



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 196 OF 2019

ROBERT ANGULU ANYANGU.....CLAIMANT

VERSUS

BOARD OF DIRECTORS

OF POTTERHOUSE SCHOOL LIMITED.....1ST RESPONDENT/APPLICANT

POTTERHOUSE SCHOOL LIMITED.....2nd RESPONDENT/APPLICANT

AND

GENERAL RIFT VALLEY AUCTIONEERS.....2nd RESPONDENT

RULING

1. On 12.6.2019, the parties herein through their counsel recorded a consent judgment in favour of the claimant in the following terms:
 - (a) Severance pay of Kshs. 1,239,280
 - (b) Unpaid salary of Kshs. 885,200
 - (c) Kshs. 214000 to be deducted from the above dues as a liability to the respondent.
 - (d) The net payment to be paid to the claimant within 15 days and in default execution to issue.
 - (e) Certificate of service to issue to the claimant.
 - (f) Each party to bear own costs of the suit.
2. The respondent paid the said agreed sum less statutory deductions and SACCO loan of Kshs. 168,293. According to the respondent the net payable was Kshs. 1,075,648 and they paid the claimant on 27.6.2019 through his salary account number 2037990313 at Barclays Bank of Kenya, Limited.
3. The Claimant was aggrieved by the respondent's decision to pay the said money through his account as opposed to paying through his lawyer, and also protested the amount paid as being less than the expected amount. After exchange of correspondences he instructed his counsel to execute the decree on ground that the respondent had failed to comply with the consent judgment.
4. On 8.7.2019 the auctioneers proclaimed goods belonging to the respondents in execution of the principal judgment debt plus interest and further demanded auctioneer's charges and fees amounting to Kshs. 980,000. As a result the respondents filed the Notice of Motion dated 9.7.2019 seeking the following orders:-
 - (a) Spent
 - (b) Spent
 - (c) The proclamation by General Rift Valley Auctioneers dated 8.7.2019 be nullified.

(d) The court be at liberty to make any further orders in the interest of justice.

(e) Mr. David Okoyo Ondieki, the Advocate for the claimant be held personally liable to bear the costs of the auctioneer on a full indemnity basis.

5. The application is premised on grounds set out in the body of the motion and the supporting affidavit sworn by Mr. Caxtone P. Kigata sworn on 9.7.2019. In brief the respondents contend that they fully settled the decreed sum through the claimant's account at Barclays Bank of Kenya on 27.6.2019 less statutory deductions and SACCO loan of Kshs. 168,293/- he owed to Porterhouse SACCO Limited; that on 28.6.2019, their advocate informed the claimant's advocate via email and whatsapp that the decreed sum was fully paid less the said deductions but the claimant's counsel proceeded to send auctioneers to execute; and that the court should invoke its inherent power to prevent an injustice because the proclaimed goods are tools of trade for the school.

6. The claimant and the Auctioneers opposed the application vide the Replying Affidavit sworn by their counsel on 15.7.2019. In brief they contend that on 12.6.2019 a consent judgment was entered for the claimant in the sum of Kshs. 1,910,480 payable within 15 days but the respondents paid only Kshs. 1,075,648 claiming the same to be final payment; that the payment was made by RTG to the claimant's account contrary to the claimant's Advocates letter dated 20.5.2019 which notified the respondent's advocate that the claimant had given instructions that the decreed sum be paid through his advocate's bank account; that the amount paid did not amount to full settlement of the decreed sum even if the same was subjected to statutory deductions; that the payment ought to have been made through the claimant's counsel in order for him to verify the figures; that the payment of the decreed sum directly to the claimant amounted to professional disrespect to the claimant's counsel by the respondent's counsel.

7. The issues for determination arising from the application affidavits and the written submission are:

- a) Whether the decreed sum was fully settled before the execution was instituted.
- b) Whether the execution should be nullified
- c) Who should pay the auctioneers fees and charges.

(a) Whether the decree fully was settled before the execution

8. I have already set out the terms of the consent judgment herein above as:

Severance pay	Ksh. 1,239,280
Salary	<u>Ksh. 885,200</u>
	Ksh. 2,124,480
Less Liability	<u>.Kshs. 2140.00</u>
	<u>Kshs. 1910480</u>

I take judicial notice that the employer was bound to pay the said Kshs. 1,910,480 less statutory deductions including Government tax, Pensions, NHIF and NSSF plus any other deductions authorized under section 19 of the Employment Act.

9. In this case the respondent contended that the payment of Ksh. 1,075,648 constituted a full settlement of the decreed sum less statutory deductions and SACCO loan of Ksh. 168,293/- . The burden of proof is on the respondents to justify the Kshs. 1,075,648/- as full settlement by setting out a detailed calculation of the statutory deductions they factored in reducing the decree sum of Kshs. 1,910,480/- to Kshs. 1,075,648/- . In addition the respondents are obligated to prove that the alleged statutory deductions they factored in fell within the four walls of Section 19 of the Employment Act.

10. After careful consideration of the correspondences annexed to the supporting affidavit, I am satisfied that the respondent did not discharge the said burden of proof before the execution was done. All what their counsel repeatedly told the claimant's counsel through emails and letters, is that the Kshs. 1,075,648/- was the full settlement after statutory deductions and SACCO loan of Kshs. 168,293/-. They never bothered to provide a schedule of the said statutory deductions or at least an itemized payslip to the claimant or his counsel

11. It is only after the execution was done and direction given by this court when the respondent wrote the letter dated 16.7.2019 to the claimant's counsel and copied to the court detailing the deductions made from the decreed sum and even provided an itemized payslip of how the decreed sum was reduced to the net of Kshs. 1,075,648/- There is no doubt from the letter dated 16.7.2019 and the payslip for June 2019 that the said Kshs. 1,075,648/- was indeed the full settlement of the decree herein and it was done on 27.6.2019 before the execution was done on 8.7.2019

(b) Whether the execution should be nullified

12. It is obvious that upon settlement of the whole decree of the court herein, no execution can issue against the judgment debtor. I therefore nullify the execution proceedings herein and recall the warrants of execution issued to General Rift Valley Auctioneers.

(c) Who pays the auctioneer's fees and charges

13. It is clear from the material presented to the court that the execution process was provoked by payment of Kshs. 1,075,648/- to the claimant without particulars of how it was arrived at and without any itemized payslip being issued to the claimant or his counsel. As such, after careful evaluation of the affidavits, submission and the letters by the defence counsel dated 16.7.2019, I must return that the execution was necessitated by respondents' failure to provide the particulars of how the sum of Kshs. 1,075,648/- was arrived at as the full settlement of the decreed sum. Consequently, I decline to condemn the claimant's counsel to personally pay the auctioneer's fees and charges. On the contrary I order the respondent /judgment debtors to pay the auctioneers fees and charges to be agreed on or taxed.

14. In conclusion, the application succeeds save for the issue of auctioneers' fees and charges which shall be borne by the respondents. There shall be no order as to costs of the application.

Dated, signed and delivered in open court at Nairobi this 31st day of January 2020.

ONESMUS N. MAKAU

JUDGE