



**Kenya Hotel & Allied Workers' Union v Karen Blixen Camp Limited  
(Cause 647 of 2011) [2022] KEELRC 1190 (KLR) (6 July 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1190 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 647 OF 2011**

**JK GAKERI, J  
JULY 6, 2022**

**BETWEEN  
KENYA HOTEL & ALLIED WORKERS' UNION ..... CLAIMANT  
AND  
KAREN BLIXEN CAMP LIMITED ..... RESPONDENT**

**RULING**

1. Before me for determination is a Notice of Motion Application dated March 30, 2022 seeking various orders, That;
  - i. The application be certified urgent and the orders sought be granted ex-parte.
  - ii. The court be pleased to grant order of injunction restraining the Claimant whether by itself, auctioneers or agents from auctioning, selling, taking possession of or in any manner dealing with the Respondent's properties listed in the proclamation Form No. 1906 dated March 29, 2022 issued by Mbusera Auctioneers pending the hearing and determination of this application.
  - iii. The court clarifies:
    - a. Whether the respondent is right to issue cheques in settlement of statutory deductions in the names of the Kenya Revenue Authority (KRA), National Hospital Insurance Fund (NHIF) and National Social Security Fund or whether the entire amount awarded should be paid directly to the claimant.
    - b. Whether the respondent is entitled to deduct the sums of money paid to the claimant at the time of termination of employment from the amount awarded by the court in its Judgement and decree.
  - iv. The respondent be awarded costs of this Application and all costs incidental thereto.



2. The application is expressed under section 1A, 1B, 3, 3A of the Civil Procedure Act, section 12 of the Employment and Labour Relations Court Act (No. 20 of 2011), Rule 33(1)(c), 2(3) of the Employment and Labour Relations Court (Procedure) Rules, 2016, article 159 (2) (d) of the Constitution of Kenya, 2010 and all enabling provisions of law.
3. The application is based on the grounds that;
  - i. The court awarded the claimant the sum of Kshs.248,899/- together with costs assessed at Kshs.40,000/-.
  - ii. On December 16, 2021, the Respondent in compliance with the judgement and decree sent cheques in settlement of the decretal sum.
  - iii. The respondent deducted the statutory deductions as ordained by section 49 (2) of the Employment Act, 2007 and prepared cheques in the name KRA (PAYE) and NHIF and NSSF for the monthly contributions respectively.
  - iv. The respondent deducted Kshs.7,838/- and Kshs.16,451/- paid to the claimants as terminal dues at the date of termination of their employment and pleaded in paragraph 12B (b) and (c) of the respondents Amended statement of Defense dated November 18, 2019.
  - v. That the following cheques were dispatched to the claimant's counsel
    - a. No. 13512 for Kshs.201,694/- as net decretal sum.
    - b. No. 13515 for Kshs.59,316.40 as PAYE.
    - c. No. 13513 for Kshs.3,200/- in favour of NHIF.
    - d. No. 13434 for Kshs.800/- in favour of NSSF.
  - vi. The claimant returned all the cheques vide letter dated January 26, 2022 contesting the decision to write the three cheques in the name of statutory bodies and deduction of amounts paid at the time of termination.
  - vii. The respondent by letter dated January 26, 2022 invited the claimant to seek a judicial interpretation and/or clarification of the two issues on this Court under its rules but the claimant obtained warrants to attach the Respondent's movable property dated 17<sup>th</sup> March 2022 alleging that the Respondent had failed to pay Kshs.302,477.85 and instructed Mbusera Auctioneers who on March 29, 2022 proceeded to proclaim the respondent's property.
  - viii. The respondent has neither failed/refused nor neglected to pay the amount due and costs as awarded by the court as demonstrated by the speed at which it issued the cheques after judgement.
  - ix. The claimant obtained the warrants through false pretences and misleading the court which was uncalled for as the court was available to resolve the issue.
  - x. The circumstances justify the issues of an injunction to restrain the claimant from auctioning the Respondent's property who stands to suffer irreparable injury if the same is not issued.
  - xi. The respondent has demonstrated good faith by making full payment in record time and is ready to provide security for the grant of the orders sought.
4. The application is supported by the affidavit sworn by Ronald Ngulu Mutie dated March 30, 2022. The application was served on April 1, 2022.



5. In its replying affidavit sworn by Wycliff Sava Mundu dated April 11, 2022, the claimant depones that the claimants advocate prepared a draft decree and the respondents counsel approved the same in November 2021 and acknowledges that the Respondent dispatched cheques vide letter dated December 16, 2021 but had deducted the sums of Kshs.7,838/- and Kshs.16,451/- from the amount awarded by the court.
6. That the sum deducted as NSSF contribution vide cheque No. 13434 of Kshs.800/- is more than that the basic pay report which has a figure of Kshs.400/-.
7. That counsel for the claimant wrote to the respondent to distribute the deductions.
8. That the court became functus officio after judgement and the respondent did not come to court with clean hands.
9. That the respondent's application invites the court to sit on its own decision and frame a question it did not frame at trial.
10. That the respondents have a regular judgement which has not been appealed against or set aside and the application is incompetent, vexatious and an abuse of court process and the grievants should be allowed to enjoy the fruits of their judgement by execution of the proclamation dated March 29, 2022.
11. The claimant prays for dismissal of the application.

#### **Respondent/Applicant's submission**

12. The applicant identifies six issues for determination, namely whether the court has jurisdiction to hear and determine the application, the claimant is entitled to execute the decree, respondent is entitled to write cheques for the of statutory deductions in the name of the statutory bodies, entitlement to deduct amounts paid to the grievants from the decretal sum. claimant is entitled to levy interest and additional costs against the Respondents and whether the respondent is entitled to costs of this application.
13. On jurisdiction the applicant submits that section 12 of the *Employment and Labour Relations Court Act*, 2011 as well as Rule 33(1)(c) and (2), (3) of the *Employment and Labour Relations Court (Procedure) Rules*, 2016 allowed post judgement applications such as the instant one.
14. That the Claimant should have utilized this avenue as opposed to commencing unwarranted and illegal execution.
15. As regards execution, the applicant submits that the issue in dispute is Kshs.24,289/- not the decretal sum of Kshs.302,477.87 and the Claimant had no basis in law and fact to proceed with execution as the Respondent neither failed or refused nor neglected to pay the decretal sum.
16. That the warrants were obtained falsely and execution should be stopped.
17. On statutory deductions, the applicant/Respondent urges that the deductions were pleaded at paragraph 12B of the Amended statement of defence.
18. That section 49(2) of the *Employment Act* made provisions for statutory deductions, on amounts awarded by the Court under section 49(1) of the Act.
19. That the respondent acted in good faith and transparently by sending the cheques to the claimant's advocate.
20. As regards the deductions of Kshs.24,289/- it is submitted that the employees are not entitled to a shilling over and above that which the court set out in its judgement and decree.



21. That the claimants have not denied receipt of the sum of Kshs.24,289/- paid on termination in their affidavit or letter.
22. That it would amount to unjust enrichment to pay the full sum stated in the judgment.
23. That the claimant would be awarding themselves damages, terminal dues and costs than awarded by the court.
24. That it was entitled to deduct the sum of Kshs.24,289/-.
25. As regards the additional cost of Kshs.11,128.25 and Kshs.950/- being interest on the decretal sum, it is submitted that having sent the cheques less than 30 days from the date of the decree, no interest or further cost should be levied.
26. On costs of the application and execution proceedings, it is submitted that since the claimant commenced execution without a factual or legal basis, the same should be awarded to the respondent as the successful party that costs follow the event.
27. The respondent prays that the application be allowed.

### **Claimant's Submissions**

28. The claimant identifies three issues for determination.
29. As to whether the respondent should deduct Kshs.24,289/- from the sum awarded, it is argued that the grievants were awarded Kshs.89,033/- and Kshs.159,866/- respectively and Kshs.40,000/- as costs and the Respondents counsel approved the decree and the cheques dispatched fell short of the decretal sum.
30. That since the dismissal was unfair the claimant is entitled to the full amount as awarded.
31. Reliance is made on *Black's Law Dictionary*, 9<sup>th</sup> Edition page 534 for the definition of judicial discretion as is the decision in [Kenfreight \(EA\) Limited v Benson K. Nguti](#) [2016] eKLR on the exercise of discretion.
32. It is submitted that the court made the award while aware that some monies had been paid to the grievants but exercised its judicial discretion.
33. That it is too late in the day to raise the issue.
34. As regards the statutory deductions and the cheques in the names of KRA, NSSF and NHIF respectively, counsel admits that section 49 of the [Employment Act](#) provides for statutory deductions on amounts awarded by the courts but disputes the manner of deduction.
35. That being a registered trade union, it is subject to statutory deduction and which amounts they remit from its members who are unionisable employees. That the NSSF deduction of Kshs.800/- is more than the net basic pay report provided by the Respondents that is Kshs.400/- as opposed to Kshs.800/-.
36. That the deductions are illegal, irregular and unlawful. That the grievants be allowed to remit the deductions through the union.
37. As to who should bear the costs of the application herein, warrants of attachment dated March 17, 2022 and the proclamation form dated March 29, 2022, it is submitted that costs follow the event.
38. The claimant submits that the total award made was attributed to the grievants in the cause and its counsel approved the decree.



39. That the decree and the question of partial payments of the sum of Kshs.24,289/- did not arise until the cheques were issued in December 2016.
40. It is further submitted that the claimant had a regular judgment which had not been appealed against and sought to enjoy the fruits of the same and had no duty to seek a clarification by the court.
41. It is the claimant's submission that having refunded the cheques to the respondent, it was their right to take out warrants of attachment of movable property in execution of the decree and instructed Mbusera Auctioneers to issue the proclamation.
42. That the sum of Kshs.302,477.85 comprises the decretal amount of Kshs.248,899/-, costs of Kshs.40,000/- interests of Kshs.11,128/- further cost of Kshs.950/- and Court collection cheques of Kshs.1,500/-.
43. Finally, it is submitted the respondent should bear the Auctioneers costs as well as costs of the application.

### **Analysis and determination**

44. The issues for determination are;
  - i. Whether the court has jurisdiction to entertain and determine the application herein;
  - ii. Whether the respondent is entitled to deduct Kshs.24,289/- from the decretal sum;
  - iii. Whether the respondent is entitled to make statutory deductions;
  - iv. Whether the grievants are entitled to interest on the decretal sum.
45. As to whether the court has jurisdiction to determine the application, the claimant/respondent avers that the court is *functus officio* as expounded by the Supreme Court in [Raila Odinga & another v IEB and 2 others](#) [2017] eKLR cited with approval from an article by [Daniel Malan Pretorius in "The Origins of Functus Officio Doctrine with Special Reference to its application on Administrative Law \(2005\) 122 SALJ 832"](#).
46. However, as explained in [Jersey Evening Post Ltd v Al Thani](#) [2002] JLR 542 at 550
 

“A court is functus officio when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded and the court functus officio; when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision, any challenge to its ruling or adjudication must be taken to a higher court if that right is available.”
47. In a similar view, the law provides for review of judgement. Rule 33 (1) of the [Employment and Labour Relations Court \(Procedure\)](#) Rules, 2016 state that;
 

A person who is aggrieved by a decree or an order from which an appeal is allowed but from which no appeal is preferred or from which no appeal is allowed may within reasonable time apply for a review of the judgement or ruling –

  - a. ....
  - b. ....



- c. If the judgement or ruling requires clarification or
  - d. For any other sufficient reason.
48. Relatedly, section 80 of the [Civil Procedure Act](#) provides that:
- Any person who considers himself aggrieved –
- a. By a decree or order from which an appeal is allowed by this Act but from which no appeal has been preferred; or
  - b. By a decree or order from which no appeal is allowed by this Act.
- may apply for a review of judgement to the court which passed the decree or made the order and the court may make such order thereon as it thinks fit.
49. Evidently, this provision does not limit the scope of the review unlike the rules quoted above.
50. The two provisions demonstrate beyond peradventure that the Court has jurisdiction to review its judgment or decree or order within certain confines of the law.
51. Since the applicant/respondent is not raising issues not canvassed during the hearing and is merely seeking a clarification on two issues, which is mandated by Rule 33(1)(c) cited above, the Court is satisfied that it is not functus officio in this matter. See [ICEA Lion General Insurance Co Ltd v Julius Nyaga Chomba](#) (202) eKLR where the Applicant sought to re-engage with the dispute in a different manner, the Court declined the invitation.
52. As to whether the respondent is entitled to make statutory deductions, whereas the respondent relies on section 49 (2) of the [Employment Act](#) 2007, the claimant relies on the Article IV(a) of the claimant’s Constitution which provides for membership of the union. In its view, the statutory deductions should have been made by the claimant after receipts of the entire sum from the employer.
53. The court find this submission puzzling as the claimant was not the employer of the claimants.
54. Section 49(2) of the [Employment Act](#) 2007 provides that;
- Any payments made by the employer under this section shall be subject to statutory deductions.
55. Relatedly, section 2 of the Act provides that employer means any person public body, firm corporation or company who or which had entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company.
56. The claimant has not established that it falls within the definition above for purposes of section 49(2) of the [Employment Act](#) which is unambiguous that payments made by the employer as relief shall be subject to statutory deductions.
57. In the court’s view, the deductions are to be made by the particular employer who is making the payments. If parliament had intended to transfer those responsibilities to other persons this provision would have been explicit.
58. But more significantly, the statutory deductions in question namely pay as you earn (PAYE), NSSF and NHIF contributions are provided for by different statutes which prescribe who is responsible how much and when they are payable.
59. For instance, section 37(1) of the [Income Tax Act](#) cap 470 provides to an employer shall deduct there from and account for tax thereon to such extent and in such manner as may be prescribed.



60. Similarly, section 15(1A) of the [National Health Insurance Fund Act](#), No. 9 of 1998 provides;  
Subject to this Act
- a. ...
  - b. ...
  - c. Any other employer shall be liable as a contributor to the fund in respect of its employees subject to paragraph 2(e) section 15(5) provides that the contributions made to the fund under sub-section 2 shall be mandatory.
61. Finally, under section 19 of the [National Social Security Fund Act](#), No. 45 of 2013, Every employer who, under a contract of service, employs one employee or more shall register with the fund as a contributing employee and shall register his employee or employees as members of the fund.
62. Further, section 20 (1) of the Act provides;  
From the commencement date and subject to the provisions of sub-section 3 and section 21 an employer shall pay the pension fund in respect of each employee in his or her employment.
- a. The employer's contribution...
  - b. The employee's contribution...
63. In a nutshell, these provisions make it patently clear that all statutory deductions in question are deducted by the employer and remitted to the relevant statutory body.
64. It requires no gainsaying that the respondent was obligated by law to make the deductions but misdirected the cheques to the claimant's counsel.
65. It is the duty of the employer to make the payments to the statutory body concerned. The claimant's submission that the decretal sum should have been sent to it without deductions is unsustainable.
66. As to whether the respondent was entitled to deduct the amounts allegedly paid to the grievants on termination, parties have adopted diametrically opposed positions. The respondent submits that the sum of Kshs.7,838/- and Kshs.16,451/- paid to the grievants as part of terminal dues should be deducted from the amount awarded by the court.
67. The respondent in fact deducted the sum of Kshs.24,289/- from the amount awarded to the grievant claiming that it was entitled to do so.
68. The claimant on the other hand asserts that the amount awarded by the court is an exercise of judicial discretion. [Black's Law Dictionary](#) 9<sup>th</sup> Edition at page 534 defines judicial discretion to mean
- “The exercise of judgement by a judge or court based on what is fair under the circumstances and guided by the rules and principles of law; a court power to act or not to act when entitled to demand the act as a matter of right.”
69. The court is in agreement with the sentiments of the Supreme Court in [Kenfreight \(EA\) Limited v Benson K Nguti](#) (*supra*) where the Court stated as follows,
- “The Act does provide for a number of remedies for unlawful or wrongful termination under section 49 and it is up to the judge to exercise his discretion to determine whether to allow any or all of the remedies provided thereunder....”



70. Having found that the termination of employment was unfair, the court exercised its discretion and made an award. The respondent had no mandate to deduct one shilling from the award. The court awarded what the grievants claimed and proved. Therefore, the Respondent cannot arrogate upon itself power to determine what to pay to the grievants which is analogous to adjudicating the dispute through the back door.
71. Once a court had pronounced itself by way of judgement order or ruling, the decision can only be challenged through a recognised legal mechanism not by the whims of any of the parties, as the respondent purported to do.
72. The amount deducted is due to the claimants ex debito justitiae.
73. As regards interest, the court awarded interest at court rates from the date of judgment till payment in full. Whereas the Respondent's efforts to pay the decretal sum by mid-December 2021 was creditable, the illegal and unauthorised deductions rendered the effort discreditable as evidenced by the Claimant's refusal to accept the cheques.
74. In addition, after the cheques here returned, the Respondent approved the decree but did nothing about its obligation to honour the judgement until the claimant obtained warrants of attachment of movable property dated March 17, 2022. In the meantime, interest was accruing on the decretal sum.
75. The contents of paragraph 9 of the respondents supporting affidavit are intriguing. The respondent appear to be suggesting that the claimant should have approached the court for clarification of the judgement or notified the respondent that it was in the process of obtaining warrants and or misled the court so as to obtain the warrants.
76. This assertion is unpersuasive bearing in mind that the claimant had a judgment in its favour against which no appeal had been sought. The claimant was entitled to act in the manner it did to realise the fruits of the judgement and had no duty to consult the respondent.
77. In the final analysis, it is ordered that:
  - a. The respondent/applicant shall not deduct the sum of Kshs.24,289/- from the decretal sum.
  - b. The respondent shall deduct and remit statutory dues to the relevant statutory bodies.
  - c. The respondent shall pay interest on the decretal sum from date of judgment till payment in full.
  - d. In light of the findings, it is only fair that parties bear their own costs.
78. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 6<sup>TH</sup> DAY OF JULY 2022**

**DR. JACOB GAKERI**

**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 March 15, 2020 and subsequent directions of April 21, 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 *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.

**DR. JACOB GAKERI**

**JUDGE**

