



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT**

**AT MOMBASA**

**CIVIL APPEAL NO. 16 OF 2020**

**ALI ISA OMAR.....APPELLANT**

**VERSUS**

**CAR AND GENERAL (TRADING) LIMITED.....RESPONDENT**

**RULING**

1. Vide its judgment dated 17<sup>th</sup> December 2020, this Court partly allowed the Appellant's appeal and awarded the Appellant a total of ksh.325,333, costs of the appeal and costs in the Court below. A decree was subsequently issued and sealed by the Court's Deputy Registrar on 11<sup>th</sup> June 2021.

2. On 10<sup>th</sup> March 2021, the Appellant filed a Party and Party Bill of Costs dated 5<sup>th</sup> March 2021, which is shown to have been taxed by the Court's Deputy Registrar on 4<sup>th</sup> June 2021 at ksh.218,385. A Certificate of Costs was duly issued thereupon.

3. On 18<sup>th</sup> June 2021, the Appellant filed an application for execution of decree, and subsequently warrants of attachment of movable property in execution of decree for money and warrants of sale in execution of decree for recovery of a total sum of ksh.545,718 were issued to Autoland Auctioneers.

4. On 8<sup>th</sup> July 2021, the Respondent filed a Notice of Motion dated the same date (8<sup>th</sup> July 2021) under a Certificate of Urgency seeking, *inter alia*, leave to effect change of advocates. The Court granted leave to the Respondent to change Advocates and issued a temporary stay of execution pending inter-partes hearing of the application on 15<sup>th</sup> July 2021.

5. On 15<sup>th</sup> July 2021, the Respondent was granted leave to amend the Notice of Motion, and an amended Notice of Motion, dated 15<sup>th</sup> July 2021, was filed on 16<sup>th</sup> July 2021. That is the application before me. the Respondent seeks the following orders:-

**a) that pending hearing and determination of this application inter-partes, this Honourable Court be pleased to grant orders restraining Messrs Autoland Auctioneers from attaching, seizing and/or selling the Respondent/Applicant's property.**

**b) that this Honourable Court be pleased to nullify, withdraw and recall the warrants of attachment issued on 22<sup>nd</sup> June 2021 and all subsequent proceedings instituted pursuant to the said warrants of attachment.**

**c) that this Honourable Court be pleased to declare the judgment as fully settled upon payment of the decretal sums after deductions of statutory deductions set by law.**

6. The Appellant filed a Replying affidavit on 22<sup>nd</sup> July 2021, in opposition of the said application, and the Respondent/Applicant filed a supplementary affidavit on 16<sup>th</sup> August 2021.

7. Both parties filed written submissions on the application pursuant to the Court's directions in that regard.

8. The Respondent/Applicant's argument is that pursuant to this Court's judgment awarding the Appellant ksh.325,333, and before filing and taxation of the Party and Party Bill of Costs, the Appellant's advocates tabulated and stated the Appellant's costs at ksh.192,625. That the Respondent agreed to pay the said stated costs and the judgment sum, **less statutory deductions**, and forwarded cheques to the Appellant's Advocates, who subsequently returned the cheques to the Respondent's advocates and filed a Party and Party Bill of Costs in Court for taxation.

9. The Appellant/Respondent deponed, and submitted that the cheques were returned because the Respondent/Applicant deducted ksh.97,600 from the judgment sum and declined to explain the deductions despite requests by the Appellant's advocates. That a Party and Party Bill of Costs was then filed and subsequently taxed. Execution proceedings followed, forcing the Respondent/Applicant to file the present application.

10. Having considered the application, the affidavits and submissions filed, it is clear that parties are only disputing over which amount is subject to statutory deductions, the extend of such deductions, and the formula applicable in calculating the statutory deductions.

11. Section 49(2) of the Employment Act 2007 provides:-

*“any payments made by the employer under this section shall be subject to statutory deductions.*

12. The Court of Appeal had the following to say in the case of **Kioko Joseph (suing as the legal representative of the Estate of Joseph kilinda) –vs- Bamburi Cement Ltd [2017] eKLR:-**

*“Section 19(1) of the Employment Act allows an employer to make deductions which are authorized by any written law from an employee's salary. The authorized deductions include statutory deductions on damages issued for wrongful termination as envisaged under Section 49 of the Employment Act...*

*Furthermore, Section 37(1) of the Income Tax Act requires an employer paying emoluments to an employee to deduct therefrom, and account for income tax thereon, to such extent as may be prescribed...”*

13. In finding that the entire global award was subject to taxation, the Court of Appeal cited its own decision in the case of **Directline Assurance Co. Ltd –vs- Jeremiah Wachira Ichura [2016] eKLR** where it was held:-

*“it is trite law that any Lumpsum payment for say, terminal dues, is subject to statutory deductions for the years taken into account. Indeed in Simon Deakin and Gilian S. Morris, Labour Law at page 405, the writers observe that it is the net salary, salary after deduction of income tax, National Insurance Contribution and contribution to pension schemes or similar benefits that is used to compute any damages due to any employees...”*

14. It follows, therefore, that the award of ksh.325,333 made by this Court in favour of the Appellant is subject to statutory deductions. This Court (Ndolo, J) pointed to that requirement at paragraph 11 of its judgment herein dated 17<sup>th</sup> December 2020. If parties herein cannot agree on the extent of such statutory deductions or the applicable formula in calculating the same, they may seek guidance and/or assistance from Mombasa Area and/or Regional Kenya Revenue Authority Office on the issue.

15. The Respondent/Applicant insists that the statutory deductions deductible amount to Ksh.97,600, which it alleges to have forwarded to Kenya Revenue Authority, a fact that the Appellant disputes. Whether forwarded or not, let the issue of the amount of statutory deductions deductible from the judgment sum be ascertained by the Kenya Revenue Authority if parties and/or their advocates cannot agree on the same.

16. Save for the disputed amount of statutory deductions stated in paragraph 15 of this Ruling, the remaining part of the judgment sum, plus Party and Party costs as taxed and certified by the taxing officer, may be the subject of execution proceedings, if not paid.

17. Rule 32 of the Employment and Labour Relations Court (Procedure) Rules 2016 provides:-

**1) “the Registrar shall issue an order in execution of a decree.**

**2) Rules on execution of an order or decree shall be enforceable in accordance with Civil Procedure Rules.”**

18. Execution of this Court's decree has already commenced against the Respondent/Applicant pursuant to an application made by the Appellant/Respondent in that regard. In view of my finding at paragraphs 15 and 16 of this Ruling, the warrants of attachment and sale dated 22<sup>nd</sup> June 2021 are hereby recalled and cancelled. The Appellant may file a fresh application for execution of decree, excluding the aforesaid disputed amount of statutory deductions.

19. The amended Notice of Motion dated 15<sup>th</sup> July 2021 partly succeeds in the foregoing terms only. Each party to bear its own costs of the application.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 2<sup>ND</sup> DAY OF DECEMBER 2021**

**AGNES KITIKU NZEI**

**JUDGE**

**ORDER**

In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this ruling has been delivered via Microsoft

Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

**AGNES KITIKU NZEI**

**JUDGE**

Appearance:

Ms. Rotich for Appellant/Respondent

Mwawasaa Respondent/Applicant