

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA
AT NAIROBI

CAUSE NO. 1850 OF 2017

(Before Hon. Justice Abuodha Jorum Nelson)

KIM JACKSON DANIEL LUSAKA ...CLAIMANT/DECREE HOLDER

VERSUS

DAYSTAR UNIVERSITY.....RESPONDENT/APPLICANT

RULING

1. By a Motion dated 15th February, 2023, the respondent/applicant sought orders among others that:

(a) The Claimant/Decree Holder be permanently restrained from executing the Decree herein pursuant to the Doctrine of Lien available to the Respondent/Judgment Debtor.

(b) Permanent stay of execution be issued.

2. The application was supported by the affidavit of **Mueni-Nyokabi Kahumbura** who deponed on the main that:

(a) She was employed by the Respondent University as its Legal Manager and thereby duly authorized to swear this

Supporting Affidavit.

(b) Their Counsel on record, Donald B. Kipkorir of KTK Advocates advised on the Ruling delivered on 03.02.2023 which copy she has perused and verily understand.

(c) The material judgment dated 25.04.2022 was clear that they pay the Claimant payment in Lieu of Notice, Leave Pay and unpaid half salaries less statutory deductions and Loans owed to Biblia Sacco.

(d) Where a Respondent owes a Claimant money, there is no need for filing a counterclaim as the Right of Lien is automatic and self-help remedy.

3. In the foregoing, the Court do find that our reconciliation is proper and that the Claimant owes them the sum of Kshs.181,030.00.

4. In the submissions in support of their application, Mr. Kipkorir for the applicant submitted that the decretal sum owing to the claimant was Kshs.788,697.00 has statutory deductions at Kshs.228,993.00 leaving a net of Kshs.559,704.00 whilst the claimant owes the

respondent/applicant the sum of Kshs.740,734.00 thus the variance of Kshs.181,030.00 in favour of the respondent/applicant. Counsel therefore submitted that in reliance on the appellate Courts rationale on the doctrine of lieu, the respondent was right within the law to exercise their inherent right under common law doctrine of lieu to credit the said decretal sum to the claimant's outstanding loan account. In this regard, Counsel relied on the case of **Barclays Bank of Kenya Ltd. v Kepha Nyabera & 191 Others [2013] eKLR**, and the Indian case of **Shivam Construction Co. and Others v Vijaya Bank, Ahmedabad and Others**.

5. According to Counsel, the respondent's financial institution, Daystar Multipurpose Sacco was right within the legal confines by exercising its inherent right under Common Law Doctrine of lieu to credit the said decretal sums to the claimant's outstanding loan accounts.
6. Ms. Chadianya for the Claimant on the other hand submitted that the doctrine of lieu was the right of an individual to retain goods and securities in his possession that belongs to another

until certain legal debts due to the person retaining the good are satisfied. Lieu did not endorse a power of sale but only to retain the property. According to Counsel, the respondent ought to have counterclaimed for the alleged outstanding amount rather than placing reliance on the doctrine of lieu which did not apply in the circumstances since there was no property or goods that were held by the respondent over the claimant. The so called Sacco loans were therefore an afterthought and merely meant to delay the execution of the judgment. The doctrine of lieu was not available to the respondent post judgment. The respondent ought to have pleaded in the response to the claim or through a counterclaim. To support the submissions, Counsel relied on the cases of **Banking, Insurance and Finance Union v Barclays Bank of Kenya Ltd & Another [2017] eKLR**, and **Booth Extrusion (Formerly) Booth Manufacturing Africa Ltd v Dumbeyia Nelson Muturi Harun t/a Nelson Harun & Company Advocates [2014] eKLR**.

7. Ms. Chadianya further submitted that the Court was *functus officio* in the matter and that the issue of stay in absence of

substantive appeal was unknown to law of a permanent injunction against execution.

8. The Court has reviewed and considered the application as well as submissions by both Counsel together with authorities relied on and is grateful to Counsel.

9. **Section 19(1)(h) of the Employment Act** provides:

“an employer may deduct from an employee (h) an amount due and payable by the employee under and in accordance with the terms of an agreement in writing by way of repayment or part payment of a loan of money made to him by an employee...”

10. The Claimant herein was the respondent's employee until his service was terminated giving rise to the present suit and ultimately the judgment herein. The Court has had the opportunity to look at his payslip which was one of the documents he attached with his claim and noted that the claimant used to make contributions to Biblia Sacco and Multipurpose Sacco. As at December, 2016, he owed Biblia

Sacco Kshs.621,493.00 and Multipurpose Sacco Kshs.843,198.00. If the Claimant continued in employment, he could faithfully paid these loans through the checkoff system from his monthly salary and even borrowed more. It therefore remained a fact that as at the time of termination of employment, the Claimant owed money to his Sacco. This has not been denied by the Claimant. He successfully said the respondent and was awarded the decretal sum. The respondent however reserves the right to pay him the sum awarded less deductions for loans he took and benefitted from while in employment. The outstanding loan does not belong to the respondent but to Sacco's closely associated with the respondent. The respondent therefore could not counterclaim for the outstanding loan amounts but had the responsibility to pay the Claimant net of deductions for loans he took. It would not only be unjust enrichment for the Claimant to get away with his loan responsibilities but unfair to his former colleagues who would lose money from the pool they borrow from. Sacco would find it difficult to operate if employers were to be prohibited from recovering loans owed by staff exiting employment.

11. From the foregoing, the Court finds the Motion dated 25th February, 2023 merited and hereby allows prayers 3 and 4 of the same. The applicant shall further have costs of the Motion.
12. It is so ordered.

Dated, Signed and Delivered virtually at **Nairobi** on this 15th day of May 2023.

Abuodha J. N.
Judge

In the presence of:-

No appearance for the Claimant/Decree Holder
Kipkorir for the Respondent/Applicant