



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

ELRC NO. 525 OF 2014

(Before Hon. Lady Justice Hellen S. Wasilwa on 20th December, 2018)

GLADYS N. MUCHENA.....CLAIMANT

VERSUS

AGA KHAN EDUCATION SERVICE, KENYA.....RESPONDENT

RULING

1. The Respondent/Applicant in its Application dated 9th August 2018 and filed on 16th August 2018 is seeking the following prayers:-

- a) *THAT the Application be certified as urgent and heard ex parte in the first instance.*
- b) *THAT an Order for Stay of Execution of the Judgment dated 9th July, 2018 be issued ex parte, at the first instance, pending the hearing and determination of the Application.*
- c) *THAT a declaration do issue that the sum of KShs. 252,501.17 paid into court on 23rd January, 2004 includes the pension earned by the Claimant up to 25/11/2003 and the three months' salary pay in lieu of notice.*
- d) *THAT the Claimant is to pursue the release of KShs. 252,501.17 paid into court on 23rd January, 2004*
- e) *THAT the sum of KShs. 252,501.17 paid into court on 23rd January, 2004 be released to the Claimant forthwith, in final settlement of the Judgment dated 9th July, 2018.*
- f) *THAT no interest on account of the decretal award issued on 9th July, 2018 is to be charged against Respondent/Applicant.*
- g) *THAT a declaration do issue that the Respondent/Applicant has fully satisfied the Judgment delivered on 9th July, 2018 by the Hon. Lady Justice Wasilwa.*
- h) *THAT a declaration do issue that the Respondent/Applicant is no longer liable to the Claimant on account of the Claimant's termination of employment.*
- i) *THOSE costs of the Application be awarded to Respondent/Applicant.*

2. The Application was supported by the Affidavit of Apollo Gazabira and is based on the following grounds:-

1. *On 9th July, 2018, the Honorable Lady Justice Hellen Wasilwa delivered a Judgment awarding the Claimant an aggregate sum of KShs. 1,584,508/- less statutory deductions and subsequently, granted the Respondent/Applicant a 15-day stay of execution pending Appeal.*

2. *The tabulation of the decretal award included:-*

- a) *3 months' salary as notice pay as the contract of employment $3 \times 70,975 = 212,925.00$.*
- b) *Salary for the unexpired period of the bond period being 7 months 10 days = 520,483.00.*

c) Pension earned up to 25th November 2003 for which the parties can agree upon or submit to the court figures for continuation if there is no agreement.

d) Damages equivalent to 12 months' salary for wrongful termination- 12 x 70,925 = 851,100.00.

TOTAL = 1,584,508.00

Less statutory deductions

3. On 23rd July, 2018 the Respondent/Applicant through the Firm of Messrs. Njoroge Regeru & Company Advocates forwarded three cheques: nos. 021869, 021870 and 021871 in the sum of KShs. 444,002.30 each, totaling to an aggregate sum of KShs. 1,332,006.90 to the Firm of Machira & Company Advocates in settlement of the decretal sum.

4. Prior to 9th and 23rd July, 2018, but after the original suit was filed, the Respondent/Applicant paid into court the sum of KShs. 252,501.07 being payment of benefits the Claimant was entitled to at the time of the termination of her employment.

5. The payment of aggregate sum of KShs. 1,332,006.90 was therefore in final settlement of the decretal award.

6. However, on 24th July, 2018, the Claimants Advocates wrote to the Applicant's Advocates acknowledging the receipt of KShs. 1,332,006.90 in partial settlement of the decretal sum awarded noting that the Claimant does not wish to be involved in the hustle of extracting the sum of KShs. 252,501.07 from the Court and thus it is the Respondent/Applicant's obligation.

7. It is clear that the Claimant desires to prejudice the Respondent/Applicant rather than enjoy the fruits of the Judgment by demanding a further sum be paid to her whilst her benefits were deposited in Court.

The Claimant's Case

3. The Claimant responded to the Respondent/Applicant's Application vide the Replying Affidavit sworn by the Claimant herself on 19th September 2018. The Claimant admitted that the sum of Kshs. 252,501.07 had been deposited in Court. However, the Claimant was of the view that the payment of Kshs. 1,332,006.90 was in part payment of the decretal sum and not a final settlement.

4. The Claimant averred that it was the Respondent's responsibility to satisfy the entire decretal sum and interest thereon without passing any burden. The Claimant further averred that the amount was deposited in Court by the Respondent as a means of coercing the Claimant into compromising the suit, which sum the Claimant refused to accept.

5. The Claimant averred that it was the duty of the Respondent to pay the balance of the decretal amount and that the Respondent was trying to impose hurdles and conditions which were non-existent in the judgment delivered by this Honorable Court.

6. The Claimant also averred that the Respondent had not shown any reason why it should not extract the deposited sum from the Court. Further, the Claimant was simply demanding payment of Kshs. 265,773 (with interest calculated as per Court decree up to 30th September 2018) and it was wrong and misleading for the Respondent to allege that she was demanding an amount beyond the decretal sum.

7. The Claimant further opposed the Respondent's Notice of Motion Application vide grounds of opposition dated 19th September 2018 and filed on 20th September 2018 on the following grounds:-

1. The Application is unmerited, frivolous, vexatious and purely meant to delay the cause of justice and the execution of the Judgment/Decree of this Honourable Court made on 9th July, 2018.

2. The grounds upon which the Application is made and the Affidavit sworn in support thereof do not make a case to warrant the Orders sought.

3. The Application amounts to an Appeal of the Judgment/Decree of this Honourable Court whereas this Honourable Court cannot sit as an Appellate Court on its own Judgment.

4. The Provisions under which the Application is made do not empower this Honourable Court to grant the Orders sought.

5. The Application in its entirety is intended to avoid payment of interest and other payments as decreed by this Honourable Court in its Judgment of 9th July, 2018.

6. The Respondent is bound by the Judgment/Decree of this Honourable Court and cannot pass over the obligation of satisfying the same to the Claimant.

7. The Application is an abuse of the Court process and is intended to frustrate the Claimant's efforts to realize the fruits

of her Judgment in a very old case.

8. **The Applicant's contention that the sum of Kshs. 252,501.07 once released to the Claimant would fully satisfy the Decree is false and incorrect as a sum of Kshs. 13,271.90 on account of interest will still be outstanding, not to mention that the costs awarded by this Honourable Court are yet to be taxed and paid by the Respondent.**

9. **The Respondent deposited the said sum of Kshs.252,501.07 on its own volition and should not pass the burden of recovering the same to the Claimant.**

10. **The alleged sum of Kshs.252,501.07 deposited in Court was never an issue considered by this Honourable Court in its Judgment of 9th July, 2018 and the Applicant should not seek to vary the Judgment of this Honourable Court on account of the same.**

The Respondent/Applicant's Submissions

8. The Respondent in its submissions dated 24th October 2018 and filed on 26th October 2018, relied on **Section 34 (1) of the Civil Procedure Act 1988** to submit that its Application was admissible and the Court has jurisdiction to determine the issue herein and that the Application was not an appeal.

9. The Respondent relied on Order XXI rule 1 of the Civil Procedure Rules, 1998 and *Republic vs. Teachers Service Commission & Another Ex-parte William Wairagu Mungai* where the Court stated that:-

“As to the issue whether the decree has been settled or not, Order 22 rule 1 (1) of the Civil Procedure Rules Provides... It would follow that by virtue of the said provision payment into court would ordinarily be deemed to be payment of the decree. Therefore, if the Respondent paid the sum into Court unconditionally, an order of mandamus would not be issued as the decree would have been settled thereby and the Applicant would have been at liberty to apply for the release thereof.”

10. The Respondent relied on the law as set out hereinabove to submit that the money payable under the decree was fully settled if the decretal sum is deposited into Court or paid directly to the decree holder.

11. The Respondent submitted that the remaining balance of the decretal amount is available to the Claimant. Nothing stops her from asking the Court to release the money to her. The Respondent relied on the case of ***Odhiambo Owiti Company Advocates versus Standard Assurance (K) Limited & 3 others: KSM Misc. Appl. No. 88 of 2008 [2016] eKLR*** where the Court in that case determined a similar issue. The judge held:-

“Clearly it is unfair on the part of the respondent to argue that since the money was not in his custody, he had every right to execute against the applicant. All the parties herein including the auctioneers are officers of the court. Despite the knowledge that the money was still held in court. there was no reason to proceed with further execution. Nothing stopped the respondent from asking the court to release the money to it.”

12. The Respondent submitted that no interest was payable on the deposited amount. The Respondent argued that Courts have held that interest stops accruing once the decretal sum has been deposited in line with **Order 22 (1) of the Civil Procedure Rules** and the Decree Holder is notified of the same. The Respondent relied on the case *Odhiambo Owiti Company Advocates versus Standard Assurance (K) Limited & 3 others [Supra]*, where the Court held as follows:-

“Had the applicant deposited in line with Order 22(1) of the Civil Procedure Rules then I would respectfully find that the interest ought to have ceased accruing once he gets knowledge of the same. The logical step would then have been to apply to the court to have it released to him.”

13. In Respondent's Further Submissions dated 22nd November 2018 and filed in Court on 23rd November 2018, the Respondent submitted that it does not contest the award delivered and neither does it seek to Appeal against the award of interest. Rather, the Respondent seeks that a determination is made confirming settlement of the decretal sum which will then give the basis of calculation of interest owed to the Claimant. The Respondent further submitted that this Court has jurisdiction to determine all questions arising between the parties to the suit relating to the execution, discharge or satisfaction of the decree under **Section 34 (1) of the Civil Procedure Act 2010**.

The Claimant's Submissions

14. The Claimant in its submissions dated 16th November 2018 and filed in court even date, submitted that the Respondent's Application is absolutely unnecessary and purely meant to vex the Claimant and to deny her the fruits of litigation. Further, the Applicant's Application is an indirect Appeal meant to reduce the value of the Judgment by denying the Claimant the interest that was awarded to her. The Applicant should have filed a clear Application for review or alternatively appealed against this Court's Judgment.

15. The Claimant further submitted that the provisions of law invoked in the Application are irrelevant and inapplicable and as such, the Application should be dismissed.

16. The Claimant relied on **Sections 34 and 99 of the Civil Procedure Act and Order XXI rule (3) of the Civil Procedure Rules** to submit that this Honourable Court does not have the jurisdiction to alter and/or improve its judgment once it is signed and delivered. The Claimant

submitted that the Respondent's argument based on *order XXII rule 1* was a fallacy.

17. The Claimant submitted that the cases of *Republic vs. Teachers Service Commission & Another Ex-parte William Wairagu Mungai* and *Odhiambo Owiti vs. Standard Assurance (K) Limited & Others* which the Respondent relied upon were irrelevant.

18. In conclusion, the Claimant submitted that there were no compelling legal grounds or valid and justifiable facts to warrant modification of the Judgment, to make it more disadvantageous and less valuable to the Claimant.

19. I have examined evidence of both parties and their submissions. It is clear from the submissions that this case is already finalized and judgement delivered. What remains is the execution process and drawing of the decree. It is only after the decree is drawn that the issue of whether the claim has been fully settled can be determined. This is therefore an execution process by the Deputy Registrar (DR), which this Court will not delve into unless it is satisfied that the claim is fully settled and therefore order release of any amounts deposited in Court. I decline to allow this application and dismiss it accordingly.

Dated and delivered in open Court this **20th day of December, 2018.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of

Wafula holding brief for Machira for Claimant

Mumbi for Respondent – Present