



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAKURU

CAUSE NO.316 OF 2016

ERNEST KIBET TORMOI.....CLAIMANT

VERSUS

KENYA FARMERS ASSOCIATION LIMITED.....RESPONDENT

RULING

The respondent, Kenya Farmers Association Limited by application and Notice of Motion dated 10th July, 2019 and seeking for orders that there be stay of execution of the judgement delivered on 7th February, 2019 and warrants of arrest issued on 5th July, 2019. The respondent is also seeking for orders that the decretal amount be paid less statutory deduction and the outstanding decretal amount after deduction of such statutory dues less the award in counter-claim be paid in 4 equal instalments. That the claimant bears the auctioneers costs and costs of the application herein.

The application is supported by the affidavit of Abisai Ambenge and on the grounds that in the judgment of the court herein the respondent partially succeeded in its counterclaim for overdrawn salary to a tune of ksh.578, 482.15 which was payable plus interest at court rates from the date such became due. The claimant taxed his bill of costs and was paid the same leaving only the decretal amount as outstanding. The respondent proposed payment of the decretal amount less the overdrawn salary and less statutory deductions in 4 months instalments but the claimant declined and proceeded to instruct auctioneers to proclaim the respondent's assets on 8th July, 2019.

Other grounds in support of the application are that the claimant extracted a decree and warrants of arrest were erroneous because they did not reflect the court judgement as required under Rule 1(2) of the ELRC Rules, 2016 and if stay of execution the claimant will proceed with attachment while the respondent is willing to pay the decretal sum in 4 equal instalments. The respondent shall suffer irreparable damage and loss where the orders sought are not allowed.

Mr Ambenge also avers in his affidavit that on the dues payable to the claimant in accordance with the judgment of the court, such should be paid less what was awarded in counter-claim and less statutory dues. The respondent has sent a proposal on the payment to the claimant where the owing dues shall be paid in 4 instalments but instead the claimant proceeded to apply for warrants of attachment and where allowed to proceed will cause great prejudice to the respondent.

The extracted decree is contrary to Rule 31(2) of the Court Rules as it should capture the award in counter-claim less statutory deductions. Such clarity is in section 19 and 49 of the Employment Act, 200 where the judgement amounts should be paid less what is awarded in counter-claim and less statutory deductions.

In reply the claimant filed his Replying Affidavit and avers that the application by the respondent should be dismissed as it lacks merit. The judgement of the court delivered on 7th February, 2019 and the decree extracted therefrom is clear that the claimant is awarded per such decree. Under Order 21 Rule 8(7) of the Civil Procedure Rules allows the court to approve and issue an order even if parties have not exchanged the draft order. The subject decree was issued by this court after being satisfied that the same conformed to the judgement and ruling of the court. What the respondent is seeking is not a review or the setting aside of the court judgement or subject decree. Even where the counter-claim was partially allowed the respondent has not extracted or served the claimant with any order for settlement.

The claimant also avers that the warrants of attachment issued by the court are regular as such comply with the judgement. No statutory deductions are due as the award is compensatory in nature and cannot be said to be in payment of a salary. The question on payment of any taxes shall be addressed by the claimant and the tax collector.

The proposal to pay in instalments is not justified and is unreasonable for the reasons that the respondent has had ample time to pay since 7th February, 2019 and the proposed instalments is a tactic to delay and prevent the claimant enjoying the fruits of his judgement. The payment of any debt as between parties is subject to negotiations and based on good faith but the respondent is not acting in good faith. For 3 years the claimant has awaited for justice and this should not be delayed. The claimant also avers that he is sickly and in need of funds for medical bills

and any delays in the payment of his dues is likely to put his health in great danger.

The claimant also avers that on auctioneer's costs, the respondent being a judgement debtor should settle such dues and the court should dismiss the application with costs.

On the judgement of the court delivered on 7th February, 2019 the claimant was awarded ksh.2,612,044.95 per the decree since extracted and dated 31st May, 2019. From the judgement, the counterclaim was allowed for ksh.873, 507.95 for the respondent being the overdrawn salary plus interests since the date such was due.

Section 19 of the Employment Act, 2007 read together with section 49 of the Act requires every employer to deduct from the wages of the employee any amount that is lawfully due to the employer before such can be paid to the employee. Section 19(1) (f) thus provides as follows;

(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;

The court judgement thus allowing the counter-claim in the terms set out above, any dues payable to the claimant, whether the wage or compensatory in nature should be paid less what is owed to the employer.

Section 49(2) of the Employment Act, 2007 the employer is required to deduct statutory dues before payment of any dues to an employee. Such requirement is mandatory and should not be left to the employee to determine. Failure to pay the same, the employer commits an offence under the law and a heavy sanction follows.

(2) Any payments made by the employer under this section shall be subject to statutory deductions.

Accordingly, the court award for the claimant is subject to deduction of the dues awarded in counterclaim for the respondent whichever is higher. From such dues and payable by the employer to the employee, the employer is statutory bound to deduct statutory dues. The respondent is also seeking to pay the decretal sum in instalments. The respondent has submitted as schedule of proposed payments the last payment being on 18th September, 2019. The respondent has since paid Ksh.300, 000.00 on 17th June, 2019 and Ksh.258, 583.75 on 18th July, 2019.

The court finds the proposed instalments are reasonable and the respondent has demonstrated willingness and good faith by paying the first two instalments.

On the costs due to auctioneers, the claimant cannot rely on an erroneous decree to issue warrants of attachment against the respondent. The decree extracted should have complied with section 19 and 49 of the Employment Act, 2007 and not order 21 Rule 8(7) as such subsidiary rules cannot supersede the applicable law. Any dues payable to the claimant must be in compliance with the Rules of this court and the applicable statute before reliance on the Civil Procedure Act and the Rules thereto.

The tabulation should be – the dues awarded to the claimant less the award in counterclaim = the total due to the claimant less statutory deductions.

Accordingly, application dated 10th July, 2019 is hereby allowed in the following terms;

- a) The judgement of the court and award to the claimant shall be paid less the amount awarded to the respondent in the counter-claim;**
- b) Such dues paid to the claimant as the employee shall be less the owing statutory deductions;**
- c) The respondent shall pay the decretal sum in four (4) instalments proposed the last being due on 18th September, 2019;**
- d) The claimant shall meet the auctioneer's costs;**
- e) Each party shall bear own costs.**

Delivered at Nakuru this 23rd day of September, 2019

M. MBARU JUDGE

In the presence of: