REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT ELDORET

CAUSE NO. 31 OF 2019

BILL BABA OWOUR...CLAIMANT

VERSUS

NATIONAL BANK OF KENYA..RESPONDENT

RULING

1. Through a Notice of Motion dated 26th, June, 2021, the applicant sought orders in the main that:

a) That the court does make a finding that the decretal sum costs and interests have not been satisfied in the manner prescribed in law for the settlement of the same where there is an advocate representing the decree holder.

b) That the respondent be directed to pay the entire decretal sum, party and party costs as taxed plus accrued interests in full to the claimant's advocates on record.

c) That in default of the respondent to comply with the order in (2) above to satisfy the decretal sum, costs and interests to the claimant's advocates; liberty to be granted to the claimant to execute.

2. The application was based on the grounds among others that the judgment debtor was obligated to satisfy the decretal sum, costs and interest by payment to the decree-holders advocates and that the issue of the decree holder being indebted to the respondent was never taken up by the respondent during the trial by way of counter-claim and no judgment was on record entitling the respondent to retain the proceeds of the judgment.]

3. The application was further supported by the affidavit of the applicant in which he deponed among others that.

a) That I impleaded the respondent who is my erstwhile employer in this cause over unfair and unlawfully termination of employment.

b) That by a judgment of this court delivered by this Honourable Court it found in my favour as against the respondent as follows:

i) The termination of the employment was unfair and unlawful.

ii) An award comprising of 1 month pay in lieu of notice in the sum of Ksh.250,000 and damages of Ksh.2,500,000 being the equivalent of 10 months' salary was made.

iii) The costs of the claim were awarded.

iv) The amounts in (b) were to be subjected to taxation.

c) That the respondent was aggrieved and lodged a notice of appeal on the 21st August, 2020.

d) That the party and party costs were taxed in the sum of Ksh.283,052 on the 23rd October, 2020.

e) That the respondent filed an application for stay of execution for stay of execution pending the intended appeal dated the 6th November, 2020.

f) That the respondent while the application was pending wrote to my advocates on the 18th November, 2020 admitting to the settlement of the decree, praying for indulgence and seeking particulars of the bank account through which the payments were to be made. Annexed hereto is the letter marked as "A"

4. The respondent in opposing the application filed a Replying Affidavit through one Stephene O'bongo in which he stated in the main that:

a) That I am an adult of sound mind and the Respondent's Head of Employee Relations, conversant with the issues in the Claimant and have been duly authorized to make this affidavit on behalf of the Respondent.

b) I am aware that this Honourable Court allowed the Claimant's claim and awarded him a sum of Kenya Shillings Two Million, Seven Hundred and Fifty Thousand (Ksh.2,750,000/=).

c) I am further aware that the Claimant's party to party bill of costs was taxed at Kenya Shillings Two Hundred and Eighty- Three Thousand and Fifty Two (Ksh.283,052/=).

d) I am aware that a sum of Kenya Shillings Two Million, Two Hundred and Eighty-Eight, Eight Hundred and Thirty Two Thousand (Ksh.2,288,832/=) was paid into the Claimant's account No. 01701030200700 held with the Respondent after statutory deductions. (*Annexed and marked SO 1 is a true copy of the account statement dated 1st December, 2020*).

e) I am also aware that the claimant at the time of dismissal had outstanding facilities to a tune of Ksh. Two million, one hundred and thirty eight thousand, three hundred and forty five (2,138,345/=)

f) I am aware that as a result of the aforementioned facilities, the part of the decretal sum paid into the claimant's account was applied in settling the outstanding dues leaving an account balance of Kenya Shillings one Hundred and Fifty thousand, sour hundred and eighty seven (Ksh.150,487/=).

g) I am aware that the letter of offer dated 7th January, 2019 had a provision for set off and it is in the spirit of the said provision that the Respondent debited the amount deposited in Claimant's account. (Annexed and marked SO 2 is a true copy of the letter of offer dated 7th January, 2019).

h) I have been advised by the Respondent's advocates on record which advise I believe to be correct that the claimant is not disputing that the decretal sum was not paid into his account no 0107010302000700 and therefore the applicant has received all the due sums under the judgment.

i) I have been advised by the Respondent's advocates on record which advise I believe to be true that there are no hard and fast rules regarding how decretal sums are to be paid and hence the averment by the claimant that the same ought to have been paid into his advocate's account or through the Auctioneers is unfounded. If anything, apaying the judgment debtor directly and not through agents is laudable.

5. In his submissions in support of the application, Mr. Kigamwa for the applicant submitted among others that the respondent had not satisfied the decree in the manner prescribed in the law. The appointed agent in law for a decree holder was the advocate and all payments of proceeds of the suit ought to have been channeled to the advocate. In this regard Counsel relied on the case of **Kenya Bus Service LTD -V- Susan Muteti [1996] eKLR** per Gicheru, Akiwumi and Shah JJA (as they then were) where the Court stated

in material part:

"there can be no doubt that generally an advocate is authorized to act as his client's agent in all matters not falling within an exception which may reasonably be expected to arise for decision in the course of the proceedings"

6. According to Mr.Kigamwa, the respondent had no legal authority to purport to set-off a secured debt which had its own recovery channel. The respondent ought, if the security was unavailable, to have during the proceedings lodged a counter claim or led a set-off for the Court to determine the matter. Further, Counsel urged that the Court finds that even if the respondent had a right of set-off it waived the same when it wrote to the claimant's advocate that the letter dated 18th November, 2020 seeking the account particulars of where payment were to be made. The respondent ought to have informed the claimant's advocate that it would exercise the right of set-off as opposed to making a telephone call undertaking to pay and also making a written commitment to settle the dues within 14 days.

7. Mr. Mwangi for the respondent on the other hand submitted that the decree of the Court had been fully satisfied and the applicants attempt of seeking to be paid twice is unjustified. The applicant is not disputing payment of a sum of Ksh.2,288,832/70 into his account held with the respondent and the same is confirmed in his affidavit in support of the application. In this respect Counsel relied on the case of **Apollo Insurance Company Ltd -v- Scholastica K. Kamau & Another HCCC No. 1945 of 1999** where Kuloba J (as he was) stated that:

" … there is no rule of law that the decretal sums in an accident claim can only be paid by way of a single Cheque in the name of the victims advocate"

8. Mr. Mwangi further submitted that the letter of offer dated 7th January, 2019 provided for the respondent's right for set off. The respondent therefore had the right of set-off and debiting the decretal sum in the applicant's account to set off outstanding liabilities. Further, it would have been counterproductive for the respondent to pay the monies to the applicant while the facilities with it are in arrears.

9. Mr. Mwangi further submitted that there were no hard and fast rules regarding the manner in which decretal sums are to be paid and the applicant' s assertion that the same ought to have been paid through his advocate was unfounded. The applicant's advocate had not come out to claim that his professional fees had not been paid for the right of lien to arise. In this regard, Counsel relied on the case of **Gavin Edmonson Solicitors ltd -V- Haven Insurance Co. Ltd [2008] UKSC** as quoted with approval in the case of **Kenneth Njindo Matiba -V- AG, John Mbau Muru t/a J.M. Mburu & Company Advocates & 3 others [2020] eKLR** where it was stated:

"In the ordinary cause of traditional litigation, with solicitors acting on both sides, the amount due under a judgment, award or settlement agreement would be paid by the defendant's solicitors to the claimant's solicitor or the claimant's solicitor might recover the sum due to his client by processes of execution. In either case the equitable lien would entitle the solicitor not merely to hold on the money received, but to deduct his charges from it before accounting to his client for the balance. But equity would also enforce the security where the defendant (or his agent or insurer) paid the debt direct to the claimant, if the payer had either colluded with the claimant to cheat the solicitor out of his charges, or dealt with the debt inconsistently with the solicitor's equitable interest in it, after having notice of that interest. In an appropriate case the court would require the payer to pay the solicitor's charges again, direct to the solicitor, leaving the payer to such a remedy as he might have against the claimant. This form of remedy, or intervention as it is sometimes called, arose naturally from the application of equitable principles, in which equitable interests may be enforced in personam against anyone whose conscience is affected by having notice of them, or by holding him to account if he does."

10. The matter before me re-awakens the memories of the "two cheques" system that was once introduced by the Insurance Industry in settling claims presented by advocates and either settled out of Court or Determined after a full trial. This system came about as a result of outcry in the industry where some rogue advocates never paid the proceeds of compensation to the victims or some of the settlement cheques were issued in respect of non-existent claimants.

11. The judgment by Kuloba J (as he then was) in the case of **Apollo Insurance Company LTD -V- Scholastica K.Kamau & Another** relied on by Mr. Mwangi was decided during this period.

12. The Court of Appeal however in the case of **Kenya Bus Services LTD -V- Susan Muteti** also relied on by Mr. Kigamwa decided that it is the advocate who has the power to demand and receive moneys due to his client until such instructions are withdrawn.

13. The logic behind the position taken by the Court of Appeal can readily be seen from two perspectives. First, under order 9 rule 5 an advocate unless changed or removed under this rule shall be considered the advocate of the party until final conclusion of the cause of matter, including any review or appeal.

14. Second, in the course of representing a client, an advocate often times incur costs which are not immediately reimbursed by the client. Therefore when a matter is concluded either through amicable settlement or decree by a Court, the proceeds of the settlement or decree ought to be remitted to the advocate for purposes of taking accounts and release of the decretal sum net of the advocates costs. The advocate therefore has professional lien over the decretal sum or the proceeds of settlement.

15. This is purely meant to shield advocates from mischief by clients who could collude with judgment debtors and or persons remitting settlement amounts to deprive an advocate of his or her professional fees. This was the mischief referred to in **Gavin Edmondson Solicitors** case cited with approval in **Kenneth Stanely Njindo Matiba -V- The AG & Others** case, cited by counsel for the respondent.

16. On the other hand, the claimant herein was an employee of the respondent. By virtue of his employment he accessed and took a house loan, car loan and unsecured personal card account. By the time the claimant was terminated his indebtedness stood at Ksh.9,092,858/74. The respondent in the affidavit in response to the application before me stated that as at the time it was prepared to settle the decretal sum including costs, the claimant was in arrears of his financial obligations to the respondent. This was not denied by the claimant.

17. The letter of offer dated 7th January, 2019 stated as follows.

" the Bank reserves the right to set off all or any account of the borrower and to consolidate all the securities held on any account to be made available for liabilities which may be guaranteed by the borrower but are not covered by the letter of offer"

18. The respondent in this particular case was therefore in a dilemma over whether to remit the entire decretal sum to the advocate for the claimant while owed money by the claimant or exercise its right of set off as contained in the letter of offer issued to the claimant while still in employment and was bound by.

19. The Court takes judicial notice that Banks have fudiciary duty over customers deposits held by them. Prudence is therefore paramount.

20. In this particular case the Court is of the view that the respondent bank acted prudently by depositing the decretal sum in the claimant's account and concurrently recovering what was owed to it by the claimant. Submission by counsel for the claimant that the indebtedness was secured and that the respondent never raised any counterclaim while may be legally sound, does not exhibit prudence because at the end of the day the claimant was still obligated to pay the loans taken from the respondent while in employment. The submission by Counsel remains a longer route but with similar result.

21. As observed earlier, advocates in the cause of acting for their clients usually incur costs which are not reimbursed immediately. They may await presentation of further fee notes or conclusion of the matter before they are settled. This is why the practice is more often than not that the party and party costs are usually retained by the advocate for the successful party in addition to any other deposit or fees the client may have paid to such advocate.

22. Guided by the foregoing, the appropriate order to make in this particular case is that the respondent do pay to the claimant's advocate the sum of Ksh. 283,052/= being the party and party costs and over which the advocate had lien for his fees. The respondent shall reserve the right to pursue the claimant for this amount.

23. **It is so ordered.**

Dated and delivered at Eldoret this 30th day of March, 2022

Abuodha Nelson Jorum

Judge ELRC

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