



University of Kenya v Jomo Kenyatta University of Agriculture and Technology & 6 others (Petition 112 of 2019) [2022] KEELRC 1198 (KLR) (4 July 2022) (Ruling)

Neutral citation: [2022] KEELRC 1198 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION 112 OF 2019
MA ONYANGO, J
JULY 4, 2022**

BETWEEN

UNIVERSITY OF KENYA PETITIONER

AND

**JOMO KENYATTA UNIVERSITY OF AGRICULTURE AND TECHNOLOGY 1ST RESPONDENT
UNIVERSITY OF NAIROBI 2ND RESPONDENT
MOI UNIVERSITY 3RD RESPONDENT
TECHNICAL UNIVERSITY OF KENYA 4TH RESPONDENT
KISII UNIVERSITY 5TH RESPONDENT
EGERTON UNIVERSITY 6TH RESPONDENT
KENYATTA UNIVERSITY 7TH RESPONDENT**

RULING

1. Before me are two notices of motion. The first is the application dated September 7, 2021, filed by the 4th respondent/applicant seeking the following orders That: -
 - a) Spent.
 - b) This application be heard ex-parte in the first instance.
 - c) This honorable court be pleased to issue a Temporary Order of Injunction restraining the petitioner/respondent and the intended interested party whether by themselves, their servants ,agents or any person whomsoever from trespassing and doing any of the following acts that is to say attaching,



removing, advertising for sale, disposing off by way of auction or private treaty the 4th respondent/applicant's properties listed in the proclamation form dated September 2, 2021 or in any manner interfering with the 4th respondent/applicant learning activities pending the hearing and determination of this application interpartes.

- d) This honourable court allows for payment of the balance of the decretal sum in monthly installments after reconciliation of the petitioner/respondent's account taking into consideration amounts paid by the 4th respondent/applicant subsequent to institution of the Petition.
 - e) This honourable court grants leave for cash gate auctioneers to be enjoined in this matter as an interested party.
 - f) The honourable court deems cash gate auctioneers to be an interested party in this Application.
 - g) The costs of this Application be provided for.
2. The application is premised on the grounds on the face of the notice of motion and as further supported by the affidavit of Ruth Kirwa, the 4th respondent's Legal Officer, sworn on September 7, 2021.
 3. In her affidavit, Ms. Kirwa depones that the 4th respondent applicant has made payments of the decretal sum, which payments the Petitioner failed to consider thus making the proclamation process unlawful and unfair.
 4. The 4th respondent further maintains that the petitioner is guilty of not reconciling its accounts and therefore causing confusion. Ms Kirwa states that the only balance of the decretal sum that remains unpaid is Kshs.12,578,994.58/-.
 5. That the petitioner, in complete disregard of the payments made by the 4th respondent, instructed the intended interested party (M/S Cash Gate Auctioneers) in gross violation of the Auctioneers Act to proclaim movable properties of the 4th respondent with a view of satisfying the decretal sum.
 6. Ms. Kirwa states that the 4th respondent would suffer irreparable loss/damage should the petitioner be allowed to proceed with the execution process and that financial compensation would not be adequate to restore it to its initial status.
 7. The Affiant urged this court to find the application with merit and to allow it in terms of the reliefs sought t.
 8. The second application is the notice of motion dated September 8, 2021 filed by the 7th respondent/applicant seeking the following Orders: -
 - a) Spent
 - b) That pending the hearing and determination of this Application this court be pleased to issue stay of execution of the warrants of attachment dated September 1, 2021 as served upon the 7th respondent/applicant.
 - c) That this court be pleased to set aside and/or dismiss the warrants of attachment of movable property in execution of decree of money dated September 1, 2021.



- d) That the court be pleased to order that all the auctioneers charges incurred by messrs mbusera auctioneers in execution of the warrants of attachment and sale dated September 1, 2021 upon which the proclamation of attachment dated September 6, 2021 is premised on, borne by the Petitioner.
- e) That costs be provided for.
- 9 The application is premised on the grounds on the face of the notice of motion in which the applicant contends that the petitioner instructed their agents messrs mbusera auctioneers to extract warrants of attachment of movable property in execution dated September 1, 2021.
10. The aforementioned agents did proceed to carry out a proclamation on September 6, 2021 and there is a likelihood and/or risk that they will proceed to carry out an attachment upon the expiry of the 7-day notice which is on September 13, 2021.
11. The applicant maintains it had already paid the decretal sum plus costs at the time the warrants of attachment were served upon it. It urged this court to set aside and/or dismiss the warrants of attachment of movable property dated September 1, 2021 and the proclamation of attachment dated September 6, 2021 be set aside and/or dismissed or recalled.
12. The applicant states that it is only fair in the circumstances that the petitioner meets all the Auctioneers charges emanating from the impugned Proclamation.
13. The application is supported by the affidavit of Professor Paul Okemo, the Acting Deputy Vice Chancellor (Administration) of the 7th respondent/applicant sworn on September 8, 2021 in which he reiterates the grounds on the face of the motion.
14. The application is opposed by a replying affidavit sworn by the petitioner's Secretary General, DR. Constantine Wasonga on September 14, 2021, in which he avers that judgment in this suit was delivered on June 5, 2020 awarding the petitioner Kshs.29,186,947/- together with costs. He avers that the 7th respondent/applicant has only settled the costs leaving the decretal sum unpaid.
15. He posits that Messrs Mbusera, under the instructions of the petitioner extracted warrants of attachment on September 1, 2021 and proceeded to attach the 7th respondent/applicant's properties on September 6, 2021.
16. The petitioner further avers that the 7th respondent/applicant has come to court with unclean hands by claiming it has settled the sums due as the Petitioner has never received any sums as alleged and the payments attached relate to payments made prior to the filing of the instant petition in the year 2018 which do not form part of the claim.
17. He further avers that any payments made by the 7th respondent/applicant after July, 2019 were made in settlement of the then current months and not arrears unpaid which were subject to this case.
18. He further deposes that other payments by the 7th respondent/applicant were made to the Chapter of the union account, which is not gazetted to receive dues in complete violation of the provisions of section 48(2) of the *Labour Relations Act* and Legal Notice No. 38 of 2015, which provides that union dues be remitted to the union's gazetted account.
19. The petitioner urged this court to dismiss the application with costs to the petitioner.
20. The 4th respondent filed a further affidavit deponed by Ruth Kirwa on September 20, 2021, in which she reiterates the averments made in the notice of motion application dated September 7, 2021.



14. She further avers that upon delivery of this court's final judgment in this matter, the 4th respondent, in compliance to the Judgment continued to make remittances of the union dues to both the petitioner's National account and to the petitioner's TUK Chapter account as evidenced by the EFT slips attached and marked "R.K. 2".
15. Ms Kirwa maintained that the amounts were paid into the accounts in strict compliance to the provisions of Clause 1 and 17.0 of the Collective Bargaining Agreement executed between the petitioner and the 4th respondent that provided for subscriptions to be paid into accounts nominated by the Petitioner, which included the UASU TUK CHAPTER account.
16. Further that the parties in a special National Executive Committee Meeting held at the petitioner's National Office Boardroom on March 31, 2017 agreed that there be sharing of funds at the ratio of 60:40% between the Petitioner's National Office and the respective Chapters. She referred to annexure "R.K. 4" copy of the minutes of the meeting and resolutions.
17. Ms. Kirwa maintains that it was not unlawful for the 4th respondent to make payments into the Chapter account as it was an authorized account in view of both the Collective Bargaining Agreement executed on February 3, 2015 and the resolutions of the National Executive Meeting held on 31st March, 2017.
18. The Affiant avers that the Legal Notice Number 38 of 2015 and the letter dated 22nd March, 2017 were compromised by the resolutions of the meeting held on 31st March, 2021 that allowed for sharing of remittances between the Petitioner's National Office and the respective Chapters.
19. Ms. Kirwa urged this court to allow the application to pay the remainder of the decretal sum by equal monthly instalments as it has shown goodwill by making continuous remittance of union dues as required under the judgment of this Court.

Submissions by the Parties**

20. In its submissions the 7th respondent/applicant states that it has availed copies of payment slips as proof of payment of amounts owed to the petitioner and that it has since settled the entire sum claimed in the Petition.
21. It is further argued that the warrants of proclamation were taken out as a result of the petitioner's failure to reconcile its accounts to ascertain how much the applicant had paid. It is therefore argued that by dint of the provisions of Rule 7 of the *Auctioneer's Act*, the costs of execution ought to be settled by the Petitioner, who gave wrong instructions to the Auctioneer.
22. It is on this basis that the applicant urged this court to set aside and/or dismiss the warrants of attachment of movable property dated September 4, 2021.

4th Respondent's Submissions

23. In its submissions in support of the application dated September 7, 2021 the 4th respondent maintains that it has complied with the court's Judgment delivered on June 5, 2020 by remitting in the year 2020 a total of Kshs.14,327,377.03/- and that subsequently in the year 2021 it remitted a total of Kshs.10,173,411.77/- as evidenced by annexures "R.K 4 a - g" and R.K 2 a - n" attached to the notice of motion application dated September 7, 2021 and the replying affidavit dated September 20, 2021 respectively.
24. The 4th respondent maintains that the confusion has been caused by the petitioner who as at the time of filing this application had not reconciled its accounts. It further submitted that it has at all times



- complied with the terms of the Collective Bargaining Agreement between itself and UASU – TUK chapter which nominated UASU – TUK chapter to be the recipient of the deductions and agency fees.
25. That the 4th respondent/applicant has remitted huge sums of money into an account TUK – UASU account as opposed to the UASU National account; that the same can be remedied by the UASU – TUK National Chapter forwarding the amounts to UASU National Chapter and that the 4th respondent should not be condemned to make double payments as the amount has been received by UASU – TUK chapter.
 26. The 4th respondent further submits that the sum of money executed by the petitioner is exaggerated given the decretal sum paid so far. It submits that the Auctioneers should not therefore be allowed to attach the movable properties listed on the proclamation.
 27. It further submits that the amount sought as auctioneer’s fees by Cash Gate Auctioneers is exaggerated and ought to be 2% of Kshs.12,578,994.58/- which ought to be Kshs.251,579.89/-. That this is the only amount the auctioneer is entitled to. It maintained that the fees charged are manifestly high and an attempt by the auctioneer to unjustly enrich itself. For emphasis the 4th respondent relied on the decision in the case of *National Industrial Credit Bank Limited v S. K. Ndegwa Auctioneer* [2005] eKLR where the court held that auctioneers’ charges ought to be guided by the *Auctioneers Rules*.
 28. The 4th respondent submits that compelling it to pay the entire decretal sum in lumpsum would incapacitate it financially and derail it from performing its functions adequately. It submitted that this court has the discretion to allow the 4th respondent/applicant to make payment of the decretal sum in instalments upon being shown ‘sufficient cause’ by the applicant. For emphasis the 4th respondent relied on the findings in the case of *Abdisalan Abdi Ali Ismail v Gubart Abdi Ali & 2 others* [2019] eKLR where the court cited the case of *Freight Forwarders Ltd v Elsek & ELSEK (K) LTD* [2012] eKLR where the court listed ‘sufficient cause’ to include;
 - i. The debtor is unable to pay in lumpsum.
 - ii. The debtor can pay by reasonable monthly instalments.
 - iii. The Application is made in utmost good faith.
 29. From the foregoing the 4th respondent/applicant submits that it has met the threshold for ‘sufficient cause’ for this court to exercise its discretion in allowing it to pay the reminder of the decretal sum Kshs.12,578,994.58/- in equal instalments of Kshs.1,000,000/- per month.
 30. The 4th respondent/applicant further submits that execution should not proceed prior to the Petitioner and the UASU TUK chapter being directed to reconcile their accounts to reflect the correct sums pending.
 31. In conclusion the 4th respondent urged this court to find merit in the application and allow it by making the following orders:
 - i. Orders that the 4th respondent is in compliance with the Judgment dated June 5, 2020
 - ii. Finds that the attachment of assets listed in the proclamation form is unlawful and unjustified
 - iii. Orders for the payment of the decretal sum in monthly instalments and



- iv. Order UASU national and UASU - TUK Chapter to reconcile their accounts to allow for transparency of the balance to be paid

Petitioner's Submissions

32. In its submissions the petitioner maintained that the applications are without merit and urged this court to dismiss it with costs to the Petitioner.
33. The petitioner further submitted that none of the amounts allegedly paid by the 4th and 7th respondent have been paid into the petitioner's account being A/C No. 075-120-4841 as required under section 50 of the Labour Relations Act, 2007 as read with Legal Notice 38 of 2015. That they are therefore liable to criminal sanctions under section 50 (10) of the Labour Relations Act, 2007 and should not be allowed to use this Court to sanitize the same.
34. It is further submitted that the contention that the 7th respondent has since settled a portion of the decretal sum in the year 2019 and 2020 is not true as there is no indication from the record that this fact was brought to the court's attention when the matter was still active in court.
35. The petitioner further submitted that both the 4th & 7th respondent/applicants' chapters have no capacity to confirm receipt of any payments as contended by the 4th & 7th respondents as the same was to be paid to the petitioner's National Office, whose records clearly confirm non-payment of the sums. It is on this basis that the petitioner maintains that both the 7th & 4th respondent/applicants cannot purport to have settled part of the decretal sums.
36. The petitioner maintains that the application filed is an abuse to the court process. For emphasis the petitioner cited the case of Republic v Chairman, Co-operatives Tribunal & 8 others ex-parte Management Committee Konza Ranching & Farming Co-operative Society Ltd [2014] eKLR where the court cited the case of Stephen Somek Takwenyi & another v David Mbuthia Githare & 2 others Nairobi (Milimani) HCCC No. 363 of 2009 where it was held that every court has inherent jurisdiction to prevent an abuse of its process by stopping the proceedings and/or putting an end to it.
37. The petitioner maintained that there can be no order of reconciliation of accounts that can be made as against it as it has proved from its records that no payments as contended was ever made to its authorized account by the 4th and 7th respondent/applicants.
38. It is further submitted that the 4th and 7th respondent/applicants have not met the threshold for the grant of the orders sought in the applications. To buttress this argument the petitioner relied on the judicial findings in the cases of Giella v Cassman Brown & Co Ltd [1973] EA 358, Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] eKLR, Paul Gitonga Wanjau v Gathuthi Tea Factory Company Ltd & 2 others [2016] eKLR and Kenya Power & Lighting Co. Limited v Sheriff Molana Habib [2018] eKLR all on temporary injunctions.
39. In conclusion the petitioner submits that the applications dated 7th and 8th September, 2021 are devoid of merit and therefore urged this court to dismiss the same with costs to the Petitioner.

Analysis and Determination

40. I have considered the application, affidavits, the annexures thereto, submissions by the parties and the authorities relied upon and note that the only issue for determination is whether the application dated September 7, 2021 has merit.



41 Judgment in this matter was delivered on June 5, 2020 in favour of the petitioner as against the 4th and 7th respondents in the following terms: -

“ 4th Respondent

The 4th respondent filed a replying affidavit w it has set out the payments made at the table at paragraph 10 thereof. The table reflects the payments in the sum of Kshs.2,424,313.85 were made on August 16, 2019 after the filing of the suit. There is proof that it failed to make remittances as required by law.

The 4th respondent will therefore pay the petitioner’s fees in addition to making remittances of any outstanding union dues and agency fees.

7th Respondent

The 7th respondent admitted to paying the union dues intermittently. In the submissions, the petitioner admits that upon being served, the 7th respondent started making payments but by the time of filing of the Petitioner’s submissions had not made full remittance.

I thus Order that the 7th respondent shall pay costs of the Petition as against it in addition to any outstanding union dues and agency fees.”

42. The petitioner subsequently proceeded to tax the costs awarded to it as against the 4th and 7th respondents respectively and a Ruling on the Bill of Costs delivered on February 19, 2021. The taxing master in her ruling taxed the costs as against the 7th respondent at Kshs.249,717/-.

43. In its defence the 7th respondent maintained that it had since settled thus warranting the filing of the instant application seeking an injunction and setting aside of the warrants of attachment. It annexed evidence of payment of the taxed costs and payment to counsel for the petitioner.

44. The 7th respondent attached to its application copies of all RTGS slips showing payment made to the petitioner since inception of this claim totaling to Kshs.65,153,231.39/-.

45. The petitioner on the other hand denied receiving any sums from the 7th respondent insisting that there was no need to order for any reconciliation of accounts. It further maintained that the 7th respondent was required to make the deposit to the gazetted account being the UASU – National office account as required under Legal Notice No 38 of 2015.

46. I have examined the accounts as filed by the 7th respondent and confirmed that the payments were indeed made to the UASU – KU Chapter and not to the UASU – National office account.

47. The 4th respondent on its part maintains that it has since paid a total of Kshs.10,173,411.77/- and accuses the Petitioner of causing confusion in this matter by failing to reconcile its accounts prior to instituting execution process. The 4th respondent further maintained that the balance due to the petitioner is only Kshs.12,578,994.58/-.

48. I have perused the accounts provided by both the 4th and 7th respondent and note that indeed payments were made by the respondents towards settlement of the decretal sums awarded to the petitioner. However, the payments were not made to the UASU National Office Account but to the Charter accounts held by the petitioner with respect to the 4th and 7th respondent.



49. This court has also taken note of the resolutions of the Special National Executive Committee meeting held on March 30, 2017 where it was agreed as follows;

“All Chapter accounts be gazette if possible. The NSG was tasked to start the process on Monday 3rd April, 2017. It was suggested that sharing of funds be in the ratio of 60:40% for the respective Chapter: National Office, remitted through split EFT or RTGS”

50. Directing further remittance by the applicants, would be subjecting the 4th and 7th respondent to double jeopardy as they will be forced to make double remittances.

51. It is only prudent that the petitioner reconciles its accounts with the respective Chapters of the 4th and 7th respondents to ascertain the actual sums paid and what is outstanding.

52. The 4th respondent has however admitted being indebted to the petitioner to the tune of Kshs.12,578,994.58/- being the balance of the decretal sum, which amount it requests to pay by way of equal monthly instalments.

53. Taking into consideration the fact that both Applicants have made effort to comply with the court orders and that the petitioner has not reconciled payments made by the applicants to chapters of the union, it is only after the Petitioner has reconciled its accounts that the actual amounts outstanding from the 4th and 7th respondents, if any, would be ascertained.

54. From the foregoing, I am persuaded that the applications dated September 7, 2021 and September 8, 2021 are merited. The court thus makes the following orders: -

- a) The petitioner is hereby directed to reconcile its accounts with the two Chapter accounts being UASU – TUK Chapter and UASU – KU chapter to ascertain the amounts paid so far and what is outstanding;
- b) That there is a stay of execution pending confirmation of amounts that remain due and owing to the petitioner.
- c) The 4th respondent’s request to pay the balance of the decretal sum by instalments is allowed
- d) The auctioneer costs (drawn to scale) shall be borne by the 4th respondent in respect of the warrants of attachment against it.
- e) The petitioner shall bear costs in respect of the auctioneer charges for the 7th respondent.

55. The petitioner to move the court for necessary orders once it has reconciled the accounts.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 4TH DAY OF JULY 2022

MAUREEN ONYANGO

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.

MAUREEN ONYANGO

JUDGE

