



REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT  
AT NAIROBI  
CAUSE 50 OF 2018

*(Before Hon. Lady Justice Maureen Onyango)*

KENYA NATIONAL UNION OF NURSES (KNUN).....CLAIMANT

**VERSUS**

ECO BANK KENYA LIMITED.....1<sup>ST</sup> RESPONDENT

KENYA COMMERCIAL BANK GROUP LIMITED.....2<sup>ND</sup> RESPONDENT

THE REGISTRAR OF TRADE UNIONS.....3<sup>RD</sup> RESPONDENT

MR. SIMON KIBIL.....4<sup>TH</sup> RESPONDENT

MR. JOHN K. BIIY.....5<sup>TH</sup> RESPONDENT

MS. LUCY J. TANUI.....6<sup>TH</sup> RESPONDENT

MS ALICE YAHUMA.....7<sup>TH</sup> RESPONDENT

MS. GRACE KINYANJUI MUTHONI.....8<sup>TH</sup> RESPONDENT

MR. ALI GABOW ABDULAHI.....9<sup>TH</sup> RESPONDENT

**RULING**

Before me for determination is an Application dated 27<sup>th</sup> August 2020. The Applicant seeks orders THAT:

1. Spent.
2. This Court be pleased to issue Judgement in favour of the Claimant and against the 4<sup>th</sup> to 7<sup>th</sup> Respondents jointly and severally for Kshs.9,686,463.15.
3. This Court be pleased to issue Judgment in favour of the Claimant and against the 8<sup>th</sup> to 9<sup>th</sup> Respondents jointly and severally for Kshs.840,000.00
4. An order against the 4<sup>th</sup> to 9<sup>th</sup> Respondents to forthwith surrender to the Claimant Motor Vehicle Registration Number KCL 708T make Toyota which was bought by funds unaccounted for.
5. An order against the 4<sup>th</sup> to 9<sup>th</sup> Respondents to account for and return all the proceeds to the Claimant acquired as a result of placing and trading with Motor Vehicle Registration Number KCL 708T make Toyota in the Eldoret Shuttle Sacco or any other Transport Sacco.

6. An order against Eldoret Shuttle Sacco and/or any other concerned or relevant Transport Sacco to produce statement of accounts and surrender to the Claimant all proceeds in its custody with respect to Motor Vehicle Registration Number KCL 708T Make Toyota.

7. The Officer Commanding Station Central Police Station and/or any other law enforcement agency to ensure compliance with the prayer (4) and that peace prevails.

8. Interest on all the monetary claims from the date of the filing

of the Claim until payment in full.

9. Costs of the application be borne by the 4<sup>th</sup> to 9<sup>th</sup> Respondents.

10. Any other relief that this Court may deem fit to grant.

Which Application is based on the grounds as set out on the face of the Notice of Motion Application and in the supporting affidavit of Seth Ambusini Panyako, the General Secretary of the Applicant, sworn on the same date.

The grounds advanced on the face of the application and the supporting affidavit are that arising from the final judgment delivered by this Court on 21<sup>st</sup> February 2020, this court directed the 4<sup>th</sup> to 9<sup>th</sup> Respondents to: -

*a) Jointly account for all the funds transacted in respect with Bank Account Number 007XXXXXXXXXXXX, held at Eco Bank's Uasin Gishu Branch being Kshs.9,686,463.15/- and to refund any monies not properly spent in accordance with the Union's Constitution, and*

*b) Further directed the 8<sup>th</sup> to 9<sup>th</sup> Respondents to jointly account for all the funds transacted in respect with Bank Account Number 11XXXXXXXX held at Kenya Commercial Bank Group Lamu Branch being Kshs.840,000.00/-.*

*c) More than six (6) months since the said positive orders were*

*issued, the Respondents have neither accounted for nor refunded the sums in issue thereby affirming the Claimant's assertion that the monies had been fraudulently obtained and used for private gain.*

*d) The Respondents have also not filed any application for review or appealed against the said orders therefore have no justifiable reason in not complying with the same by way of refunding the sums in issue.*

*e) The Respondents application for stay of execution of the orders of court was orally made on 21<sup>st</sup> February, 2020 but the same was declined by the court since no plausible reason to warrant stay was advanced.*

*f) In blatant defiance of the court orders of 21<sup>st</sup> February, 2020, the 4<sup>th</sup> to 9<sup>th</sup> Respondents have refused to refund a total sum of Kshs.10,526,463.15 belonging to the Claimant.*

The Claimant/Applicant avers that the sums in issue were not spent in accordance with the Union Constitution since the 4<sup>th</sup> to 9<sup>th</sup> Respondents did not have capacity to handle Union money in the impugned manner. He avers that counsel on record for the 4<sup>th</sup> to 9<sup>th</sup> Respondents were present during the delivery of judgment on 21<sup>st</sup> February 2020. That on 11<sup>th</sup> June, 2020, the Claimant's counsel wrote to the Respondent's counsel demanding compliance with the court orders by way of refunding the sums in issue to no avail.

He avers that he is aware that the 4<sup>th</sup> to 9<sup>th</sup> Respondents used the proceeds acquired illegally to buy Motor Vehicle Registration Number KCL 708T Make Toyota which they have put in the Eldoret Shuttle Sacco for public transport from Eldoret to Nairobi and vice versa. That the monies and profits acquired from the said business is used by the Respondents for their own selfish private gain and not for the benefit of the Union Members as prescribed by the Union Constitution.

The Application is opposed by way of grounds of opposition with the Respondents stating that it is defective, bad in law, lacking in merit and an abuse of the court process. The application is res judicata and that the court is *functus officio* having already expressed itself in the final judgement. It also alleges that the Claimant has not come to court with clean hands. The Respondents pray for the dismissal of the Claimant's Application with costs.

### **Submissions**

The Applicant submitted that it filed the Application with a view to resolve a confusion that had arisen after the orders of this court had not been obeyed by the Respondents. It submitted that despite knowing what the amount of money is, the 4<sup>th</sup> to 7<sup>th</sup> Respondents have not made any efforts to comply over a year later as the judgement was not clear. That this application seeks a review and is not appeal.

It submitted that once the amounts payable is clear, the Applicant can demand for payment/enforcement. That once made clear, the Applicant will either file an application for contempt or execute the decree as provided at law. The applicant therefore invites this court to make the requisite ruling in review and order that the 4<sup>th</sup> to 7<sup>th</sup> Respondents to jointly and severally pay Kshs.10,526,463.15 owed or orders issue as

prayed in the Application.

The Applicant relied on the **Guidelines for Judgement Drafting, by Muthoga J.** to the effect that a judgement must be expressed in a language that communicates accurately and clearly, those conclusions and the reasons supporting them. The Applicant further relied on **Courts of Saskatchewan, Enforcing Orders** where it is stated that in a judgement, the Judge ought to order exactly what is owed and to whom.

The Respondents did not file any submissions.

### **Analysis and determination**

I have carefully considered the application, evidence filed therewith and submissions before me. The issues for determination are:-

1. Whether this court has the jurisdiction to hear this matter.
2. Whether the Application herein is merited.

### **Whether this court has the jurisdiction to hear this matter.**

Before this court looks to determine the prayers sought in this application, the first step is to address whether it possesses the jurisdiction to entertain the matter, which has been raised by the Respondents by way of plea of *res judicata* and *functus officio*.

In **Peter Lai Muthoka v Standard Group [2017] eKLR**; the court held:

*“Jurisdiction is everything and without it, a court has no power to make any step. This was stated in the classic case of **The Owners of the Motor Vessel “Lillian S” Vs Caltex Oil (Kenya) Ltd (1989) KLR 1.** where Nyarangi J.A. held as follows:*

*“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”*

*“Where does jurisdiction emanate from? A court's jurisdiction flows from either the Constitution or legislation or both. The Supreme Court of Kenya in the case of **Samuel Kamau Macharia v KCB & 2 Others, Civil Application No. 2 of 2011** stated thus:*

*“A Court's jurisdiction flows from either the Constitution or Legislation or both. Thus a Court of Law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by Law”*

This matter was determined and the judgement delivered on 21<sup>st</sup> February 2020. For all intents and purposes, the delivery of the judgement renders this court *functus officio* and the matter is *res judicata*. The only channel through which this court can “re-open” this matter is vide an application for review of judgement under Rule 33 of Employment and Labour Relations Court (Procedure) Rules which provides the following:

### **33. Review**

**(1) 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 judgment or ruling—**

- (a) if there is discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made;**
- (b) on account of some mistake or error apparent on the face of the record;**
- (c) if the judgment or ruling requires clarification; or**
- (d) for any other sufficient reason.”**

The Applicant has listed Sections 47(1) of the Labour Relations Act, Section 1A, 1B and 3A of the Civil Procedure Act; Order 51 of the Civil Procedure Rules as the provisions under which the application is brought, none of which make provision for the court to revisit its judgement whether it was for clarification or granting any further orders subsequent to the judgement.

Further, the Court has considered the prayers in the Memorandum of Claim which formed the basis for the judgment delivered by this court on 21<sup>st</sup> February 2020. In the claim the Applicant sought the following reliefs: -

1. That this Court be pleased to issue an Order of Permanent closure of the Bank Account No. 007XXXXXXXXXXXX in the 1<sup>st</sup> Respondent's Eldoret Branch bearing the 4<sup>th</sup> to 7<sup>th</sup> Respondents as signatories and transfer all the funds therein 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 No 202XXXXXX

2. That this Court be pleased to issue an Order of Permanent closure of the Bank Account No. 11XXXXXXXX n the 2<sup>nd</sup> Respondent's Lamu Branch bearing the 8<sup>th</sup> and 9<sup>th</sup> Respondents as signatories and transfer all the funds therein 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 No 202XXXXXX

3. That this Court be pleased to quash the instruments used in opening Bank Account No. 007320526433901 being operated in the 1<sup>st</sup> Respondent's Eldoret Branch and Account No. 11XXXXXXXXbeing operated by the 2<sup>nd</sup> Respondent's Lamu Branch.

4. That this Court be pleased to issue an Order directing the 1<sup>st</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Respondents to jointly pay ALL FUNDS transacted in the Bank Account No. 007XXXXXXXXXXXX from the time of its opening, the same that amounts to Kshs.9,686,463.15 with interest at Court rate into the Claimant's Gazetted bank Account whose details are: -

Kenya National Union of Nurses

Bank; Barclays Bank of Kenya

Branch; Queensway Branch Nairobi

Account No 202XXXXXX

5. That this Court be pleased to issue an Order directing the 2<sup>nd</sup>, 8<sup>th</sup> and 9<sup>th</sup> Respondents to jointly pay ALL FUNDS transacted in the Bank Account No. 1177568497 from the time of its opening, the same amounts to Kshs.840,000 with interest at Court rate into the Claimant's Gazetted bank account whose details are: -

Kenya National Union of Nurses

Bank; Barclays Bank of Kenya

Branch; Queensway Branch Nairobi

Account No 202XXXXXX

6. That this court be pleased to issue an Order directing the relevant criminal investigation department to commence forthwith criminal investigations into the operations of the two accounts herein and the Employers who are fraudulently diverting the Union dues to these two accounts.

7. That this court be pleased to issue an Order directing the 1<sup>st</sup> and 2<sup>nd</sup> Respondent to immediately transfer ALL MONIES in possession into the Claimant's Gazetted Bank Account or Authorized Account as specified below:

Kenya National Union of Nurses Bank;

Barclays Bank of Kenya

Branch; Queensway Branch Nairobi

Account Number No. 202XXXXXX.

OR

Bank; Co-Operative Bank Branch; Aga Khan Walk.

Account Number; 011XXXXXXXXXX

8. That, this Court issue an order directing any employer who may have channelled the union dues into the two accounts in the 1<sup>st</sup> and 2<sup>nd</sup> Respondent to pay the Claimant from its own kitty all sums of monies owed to the Claimant as union dues which the culprit employers has diverted into these two unauthorized and fraudulent accounts after deductions the members' wages as provided for under Sec. 19(6) of The Employment Act, 2007 Laws of Kenya and to continue in remittance of the said dues to the Claimant's Bank Accounts in prayer no 4 above.

9. That this court be pleased to order any persons, firm corporate, individual employer or agent of any employer who by virtue of choice, association and knowledge necessitated the fraudulent transaction of the Bank Account No. 007XXXXXXXXXXXXX being operated in the 1<sup>st</sup> Respondent's Eldoret Branch and Bank Account No. 11XXXXXXXX in the 2<sup>nd</sup> Respondent's Lamu Branch to pay the Claimant compensation for economic damages at court rate and discretion.

10. That this Court be pleased to grant such orders or relief as it deems fit and just in the circumstances.

11. That the cost of this suit be borne by the Respondents.

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 paragraphs 6 to 8 of the application to the effect that the 4<sup>th</sup> to 9<sup>th</sup> Respondents bought Motor Vehicle Registration No. KCL 708T 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.**

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 30<sup>TH</sup> DAY OF APRIL 2021**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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 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**