



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 2119 OF 2014

*(Before Hon. Lady Justice Maureen Onyango)*

JULIET CHEPCHUMBA TUWOT & 227 OTHERS.....CLAIMANT

VERSUS

EAST AFRICAN PORTLAND CEMENT PLC.....1<sup>ST</sup> RESPONDENT

KENYA CHEMICAL AND ALLIED WORKERS..... 2<sup>ND</sup> RESPONDENT

AND

CO-OPERATIVE BANK KENYA LIMITED.....1<sup>ST</sup> GARNISHEE

STANDARD CHARTERED BANK LIMITED.....2<sup>ND</sup> GARNISHEE

KENYA COMMERCIAL BANK LIMITED.....3<sup>RD</sup> GARNISHEE

EQUITY BANK LIMITED.....4<sup>TH</sup> GARNISHEE

SAFARICOM LIMITED.....5<sup>TH</sup> GARNISHEE

KENYA RAILWAYS CORPORATION..... 6<sup>TH</sup> GARNISHEE

**RULING NO. 5**

1. Before me for determination are two applications brought by way of Notice of Motion Applications dated 29<sup>th</sup> June 2021 and 9<sup>th</sup> July 2021 respectively.

2. Notice of Motion Dated 29<sup>th</sup> June 2021 filed by the Claimant Kenya Chemical and Allied Workers seeking orders THAT:

*i) THAT the Application filled herein be and is hereby certified as urgent, service be dispensed with in the first instance and the same be heard exparte.*

*ii) THAT the Court do issue a Garnishee order nisi attaching the Respondents Accounts which include, Cooperative Bank Account number xxxx, Athi River Branch, S.C.B Bank Account number xxxx, Kenyatta Avenue branch, KCB Bank Account number xxxx, Kitengela Branch, KCB Account number 1107115124, Moi Avenue branch, Equity Bank Account number xxxx, Kenyatta Avenue branch and MPESA till number 886882, Kenya Railways Corporation and or any other bank accounts for payment of Kshs.1,311,585,364.80/= to Nyabena Nyakundi & Co. Advocates, Account Number xxxx Family Bank, Cargen Branch.*

*iii) THAT the Court do issue Garnishee Order absolute attaching Kshs.1,311,585,364.80/= from the Respondent's Accounts as mentioned above and the same be remitted to Nyabena Nyakundi & Co. Advocates, Account Number xxxx at Family Bank.*

*iv) THAT the aforesaid Garnishee orders to remain in force until the full decretal sum of Kshs.1,311,585,364.80/= has been paid.*

*v) THAT the Court do issue orders restraining the Respondent from issuing cheques to any companies or individuals from accounts at Cooperative Bank Account number 01120065195300, Athi River Branch, Standard Chartered Bank Account number xxxx,*

Kenyatta Avenue branch, Kenya Commercial Bank Account number xxxx, Kitengela Branch, KCB Account number xxxx, Moi Avenue branch, Equity Bank Account number xxxx, Kenyatta Avenue branch and Safaricom Limited, MPESA till number 886882 and money held by Kenya Railways Corporation until the decretal sum of Kshs.1,311,585,364.80/= is fully paid as required by Section 48 of the Labour Relations Act, 2007.

vi) THAT any other account operated or to be opened by the Respondent to remain attached until the full decretal sum has been fully paid.

vii) THAT the Court do order that the amount awarded herein should attract interest at Court rates from the date of judgment (6<sup>th</sup> July, 2015) until payment in full.

viii) THAT this court do issue orders as it may deem fit and just to meet the ends of justice.

ix) THAT costs of the application and that of the Garnishee be met by the Respondent.

3. The application is based on the grounds as set out on the face of the Notice of Motion Application and in the supporting affidavit of **PETER OUKO**, the National Secretary General of the Union, sworn on the 29<sup>th</sup> June, 2021.

4. The second Notice of Motion dated 9<sup>th</sup> July 2021 filed by the Respondent East African Portland Cement PLC and seeks orders THAT:

i) THAT this instant application be certified as extremely urgent and by reason of the obvious abuse of court process perpetrated by the Respondent union (discernible from the face of this courts record) and the attendant gross violation of justice that has occurred and a gross violation to the applicant company's rights that has also occurred (and continuous to occur) be disposed off ex-debitio justitiae and at an ex-parte

ii) THAT the ex-parte garnishee order nisi issued by this Court, the learned Justice Rika, on 6/07/2021 be hereby ex debito justitiae and reason of the obvious court process perpetrated by the Respondents union (discernible from the face of this courts record) and the attendant gross violation of justice that has occurred and the gross violation to the applicants company rights that has also occurred (and continues to occur) be discharged and or set aside at an ex-parte stage pending the hearing of the instant suit inter parte.

iii) THAT in order to give the Respondent Union its day in court and an opportunity to canvass its application dated 29/06/2021 without its being prejudiced in any way (and after setting aside/discharge of the orders of 6/07/2021 as prayed under paragraph 2 above) the monies in the bank accounts mentioned in the Respondent Union's application dated 29/06/2021, to wit. Cooperative Bank Account Number xxxx, Athi River Branch, Standard Chartered Bank Account Number xxxx Kenyatta Avenue Branch, Kenya Commercial Bank Account Number xxxx, Kitengela Branch, Kenya Commercial Bank Account Number xxxx Moi Avenue Branch, Equity Bank Account Number 1290262660420 Kenyatta Avenue Branch and Mpesa Till Number 886882, Kenya Railways Corporation be utilized by the applicant company for instance paying for goods and services ( for example spare parts for the factory, arrears and payments to Kenya power and lighting company limited) expenses paying employee wages and remuneration and directors emolument's, making statutory payments and making payments pursuant to court orders

iv) THAT this instant application and the Respondents Unions notice of motion application dated 29/06/2021 be set down for hearing inter partes together as a matter of priority

v) THAT the Respondents union's notice of motion dated 29/06/2021 be dismissed in its entirety with costs and orders of 6/07/2021 (and or their modifications thereof) be set aside/discharged

vi) THAT the costs of this instant suit be borne by the Respondent union.

vii) Costs of this application be provided for.

5. The application is based on the grounds as set out on the face of the Notice of Motion Application and in the supporting affidavit of **Roseline Ominde**, the acting Head of Legal at the Applicant, sworn on the 9<sup>th</sup> July, 2021.

#### **Claimant's Case**

6. In support of the application dated 29<sup>th</sup> June 2021 the affiant being the National Secretary General of the Union states that the Court entered a judgment against the Respondent which was for the grievants' salary arrears and house allowances amounting to Kshs.1,401,585,364.80 which has been due since 6<sup>th</sup> July 2015.

7. The affiant further states that on 13<sup>th</sup> January 2020 parties recorded a consent for settlement of the decretal sum which consent the Respondent has refused to comply with despite having assets in form of money with different banks and properties.

8. Further the Affiant avers that the Respondent having defaulted in complying with the consent the Claimant is at liberty to execute.

9. The Affiant states that the application seeks to compel the garnishees holding property on behalf of the Respondent to have the same paid to the grievants through their advocates.

10. In opposition to the Respondent's application dated 9<sup>th</sup> July 2021 the Claimant filed a replying Affidavit sworn by **PETER OUKO**, the General Secretary of the Claimant on 22<sup>nd</sup> July 2021.

11. He states that the application seeking to set aside the garnishee order nisi has been made with unclean hands and as such prays that the application be dismissed.

12. The affiant avers that the judgment amount of Kshs.1,401,585,364.80 was due on 31<sup>st</sup> December 2017 but the judgment debtor has only paid Kshs.90,000,000.

13. The affiant states that through its representatives it has sought for meetings to discuss about the full settlement of the matter but the Respondent has been evasive and non-committal throughout.

14. The affiant states that he is aware that Kenya Railways Corporation owes the Respondent over 2 billion which it pays the Respondents at Kshs.250,000,000 quarterly and which proceeds were part of the Kshs.90,000,000 paid as partial payment in the settlement of the decretal sum.

15. The affiant avers that the Judgment debtor has been receiving this payment from the 6<sup>th</sup> Garnishee without settling the decretal sum.

16. The affiant states that the application dated 29<sup>th</sup> June 2021 is not subjudice to the Respondents application dated 17<sup>th</sup> May 2021.

17. The affiant further avers that the judgment debtor's application to set aside the garnishee order nisi has been overtaken by events since some of the garnishees have responded and filed their affidavits.

18. The affiant states that the judgment debtor should be blamed for refusal to come up with a proposal for repayment and failing to sell the properties within 1 year from the date of signing the settlement deed.

19. The Claimant prays that the application be dismissed with costs.

20. On the 3<sup>rd</sup> August 2021 the court gave directions that parties file submissions on computation relating to payment of Kshs.1,401,585,364.80.

21. The Claimant filed submissions on the purported computation of that amount payable to the Respondents former employees.

22. The Claimant submits that on 2<sup>nd</sup> August 2018 the court did certify that the amount due and payable was Kshs.1,401,585,364.80 and after protracted legal proceedings between the parties the Respondent failed to table its own computation after being given several opportunities to do so. As such the court adopted the union's computation.

23. The Claimant submits that the purported tabulation is a deliberate effort to confuse issues and delay finalization of the matter. He submits that the above figure was arrived at after individual calculation and the court decree is clear on what each individual is entitled to. It prays that the purported tabulation be rejected.

24. The Claimant submits that the Respondent transacts over Kshs.300 million a month yet it has not bothered to clear the decretal sum therefore compelling the grievants to execute hence the application.

### **Respondent's Case**

25. The Respondents filed an application dated 9<sup>th</sup> July 2021 which application is supported by the affidavit sworn by **Roseline Ominde**, the Acting Head of Legal.

26. The affiant states that the grievants filed a suit against the Respondent and a judgment was rendered on 6<sup>th</sup> July 2015 which the Respondents appealed against but the appeal was dismissed.

27. The affiant states that on 8<sup>th</sup> January 2020 the applicant and the Respondent entered into a consent which set out how Kshs.1,401,585,364.80 will be paid. That since the date of the consent the Applicant has paid Kshs.90,000,000.

28. The affiant states that according to the consent execution was only to take place upon the applicant failing to pay the balance after disposing off some of its assets and settling a loan owed to Kenya Commercial Bank.

29. The affiant states that the Respondent is in the process of disposing off some of its assets. That one property being L.R No. 8786 has been disposed off to KCB and settled part of the outstanding loan. That the applicant is in the process of disposing off a second parcel being L.R 8784/4 after sale of which the proceeds will be enough to settle the balance of the loan owed to KCB and the entire decretal sum owed of the Claimant.

30. The Affiant states that the Claimant filed two applications seeking execution dated 17<sup>th</sup> May 2021 and 29<sup>th</sup> June 2021 both based on similar grounds that the applicant has failed to satisfy the balance of the decretal sum which is *sub judice*. That the applications by the Claimant seeking garnishee orders through the said application is an abuse of the courts process.

31. The Affiant states that the freezing order granted on 6<sup>th</sup> July 2021 has crippled and rendered insolvent a company that contributes immensely to the economic well-being of the Machakos County.
32. The Affiant states that the applicant is unable to pay its various third party service providers thus unable to operate. That it is also unable to pay its 515 employees their salaries for the month of June 2021.
33. The Respondents submitted that the issue of computation for the grievants represented by Ms Juliet Towot was part of the original grievants in the main suit and as such should be allocated their dues under the decretal sum.
34. The Respondents urges the Court to affirm that the 288 grievants are entitled to the decretal sum.
35. The Affiant prays that the application be allowed to mitigate the travesty of justice. That allowing the application will not prejudice the grievants who are already protected by the consent dated 13<sup>th</sup> January 2021.
36. In response to the application dated 29<sup>th</sup> June 2021, one **JULIET CHEPCHUMBA TUWOT** representing 228 grievants acting in person, filed a replying affidavit sworn on 26<sup>th</sup> July 2021.
37. In her affidavit she states that the application dated 29<sup>th</sup> June 2021 and the application dated 19<sup>th</sup> May 2021 are both premature as settlement award for 228 grievants is yet to be determined.
38. The Affiant states that confirming the garnishee order nisi to absolute will negate the pending application by the 228 applicants who were acting in person as the application construes that the entire decretal sum belongs to 465 co-grievants excluding the 228 grievants.
39. The Affiant states that 228 grievants acting in person have computed their claim to a tune of Kshs.580,153,775.74 which forms part of the decretal sum of Kshs.1,401,585,364.80 for all the 693 grievants in the whole suit.
40. The Affiant states that they will only be agreeable to confirmation of garnishee nisi orders as absolute if their claim is factored in and the same deposited in Court.

#### **Garnishees Response**

41. The 2<sup>nd</sup> Garnishee, Standard Chartered Bank Limited responded to the application by way of a replying affidavit sworn by Peter Mathenge who is the principle public Sector of the 2<sup>nd</sup> Garnishee on 29<sup>th</sup> July 2021.
42. The affiant states that the Corporate Current Account Number xxxx has zero balance and is a dormant account. He also stated that Corporate current account number xxxx is holding a sum of Kshs.3,307,766.45 and Premium investment account number xxxx is holding a sum of Kshs.4,963.95.
43. The 5<sup>th</sup> Garnishee Safaricom Limited in response to the application dated 29<sup>th</sup> June 2021 filed a replying affidavit sworn by Daniel Ndaba, its Senior Manager, Litigation.
44. The Affiant states that Mpesa pay bill number 886882 operated by the Judgment debtor has been inactive since 27<sup>th</sup> November 2020 and has no funds to satisfy the Garnishee order nisi and prays that it be discharged with costs.
45. The 4<sup>th</sup> Garnishee, Equity Bank Limited in response to the application dated 29<sup>th</sup> June 2021 filed a replying Affidavit sworn by Patrick Waithira, its Operations Manager on 13<sup>th</sup> July 2021.
46. The Affiant states that the Respondents Account number xxxx has a current balance of Kshs.17,928,300.

#### **Analysis and Determination**

47. I have considered the both applications, the responses and the submissions by the parties. The issues for determination are;
- a) Whether the 228 grievants acting in person form part of the beneficiaries of the decretal sum of Kshs.1,401,582,364.80.
  - b) Whether the parties are entitled to the reliefs sought in the application dated 29<sup>th</sup> June 2021 and application dated 9<sup>th</sup> July 2021.

#### **Whether the 228 grievants acting in person award form part of the decretal sum of Kshs.1,401,582,364.80**

48. One Juliet Chepchumba Tuwot who is acting on her behalf and that of 228 unrepresented grievants in response to the application dated 29<sup>th</sup> June 2021 raised an issue that the garnishee application pending before Court excludes the 228 grievants who she represents and who are part of the staff released by the Respondent and are beneficiaries of the decretal sum in this suit. This position is supported by the Respondent.
49. She states that the 228 grievants acting in person computed their claim to the tune of Kshs.580,153,775.74 which forms part of the

decretal sum.

50. The Claimant in their submissions disagrees and states that it is the Claimant's computation that was adopted by the court since the Respondents and the 228 grievants had not filed their computation.

51. For the Court to reach a determination on whether the 228 grievants in person are part of the beneficiaries of the decretal sum, the Court will require to hear all the parties.

**Whether the parties are entitled to the reliefs sought in the application dated 29<sup>th</sup> June 2021 and the application dated 9<sup>th</sup> July 2021**

52. The Claimant and the Respondent entered into a consent dated 8<sup>th</sup> January 2020 which set out the mode of payment of the decretal sum. Since the entry of the consent the Respondent has paid a sum of Kshs.90,000,000 which is not disputed.

53. The Claimant contends that since then the Respondent has not made any effort to settle the balance of the decretal sum hence necessitating the instant garnishee application.

54. The Court issued garnishee order nisi on the 6<sup>th</sup> July 2021 attaching the bank accounts. However, on the 7<sup>th</sup> July 2021 the grievants filed an application seeking to have the orders set aside and prayed to be granted an opportunity to canvass the application dated 29<sup>th</sup> June 2021.

55. The Court on 28<sup>th</sup> July 2021 discharged the garnishee order *nisi* that had been issued earlier.

56. The 2<sup>nd</sup> application filed by the Respondent on 9<sup>th</sup> July 2021 was as a result of the orders granted by the court which had paralyzed the operations of the Respondent. The orders having been discharged I find that the application has been overtaken by events.

57. For the same reasons, the Claimant's application dated 29<sup>th</sup> June 2021 has also been overtaken by events.

58. Issue of the 228 grievants represented by Juliet Chepchumba Tuwot before any further execution of the decree herein can proceed.

59. The above is the ruling delivered by the Court in the presence of the parties on 8<sup>th</sup> October 2021. However, while perusing the file before releasing the same to the Registry, the Court has come across a ruling dated 16<sup>th</sup> September 2020 delivered by my sister Wasilwa J. who has since left the station.

60. The ruling was in respect of two applications dated 18<sup>th</sup> February 2020 and 22<sup>nd</sup> April 2020 filed by **Juliet Chepchumba Tuwot and 129 Others v EA. Portland Cement**, the Respondent herein and Kenya Chemical & Allied Workers Union, the Claimant herein. The application sought the following orders –

*The first Application was the Notice of Motion Application dated 18<sup>th</sup> February, 2020. The same was brought under Certificate of Urgency and under the provisions of Section 12 of the Employment Act, 2007 seeking Orders that:-*

- (1) The Hon. Court be pleased to accord leave to the Applicants herein to act in person in this matter and priority hearing date be given to the application.*
- (2) The 1st Respondent be compelled to release claimants/applicants' withheld as decretal sum and remit to their respective accounts to be provided.*
- (3) The respondents do file list and award of each grievant unpaid by the 1st Respondent.*
- (4) The firm of M/s Nyabena Nyakundi & Co. Advocates to give account of all monies paid by the 1st respondent on behalf of applicants/claimants herein to his Account NO.014000045486 held by Family Bank, Cargen House Branch, Nairobi and pay the applicants herein their shares forthwith.*
- (5) The 1st Respondent do file in Court settlement deed together with the full list of beneficiaries.*
- (6) Costs be in the Cause.*

*The second application was the Notice of Motion Application 22<sup>nd</sup> April, 2020 also filed by the Claimants/Applicants under Certificate of Urgency seeking the Orders that:-*

- (1) The Hon. Court be pleased to adopt the computation of the applicants herein for sum of Kshs.580,153,775.74 as an order of Court.*
- (2) The 1<sup>st</sup> Respondent be compelled to file their mode of payment of the said sum and remit to their respective accounts to be provided.*

(3) *The 1<sup>st</sup> Respondent's management do involve the Applicant's representatives to negotiation meetings of settling this claim.*

(4) *Costs be in the Cause.*

61. The grounds in support of the applications were the following of the first and second applications respectively –

*“The first application was premised on the grounds that:-*

- a) This is a concluded matter and therefore leave of Court is mandatory in order for the applicants to have audience from Court.*
  - b) All applicants were at material times members of the 2<sup>nd</sup> Respondent and were represented by the firm of M/s Nyabena Nyakundi & Co. advocates.*
  - c) The claim before the Court was for 693 claimants and the net award approved by the Court as decretal sum was for Kshs.1,401,585,364.80 being salaries arrears and house allowance excluding other allowances such as overtime, leave, travelling allowance, shift allowance etc.*
  - d) Following a successful Garnishee application filed by M/s Nyabena & Co. Advocated the 1st respondent offered sum of Kshs.90 million which was to be paid in two instalments so that Company accounts are opened.*
  - e) The 1<sup>st</sup> instalment of Kshs.40 million has been disbursed to the firm of M/s Nyabena Nyakundi & Co. advocates for onward transmission to the beneficiaries.*
  - f) To our surprise our names do not appear anywhere in the list of beneficiaries and we are in dilemma as regards our payments.*
  - g) It was our expectation that whatever moneys paid should be shared equally as each person has his/her own needs of money and hence the urgency of this matter.*
  - h) We are informed from the reliable sources that priority of payment was made to those named in the garnishee application and not from the original list of 693 Claimants on Court record filed by the 1st respondent while seeking stay of execution orders.*
  - i) Without clear modalities on mode of payment and actual lists of beneficiaries submitted to Court there is likelihood for some Claimants ending up losing their award and their shares squandered by either their Counsel on record or 2nd Respondent's agents and hence is necessary for M/s Nyabena Nyakundi to give accounts of all moneys received together with lists of beneficiaries.*
  - j) All negotiations report of settling the balance of Court decree should be filed in Court with timelines but not to leave the matter open it would be difficult to fast track settlement.*
  - k) The respondents are groping on actual lists of beneficiaries*
- despite the existence of original list of 693 claimants on Court's record.”*

*The second application was premised on the grounds that:-*

- a) The Applicants were among the Claimants in this claim and during payment of Kshs.90 million to 465 co-Claimants were not considered and their claim is in limbo.*
- b) The 1<sup>st</sup> Respondent and the firm of M/s Nyabena Nyakundi & Co. Advocates representing 465 Claimants have recorded settlement deed leaving out the 228 Claimants/Applicants herein.*
- c) The 228 Claimants were beneficiaries of the Court's judgment and their claims are captured in the Financial Report 2016 of 1st Respondent.*
- d) The 1<sup>st</sup> Respondent's management is only busy concentrating on 465 Claimants and has not recorded any settlement deed with applicants' representatives.*
- e) The Applicants have tabulated their individual claims against the 1<sup>st</sup> Respondent and would like the same to be adopted as an order of Court.*

62. After hearing the parties, the Court made orders as follows –

*“42. In my view, the starting point is whether the Applicants were originally part of this Claim as filed in 2014 and whether the judgement of the Court entitled them to benefit from the judgement entered by this Court on 6/7/2015. From the pleadings herein, the Claim was filed by the Union on behalf of their unionisable employees.*

*43. The Applicants are members of the Claimant’s Union, which the Respondents have not disputed. The question then is why the Applicants have been left out of the payment schedule.*

*44. In the circumstances, it important that the Applicants be part and parcel of the members being paid out the moneys paid by the Respondents in Main Claim. I therefore find the application has merit and I allow it. I also allow the application in terms of the 2nd Respondent accounting for the money paid out by the 1st Respondent and to show how the Applicants have been included in the schedule.”*

63. It is worth noting that Mr. Nyabena for Claimant, Mr. Muchiri for Respondent and Ms Tuwot were all present in Court on 16<sup>th</sup> September 2020.

64. What is pending is therefore for the 1<sup>st</sup> Respondent in the application, East Africa Portland Cement Company Limited to comply with the Court order by demonstrating how the grievants represented by Ms. Tuwot have been included in the tabulation.

65. It is for this reason that I dismiss the application dated 29<sup>th</sup> June 2021.

66. All garnishees are discharged from these proceedings. Their costs of 25,000 each for 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> garnishees only will be recovered from the accounts of the Judgment Debtor that they hold.

67. No costs are payable to the 1<sup>st</sup> and 3<sup>rd</sup> Garnishees who did not respond to the application dated 29<sup>th</sup> June 2021.

68. There shall be no orders for costs of the applications dated 29<sup>th</sup> June 2021 and 9<sup>th</sup> July 2021 with respect to the substantive parties to this suit.

69. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 8<sup>TH</sup> DAY OF OCTOBER 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**