



**University of Nairobi v Alusa (Appeal E161 of 2021)
[2024] KEELRC 13533 (KLR) (20 December 2024) (Ruling)**

Neutral citation: [2024] KEELRC 13533 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E161 OF 2021
SC RUTTO, J
DECEMBER 20, 2024**

BETWEEN

UNIVERSITY OF NAIROBI APPELLANT

AND

FLORENCE K.ALUSA RESPONDENT

RULING

1. The Respondent herein obtained a decree from the trial Court for the sum of Kshs 2,052,117.24. The Appellant was aggrieved by the judgment of the trial Court hence instituted an Appeal in this court.
2. The record bears that vide a Ruling delivered on 30th November 2021, the court allowed the Applicant's application for stay of execution pending appeal on condition that the Applicant deposits 70% of the decretal amount in a joint interest earning account of the Advocates on record within 30 days and releases the other 30% to the Respondent within 30 days.
3. In its judgment which was delivered on 30th June 2023, this court allowed the Appeal by the Applicant and consequently set aside the judgment of the trial court in Milimani CMEL No. 1442 of 2019.
4. Subsequently, the Applicant filed the instant Application dated 3rd May 2024, in which it seeks the following orders;
 1. That the Court does make an order for restitution directed to the Plaintiff/Respondent (sic) to refund the Respondent (sic) the sum of Kshs 2,155,182.35 plus interest from the date of full payment, being the decretal sum paid to the Claimant/Respondent (sic).
 2. That this honourable Court does compel the firm of Omongo Gatune & C Advocates to provide accounts on the decretal sums received by them on behalf of the Plaintiff/Respondent (sic.)
 3. That the costs of this Application be provided for.



5. The Application is grounded on the annexed Affidavit sworn on 3rd May 2024 by Donald B. Kipkorir, Advocate on record for the Applicant.
6. Grounds in support of the Application are that vide a letter dated 23rd January 2024, the Applicant's Advocates wrote to the Respondent's Advocate requesting them to refund the entire decretal sum followed by a reminder dated 7th February 2024 both of which elicited no response.
7. That it is in the interest of justice that the Applicant be refunded the sums paid out to the Respondent with interest and to have the law firm of Omongo Gatune & Co. Advocates render accounts on the decretal sums paid.
8. In response to the Application, the Respondent, Florence K. Alusa filed a Replying Affidavit sworn on 26th June 2024 in which she avers that this matter is subjudice (under judicial consideration in Nairobi Court of Appeal E621 of 2023) as the decision of the higher appellate court is pending.
9. That the Applicant is aware and knows about the ongoing appeal at the Court of Appeal which has high chances of reversing this Honourable court's decision.
10. The Respondent avers that she has appealed and requests for a stay of execution of any restitution claim until the higher court delivers its judgment.
11. According to the Respondent, requiring restitution while a higher appeal is pending would be premature and could result in unnecessary complications and potential inequity, particularly if the Court of Appeal reverses this Court's decision.
12. The Respondent further avers that costs of the suit were paid and she has been advised by her counsel that professional fees ordered by Court for services rendered including court appearances, drafting documents and legal representation are typically protected from restitution unless there is evidence of malpractice or breach of contract.
13. That she received the gratuity pay in good faith as the judgment debtor was complying with a lawful court order and the money has since been spent to meet essential personal and familial needs, reflecting a change of position that makes restitution inequitable.
14. She further avers that the Respondent's initial compliance with the Court order induced her expenditure of the awarded amount.
15. The Respondent contends that forcing restitution under these circumstances would impose undue hardship on her given the long period of service and the dependency on the awarded funds.

Submissions

16. The Application was canvassed by way of written submissions. Both parties complied and I have considered their respective submissions.

Analysis and Determination

17. Having considered the Application, the Respondent's Replying Affidavit, and as well as the submissions on record, it is evident that the main issue for determination is whether the Application is merited in that the Court should make an order for restitution directing the Respondent to refund the sum of Kshs 2,155,182.35 plus interest from the date of full payment.
18. As stated herein, the court vide its Ruling delivered on 30th November 2021, granted stay of execution pending appeal on condition that the Applicant deposits 70% of the decretal amount in a joint interest



- earning account of the Advocates on record within 30 days and the other 30% be released to the Respondent within 30 days.
19. Annexed to the Affidavit of Donald Kipkorir is a copy of Proof of Payment in favour of the Respondent indicating that payment in the sum of Kshs 646,554.00 had been transferred to her account.
 20. The Respondent further annexed Proof of Payment indicating that the sum of Kshs 1,508,628.35 had been transferred to KTK And Omongo Gatune.
 21. It is therefore not in doubt that the Appellant complied with the orders of the Court as directed on 30th November 2021.
 22. Section 91(1) of the *Civil Procedure Act* which provides for restitution, is couched as follows:

“Where and in so far as a decree is varied or reversed, the Court of the first instance shall, on application of the party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position they would have occupied but for such decree or such part thereof as has been varied or reversed.”
 23. A plain reading of the aforementioned statutory provision leaves no doubt that in view of the reversal of the trial Court’s decision on Appeal, the Applicant is entitled to an order of restitution by way of a refund of the decretal sum paid to the Respondent.
 24. As to the Respondent’s assertion that she has since spent the money to meet essential personal and familial needs, reflecting a change of position that makes restitution inequitable and that forcing restitution would impose undue hardship on her, I must say that this is a contradiction to her averments under paragraph 8 of her Replying Affidavit sworn on 4th November 2021 which was in response to the Applicant’s Application for stay.
 25. In the said Replying Affidavit, the Respondent averred that she was still working for the Applicant and that the decree being a money decree, is ascertainable or capable of being ascertained and refunded in the unlikely event the Applicant was to succeed on the appeal.
 26. Based on the Respondent’s assertions, the Court observed that she was still in employment of the Applicant and in case of any refunds or costs incurred, there is a recourse in the circumstances. In this regard, the Court further opined that the Respondent was able to bear the costs of litigation or any other consequences.
 27. It was in light of the foregoing premises that the Court ordered the Applicant to release to the Respondent 30% of the decretal amount within 30 days.
 28. To this end, the Respondent’s assertions that restitution would impose undue hardship on her, does not hold water and is untenable.
 29. The Respondent has further argued in her submissions that this is not the Court of first instance as it became seized of the matter on appeal. It is my respectful view that, since the Respondent was paid 30% of the decretal amount pursuant to this Court’s Ruling delivered on 30th November 2021, it is only logical that an order for refund be made by this Court as opposed to the trial Court.
 30. With respect to the Respondent’s contention that there is an appeal pending at the Court of Appeal which has high chances of reversing this Court’s decision, my take is that the same is not a sound reason to decline restitution.



31. I say so bearing in mind that in the event the Appeal succeeds, it follows that the Respondent will be entitled to payment as appropriate. What's more, it is worth noting that she has not expressed doubt in the Applicant's ability to satisfy the decree in case the Appeal goes her way.
32. For the foregoing reasons, I will allow the Application dated 3rd May 2024 and direct that the Respondent pays to the Applicant by way of restitution the sum of Kshs.646,554.00 within two (2) months from the date of delivery of this Ruling.
33. The sum of Kshs 1,508,628.35 deposited in the joint interest earning account together with accrued interest be released to the Respondent through its Advocates on record.
34. There will be no order as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER 2024.

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STELLA RUTTO

JUDGE

Appearance:

Mr. Simiyu instructed by Mr. Kipkorir for the Appellant/Applicant

No appearance for the Respondent

Millicent Court Assistant

Order

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE

