IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MURGOR, LAIBUTA & NGENYE, JJ.A.)

CIVIL APPEAL NO. E069 OF 2023

BETWEEN

KASSIM ABDULATIFF MOHAMED.....APPELLANT

AND

BARCLAYS BANK OF KENYA LIMITED.....RESPONDENT

(An Appeal from the Judgment of the Employment and Labour Relations Court at Mombasa (Rika, J.) delivered on 12th March, 2020

in

ELRC CAUSE NO. 739 OF 2016)

****

JUDGMENT OF THE COURT

The dispute to which this appeal relates arose before the Employment and Labour Relations Court at Mombasa between ***the Appellant, Kassim Abdulatiff Abdalla Mohamed*** as the Claimant and ***Barclays Bank of Kenya Limited, the Respondent***.

On 25th November 2019, the parties filed a Consent Judgment in the suit, which provided, first, that Judgment be entered for the Appellant against the Respondent in the sum of Kshs. 6,000,000; secondly, that the Respondent's counter-claim be marked as withdrawn; and, thirdly, that the decretal amount be settled within 14 days from the date of filing the consent, failing which the Claimant would be at liberty to execute. The consent further required that payment be made via RTGS into the Claimant's advocates' bank account, whose details were supplied in the consent. Fourthly, the parties agreed that each would bear its own costs of both the Claim and the Counter-Claim. Lastly, the matter was to be marked as fully settled. The trial court recorded and adopted the Consent Judgment on 26th November 2019.

However, on 17th December 2019, the Respondent moved the court under a Certificate of Urgency seeking, among other orders, that the Court issues a stay of execution of the decree arising from the Consent Judgment of 26th November 2019 pending determination of the application, as well as an order that any actions already taken pursuant to the Judgment be set aside until the application was heard and determined, and a further

order that it had fully complied with the Consent Judgment. The application was supported by the affidavit of Vaslas Odhiambo, the Respondent's Head of Employee Relations, sworn on 13th December 2019.

In his affidavit, Vaslas deponed that, pursuant to the consent, the Respondent paid the agreed sum of Kshs. 6,000,000, but that the payment was subject to P.A.Y.E. under the Income Tax Act. The Respondent therefore deducted Kshs. 1,623,398 as P.A.Y.E. and remitted it to the Kenya Revenue Authority (KRA), and paid the balance of Kshs. 4,376,601 to the Claimant's advocates. According to the Respondent, the Appellant's threats to execute were unlawful as the decree had been satisfied in full. The Respondent argued that the deductions were mandatory under ***Section 37*** of the ***Income Tax Act (Cap 470)*** read together with ***Section 49(2)*** of the ***Employment Act, 2007*** which require employers to deduct and remit statutory taxes from payments made in respect of employment or termination thereof. The Respondent therefore maintained that it had complied fully and lawfully with the consent.

The Appellant opposed the application by way of a Replying affidavit sworn on 15th January 2020 by his advocate, Mr. Peter Omwenga, who stated that the Claim had an approximate value of Kshs. 110,135,608, and that at an earlier stage in March 2019, the Respondent had made an out-of-court settlement offer of

Kshs. 4,376,607, which he rejected. He further deponed that, following subsequent negotiations, the parties agreed to settle the matter for Kshs. 6,000,000 on the express understanding that the sum was all-inclusive and not subject to any deductions whatsoever. On this basis, the Appellant accepted

the settlement; and that, therefore, the Respondent remained indebted to him for the amount deducted as PAYE, and that he was entitled to execute for the balance.

In determining the application, the learned Judge examined the legal framework governing the deduction of income tax from employment-related payments and confirmed that ***Section 37(1)*** of the ***Income Tax Act*** requires an employer who is paying emoluments to an employee to deduct income tax (in this case PAYE) and remit it to the Kenya Revenue Authority. Further, ***Section 49(2)*** of the ***Employment Act, 2007*** expressly provides that all payments made by an employer to an employee as a remedy for wrongful dismissal or unfair termination are subject to statutory deductions. The trial court therefore found that an employer has a mandatory statutory obligation to deduct and remit income tax from such payments. As far as the Consent Judgment was concerned, the Judge observed that it did not contain any clause indicating that the amount of Kshs. 6,000,000 was intended to be net of tax or all-inclusive; that, unlike in some settlement agreements where the parties expressly provide that the employer will shoulder the tax obligations, the consent filed in

this matter was silent on the question of tax. This silence meant that the statutory presumption applied, namely that the income was taxable and subject to PAYE deductions.

The Judge further observed that the Appellant had not produced the correspondence allegedly exchanged in March 2019 showing that he was previously offered Kshs. 4,376,607 net of tax, which he declined. Without that evidence, the Court found no basis on which to conclude that the Kshs. 6,000,000 agreed in the later settlement was intended to be net of tax.

The court opined that, the Respondent having already remitted PAYE to KRA, it could not be ordered to pay the Appellant money already paid to the Government; that, if the Appellant believed that any portion of the remitted tax was wrongfully deducted, his remedy lay in seeking a refund from the Commissioner of Domestic Taxes and not in execution against the employer. By so finding, the Judge held that the Respondent had fully satisfied the terms of the consent Judgment recorded on 26th November 2019, and that there shall be no execution by the Appellant in pursuit of Kshs.1,623,398.

Aggrieved, the Appellant filed an appeal to this Court on grounds that the learned Judge was in error in wrongly presuming that the amount stated in the Consent Judgment was taxable, thereby arriving at an incorrect interpretation of the parties'

intention; in effectively varying the terms of the Consent Judgment recorded on 26th November 2019 despite the absence of any compelling grounds or legal basis to warrant such a variation; and in improperly altering the Consent

Judgment even though the consent itself did not contain sufficient material facts on its face to justify such interference.

Additionally, the Appellant averred that the Court lacked jurisdiction to revisit or reinterpret the consent Judgment as it had become *functus officio* upon adopting and recording it; that it was wrong in finding that the Respondent had fully satisfied the Consent Judgment notwithstanding the undisputed shortfall occasioned by the deduction of Kshs. 1,623,398; and in further ordering that the Appellant was not entitled to execute for the sum of Kshs. 1,623,398, thereby denying the Appellant the benefit of the full decretal amount agreed upon in the consent Judgment.

Both parties filed written submissions and, when the appeal came up for hearing on the Court's virtual platform, learned counsel ***Mr. Omwenga*** appeared for the Appellant while there was no appearance for the Respondent, though they had filed written submissions.

In their written submissions, counsel for the Appellant submitted that, upon adoption, the consent became binding on the parties and created contractual obligations that the

Respondent was required to honour in full; and that the Respondent breached the consent by paying only Kshs. 4,376,607 instead of the agreed Kshs. 6,000,000, prompting the Appellant's protest by a letter dated 6th December 2019. It was argued that, rather than comply with the

consent, the Respondent improperly sought relief through the application dated 17th December 2019 seeking a declaration that it had already satisfied the consent. Counsel contended that the trial Judge was in error in entertaining the application and ultimately rewriting the parties' agreement by holding that the Respondent had fully satisfied the consent. They argued that nothing in the Respondent's application met the legal threshold for the variation or setting aside of a consent order.

Counsel relied on well-established cases of ***Flora N. Wasike vs Destimo Wamboko*** ***[1988] eKLR;*** ***National Bank of Kenya Ltd vs Pipeplastic Samkolit (K) Ltd*** ***[2001] eKLR;*** and ***Board of Trustees of NSSF vs Michael Mwalo*** ***[2015] eKLR*** for the proposition that a consent judgment has contractual force, and may only be interfered with on limited grounds, such as fraud, collusion, misrepresentation, lack of material facts, or any circumstance that would justify rescission of a contract. They submit that none of these grounds were present. The decisions in ***Cheruiyot vs Korir*** ***(Civil Appeal No. 131 of 2017***), where this Court reiterated the standard set out in ***Hirani vs Kassam*** ***[1952] 19 EACA 131;*** and ***Brooke Bond Liebig vs Mallya***

[1975] EA 266, were relied on for the proposition that a consent cannot be varied unless stringent criteria are met. The Appellant argued that the Respondent's application did not raise fraud, collusion, misapprehension of facts or any ground sufficient to disturb the

consent; that the learned Judge effectively rewrote the parties' contract, acted without jurisdiction since the Court was *functus officio* after adopting the consent, and reached conclusions that were unsupported by law.

On their part, counsel for the Respondent submitted that the appeal was without merit and should be dismissed; that the parties voluntarily recorded a consent Judgment on 26th November 2019, which brought the primary dispute to an end; that, in compliance with the consent, the Respondent paid the decretal sum of Kshs. 6,000,000, but as required by law, subject to statutory deductions; and that, as a result, the amount remitted to the Appellant was Kshs. 4,376,601.60. They relied on documentary evidence comprised in the record, including the RTGS confirmation and the PAYE summary together with the KRA e-Return Acknowledgment Receipt to demonstrate that Kshs. 1,623,398.40 was deducted and remitted to the Kenya Revenue Authority (KRA). According to counsel, it was only after these lawful deductions were made that the Appellant, through his advocate, threatened to issue warrants of attachment to recover the tax already remitted. It was this threat that prompted the

Respondent to file its application dated 17th December 2019 seeking a declaration that it had fully complied with the Consent Judgment.

Counsel submitted that the learned Judge correctly held that the Respondent had fully satisfied the consent and in further holding that the

Appellant was not entitled to execute for the sum deducted as PAYE; that the deduction of PAYE being the central question in the appeal did not amount to variation of the consent but, rather, were mandated by law under ***Section 37(1)*** of the ***Income Tax Act*** and ***Section 49(2)*** of the ***Employment Act.***

Counsel emphasized that the deductions in the present case were entirely consistent with these tax requirements. The case of ***Andrew Mukite Saisi vs Tracker Group of Companies Limited (supra)*** was also relied on for the proposition that terminal dues and related payments were subject to PAYE; and that employers must deduct tax before disbursing the balance to the employee. Similarly, this Court's decision in the case of ***Kioko Joseph (suing as legal representative of the estate of Joseph Kilinda) vs Bamburi Cement Ltd [2017] eKLR*** was relied on to support the position that employers must deduct PAYE from lump-sum settlements and remit payments, relying expressly on the KRA Employer's Guide. Counsel submitted that the principles from these authorities are directly applicable to the present appeal.

It was argued that even though the Consent Judgment did not expressly address tax obligations, this omission does not exempt the payment from statutory deductions; that the consent did not state that the Kshs. 6,000,000 was net of tax or all-inclusive and that, in the absence of such express wording, the employer was obligated by law to deduct PAYE. They maintained that the

Appellant's claim that the deduction amounted to a variation of the consent was unfounded, and that the trial Court properly held that the consent required no variation, but only lawful execution; that, if the Appellant insists that he was entitled to a waiver, his redress lay with seeking a refund from the Commissioner of Domestic Taxes. They urged the Court to uphold the Ruling of the ELRC, find that the Respondent fully complied with the consent judgment and dismiss the appeal with costs.

This being the first appellate Court, the mandate was well stated in the often-cited case of ***Selle vs Associated Motor Boat Co. Ltd [1968] EA 123,*** thus:

> ***"An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul***

Hameed Saif vs. Ali Mohamed Sholan (1955), 22 E. A. C. A. 270)".

See also the case of ***Jabane vs Olenja, [1986] KLR 661.***

Having considered the Appeal and the rival submissions before this court, two issues arise for determination, namely: whether this Court has jurisdiction

to hear the Appeal; and whether the trial court was in error in holding that the entire award contained in the Consent Judgment, namely the sum of Kshs. 6,000,000—was subject to taxation, thereby upholding the Respondent's deduction and remittance of PAYE.

On the first issue, the Appellant has raised the question of jurisdiction of the trial court to hear the application on the premises that, pursuant to adoption of the consent as a judgment of the court, it was rendered *functus officio* and therefore lacked jurisdiction.

We need to point out right at the outset that it is without doubt that jurisdiction is everything and without which the court can do nothing else and must down its tools. See **Owners of the Motor Vessel M.V Lillian S. vs *(K) Limited* [1989] KLR 1**.

As to whether the trial court was *functus officio* and therefore lacked jurisdiction to hear the application, the phrase *'functus officio'* is defined in ***The Black's Law Dictionary (10th Edition)*** as being "*(Of an officer or official) without further authority or legal competence because the duties and functions of*

the original commission have been fully accomplished."

In the case of ***Kenya Broadcasting Corporation vs Geoffrey Wakio*** ***[2019] eKLR,*** it was reiterated thus:

> ***"(35) To sum up, a court is functus when the proceedings are fully concluded and the judgment or order has been perfected. This, however, does not foreclose proceedings which are incidental to or natural consequence of the final decision of the court including any other matter on which the court could exercise supplemental jurisdiction. Therefore, in determining whether the court is functus officio one should look at the order or relief which is being sought in the case despite that judgment has already been rendered by the court. (See Bellevue Development Company Limited v Vinayak Builders Limited & another [2014] eKLR)."***

Similarly, in the case of ***Menginya Salim Murgani vs Kenya Revenue Authority [2014] eKLR,*** the Supreme Court held that:

> ***"It is a general principle of law that a Court after passing Judgment, becomes functus officio and cannot revisit the Judgment on merits, or purport to exercise a judicial power over the same matter, save as provided by law."***

A consideration of the events as they transpired after the Consent Judgment was entered on 25th November 2025 shows that, after payment was made to the Appellant and the Kenya Revenue Authority, the Appellant claimed that the Respondent had failed to pay him Kshs. 1,623,398.40 deducted and remitted to the Kenya Revenue Authority (KRA). Thereafter, by a letter

dated 6th December 2019, the appellant demanded payment of Kshs. 1,623,398.40 failing which he would obtain warrants of execution against the Respondent. In the abundance of caution, the Applicant filed the instant application as a natural consequence of the proceedings for a determination on whether, having paid the

amount of Kshs. 1,623,398.40 to the Kenya Revenue Authority as by law prescribed, it had perfected the Judgement and order of the trial court.

The Consent Judgment specified that Judgment be entered for the Appellant against the Respondent in the sum of Kshs. 6,000,000. Thereafter, the Applicant paid Kshs. 4,376,601.60 to the Respondent and the balance of Kshs. 1,623,398.40 to the Kenya Revenue Authority as statutory dues. Pursuant to the Respondent's demand that the payment to Kenya Revenue Authority notwithstanding, it behoved the Applicant to seek verification from the trial court on whether it had perfected the Consent Judgment having made payment in the manner in which it did. And for its part it was incumbent upon the court to make a determination on whether the Applicant had complied with the Consent Judgment.

Given that the matter appertained to execution of the Consent Judgment and not the merits of the Judgment, we find that the court was not *functus officio,* and therefore had jurisdiction to entertain the Applicant's Motion.

We would add that ***Sections 1A, 1B*** and ***3A*** of the ***Civil***

Procedure Act also endow courts with inherent power to make any orders as may be necessary for the ends of justice to be met or to prevent abuse of the process of the court. The extent of inherent powers of the court was elaborately elucidated by the authors of the ***Halsbury's Laws of England, 4thEdn. Vol. 37 Para. 14*** in the following terms:

"The jurisdiction of the court which is comprised within the term "inherent" is that which enables it to fulfil itself, properly and effectively, as a court of law. The overriding feature of the inherent jurisdiction of the court is that it is part of procedural law, both civil and criminal, and not part of substantive law; it is exercisable by summary process, without plenary trial; it may be invoked not only in relation to the parties in pending proceedings, but in relation to anyone, whether a party or not, and in relation to matters not raised in litigation between the parties; it must be distinguished from the exercise of judicial discretion; it may be exercised even in circumstances governed by rules of court. The inherent jurisdiction of the court enables it to exercise control over process by regulating its proceedings, by preventing the abuse of the process and by compelling the observance of the process … In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them."

Essentially, therefore, following the demand for Kshs. 1,623,398.40 by the Appellant after the payment of statutory dues to the Kenya Revenue Authority, the trial court was not *functus officio,* but was well within its inherent jurisdiction to

determine the application seeking the orders for stay of execution among other orders.

Having so found that the trial court had jurisdiction to determine the application, we next consider the issue of whether the trial court rightly held that the entire award contained in the Consent Judgment, namely the sum of Kshs.

6,000,000—was subject to taxation, thereby upholding the Respondent's deduction and remittance of PAYE.

The Income Tax Act establishes a clear and comprehensive regime governing the taxation of employment-related income. ***Section 3(1)*** imposes income tax on "the income of a person which accrued in or was derived from Kenya." Under ***Section 3(2)(a)(ii),*** such income expressly includes *"...gains or profits from employment or services rendered."*

This position is reiterated in ***Section 5(1),*** which provides that:

> ***"For the purposes of section 3(2)(a)(ii), an amount paid to—***
>
> ***(a) a person who is, or was at the time of the employment or when the services were rendered, a resident person in respect of any employment or services rendered by him in Kenya or outside Kenya;***
>
> ***…***
>
> ***shall be deemed to have accrued in or to have been derived from Kenya."***

Section 5(2) further expands the meaning of *"gains or profits from employment"* to include:

> ***"…wages, salary, leave pay, sick pay, payment in lieu of leave, fees, commission, bonus, gratuity,***

or subsistence, travelling, entertainment or other allowance received in respect of employment or services rendered…”

These provisions make it clear that any amount paid to an employee or former employee in respect of employment or services rendered constitutes deductible tax income.

Correspondingly, ***Section 37(1)*** of ***the Employment Act*** imposes a mandatory obligation on employers to deduct and remit PAYE from *"any emoluments paid to an employee."* Read together with ***Section 19(1)(f)*** of the ***Employment Act***, employers are authorized to make lawful statutory deductions from payments due an employee. Hence, the legislative intent is unmistakable, namely that every payment arising from an employment relationship – whether salary, terminal dues, compensation, gratuity, or other lump-sum awards – is subject to withholding tax, unless expressly exempted.

It is also instructive to note that the KRA's Employers Guide on P.A.Y.E prescribes that:

> ***"Procedure On Lump Sum Payments Gratuities, Bonuses etc***
>
> ***A. Notification***
>
> ***Employers are no longer required to notify the Tax Department before making payments of terminal benefits to the employees upon leaving their employment. Every employer has***

an obligation under Section 37 of the Income Tax Act to recover appropriate tax from any lump sum amount before releasing the difference/balance to the employee.

1. …..

2. Compensation for termination of employment

Liability extends to any payment, whether voluntary or obligatory made to a person to compensate him for the termination of his contract of employment or services, whether the contract is written or verbal and whether or not there is provision in the contract for such payment." Emphasis added.

The combined effect of these provisions is clear. Any amount paid to an employee or former employee as a gain resulting from the rendering of professional services – including lump-sum settlement amounts, including interest awarded as compensation for delayed payment – constitutes taxable income. It therefore attracts PAYE, and the employer has a statutory duty to deduct and remit such tax before releasing the net balance to the employee. In the case of ***Directline Assurance Co. Ltd vs Jeremiah Wachira Ichaura*** ***[2016] eKLR,***

this Court held that:

"…it is trite law that any Lumpsum payment for say, terminal dues, is subject to statutory deductions for the years taken into account. Indeed, in Simon Deakin and Gilian S. Morris, Labour Law at page 405, the writers observe that it is the net salary, salary after deduction of income tax, National Insurance Contribution and contribution to pension schemes or similar

benefits that is used to compute any damages due to any employees…"

Further, it is instructive that both parties cited this Court's decision in the case of ***Andrew Mukite Saisi vs Tracker Group of Companies Limited (supra)*** where,

on the question of payment of employee Income Tax, it was held that:

> "***We are guided on this finding by the authority of this Court in Kioko Joseph (suing as the legal representative of the Estate of Joseph Kilinda – vs – Bamburi Cement Ltd [2017] eKLR (Civil Appeal No. 69 of 2016) when dealing with an appeal where arguments similar to those that have been advanced in this appeal had been made. The Court referred to KRA's Employer Guide on PAYE, which states that every employer has an obligation to recover the appropriate tax from any lump sum amount, and that the liability for taxation extends to any payment, whether voluntary or obligatory, made to a person to compensate him for the termination of his employment or services. It therefore follows that even though the consent entered between the parties did not make provision, in express terms, for the payment of tax, any amount that was paid to the appellant was therefore subject to taxation. The appellants complain that this would amount to variation of the consent Judgment is therefore baseless, and this ground fails..."***

The Employment and Labour Relations Court has consistently upheld the principle that any income accruing to an employee by virtue of the employment relationship, or from the rendering of services, is subject to income tax. This position was reiterated in several decisions without number, including, ***Kaniu vs Family Bank Limited [2023] KEELRC 3060 (KLR)*** where the Court emphasized that statutory deductions apply to all

employment-related payments; ***Chagaba vs***

Artcaffe Coffee & Bakery Limited ***[2023] KEELRC 89 (KLR),***

which affirmed that terminal dues constitute taxable income; and ***Sakam Enterprises Limited vs***

Wando ***[2025] KEELRC 2917 (KLR)*** in which it was held that employers are

obligated to deduct PAYE before remitting any lump-sum exit

payments. Similarly, in the recent case of ***Ndungu vs***

Safaricom PLC; Martin Mwaniki t/a

***Anfield Auctioneers (Interested Party)* [2025] KEELRC 2234 (KLR),** it was held

that even settlement amounts arising from employment disputes are subject to statutory deductions. Collectively, these authorities underscore that employment-related income cannot escape the taxation regime regardless of the form or description of the payment.

The Appellant's case rests heavily on the contractual nature of a Consent Judgment and the argument that, in allowing the Respondent's application, the trial court impermissibly rewrote the consent entered into by the parties. From the outset, however, it is clear that the consent was distinctly silent on the issue of income tax. As seen in the above cited cases, even where a judgment or consent does not expressly provide for the payment or deduction of taxes, any amount paid to an employee on account of employment remains subject to taxation by operation of law. A court cannot, by consent or otherwise, exempt parties from mandatory statutory obligations unless the statute itself provides such an exemption. The consent Judgment contained no express stipulation that the settlement sum of Kshs. 6,000,000 was "net of tax", or that the Respondent would bear

the employee’s tax liability. In the absence of such wording, the Respondent was legally bound to deduct and remit PAYE in accordance with ***Section 37*** of the ***Income Tax Act*** and ***section 19(1)(f)*** of the ***Employment Act***. The

deduction of statutory tax, therefore, did not vary, alter, or rewrite the consent; it merely reflected the Respondent's compliance with the law.

Accordingly, the Appellant's contention that the trial Judge varied the consent is unsustainable. The Judge simply held that statutory tax obligations apply regardless of the parties' silence, and cannot be circumvented through a Consent Judgment.

In sum, the Appellant's appeal lacks merit and is hereby dismissed with costs to the Respondent.

It is so ordered.

***Dated** and **delivered at Mombasa this 30th day of January, 2026**.*

A. K. MURGOR
.....
JUDGE OF APPEAL

DR. K. I. LAIBUTA CArb, FCIArb.
.....
JUDGE OF APPEAL

G. W. NGENYE-MACHARIA
.....
.. JUDGE OF APPEAL

I certify that this is a
True copy of the original

Signed
DEPUTY REGISTRAR