



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAKURU**

**CAUSE NO.259 OF 2015**

**JANE JEROTICH SIRMA.....CLAIMANT**

**VERSUS**

**POSTAL CORPORATION OF KENYA.....RESPONDENT**

**RULING**

The ruling herein relate to two applications one dated 25<sup>th</sup> November, 2019 by the respondent and another dated 5<sup>th</sup> December, 2019 by the claimant.

The respondent, Postal Corporation of Kenya filed application dated 25<sup>th</sup> November, 2019 seeking for orders that there be stay of execution of the court judgement and decree dated 17<sup>th</sup> November, 2017; there be unconditional release of motor vehicle KAD 294M seized by M/S Legacy Auctioneers Services on 15<sup>th</sup> November, 2019 following instructions by the claimant; the attachment be held illegal and in contravention of section 25 of the Postal Corporation Act; the claimant be held in contempt of court orders issued on 13<sup>th</sup> November, 2019 and be convicted for 6 months in jail and are liable to pay for loss and user of the attached motor vehicle.

The respondent is also seeking for orders that there be a review of the judgement dated 17<sup>th</sup> November, 2017 due to discovery that the claimant had been advanced a loan by the respondent on account of being an employee and has since the filing of the claim failed to meet her obligation to repay the monthly instalments and thus has an outstanding sum due; the claimant be held liable to pay the due loan in full at ksh.323, 136 and the same be deducted from the judgement award herein.

Other orders sought are that the court does direct that the claimant is not entitled to the costs until the notice of objections to taxation is determined. The proclamations, warrants or attachments and notification of sale by Legacy Auctioneers Services over the respondent's property are set aside.

The application is supported by the annexed affidavit of John Tonui the General Manager/ Human Resource & Administration of the respondent and on the grounds that on 17<sup>th</sup> November, 2017 the court delivered judgement and awarded the claimant ksh.373, 805 and that salaries and house allowances from 3<sup>rd</sup> November, 2009 to 11<sup>th</sup> July, 2013 be tabulated and paid to the claimant as part of the decretal sum together with costs.

The total award came to ksh.1, 069,126 which the respondent did not dispute.

The part of the award for tabulation on house allowance was assessed at ksh.531,600. Following the court judgement which required further tabulation of dues to the claimant, the respondent paid the same in instalments when each amount was determined.

The claimant made application for execution of decree on 1<sup>st</sup> October, 2019 for a decree of ksh.1, 883,278 which the respondent has paid as follow;

Amount per judgement Ksh.373, 805

Less PAYE at Ksh.112, 141.50

Issued cheque number 061468 for ksh.261, 663.50 on 14<sup>th</sup> February, 2018.

The respondent has further paid as follows;

Amount per judgement Ksh.1, 364,438

Less PAYE Ksh.407, 923

Less outstanding loan amount Ksh.323, 136

Cheque Number 063718 Ksh.633, 378.60 on 18<sup>th</sup> October, 2019.

The loan amount was deducted as due and owing from the claimant as following the judgement of the court there was discovery that the claimant had an outstanding loan unpaid and upon delivery of judgement it is only fair that such debt be recovered from the award.

Mr Tonui also avers from his affidavit that the total amount paid to the claimant is Ksh.1,738,243 out of a total of ksh.1,883,278 the balance due being ksh.145,035 and there is goodwill to settle the same.

Upon the hearing of application date 11<sup>th</sup> November, 2019 the court allowed stay of execution to allow for service. The claimant was served through the advocates but preceded with execution in contravention thereof. The illegal execution of the respondent's property has caused loss and damage and should be penalised and punished for contempt.

In reply the claimant filed her Replying Affidavit and avers that a decree dated 11<sup>th</sup> March, 2019 issued awarding her ksh.1,974,531 with costs which were taxed at ksh.280,102 making a total of ksh.2,254,633 and of which the respondent has only paid ksh.1,278,631.40 leaving a balance of ksh.976,001.60.

Upon the delivery of ruling on taxation the respondent applied for a stay execution and was granted 45 days. On 22<sup>nd</sup> October, 2019 the respondent paid Ksh.633, 378.60 by cheque which was dishonoured due to insufficient funds but this was later replaced. The respondent alleged to have made a deduction of ksh.323, 136 on a purported house loan which amount was not part of the court award or decree.

The claimant also avers that on 29<sup>th</sup> October, 2019 there was application for execution by attachment and sale of the respondent's property and the court issued the warrants of attachment and sale on 5<sup>th</sup> November, 2019 to Legacy Auctioneers Services who proclaimed.

What the respondent purports to address now ought to have been by counter-claim which was not done. The same cannot be addressed post judgement as such would deny the claimant a fair chance to give her defence.

The respondent as aware that the claimant had applied for a house loan in the year 1997 and where there was a balance this was within the knowledge of the respondent and not a new discovery post judgement. Such matter is brought with undue delay and should be disregarded.

The claimant also avers that by letter dated 15<sup>th</sup> November, 2019 Legacy Auctioneers service were informed that motor vehicle number KAD 294M had been attached in the morning and that by the time they were served with the court order on stay of execution the vehicle had been attached. There is no contempt of the court orders.

The respondent is not offering any security for the orders sought to issue and the application made should be dismissed with costs.

With regard to application by the claimant by application dated 5<sup>th</sup> December, 2019 is seeking for orders that;

*The decision of the taxing officer delivered on 10<sup>th</sup> September, 2019 on the Bill of Costs dated 4<sup>th</sup> April, 2019 is set aside and the bill of costs be remitted back for taxation before another taxing officer.*

The application is based on the claimant's affidavit and on the grounds that the bill of costs was taxed at ksh.280, 102 on 10<sup>th</sup> September, 2019 to which a notice of objection dated 24<sup>th</sup> September, 2019 was filed contesting the same under the provisions paragraph 11(1) of the Advocates (Remuneration) Order and requested for reasons of the taxing officer on items 1 – 103. The taxing officer has neglected or refused to furnish the claimant was reasons for the decision.

Other grounds are that the taxing officer erred in law and in fact in taxing off items 2 – 13 on the grounds that they are provided for under item number 1. There was failure to tax items 14, 29, 31, 35, 59, 60, 64, 65, 70, 72, 73, 82, 83, 97, 98 and 102 amounting to Ksh.63, 050. Failing to tax item 15 at ksh.1, 400 on the grounds that service was effected at Nakuru whereas this was done at Nairobi.

The taxing officer failed to award costs to the claimant fees for getting up to prepare for trial and failing to tax off items 22, 24, 27 and 39 on the grounds that these are not on the record. Failing to tax off items 53, 90, 93, 94, 99 and 103 on the grounds that these are not spent and not on the court file. Items 21, 26, 77 and 89 are wrongly taxed at ksh.1, 100 as well as items 45, 57, 59, 67, 81 and 88 at ksh.2, 300.

The claimant in her affidavit avers that the taxing officer erred in law and in fact in failing to appreciate the bill of costs in its totality and wrongly taxed off most items whereas some items had not been contested by the respondent. The total tabulation of the bill of costs was erroneous and should thus be referred to another taxing officer for taxation.

Both parties made oral submissions with regard to both applications

With regard to application dated 5<sup>th</sup> December, 2019 seeking to have another taxing master address tax the Bill of Costs 4<sup>th</sup> April, 2019 on the issues set out therein, the claimant having filed the Notice of Objections to the ruling of the taxing officer and in the claimant's affidavit having addressed the items to be addressed and the reasons thereof, the court finds it necessary that there is good justification to the Bill of costs being addressed by a different officer and who shall give reasons for the decisions taken.

The Bill of Costs dated 4<sup>th</sup> April, 2019 shall hereby be placed before a different taxing officer.

With regard to the application dated 25<sup>th</sup> November, 2019 it is trite that where costs are contested, execution cannot issue and to proceed with the same is irregular. Upon the Ruling of the taxing master with regard to the Bill of costs dated 4<sup>th</sup> April, 2019 delivered on 10<sup>th</sup> September, 2019 the claimant filed Notice of Objection to the same and set out several items said to be wrongly and improperly assessed and for this requested such costs be re-assessed by a different taxing officer. These objections have not been addressed and remain outstanding.

To thus move with execution on this basis, even where warrants were issued is irregular and contrary to the provisions of section 94 of the Civil Procedure Act. To proceed with taxation before the full costs can

be ascertained, an applicant must move the court and get leave to proceed in such manner.

*94. Where the High Court considers it necessary that a decree passed in the exercise of its original civil jurisdiction should be executed before the amount of the costs incurred in the suit can be ascertained by taxation, the court may order that the decree shall be executed forthwith, except as to so much thereof as relates to the costs; and as to so much thereof as relates to the costs that the decree may be executed as soon as the amount of the costs shall be ascertained by taxation*

In **Petition No.3 & 4 of 2019 Hosea Sitienei & another versus University of Eldoret & Others** the court held that Section 94 of Civil Procedure Act gives the court discretion to allow execution before taxation. Good reason(s) must be made for the court to allow such process. In **Bamburi Portland Cement Co. Ltd versus Hussein (1995) LLR 1870 (CAK)** the court stated that;

*Section 94 of the Civil Procedure Act requires that for execution of a decree before taxation leave must be obtained from the High Court, such leave may be sought informally at the time judgment is delivered but if that is not done then it must be made by way of a notice of motion. The motion must be served on the other party and heard inter parties. Order 21 Rule 7(4) of the Civil Procedure Rules purports to confer on the registrar and deputy registrar the power specifically given to High Court under section 94 of the Act. Rule 7(4) is clearly ultra vires section 94 of the Act because the section reserves that power exclusively to the High Court.*

In this regard therefore, the entire execution proceedings initiated by the claimant against the respondent pursuant to warrants obtained on 1<sup>st</sup> November, 2019 and Sale of property by Legacy Auctioneers services on 5<sup>th</sup> November, 2019 while the claimant was well aware that there were objections to the taxation of the Bill of Costs and which had not been determined was irregular and unlawful.

For the illegality in the execution process, this is set aside. The attendant costs incurred by the respondent shall be met by the claimant. The loss and damage not outlined, only costs for attending these proceedings are due.

The other issue which has arisen is the attachment of the respondents property followed issuance of court orders stopping the same. The claimant argument is that the orders of stay were served after warrants of attachment had issued in the morning.

As noted above, the entire process of execution negated, the same being unlawful cannot be justified by any other means to sanitise it. Where the claimant proceeded through an illegality to execute, there being court orders stopping such execution, to proceed and rationalise that service was effected after the fact is to confirm contempt

The respondent shall assess the due loss for loss of user of the attached motor vehicle KAD 294M and have these costs and losses addressed accordingly.

With regard to the review of the court judgement delivered on 17<sup>th</sup> November, 2017 to include and take into account the house loan advanced to the claimant while in the employment of the respondent and which loan has not been settled in full the claimant has contested this on the grounds that the respondent had knowledge she had a house loan unpaid and should have filed a counter-claim which was not done. However, an employer is allowed under the provisions of section 17 of the Employment Act, 2007 (the Act) to made a salary deduction from an employee's salary where there is payment of monies in excess and there is need for recovery of the same.

The provisions of section 17 of the Act should also be read together with section 19 of the Act and which allow the employer to make all lawful deductions allowed by agreement, contract and or authorised by written law.

*(1) Notwithstanding section 17(1), an employer may deduct from the wages of his employee—*

...

*(f) any amount the deduction of which is authorised by any written law for the time being in force, collective agreement, wage determination, court order or arbitration award;*

*(g) ...*

*(h) an amount due and payable by the employee under and in accordance with the terms of an agreement in writing, by way of repayment or part repayment of a loan of money made to him by the employer, not exceeding fifty percent of the wages payable to that employee after the deduction of all such other amounts as may be due from him under this section; and*

where the claimant had obtained a house loan from the respondent upon terms and conditions agreed upon, at the end of her employment with the respondent, such became due. all lawful dues owing to the employer became lawfully due at the end of employment and any terminal dues payable to the claimant should factor the provisions of section 17, 19 and 49(2) of the Act with regard to due deductions, the allowed deductions and the statutory deductions.

Such are not matters ordinarily gone into in counter-claims. these are lawful deductions the employer is allowed to effect from an employee. If not recovered during employment, before payment of terminal dues, such owing monies are to be recovered.

In the tabulation of final award and dues owing to the claimant and payable by the respondent as the employer, the due house loan unpaid and having been obtained in the course of employment with the respondent is lawfully recoverable.

Terminal dues

Total Judgement award;

Total salaries + allowances assessed;

Total Costs awarded;

Less statutory deduction in accordance with section 49(2) of the Employment Act, 2007;

Less owing dues from the claimant;

Less what the respondent has paid to the claimant of the judgement amount; and

Total dues.

The claimant has not denied owing the respondent but has not offered to settle such outstanding house loan through any other means. The debt owing is legally due for recovery before the award payable by the respondent to the claimant can be paid.

**Accordingly, the following orders issues;**

**(a) application dated 5<sup>th</sup> December, 2019 is hereby allowed to the extent that the Bill of costs dated 4<sup>th</sup> April, 2019 shall be placed before another Taxing Officer for taxation and who shall give reasons for the same;**

**(b) Application dated 25<sup>th</sup> November, 2019 is hereby allowed in the following terms;**

**(i) The execution process herein is unlawful and thus irregular;**

**(ii) The warrants issued for the attachment of the respondents property are hereby struck out;**

**(iii) The respondent shall assess the loss in the non-user of attached motor vehicle KAD 294M from the date of irregular attachment until release and address accordingly;**

**(iv) The recovery of house loan [Ksh.323, 136] and other debts owing from the claimant to the respondent from her employment with the respondent is lawful and appropriate. These shall be factored in the payment of dues and award of the court;**

**(v) For completeness, the claimant shall await the taxation process to conclude and on the issued decree the respondent shall pay the outstanding dues taking account of (b) (iv) above; and**

**(vi) Costs herein awarded to the respondent.**

**(c) File shall be placed with the Taxing officer.**

**Delivered at Nakuru this 6<sup>th</sup> day of February, 2020.**

**M. MBARU**

**JUDGE**

In the presence of: .....

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