



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 2164 OF 2012**

(Before Hon. Lady Justice Maureen Onyango)

**KENYA SCIENTIFIC RESEARCH INTERNATIONAL TECHNICAL AND ALLIED  
INSTITUTIONS WORKERS UNION.....CLAIMANT**

*VERSUS*

**M/S FRIENDS COMMUNITY CENTRE OFAFA NAIROBI.....1<sup>ST</sup> RESPONDENT**

**BOARD CHAIR PERSON.....2<sup>ND</sup> RESPONDENT**

**CENTRE MANAGER.....3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

The Application before the Court is one dated 5<sup>th</sup> March 2018, brought under Order 22, Rule 22, Order 40, Rules 1 and 2 and Order 51 Rule 1 of the Civil Procedure Rules, Sections 1A, 1B, 3A and 63 (e) of the Civil Procedure Act, Article 159 of the Constitution of Kenya and all other enabling provisions of the law where the Respondent/Applicant seeks for orders:

1. This Honourable Court be pleased to certify this Application as urgent, the same be heard ex parte and service thereof be dispensed with, in the first instance.
2. This Honourable Court be pleased to issue a temporary injunction and or order staying the execution of the decree issued by this Court on 09.07.2014 pending the hearing and determination of this Application.
3. That the court be pleased to declare that the full amount agreed on as per the consent was fully settled and any execution thereof is illegal.
4. This Honourable Court be pleased to issue a permanent injunction and or order prohibiting the Claimant, Auctioneers acting under its instructions, employees, servants, agents or any persons acting at its behest from selling, wasting, alienating, disposing or in any way interfering with or levying execution against the property of the Respondents/Applicants.
5. The Claimant shall bear the costs of this Application.

The Application is premised on the grounds that:

1. The Claimant applied for and obtained a decree at an exaggerated amount of Kshs.391,601/ = as if the decretal sum was never paid. The full amount has been paid as per the consent and order of the court.
2. The Claimant, in feigning ignorance of the settlement, has now instructed Auctioneers who have obtained warrants of execution dated 27.02.2018 and have since proclaimed the Respondents' property saleable on 08.03.2018.
3. The Claimant and the Respondents recorded a consent dated 10.04.2014 and filed in court on 22.04.2014. The Court adopted the consent as an order of the court.

4. It was a term of the consent that the Respondents shall pay an all-inclusive sum of Kshs.250,000/= and Kshs.30,000 in costs.
5. The first instalment of Kshs.100,000/= was to be paid on or before 30.04.2014 and the second instalment of Kshs.150,000/= was to be paid on or before 30.05.2014.
6. However, due to the change in management of the 1<sup>st</sup> Respondent payment was delayed. The delay occasioned by change in management leading to unavailability of one of the signatories to the cheques. This was explained to the Claimant.
7. Attempts were made to deliver the cheques to the Claimant but the Claimant declined to receive the cheques.
8. The cheques for a total sum of Kshs.250,000/= were sent to the member of the Claimant, NEREAH ATIENO UDUNY, by a letter dated 26.09.2014 who acknowledged receipt of both the letter and the cheques. The letter was copied to the court and was filed on 30.09.2014.
9. The balance of Kshs.30,000/= in settlement of costs was paid by a cheque for Kshs.30,000 sent by a letter dated 15.10.2014 and acknowledged by the Claimant on 17.10.2014.
10. The Claimant, by a letter dated 28.10.2014, acknowledged that all payments were made. However, the letter was misguided letter to the extent that the Claimant sought interest on the amount, which was not agreed on in the recorded consent.
11. The firm of Ochanda Onguru and Company, by a letter dated 24.10.2017, despite having never been on record and having not filed an Application to come on record as is by law required, wrote to the Respondent's Advocates forwarding a purported draft decree for comments.
12. The Respondents' Advocates on, 30.10.2017, wrote to the said firm of advocates expressing shock in the light of the fact that the matter had been settled in 2014.
13. It is apparent that on the basis of the misconceived letter from the said firm, the Claimant has moved to obtain a decree and applied to levy execution against the Respondents.
14. The law requires that where judgment has been entered, an advocate who wishes to come on record must apply to the court and be allowed to come on record, which procedure the firm of Ochanda Onguru and Company did not follow. This failure renders the whole execution proceedings a nullity and illegal.
15. The Respondents' property is at a risk of being sold within seven (7) days from 01.03.2018.
16. The Respondents stand to suffer irreparable injury if the Auctioneers are not restrained from moving and selling the proclaimed assets.
17. It is in the interest of justice that the orders sought be granted.
18. The Claimant will suffer no prejudice if the orders sought are granted.

The Application is supported by the affidavit of Janet Makungu Gulavi, the chairperson of the Management Board of the 1<sup>st</sup> Respondent/Applicant who reiterates the grounds on the face of the Application and prays for a permanent injunction against the Defendant prohibiting them from in any way interfering with the Respondent's property and for a declaration that the agreed amount was fully settled and execution thereof is illegal.

The application is opposed and the Claimant has filed a Replying affidavit sworn by the grievant one Nereah Atieno wherein she stated that the matter was heard and determined by the Court which awarded her Kshs.250,000/= plus interest and costs.

She contends that the Applicant partially settled the award and in lieu of this delay in settlement interest has accrued at the rate of 12% making the sum due currently as Kshs.391,600. That she has only been able to recover Kshs.250,000 leaving a balance of Kshs.141,601 which she is now demanding. She prays for the application to be dismissed with costs.

### **Submissions**

The Applicant submits that the execution proceedings herein are incompetent for the reason that the Claimant was at all times during the proceedings herein the representative of their Member and former employee of the 1<sup>st</sup> Respondent, Nereah Atieno Uduny.

That the Claimant and the Respondent recorded a consent dated 10.04.2014 and filed in court on 22.04.2014 which was adopted as an order of the court and the matter closed. The Advocates, Ochanda Onguru and Company now purporting to pursue execution proceeding on behalf of the grievant, have never filed a Notice of Appointment of Advocates during the course of proceedings in accordance with Rule 7 of Order 9 of the Civil Procedure Rules, 2010 which provides as follows:

“Where a party, after having sued or defended, in person, appoints an advocate to act in the cause or matter on his behalf he shall give

notice of the appointment and the provisions of this Order relating to a notice of change of advocate shall apply to a notice of appointment of an advocate with the necessary modifications.”

It is submitted that the said firm of Advocates ought to have obtained leave of the court to come on record, judgment having been entered as provided under Order 9 Rule 9 of the civil procedure rules 2010. That the said firm is therefore a stranger to this matter and has no locus standi.

The Applicant cites the decision of Kasango J in *Florence Hare Mkali a v P wani Tawakal Mini Coach & another (2014) eKLR* held at paragraphs 16, 17 and 18 as follows:

“In this regard I am in agreement with finding of the Court in the case **John Langat-Vs- Kipkemoi Terer & 2 Others (2013)eKLR** where Justice A. O. Muchelule faced with similar circumstances stated-

“There was no application made to change advocates. In the replying affidavit, the appellant swore that there was a consent entered into between his previous advocates and his present advocate to effect change. This was done following the judgment. He annexed the said consent. There is no evidence that the respondents were put in the picture. But more important, the consent could, not effect the change of advocates “without an order of the court.” No such order was sought or obtained. It follows, and I agree with Mr. Theuri and Mr. Nyamweya, that Anyoka and Associates are not properly on record for the appellant, and therefore the appeal and the application are incompetent. ”

It follows that the execution application filed by Mr. Kinyua Njagi and Company Advocates was therefore filed by a firm not on record and that: application is therefore hereby expunged from the record.

It follows that execution that flowed, from that execution application was irregular and without legal basis. The Court will order the costs of the auctioneer be paid by the firm of Kinyua Njagi and Company Advocates.

As to whether the decretal amount has been settled it is submitted that the decretal amount was fully paid by cheques for a total of Kshs.250,000.00/= to the member of the Claimant, Nereah Atieno Uduny, by a letter dated 26<sup>th</sup> September 2014 who acknowledged receipt of both the letter and the cheques. That the balance of Kshs.30,000 in settlement of costs was paid by a cheque for Kshs.30,000 sent by a letter dated 15<sup>th</sup> October 2014 and acknowledged by the Claimant on 17<sup>th</sup> October 2014. They submit that the decretal sum is thus fully settled.

On interest due it is submitted that the consent annexed to the Supporting affidavit of JANET MAKLJNGU GULAVI and marked “JMGI” does not have a clause on interest. The amount agreed on was “all inclusive.” That a consent is a binding contract between the parties and cannot be varied without the written consent of such parties. The parties should be held to the terms of the consent. The Court of Appeal in **Lalji Karsan Rabadia & 2 Others v Commercial Bank of Africa Limited [2015J eKLR** relying on the case of **Wallis v. Smith** where Jessel, Master of the Rolls, who stated, thus:-

“I have always thought, and still think, that it is of the utmost importance as regards contracts between adults — persons not under disability, and at arm ’s length — that, the Courts of Law should maintain the performance of the contracts according to the intention of the parties; that they should not overrule any clearly expressed intention on the ground that Judges know the business of the people better than the people know it themselves. I am perfectly well aware that there are exceptions, but they are exceptions of a legislative character. ”

That the parties herein agreed to the terms of the consent and interest was not part of it. That the Claimant and their member must be bound by the terms of the consent and this court cannot vary the terms of the consent where there is not the remotest suggestion of coercion, fraud or undue influence.

It is further submitted that the Claimant was dishonest and failed to disclose a material fact in applying to execute a sum of Kshs.391,601/= when Nereah Atieno has admitted to have been paid Kshs.250,000.00/=. The Grievant now claims that a balance of Kshs.141,601 remains unpaid and not Kshs.391,601/= in respect of which the decree was issued which the Respondent contends is very insincere. That the Court should frown on this conduct of the Claimant as was stated in the case of **Johnson Kiweji vs. Barclays Bank of Kenya Ltd Kisumu HCCC No. 171 of 2003** quoted in **Kenya Planters Cooperative Union Ltd v Kenya Commercial Bank Limited & 4 others (2016) eKLR** where it was held:

“The failure to make a candid disclosure of all material and essential facts would militate against the person concealing that evidence or facts from the Court... The courts would be strict on non-disclosure of material facts by a party seeking a remedy more so when he has concealed important material from the Court at the first instance. ”

The Respondents submit that if any interest is payable to the Claimant, the same cannot be Kshs.391,601.00/= nor can it be 141,601/- as claimed at paragraph 6 of the Replying Affidavit of Nereah Atieno. Such claim is usurious and contrary to the *in duplum* rule which provides that interest stops accruing when the interest equals the balance of the principal.

That the consent provided that the first instalment of Kshs.100,000/= was to be paid on or before 30<sup>th</sup> April 2014 and the second instalment of Kshs.150,000.00/= was to be paid on or before 30<sup>th</sup> May 2014. The total of Kshs.250,000.00/= was paid on 26<sup>th</sup> September 2014. Computing the interest would be as follows:

1. For the 1<sup>st</sup> instalment, it delayed by 5 months (April to September)

Interest =  $100,000 \times 12/100 \times 5/12 = 5,000.00/-$

2. For the 2<sup>nd</sup> instalment, it delayed by 4 months (May to September)

Interest =  $150,000 \times 12/100 \times 4/12 = 6,000.00/-$

3. Total interest unpaid since 26.09.2014 = 11,000.00/-

The Respondent urge the Court that Kshs.11,000/- is the only amount which ought to be found payable and should be set off against Kshs.45,000/= in costs of this application in favour of the Respondents.

### **Claimant/Respondent's Submissions**

With regard to the issue of Ochanda Onguru and Company Advocates being on record illegally, it is submitted that the same is not true as at the time the consent was filed there was no Advocates on record for the Claimant to warrant Application for leave as envisaged by the Law. That the firm of Ochanda Onguru and Company Advocates did file their Notice of Appointment dated 9<sup>th</sup> November 2016 and filed on the same day and as such that it is therefore not correct to say that the said Advocates are not properly on record.

That the decree is lawful and the Application ought to be dismissed with costs.

### **Determination**

On 9<sup>th</sup> July 2014, the following order was recorded in the court record –

1. That terminal benefits due and owing to Ms. Nereah Atieno Uduny who is being represented by the Claimant herein as far as her employment with the Respondents is concerned do and are hereby agreed at the sum of Kshs.250,000 all-inclusive.
2. That since the dates for payment have lapsed the entire decretal sum of Ksh.250,000 and costs in the sum of Kshs.30,000 to be paid on or before 30<sup>th</sup> July 2014 together with interest at court rates.
3. That the aforesaid terminal benefits will be settled by the 1<sup>st</sup> Respondent on behalf of all the three (3) respondents. That the Claimants party-to-party costs have been agreed at Ksh.30,000 and the same to be paid together with the terminal benefits within the stipulated time.
4. That failing payment Claimant to proceed to execute the decree.

From the documents attached to the respondents application herein it is evident that the claimant received two cheques – No. 75 from KCB dated 29<sup>th</sup> July 2014 for Kshs.150,000 and Cheque No. 2313 from Barclays Bank in the sum of Kshs.100,000 dated 18<sup>th</sup> June 2014 on 26<sup>th</sup> September 2014. A cheque Kshs.30,000 was sent to the General Secretary under cover of a letter from Wekesa and Simiyu Advocates dated 15<sup>th</sup> October 2014. The letter is stamped received by the claimant union on 17<sup>th</sup> October 2014. The cheque is dated 15<sup>th</sup> October 2014 and is from KCB.

By letter dated 28<sup>th</sup> October 2014 the claimant union confirmed full payment with the exception of interest.

Order 9 Rule does not apply to the firm of Onguru and Company advocates as the claimant was not represented by an advocate before judgment. The relevant provisions are Order 9 Rule 8. The firm of Ochanda Onguru is therefore properly on record for the claimant.

I however agree with the respondent's submission that the execution is irregular for reason that the decretal sum was paid way back in 2014.

The foregoing being the position, the application herein is allowed and I consequently make the following orders –

1. I declare that the full amount agreed on as per consent dated 10<sup>th</sup> April 2014 filed in court on 22<sup>nd</sup> April 2014 as adopted by the court on 9<sup>th</sup> July 2014 has been fully settled.
2. That the execution herein is irregular.
3. That a permanent injunction be and is hereby issued prohibiting the claimant, auctioneers acting under the claimant's instructions or any other person claiming through the claimant from any further execution of the decree issued herein.
4. That the warrants of attachment of movable property in execution of decree of money issued to High Class Auctioneers be and is hereby withdrawn and cancelled.
5. That the claimant shall pay costs of this application to the respondent.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 12<sup>TH</sup> DAY OF OCTOBER 2018**

**MAUREEN ONYANGO**

**JUDGE**