



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 677B OF 2014**

**SYLVESTER ODUOR OYILE.....CLAIMANT/RESPONDENT**

VERSUS

**PRIMEFUELS (KENYA) LIMITED.....RESPONDENT/APPLICANT**

**RULING**

The Notice of Motion application before the court is dated 10<sup>th</sup> March 2021 and brought under a certificate of urgency under sections 3 and 20 of the Employment and Labour Relations Court Act, Rules 28 (1) (a) and (g) of the Employment and Labour Relations Court (Procedure) Rules, Article 10 and Article 50 of the Constitution of Kenya, sections 1A, 1b, 3, 3 A, 63 E and 95 of the Civil Procedure Act, Order 22 Rule 22 and Order 50 Rule 6 of the Civil procedure Rules, section 37 of the Income Tax Act, section 19 (1) and 49(2) of the Employment Act, 2007 and all enabling provisions of the law.

The applicant seeks the following orders:

- a) *Spent*
- b) ***THAT*** pending inter-parties hearing and determination of this Application this Court be pleased to order stay of execution of the judgment delivered on 13<sup>th</sup> March 2020 by the Justice Byram Ongaya together with all resultant Orders and Decrees arising therefrom:
- c) ***THAT*** this Court be pleased to lift the proclamation issued against the Applicant's Motor vehicles KCJ 976Y, KCJ 983 Y, KCF 532L, KCF 056L KBS 384 Z and KCR 334P;
- d) ***THAT*** this Court deems the decree as having been fully and finally settled by the Respondent.
- e) ***THAT*** the Claimant's Advocates bear the auctioneers' costs in respect of the attachment of 10<sup>th</sup> March 2021.
- f) ***THAT*** the Court to issue such other orders as it may deem
- g) ***THAT*** the costs of this application be borne by the Claimant's Advocates.

The application is based on the grounds on the face of the application and the Supporting Affidavit that;

- 1) On the 13<sup>th</sup> March 2020, the Justice Byram Ongaya delivered a Judgment in which this Court inter alia ordered that:
  - a. The Respondent (herein referred to as the Applicant) pays to the Claimant a total of Ksh. 1,013,076 (less due PAYE) by 01.05.2020 failing which interest at court rates to be payable thereon from the date of this judgment till the date of payment; and
  - b. The Respondent pays the Claimant's costs of the suit.
- 2) The Claimant extracted a Decree from the said judgment and the Deputy registrar issued a Decree on 3<sup>rd</sup> August 2020 ordering that the Respondent pays the Claimant the sum of Ksh. 1,013,076 less due PAYE.

3) On 5<sup>th</sup> February 2021, the Claimant's costs were taxed at Ksh 406,992.17 and a certificate of Taxation dated 15<sup>th</sup> February 2021 issued to Health Consult Auctioneers by the Deputy Registrar of this Court.

4) Shortly after the Certificate of Taxation was issued, Health Consult auctioneers on instruction of the Claimant moved to obtain a Warrant of Attachment, and via the proclamation dated 23<sup>rd</sup> February 2021 proclaimed the Applicant's Assets being 6 Motor vehicles registration numbers KCJ 976Y, KCJ 983 Y, KCF 532L, KCF 056L KBS 384 Z and KCR 334P.

5) Under the cover of the letter dated 24<sup>th</sup> February 2021 the Applicant through its advocates on record issued two cheques dated 23<sup>rd</sup> February and 26<sup>th</sup> February 2021 in full and final settlement of the amount to the Claimant as set out in the Warrants of Attachment less PAYE on the judgment sum at Ksh. 296,306.15 In accordance with the Judgment and Decree of this Court.

6) The applicant has since remitted the PAYE as per the foregoing to KRA and has furnished the Claimant with proof of the same via an email dated 2<sup>nd</sup> March 2021.

7) However, and in a purported rewriting of the Orders of this Honorable Court, the Claimant's Advocates wrote back to the Applicant's Advocates declaring that Health Consult auctioneers was still under instruction to recover the amount set out in the Warrant of Attachment .

8) The Claimant's Advocates have not returned the cheques issued to them owed to the Claimant in settlement of the sum owed to Claimant and the Respondent is aware that the Claimant's Advocates have since banked the Cheques issued to them.

9) Being aggrieved by the irregular attachment of its motor vehicles in respect of a judgment sum, costs and charges that have already been duly settled in full, the Applicant hereby files this application seeking orders staying the execution of the Judgment and Decree as well as lifting of the proclamation.

10) This Court has the powers to grant the orders sought in the interest of Justice and that the Respondent/Applicant requests this Court to exercise its discretion in the best interest of Justice.

11) Unless the orders sought are granted the Respondent/Applicant will suffer irreparable harm, loss damage as the execution of the judgment in issue will cripple its operations.

The claimant opposed this Application through the Replying Affidavit sworn by Esther Mwikali on 22<sup>nd</sup> March 2021 and avers that the instant application lacks merit, is frivolous, vexatious and only intended to unduly escalate costs of litigation herein. That it does not meet the threshold for granting the orders sought and is an abuse of court process and should therefore be dismissed with costs.

Judgment was delivered on 13<sup>th</sup> March 2020 in favour of the Claimant who was awarded Ksh 1,013,076 less due PAYE. Further that costs were assessed at Ksh. 406,992.17. That despite demand, the Respondent failed to settle the sums as decreed and awarded. Consequently, the Claimant applied for Warrants of Attachment and sale in execution of the court's decree and on 18<sup>th</sup> February 2021, the court issued Warrants of Attachment and sale, directing recovery of Ksh 1,534,428. That the Respondent is yet to fully settle the decretal sums in terms of the decree and Warrants of Attachment and sale hereinabove having only paid Ksh. 1,238,121.85.

The Claimant also denies the allegation that the Respondent's motor vehicles have been attached in execution of the decree.

Parties made oral submissions.

The respondent as the applicant submitted they seek stay of execution, lifting of proclamation and a declaration that the decree had been settled. That the claimant instructed auctioneers to attach the proclaimed assets on alleged non-payment of the Decree. Upon receipt of the Warrants, the Applicant drew cheques worth Ksh 1,238,121 in favor of the Respondent herein. The same was communicated to the claimant with an explanation that the cheques represented the award as per the court judgment less the statutory deductions. The Claimant, however, insisted on proceeding with attachment despite receipt of the aforementioned cheques. That consequently, Motor Vehicle Registration no KAX 457 H was attached and the auctioneers insisted that it would only be released upon evidence of payment of the entire decretal amount. The Applicant prays that Claimant bears the costs of the attachment.

Counsel for the Claimant submitted that the court issued a decree for Ksh 1,013,076 plus costs which was assessed at Ksh 406,992. That the Claimant asked for payment of the same but the Respondent declined upon which the Claimant applied for Warrants of Attachment.

Further that the Court factored in the issue of PAYE when it arrived at the figure of Ksh 1,534,428 and the auctioneers had clear instructions to execute based on the said document. That it was only after proclamation that the Respondent agreed to settle the decree. That the amount indicated in the Warrants of Attachment was not by the Claimant but by the Court. The learned counsel therefore urges the court to dismiss the Application with costs.

## **DETERMINATION**

The twin issues for determination are;

- a) Whether the decree has been fully paid and settled.
- b) Whether the Applicant is entitled to the prayers sought.

It is common cause on the 13<sup>th</sup> March, 2020 the court delivered a Judgment and ordered that;

*c. The Respondent (herein referred to as the Applicant) pays to the Claimant a total of Ksh. 1,013,076(less due PAYE) by 01.05.2020 failing interest at court rates to be payable thereon from the date of this judgment till the date of payment; and*

*d. The Respondent pays the Claimant's costs of the suit.*

It is also not in dispute that the Applicant herein has paid the Claimant a sum of Ksh. 1,238,121. What is in dispute is whether this amount settles the decree or whether the Applicant should pay KS 1,534,428 as per the Warrants of Attachment.

The Respondent does not deny that the tax due was Ksh. 296,306.15 and has already been remitted. It therefore follows that the Respondent's final figure should be calculated as follows:

Total Award.....	1,013,076
Less PAYE.....	(296306)
Assessed Costs.....	406 992
Interest.....	111,910
Total.....	<b><u>1, 235,672</u></b>

From the above calculations, it is clear that the claimant was entitled to **KS 1,235,672**. Having already paid Ksh **1,238,121** the respondent has settled in full the Claim for the Claimant.

The claimant therefore obtained warrant of attachment on the mistaken belief that the owed dues were Ksh.1, 534,428 before taking into account the statutory deductions as directed by the court in the judgement and pursuant to the provisions of section 49(2) of the Employment Act, 2007 read together with section 37 of the Income Tax Act. To proceed on such basis invalidated the very decree relied upon to proceed with execution. It was erroneous.

**Accordingly, the application dated 10<sup>th</sup> March 2021 is allowed in the following terms;**

- a) The respondent has fully settled the decree herein;**
- b) The proclamation issued against the Applicant's Motor vehicles KCJ 976Y, KCJ 983 Y, KCF 532L, KCF 056L KBS 384 Z and KCR 334P is hereby lifted**
- c) The claimant shall bear the costs of the auctioneers;**
- d) On the application, Each Party to bear its own costs**

**DELIVERED IN OPEN COURT AT NAIROBI THIS 16TH DAY OF APRIL, 2021.**

**M. MBARU**

**JUDGE**

In the presence of:

Court Assistant: Okodoi

..... and .....