



**REPUBLIC OF KENYA**  
**EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 1666 OF 2014**

**(Before Hon. Justice Hellen S. Wasilwa on 21<sup>st</sup> February, 2017)**

**MAURICE NDIKU KILONZO.....CLAIMANT**

**VERSUS**

**DAWA LIMITED .....RESPONDENT**

**RULING**

1. The Application before Court is the Notice of Motion dated 25.7.2016 filed by the Applicants herein and brought under the provisions of Section 12(3)(i), (ii), (iv) & (viii) of the Industrial Court Act 2011, Section 3A of the Civil Procedure Act and Order 22 Rule 22, Order 42 Rule (6) of the Civil Procedure Rules, Rule 16 of the Industrial Court (Procedure) Rules, 2010 and all the enabling provisions of the Law and the inherent powers of the Court.

2. The Applicant seeks orders to stay a proclamation and attachment of the Respondent's property by the Claimant and also a temporary injunction restraining the Claimant from executing, attaching, carrying away or in any way dealing with the goods proclaimed on 19<sup>th</sup> July 2016.

3. The Respondent/Applicant also seeks an order that the Proclamation dated 19<sup>th</sup> July 2016 and/or any attachment issued herein be declared irregular and/or otherwise unlawful and illegal and the same be raised and or lifted and that the Claimant/Decree holder do bear the costs of the said attachment.

4. They also want the Court to declare the proclamation dated the 19<sup>th</sup> July 2016 for the sum of 269,999/10 a nullity since the said amount had been fully settled.

5. They have also averred that the execution is otherwise irregular and illegal coming twelve months after the judgment of this Court without the requisite Notice to Show Cause.

6. The Application is based on the following grounds:

***a) "Judgment was entered herein on the 17<sup>th</sup> June, 2015 after submissions on contested claims of (1) Service Pay and (ii) compensation for wrongful termination.***

***b) Earlier on, parties herein consented to judgment on uncontested claims of Kshs.146,405/= (on 1 month's salary in lieu of notice, salaries for July and August, 2014 and Accrued leaver).***

***c) Such uncontested claims of Kshs.146,405/= had already been paid to the Claimant at the time of termination on the 1<sup>st</sup> July, 2014, so that although claimed in the pleadings, they were not payable.***

***d) The consent was therefore entered into against this background. This explains why the final judgment of the Court was only confined to the contested amount.***

***e) Had the Claimant extracted a decree of the Court, it would have reflected a decretal sum of Kshs.258,000/= which the Court determined as between parties.***

***f) The Claimant to date has not extracted a decree, a prerequisite to commencing the execution process, thus making this exercise a nullity.***

***g) The execution is further irregular for the reason that being effected after 1 (one) year after judgment was entered, a Decree Holder is required to take out a Notice To Show Cause against a Judgment Debtor.***

7. This Application is also supported by the supporting affidavit of one Dickens Ouma an Advocate of the High Court of Kenya who has conduct of this claim on behalf of the Respondent/ Applicant herein.

8. The Applicant through this supporting affidavit avers that earlier on Parties had entered a consent on uncontested claim of Kshs.146,405/= which was recorded in Court. They aver that the uncontested claim of Kshs.146,405/= was already paid to Claimant upon termination being 1 months' salary in lieu of notice, salary for July and August 2014 and accrued leave.

9. That had the Claimant extracted a decree, it would have reflected a decretal sum of Kshs.258,000/= being what the Court determined as being payable being 6 months compensation for wrongful termination. That costs awarded were also agreed upon by the Court.

10. They aver that the execution is further irregular being commenced one year after judgment without taking out a Notice to Show Cause. They therefore want the execution process annulled and that they be not liable to pay any Auctioneer fees.

11. The Claimant opposed this application and filed his affidavit on 13.8.2016. He also filed his submissions dated 28/10/2016 and state that he got judgment of Kshs.258,000/= being compensation for unfair termination and party and party costs of 115,885/= all totaling 405,005/=. That made decretal sum to be 405,005/= plus costs totaling 520,890/=.

12. They argue that the Applicant wants the Court to set aside a consent judgment without laying down any legal basis.

13. From my understanding of the Application, the Applicants insist that there was no decree done that would have warranted an execution and in any case no proceedings of Notice to Show Cause were taken out the same having taken over 1 year since the judgment was entered.

14. Judgment in this case was delivered on 17.6.2015. Taxation proceeded and a consent was entered on 26/1/2016 on costs. That is now the effective date when both judgment and costs were entered by Court. The execution proceedings were commenced on 15<sup>th</sup> July 2016 and therefore the contention that this was over 1 year since the judgment is not true.

15. On whether a decree was taken out or not before the execution process commenced, this is a matter that should have been argued before the Deputy Registrar who handles execution proceedings. The Applicants chose to file this application and prosecute it before the Employment & Labour Relations Court. The issues of whether an execution process is wrong or not is a matter to be handled by the Deputy Registrar under Order 22 of Rule 6 which states as follows:

***“6. Where the holder of a decree desires to execute it, he shall apply to the court which passed the decree, or, if the decree has been sent under the provisions herein before contained to another court, then to such court or to the proper officer thereof; and applications under this rule shall be in accordance with Form No. 14 of Appendix A:***

***Provided that, where judgment in default of appearance or defence has been entered against a defendant, no execution by payment, attachment or eviction shall issue unless not less than ten days’ notice of the entry of judgment has been given to him either at his address for service or served on him personally, and a copy of that notice shall be filed with the first application for execution.”***

16. I direct that the application for execution be directed at the proper Court. As to this Application, the merits or otherwise, will be handled by the Deputy Registrar for further directions.

17. In the meantime, I will stay the execution process so far commenced until further direction by the Deputy Registrar.

Read in open Court this 21<sup>st</sup> day of February, 2017.

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Kilonzo for Respondent – Present

Mwanthi for Claimant