



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE 12 OF 2017**

**(Before Hon. Justice Hellen S. Wasilwa on 6<sup>th</sup> March 2019)**

**JOHN BIY .....CLAIMANT**

**-VERSUS-**

**SETH PANYAKO.....1<sup>ST</sup> RESPONDENT**

**REGISTRAR OF TRADE UNIONS .....2<sup>ND</sup> RESPONDENT**

**KENYA NATIONAL UNION OF NURSES .....3<sup>RD</sup> RESPONDENT**

**AND**

**LOCAL AUTHORITIES PROVIDENT FUND**

**(LAPFUND) .....1<sup>ST</sup> INTERESTED PARTY**

**LAPTRUST (UMBRELLAS) RETIREMENT**

**FUND BOARD OF TRUSTEES.....2<sup>ND</sup> INTERESTED PARTY**

**AND**

**CO-OPERATIVE BANK LIMITED .....GARNISHEE**

**RULING**

**1. The Application before Court is the Notice of Motion dated 31/12/2018 wherein the Applicant seeks the following orders:-**

**1. *“THAT this application be certified as urgent, and be heard ex-parte in the first instance.***

**2. *THAT leave be granted for this application to be heard during this Court’s Vacation.***

**3. *THAT the Honorable Court do issue a Garnishee Order Nisi attaching the 3rd Respondent’s “Account Number 01120309515200” at Co-operative Bank, Agakhan Walk Branch Nairobi for payment of Kshs.1, 855, 000/= to the Claimant’s Account 01109182253100 Co-operative Bank Eldoret pending hearing and determination of the application.***

**4. *THAT the Honourable Court be pleased to issue a Garnishee Order absolute attaching Kshs.1, 855, 000/= together with Costs and interest at Court rates from the 3rd Respondent’s Account Number 01120309515200” at Co-operative Bank, Agakhan Walk Branch Nairobi being the amount in respect of which an order was given in favour of the Applicant/Claimant herein on 6th April, 2017 from June, 2017 upto December, 2018 and to continue paying the Applicant a sum of Kshs.105,000/- on a monthly basis when it is due pending hearing and determination of the Claim.***

**5. *THAT this Honourable Court do issue such Orders as it may deem fit and just to meet the ends of justice.***

6. *THAT the costs of this application be borne by the 1st and 3rd Respondents”.*

2. The Application is based on the grounds upon the face of this Application which are as follows:-

a. *THAT the Applicant is the National Chairman of the 3rd Respondent and by virtue of his position he is entitled to payment of monthly allowance of Kshs.80,000/- and airtime allowance of Kshs.5,000/= which has since been reviewed to Kshs.100,000/- and Kshs.5,000/- airtime allowance respectively per month.*

b. *THAT on 6th April, 2017 the Honourable Court gave the following orders:*

a. *THAT pending the hearing and determination of the main claim the claimant shall continue to receive his monthly allowances and any due benefits until lawfully exit from office.*

b. *THAT the disciplinary Notices issued to the Claimant culminating to this suit are hereby stayed pending hearing and determination of the main suit.*

c. *THAT the orders of 27th January, 2017 are hereby set aside.*

d. *THAT the parties shall comply with rule 14 of the Employment and Labour Relations Court Procedure Rules 2016 and proceed to take a mention date at the registry for the court to deal as under rule 15.*

e. *THAT costs be in the cause.*

c. *THAT the Court Order dated 6th April, 2017 was extracted and served upon the 3rd Respondent who has paid Kshs. 160,000/- as at May, 2017, but has failed, neglected, ignored, and/or refused to satisfy it in full, to pay the amount from June, 2017 onwards.*

d. *THAT from the month of November, 2017 the allowances of National Executive Committee Members of the 3rd Respondent were increased from Kshs.80,000/= per month to Kshs.100,000/= none the less the Airtime allowance remained Kshs.5000/=.*

e. *THAT the 3rd Respondent maintains an Account Number 01120309515200" at Co-operative Bank, Agakhan Walk Branch Nairobi with the Garnishee and the 1st Respondent is a signatory to the Bank Account.*

f. *THAT the Claimant is a family man with urgent financial needs like food, rent, school fees, and loans which he is unable to meet and is suffering loss and damages.*

g. *THAT since June, 2017 the Applicant has not been paid either his allowances or Airtime Allowance despite the Court Order being couched in mandatory terms that the Applicant ought to be paid the same by the 3rd Respondent on a monthly basis.*

h. *THAT to date the money due, owing and payable to the Applicant/Claimant by the 3rd Respondent is the sum of Kshs.1, 855, 000/=.*

i. *THAT the 3rd Respondent has no reason at all to withhold the Claimant's cash and is just being vindictive since no reason has been advanced by the 3rd Respondent to justify why it is withholding the Claimant's allowances now amounting to Kshs.1,855,000/= despite the Court Order.*

j. *THAT the 3rd Respondent has refused to pay the Applicant the aforesaid allowances yet the 3rd Respondent Union receives a monthly members subscription in excess of Kshs. 6,000,000/= and the refusal to pay the Applicant the aforesaid allowances is intentional, ill intended, purposeful and not for lack of funds and is inexcusable and unacceptable and tantamount to utter disregard to this Court's Orders.*

k. *THAT the 3rd Respondent has been acting with impunity, disobeying Court orders and expressing open defiance and the most obvious case in issue is the disobedience of the Court order of 6th April, 2017 and it is only fair and just that this Honourable Court do proceed to issue Garnishee orders to the Garnishee to facilitate compliance of the Court Orders issued against the 3rd Respondent.*

l. *THAT it is meet and just that the Honourable Court upon hearing this application do proceed to issue an order to compel the Garnishee to release to the Applicant the amount held by it in trust for the 3rd Respondent herein.*

m. *THAT the prayers sought will not in any way be prejudicial to the 3rd Respondent whereas the Applicant/Claimant continues to suffer severe financial difficulties due to the non payment of allowances to the Claimant by the 3rd Respondent to comply with the Court Order.*

n. *THAT the no-payment and disobedience of the Court orders issued on the 6th April, 2017 by the 3rd Respondent has been done with malice, bad faith, ill intent, ill motive with the major driving factor being to frustrate and paralyse the Applicant/Claimant financially to the extent that the Claimant cannot be able as a result to take care of his day to day needs and provide for his family since this is one of his main source of income.*

***o. THAT it is meet and just that the orders given and issued by this Honourable Court on 6th April, 2017 be obeyed by enforcement to avoid future disobedience.***

3. The Application is further supported by the Supporting Affidavit sworn by John K. Biiy deponed to on 31/12/2019 on the grounds above.
4. The 1<sup>st</sup> and 3<sup>rd</sup> Respondent opposed the above application and filed their Grounds of Opposition on 22/1/2019. They raise the following grounds:-

***1. "THAT, the 1<sup>st</sup> and 3<sup>rd</sup> Respondent denies each and every averment contained in the Claimant's Application dated 23<sup>rd</sup> November, 2018 unless expressly admitted herein.***

***2. THAT the 1<sup>st</sup> and 3<sup>rd</sup> Respondent are fully seized with the matters relating the instant proceedings.***

***3. THAT, the Respondent has read and understood the contents of the Notice of Motion Application dated 31<sup>st</sup> December, 2018 together with the Supportive Affidavit sworn on the same date by one Mr. John K. Biiy to which we wish to respond to as follows:***

***4. THAT, the 1<sup>st</sup> and 3<sup>rd</sup> Respondent are strangers to the averments made at paragraph "a" as the Claimant lacks the locus standi because he was procedurally and lawfully expelled from office of the 3<sup>rd</sup> Respondent therefore he is neither the chairman, member or an employee 3<sup>rd</sup> Respondent and does not have the mandate to sue or institute this suit.***

***5. THAT, the National Executive Council of the 3<sup>rd</sup> Respondent held a meeting on 15<sup>th</sup> June 2017 and after deliberating on numerous charges against the Claimant, resolved to expel him from his positions as Chairman of the 3<sup>rd</sup> Respondent and as a Branch Secretary of Uasin-Gishu Branch of the union for a period of 20 years which material facts the Claimant failed to disclose to the Court.***

***6. THAT, on 19<sup>th</sup> June 2018, the 3<sup>rd</sup> Respondent wrote to the 2<sup>nd</sup> Respondent (Registrar of Trade Unions) requesting for change of Names of officials in Form Q to conform to the changes made on 15<sup>th</sup> June 2017 whereby the Claimant had been removed from his positions, (Annexed and Marked SP-1 is a copy of the letter dated 19<sup>th</sup> June 2017 together with Form Q attached in the list of documents dated 4<sup>th</sup> January 2019).***

***7. THAT, on 20<sup>th</sup> June 2017, the 2<sup>nd</sup> Respondent wrote to the Attorney General seeking for interpretation and advice regarding the ruling and orders issued by the court as specified in the letter. (Annexed and Marked SP-8 is a copy of the letter dated 20<sup>th</sup> June 2017 in the list of documents dated 4<sup>th</sup> January 2019).***

***8. THAT, on 21<sup>st</sup> June 2017, the 2<sup>nd</sup> Respondent wrote to the 3<sup>rd</sup> Respondent relaying the opinion of the Attorney General regarding the orders of the Court issued on 6<sup>th</sup> April 2017, which opinion the 3<sup>rd</sup> Respondent did not agree with.***

***9. THAT, the 1<sup>st</sup> Respondent being unsatisfied by the interpretation of Court on the ruling of 6<sup>th</sup> April moved to the Court to review and clarify her orders in the said ruling. The Court held as follows in her review dated 7<sup>th</sup> November 2017:-***

***1. "THAT, on the Court clarification the Respondent are not barred from taking any action on Claimant.***

***2. THAT, the ruling dated 6/4/2017 is not a super injunction.***

***3. THAT, the Claimant shall serve the 1<sup>st</sup> Respondent and 2<sup>nd</sup> Respondent with the application.***

***4. THAT, a hearing date shall be allocated at the registry on priority basis.***

***5. THAT, 1<sup>st</sup> Respondent shall aid Justice and take service personally.***

***6. THAT on the ruling of 6/4/2017 the Court refer parties to order (d) and deal as appropriate.***

***(Annexed and Marked SP-9 is a copy of the order dated 8<sup>th</sup> day of November 2017 in the list of documents dated 4<sup>th</sup> January 2019).***

***10. That, upon review and/or clarification in paragraph 9 above of the orders of 6<sup>th</sup> April 2017, the only order that was retained is order (d) as specified in the ruling of 6<sup>th</sup> April 2017, hence orders a, b and c stood vacated.***

***11. THAT, the 3<sup>rd</sup> Respondent wrote to the 2<sup>nd</sup> Respondent on 8<sup>th</sup> November 2017 forwarding the orders of the Court issued on 8<sup>th</sup> November 2017 clarifying orders of 6<sup>th</sup> April 2017, (Annexed and marked SP-10 is a copy of the letter dated 8<sup>th</sup> November 2017 in the list of documents dated 4<sup>th</sup> January 2019).***

***12. THAT, upon receipt of the letter by the 3<sup>rd</sup> Respondent dated 8<sup>th</sup> November 2017, the 2<sup>nd</sup> Respondent wrote to the 3<sup>rd</sup>***

*Respondent notifying her of having registered the changes of officers covering the appointments made on 15<sup>th</sup> June 2017, (Annexed and Marked as SP-12 in the list of document dated 4<sup>th</sup> January 2019 is a copy of the letter dated 10<sup>th</sup> November 2017 together with extract in respect of the changes showing that the position of the National Chairman formerly held by the Claimant was vacant).*

**13. THAT, the Claimant did not challenge his removal from office through the 3<sup>rd</sup> Respondent's internal mechanism as provided under Chapter XXI 1 (a, b) 3 of the 3<sup>rd</sup> Respondent Constitution which states inter alia:-**

**1. A member of the council or an officer may be interdicted, suspended or expelled from the Union as may be determined by the National Executive/Governing Council if:**

**a) She/he fails within 14 days of demand in writing by the General Secretary to pay subscription which are more than 6 months in arrears or, he infringes any of the terms & conditions of this Constitution or acts in manner which is detrimental to the interests of the Union provided that any member or officer interdicted, suspended or expelled shall have the right to appeal against such suspension or expulsion to the first National Governing Council following such actions by the National Executive/Governing Council.**

**b) Notice of an appeal shall be forwarded or handed to the General Secretary in writing within 14 days of the date on which the decision of the National Executive/Governing Council was communicated to the member or officer concerned.**

**3. A member of the council or an official who has appeared before the National Executive Council in accordance with subsection (1) (b) of this chapter shall, if he is dissatisfied with the decision of the National Executive Council and has lodged an appeal in the manner provided have the right to re-state his/her case at the National Governing Council when the matter shall be considered.**

**14. THAT, the claimant did not challenge his removal from office in accordance with the provisions of Section 30 of the Labour Relations Act, 2007 by which the decision of the Registrar of Trade Unions (2<sup>nd</sup> Respondent) registered the changes of removing him from the office which he should have been appealed to the Employment and Labour Relations Court within thirty (30) as provided for inter alia:-**

Section 30.

Any person aggrieved by a decision of the Registrar **made under this Act may** appeal to the Industrial Court against that decision **within thirty days of the decision.**

**(Underline are my own emphasis)**

**15. THAT, on the averments by the Claimant in paragraph "d" the 1<sup>st</sup> and 3<sup>rd</sup> Respondent denies the same as the 3<sup>rd</sup> Respondent does not pay any allowance/s to her NEC members but rebates commensurate to the official undertakings at their respective Branches and which must always be accounted for and the Union is therefore stranger to any increase in allowances in terms of the figures given and without any documented justification.**

**16. THAT, the 1<sup>st</sup> and 3<sup>rd</sup> Respondent declines the Garnishee being a signatory to the 3<sup>rd</sup> Respondent's Bank account but a custodian of the said account which it keeps on its behalf and contends to the averments on paragraph "e" only to the extent that the 1<sup>st</sup> Respondent is a mandatory signatory to the Account.**

**17. THAT, the 1<sup>st</sup> and 3<sup>rd</sup> Respondent are strangers to the Claimant's averments in paragraph "f" as the Claimant is neither an official, a member or an employee.**

**18. THAT, 1<sup>st</sup> and 3<sup>rd</sup> Respondent are strangers to the Claimant's averments in paragraph "g" the Claimant was paid all allowances due to him upto the time he was procedurally removed from office, (Annexed herewith are copies of payment vouchers marked SP-13 in the list of documents dated 4<sup>th</sup> January 2019).**

**19. THAT, 1<sup>st</sup> and 3<sup>rd</sup> Respondent are strangers to the Claimant's averments in paragraph "h", "i" and "j" and puts the Claimant to strict proof.**

**20. THAT, 1<sup>st</sup> and 3<sup>rd</sup> Respondent are strangers to the Claimant's averments in paragraph "k" and avers that the 3<sup>rd</sup> Respondent has always obeyed and complied to the Court orders served upon it from time to time and will religiously comply to the orders of this Honourable Court hence puts the Claimant to strict proof.**

**21. THAT, flowing from the above chronology of events, the claimant deliberately withheld material facts from the court which if they were disclosed the orders of 2<sup>nd</sup> January 2019 could not have been issued.**

**22. THAT, the 1<sup>st</sup> and 3<sup>rd</sup> Respondent declares that the orders of 2<sup>nd</sup> January, 2019 were fraudulently obtained by the claimant through misrepresentation and material non-disclosure.**

23. **THAT, the 1<sup>st</sup> Respondent has filed a Notice of Preliminary Objection dated 18<sup>th</sup> December, 2018 to the claimant's claim hence the Claimant's present application is in bad faith and an abuse of Court process which facts were not disclosed to the Court.**

24. **THAT, the claimant has not disclosed the Honourable Court that he alongside his allies has fraudulently diverted the 3<sup>rd</sup> Respondent funds through Eco Bank Account No.0073205026433901 amounting to Ksh. 9,686,463.15 to which he is a signatory, (Annexed and Marked SP-14 is Statement of Account from Ecobank in the list of documents dated 4<sup>th</sup> January 2019).**

25. **THAT, the Claimant did not disclose to the Court that he further fraudulently diverted the 3<sup>rd</sup> Respondent's funds to another fraudulent Account No. 1004699676 through NIC Bank amounting to Ksh.480,937.55 in his and his friends name at the NIC Bank, (See a copy of statement from NIC Bank marked SP-15 in the list of documents dated 4<sup>th</sup> January, 2019).**

26. **THAT, the Claimant's exhibit marked as "JKB 1 ( c )" is a misleading material and that the Uasin Gishu Branch of the 3<sup>rd</sup> Respondent was procedurally dissolved by Union and that the 2<sup>nd</sup> Respondent completed the process on 10<sup>th</sup> April, 2018 (See a copy of the letter dated 10<sup>th</sup> April, 2018 by the 2<sup>nd</sup> Respondent marked as "SP- A" herein).**

27. **THAT, it is the averment of the 1<sup>st</sup> and 3<sup>rd</sup> respondents that the said Orders of 2<sup>nd</sup> January, 2019 were issued in contravention of Order 40 Rule 6 of the Civil Procedure Rules as the Order which was issued on 6<sup>th</sup> April, 2017 and relied upon by the Claimant's instant application which lapsed on 6<sup>th</sup> April 2018 as provided for under Order 40 of the Civil Procedure Rules 6 which provide inter alia: -**

**"Where a suit in respect of which interlocutory injunction has been granted is not determined within a period of 12 months from the date of grant, the injunction shall lapse unless for any sufficient reason the court orders otherwise".**

28. **THAT, this application offends the provisions of Order 23 of the Civil Procedure Act CAP 21 of 2012 which provides as follows:-**

**1. (1)"A Court may, upon the ex parte application of a decree-holder, and either before or after an oral examination of the judgment that a decree holder or his advocate, stating amount and that another person indebted to the judgment-debtor and is with jurisdiction, order that all debts (other than the salary or allowance coming within the provisions of Order 22 Rule 42 owing from such third person (hereinafter called "the "garnishee") to the judgment debtor shall be attached to answer the decree together with die costs of the garnishee proceedings: and by the same or any subsequent order it may be ordered that the garnishee shall appear before the court to show cause why he should not pay to the decree-holder the debt due from him to the judgment-debtor or so much thereof as may be sufficient to satisfy the decree together with the costs aforesaid".**

29. **THAT, the Claimant's present suit is an abuse of Court process as there are numerous applications filed and abandoned by the Claimant as enumerated hereunder; -**

- i) **Contempt applications dated 9<sup>th</sup> May 2017.**
- ii) **Contempt applications dated 18<sup>th</sup> May 2017.**
- iii) **An application dated 4<sup>th</sup> December 2017.**
- iv) **The main suit dated 27<sup>th</sup> January 2017.**

30. **THAT, the interim orders sought will cause the 3<sup>rd</sup> Respondent irreversible loss or injury to her members as the Bank account of the 3<sup>rd</sup> Respondent shall be attached to pay non-existing losses and contested liabilities.**

31. **THAT, the application is frivolous, malicious and abuse of Court process and has no basis whatsoever.**

32. **THAT, the Claimant's application should therefore be dismissed with costs to be borne by the Claimant.**

5. The 1<sup>st</sup> Interested Party also opposed this application on the grounds that garnishee proceedings cannot be taken out as there is no judgement and decree in the suit capable of execution by way of garnishee proceedings.

6. They also submitted that the application offends Order 22 rules 6, 13 and 26 as read with Order 23 Rule 1 of the Civil Procedure Rules 2010. They therefore ask this Court to dismiss this application accordingly.

7. The garnishee submitted that in the Account in question, the bank holds 790,000/= Kshs which they can release depending on the Court direction.

8. I have considered all the averments and submissions of all the Parties. The issue for this Court to determine is whether the application is properly before me and if it is merited.

9. In opposing this application, the Claimant/Respondent and Interested Parties submitted that there is no judgement and decree on record capable of being executed through garnishee proceedings. The Claimant cited Order 40 rule 6 and Order 23 of the Civil Procedure Rules.

10. Order 23 rule (1)(1) of the Civil Procedure Rules states as follows:-

***“A Court may, upon the ex parte application of a decree holder, and either before or after an oral examination of the judgment debtor, and upon affidavit by the decree-holder or his advocate, stating that a decree has been issued and that it is still unsatisfied and to what amount, and that another person is indebted to the judgment-debtor and is within the jurisdiction, order that all debts (other than the salary or allowance coming within the provisions of Order 22, rule 42 owing from such third person (hereinafter called the “garnishee”) to the judgment-debtor shall be attached to answer the decree together with the costs of the garnishee proceedings; and by the same or any subsequent order it may be ordered that the garnishee shall appear before the court to show cause why he should not pay to the decree holder the debt due from him to the judgment-debtor or so much thereof as may be sufficient to satisfy the decree together with the costs aforesaid”.***

11. The import of this Order is that a garnishee order is issued to the benefit of a Judgment Debtor and this envisages that there is a Judgment on record from which a decree has been extracted. The matter before me was filed in 2017. Since then Parties have filed one application after another and the Main Cause has never been heard.

12. In a ruling of this Court on 1/10/2018, I directed Parties to proceed with the main claim for hearing. This has never been done and even at the moment, the Parties have not proceeded to take a hearing date. In this respect, there is no judgement on record from which a decree has been issued and therefore garnishee proceedings cannot lie.

13. Order 40 rule 6 on the other hand states as follows:-

***”Where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of twelve months from the date of the grant, the injunction shall lapse unless for any sufficient reason the court orders otherwise”.***

14. This relates to an order of Injunction issued by Court. The order indicates that such an Injunction lapses within 12 months unless the matter is determined. This is however discretionary dependent on further orders of the Court. There is no application before me to extend orders, which have lapsed if at all.

15. I will in the circumstances not delve into whether to extend or not extend orders on record. However, relying on Order 23 it is my finding that there is no Judgment upon which to base these garnishee proceedings. No decree has ever been extracted. I will therefore agree with the Claimant and 1<sup>st</sup> Interested Party that the Application in Court is premature and I will allow it to be spent.

16. Costs in the cause.

Dated and delivered in open Court this **6<sup>th</sup> day of March, 2019.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Odhiambo for 2<sup>nd</sup> Interested Party – Present

Seth Panyako for 1<sup>st</sup> and 3<sup>rd</sup> Respondent – Present

Mungai holding brief Nyamambi for Claimant – Present

Vincent Odhiambo for 1<sup>st</sup> Interested Party – Present