



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

**CAUSE NUMBER 567 OF 2016**

**BETWEEN**

**BARET BOYO BURUDI .....CLAIMANT**

**VERSUS**

**OWL ALARMS [K] LIMITED.....RESPONDENT**

**AND**

**PRIME BANK [K] LIMITED .....INTERESTED PARTY**

**RULING**

1. Judgment was delivered in favour of the Employee/Claimant herein, against his Employer/ Respondent, for terminal benefits and compensation for unfair termination, amounting to Kshs. 90,461, on 9<sup>th</sup> March 2018.

2. 1 year later, the Judgment remains unsatisfied. The Claimant commenced execution proceedings. Costs were certified, and together with interest, bring the total decretal sum to Kshs. 218,437.

3. 2 Applications have been filed subsequently with regard to execution. The 1<sup>st</sup> was filed by the Claimant, asking for garnishment of money held by Prime Bank in Respondent's account, in satisfaction of the decree. Claimant's Application is dated 3<sup>rd</sup> December 2018. Order nisi issued on 3<sup>rd</sup> December 2018.

4. Prime Bank filed a Replying Affidavit sworn by Shaina Osman, Nyali Branch Manager, on 19<sup>th</sup> February 2019. The Bank confirms it holds money in Respondent's account, sufficient to satisfy the decree, and shall abide by any orders made by the Court.

5. The Respondent filed an Application on 13<sup>th</sup> December 2018, asking the Court to stay execution of decree, set aside Judgment on record, and grant the Respondent leave to respond to the Claim. The Respondent relies on the Affidavit of General Manager Tony Manali, sworn on 11<sup>th</sup> December 2018. Its position is that it became aware of the existence of the Claim, only upon being served with the order nisi on 4<sup>th</sup> December 2018. The person alleged to have received summons on behalf of the Respondent, Susan Ndishu, was unknown to the Respondent. Service did not conform to the procedural rules pertaining to service on corporates. The Respondent has a good Response which raises triable issues.

6. The General Manager also swore an Affidavit in responding to the Claimant's application for garnishment. The Affidavit was filed on 18<sup>th</sup> December 2018. He repeats the position in the earlier Affidavit, which is, that service was irregular, or did not take place at all. It is the General Manager's position that the Claimant did not issue 10 days' notice of entry of Judgment; there was no service of draft decree; no bill of costs was filed; certificate of costs was not forwarded to the Respondent for approval; and the execution process was irregular. The General Manager filed a Further Affidavit on 14<sup>th</sup> January 2019, buttressing the earlier Affidavits.

7. Parties agreed on 20<sup>th</sup> December 2018 to have the 2 Applications considered and determined on the basis of their Affidavits and Submissions. They confirmed filing of Submissions on 20<sup>th</sup> February 2019.

**The Court Finds:-**

8. The Respondent is not truthful in holding that it was not served with Summons, Statement of Claim, and other Notices requiring Court

attendance.

9. The Court has reached this view upon careful review of its proceedings. On 28<sup>th</sup> September 2017, the Claim was set down for formal proof. In attendance was Ms. Kitoo Advocate holding brief for Ms. Odhiang' Advocate for the Claimant. In attendance also, was Mr. Nyongesa, Advocate for the Respondent. This was on 28<sup>th</sup> September 2017, before hearing took place, and long before Judgment was delivered, and execution proceedings commenced.

10. Mr. Nyongesa appeared next on 13<sup>th</sup> December 2018, to inform the Court that the Respondent had now filed the current Application, and its Advocates formally placed on record. 13<sup>th</sup> December 2018 is a notable date. This is when the Law Firm on record for the Respondent, Ameli Inyangu & Partners, filed its Notice of Appointment of Advocates. Hearing of the Application for garnishment was on the same date, 13<sup>th</sup> December 2018. Mr. Nyongesa must have appeared on instructions from the Law Firm Ameli Inyangu & Partners. It cannot be true as alleged by the General Manager at paragraph 9 of his Further Affidavit, that Mr. Nyongesa had no instructions.

11. If Mr. Nyongesa appeared for the Respondent on 28<sup>th</sup> September 2017, even without having been formally appointed, it would suggest that the Respondent was aware about the proceedings. An Advocate does not just appear in Court, even while not formally on record for a Client, without some form of communication with the Client. Why did not the Respondent raise the complaint about default of service, before the formal proof, its Advocate [perhaps not fully instructed or in plain terms, not paid legal fees] having been present when the date for formal proof was taken?

12. There is on record a Notice sent to the Respondent by the Court on 27<sup>th</sup> February 2018, indicating Judgment reserved for 20<sup>th</sup> March 2018, had been rescheduled for 9<sup>th</sup> February 2018. Is this Notice from the Court disputed?

13. Order nisi was served upon the same Officer of the Respondent named Susan, on 5<sup>th</sup> December 2018. The Respondent acknowledges receipt of order nisi, served upon the same Officer, but disputes employing such an Officer, when service of other relevant processes is concerned.

14. The Claimant was granted 6 months' salary in compensation for unfair termination. The draft Statement of Response does not disclose valid reason, or reasons justifying termination, warranting the Court to reopen proceedings. The Respondent admits that the Claimant worked from the year 2005 to 2015, but argues service was inconsistent, to allow the Claimant annual leave. This line of thinking is faulty, because in aggregate the Claimant worked for a number of years meriting conversion under Section 37 of the Employment Act. He would not be disentitled to annual leave, granted in the Judgment of the Court, on account of his irregular terms of service. Lastly, there was no notice or notice pay, given to the Claimant. Termination for whatever reason was abrupt. The Court has seen nothing in the draft Statement of Response, viewed against the orders of compensation equivalent to 6 months' salary, annual leave pay, and notice pay, which would qualify the Statement of Response as raising triable issues. There are no triable issues in the Statement of Response.

15. The Respondent alleges Notice of Judgment was served upon the Law Firm of Ameli Inyangu & Partners and was defective because this Firm was not on record for the Respondent. The Respondent disavows its Advocates and Employees whenever it is suitable to do so. No service is proper to the Respondent, whether made on its Advocates or Officers. The Court in any case notified the Respondent about the date of delivery of Judgment. No reason is given why the Respondent ignored the Notice from the Court. The decree was drawn, sealed and issued by the Deputy Registrar under Rule 31 of the Rules of this Court. There is no Rule shown to have been infringed, in execution of decree.

16. Prime Bank confirms there are sufficient funds, in Respondent's account, to satisfy decree.

IT IS ORDERED:-

- a. The Application filed by the Respondent on 13<sup>th</sup> December 2018 is rejected.**
- b. Order nisi granted in favour of the Claimant on 3<sup>rd</sup> December 2018, is confirmed.**
- c. Prime Bank shall release the garnished amount to the Claimant forthwith, in satisfaction of the decree.**
- d. Costs of garnishee proceedings to be paid to the Claimant and the Garnishee, by the Respondent.**
- e. Costs of the Application for setting aside Judgment to be paid to the Claimant by the Respondent.**

**Dated and delivered at Mombasa this 22<sup>nd</sup> day of March 2019.**

**James Rika**

**Judge**