



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT ELDORET**

**ELRC NO 74 OF 2017**

**JACOB JUMA MAKOKHA.....CLAIMANT**

**VERSUS**

**RADER LIMITED.....RESPONDENT**

**RULING**

1. By Motion dated 26<sup>th</sup> February, 2020 the applicant sought orders among others that the Court issues a declaration that the execution of the Court’s decree was improper and misconceived as the respondent/applicant was not served with the draft decree leading to the issuance of ex-parte decree.

2. The application was based on the grounds hat the applicant was at a loss how the decretal sum was arrived at since part of the sum was calculated based on respondent’s records.

3. The applicant further lamented that majority of the property attached were respondent’s tools of trade thus exempted under the law.

4. The application was further supported by the affidavit of Conslata Karuri who deponed among others that

(i) That I am the Human Resource Manager of the Respondent /Applicant company and duly authorized and competent to swear this affidavit for and on behalf of the Respondent /Applicant.

(ii) That a judgement was entered in favor of the Claimant respondent on 26<sup>th</sup> September, 2018 in the following terms: -

**(a) Annual leave pay of Kshs. 4,667**

**(b) Notice pay of Kshs. 16,227 and**

**(c) Overtime payments shall be computed based on work records and upon clearance with the Respondent /Applicant.**

(iii) That the Claimant /Respondent extracted a Decree dated 30<sup>th</sup> January, 2020 which the Respondent /Applicant learnt of through

the Warrant Attachment dated 31<sup>st</sup> January,2020.

(iv) That the Respondent/Applicant was not served with the draft decree leading to the issuance of an ex parte Decree and subsequently applying for the Warrant of Attachment of movable property in execution of the Decretal sum.

(v) That the Respondent /Applicant is at a loss as to how the decretal sum was arrived at since part of the sum was to be calculated based on the Respondent/Applicant's records.

(vi) That the Respondent /Applicant has been served with a proclamation notice dated 29<sup>th</sup> February,2020 seeking to attach its immovable properties.

(vii) That the majority of the properties to be attached are the Respondent/Applicant's tools of trade thus exempted under the Law thus void.

(viii) That the Respondent /Applicant will suffer irreparable harm if the ex parte Decree issued to the Claimant /Applicant are not set aside together with all consequential orders made thereunder: -

4. The Claimant opposed the application and filed a replying affidavit in which he stated among others that

(i) That on 29<sup>th</sup> June, 2018, the matter proceeded in presence of both my advocates on record and the Respondent's advocate and a date for mention to confirm filing of submissions of was taken by consent and thereafter a date for delivery of judgement was taken.

(ii) That on 26<sup>th</sup> September 2018, judgment was duly delivered where the court gave me an award and directed in the said judgment that overtime dues owed to me by the Respondent /Applicant herein be computed based on the work records within 30 days from the date of delivery of judgement.

(iii) That my advocates on record extracted a decree on 24<sup>th</sup> April, 2019 and informed the Respondent of the decretal sum vide a letter dated 19<sup>th</sup> November, 2019.

(iv) That on 15<sup>th</sup> November , 2019 my advocates on record through a duly licensed Court Process Server caused service of mention notice dated 8<sup>th</sup> November, 2019 upon the Respondent attached to affidavit of services filed in court on 20<sup>th</sup> November notifying the Respondent that this matter was listed for mention to show cause why the Claimant's overtime computation should not be adopted as order of the Court.

(v) That on 20<sup>th</sup> November, 2019 my advocates on record sought leave to file and serve overtime dues computed y my advocates, the same was duly granted. The court adopted the overtime dues computed by my advocates on record as judgement of the court for failure of the Respondent to appear in court and show cause by the said Claimant's computation of overtime dues should not be adopted.

(vi) That on 3<sup>rd</sup> December, 2019 my advocates on record vide courier caused service of the Claimant's computed overtime dues and letter dated 19<sup>th</sup> November, vide forwarding letter sated 19<sup>th</sup> November notifying the Respondent of the decretal sum and serving a copy of the computed overtime dues.

(vii) That at all times the Respondent were served and wee aware of existence of this matter and cannot feign ignorance of this suit. The instant application before court has only been prompted by the execution proceedings and nothing else for the reason that the Respondent has never bothered to check on the progress of the matter since the year 2018.

5. That nothing precluded the Respondent from drawing and filing the Claimant's computation of overtime dues and subsequently thereafter extract a decree or pay up the sum owing. The Respondent's application is not brought in good faith since they waited upto the last minute for them to act on the matter.

6. That the no tangible explanation if any has been offered why Respondent took the more than 12 months to come up with the Claimant's computation of overtime dues despite having the knowledge of the delivery of judgement as evidenced by paragraph 2 of the Supporting Affidavit sworn by one, Consolota Karuri in support of the application at hand.

5. In submission in support of the application Mwamuye for the applicant submitted mainly that on 30<sup>th</sup> January, 2020 the Claimant extracted a decree without the respondent's knowledge seeking to obtain Kshs. 846,868.40. The decretal according to Counsel was based on the Claimant's independent and misguided calculation of overtime payment's which were to be computed based on respondent's records which the Claimant had no access to and neither did he request for such access from the respondent.

6. Counsel further submitted that the respondent was not served with the decree and only learnt of it through the warrants of attachment dated 31<sup>st</sup> January, 2020. Further the respondent was a stranger to the documents attached and relied upon by the Claimant as the same were never served on the applicant.

7. The Claimant on his part submitted that the respondent failed to comply with the orders of the Court after the matter had been mentioned severally for the respondent to supply overtime records. The Claimant consequently sought leave of Court to file their computation of overtime dues on 20<sup>th</sup> November, 2019 which the court granted. The matter was subsequently set for mention on 15<sup>th</sup> November, 2019 when the respondent was required to appear and show cause why the Claimant's computation of the overtime dues should not be adopted. The respondent was duly served with a mention notice but never appeared. The matter was rescheduled for further mention on 6<sup>th</sup> November, 2020 and yet again the respondent never appeared. On 20<sup>th</sup> November, 2019 the Court consequently adopted the overtime dues as computed by the Claimant.

8. According to counsel for the Claimant therefore the Claimant was all along aware of the existence of the matter and could not feign ignorance as regards compliance with the Court's directions. Counsel further submitter that the present application was prompted by the execution process.

9. Concerning the disputed amount counsel submitted that the Court adopted computation by the Claimant done on 20<sup>th</sup> November, 2020 at Kshs. 423,974/40. The applicant via its application dated 26<sup>th</sup> February, 2020 proposed overtime at Kshs. 312,753/65. The difference between the disputed sums is therefore Kshs. 111,220/75 Counsel therefore submitted that pending the determination of the disputed sum this court adopts what has since been offered by the respondent being Kshs. 312,753/65.

10. The court has perused the history of this matter from when Honourable Lady Justice Mbaru entered judgement on 20<sup>th</sup> September, 2018 and directed that overtime payments be computed based on the work records and within 30 days from the date of the judgement.

11. As correctly observed by the Counsel for the Claimant the matter has since the judgment been mentioned severally for the respondent/applicant to provide records for overtime to enable computation thereof. This never happened. On 20<sup>th</sup> November, 2019 more than a year after the delivery of the judgement the court directed that in view of lack of cooperation on the part of the respondent in providing records for purposes of computing overtime the Claimant do compute and file and serve his own version of the computation for overtime. This was done and adopted by the Court.

12. The respondent by the present application now contests the said computation by the Claimant arguing that the said computation had no basis since the Claimant did not have records. This contention is ironical since the respondent is the one who refused and/or ignored to provide the said records. They cannot be heard to question the accuracy of the computation by the Claimant yet they refused and or ignored to provide records.

13. Counsel for the Claimant has taken a middle ground position and submitted that if the disputed figure be the Kshs. 111.220/75 then I should order that the respondent do pay the admitted figure of Kshs. 312,753/65. This appears to me a reasonable proposition and hereby so order that the respondent forthwith pay the admitted figure of Kshs. 312,753/65 and the balance of Kshs. 111,220/75 be verified between the parties and the matter be mentioned on 17/2/2021 for recording of final orders.

14. It is so ordered.

**Dated at Eldoret this 4th day of December 2020**

**Abuodha Jorum Nelson**

**Judge**

**Delivered this 4<sup>th</sup> day of December 2020**

**Abuodha Jorum Nelson**

**Judge**

**In the presence of:-**

.....for the Claimant and

.....for the Respondent.

**Abuodha J. N.**

**Judge**



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