couched in an express and mandatory form hence the Court need not pronounce itself on the same.
12. The above section 49(2), is also in consonance with the provisions of section 37(1) of the *Income Tax Act* which provides as follows;
 - “An employer paying emoluments to an employee shall deduct therefrom, and account for tax thereon, to such extent and in such manner as may be prescribed.”
13. Section 37(2) of the *Income Tax Act*, provides for a penalty against an employer in the event of non-compliance with the provisions of (1). As such, the Respondent was under a legal obligation to effect deductions from the claimant's award.
14. The court has also considered the communication between counsels on record and noted that the claimant's counsel was duly notified of the reason for the deduction of the sum of Kshs 1,543,947.23. Accordingly, it was improper for the claimant to move and execute for the said amount in the manner it did.



15. The applicant has further urged the court to order for the legal transfer of Motor Vehicle make: Chevrolet Trail Blazer 2.8 cc bearing the Registration No. KCH 056B in full compliance with the court's orders.
16. These court's orders were clear and unequivocal in regards to the ownership and transfer of the motor vehicle in question hence the claimant is liable to comply with the same fully. This is not limited to the physical transfer of the motor vehicle. It extends to its legal status.
17. To this end, the Application dated 23rd May, 2022 is found to be meritorious and is hereby allowed as prayed. For the avoidance of doubt, the court makes the following orders: -
 - a. The Warrants of Attachment issued on 16th May, 2022 and Proclamation Notice by Moran Auctioneers issued to the applicants on May 19, 2022 are hereby quashed and the auctioneer's costs shall be borne by the claimant.
 - b. An order is hereby issued directing the claimant to legally transfer the Motor Vehicle make: Chevrolet Trail Blazer 2.8 cc bearing the Registration No. KCH 056B to the respondent through the National Transport Safety Authority (NTSA), Transport Integrated Management System (TIMS).
 - c. The claimant shall bear the costs of this Application.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 10TH DAY OF JUNE, 2022.

.....
STELLA RUTTO

JUDGE

Appearance:

Mr. Ayisi for the Applicant/Respondents

No appearance by the Claimant/ Respondent

Court Assistant Barille Sora

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

