



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, GATEMBU & J. MOHAMMED, JJ.A)

CIVIL APPEAL NO 208 OF 2013

BETWEEN

ANDREW MUKITE SAISI.....APPELLANT

AND

TRACKER GROUP OF COMPANIES LIMITED...RESPONDENT

(Appeal from the ruling of the Industrial Court of Kenya at Nairobi (Rika, J.) dated 25th February 2013

in

Industrial Cause No 748 of 2011)

JUDGMENT OF THE COURT

Background

1. **Andrew Mukite Saisi** (the appellant herein) was employed by **Tracker Group of Companies Ltd** (the respondent) where he was engaged as the Group Chief Executive Officer between 16th July 2007 and 15th July 2010. At the end of his contract, he and a representative of the respondent computed the appellant's terminal dues. However, despite the appellant's demands for payment of his dues, the respondent did not pay which led to the appellant filing a claim before the Industrial Court (now the Employment & Labour Relations Court) for his dues, interest as well as costs. Before the matter was heard the parties entered a consent judgment on 12th July 2012 whose terms were that the respondent was to pay, in full and final settlement, Kshs 4,700,000.00 comprising the total sum payable to the appellant for gratuity, payment in lieu of leave, interest at court rates at 14% on the gratuity and payment in lieu of leave, performance pay for 35 months and party and party costs.
2. The respondent paid the appellant a total of Kshs 3,996,127.00 and claimed that it had deducted the sum of Kshs 1,403,873.00 towards payment of Pay As You Earn (PAYE) tax. The appellant was aggrieved and he instructed Keysian Auctioneers to recover the outstanding sum from the respondent. These auctioneers proceeded to proclaim the respondent's assets, which prompted the respondent to file an application before the Industrial Court seeking an order of injunction restraining the appellant, or any one working under his direction, from levying distress or from disposing or in any way dealing with the assets of the respondent.
3. The main ground upon which the application was predicated was that the proclamation of the respondent's assets was unwarranted and prejudicial to the respondent as it did not owe the appellant any money. According to the respondent, the sum of Kshs 1,403,873.00 that was deducted from the appellant was paid to Kenya Revenue Authority (KRA) on account of statutory dues on income tax. In response to this application, the appellant stated that the amount due to him was not subject to income tax, and even if it was, it would not be applicable on party and party costs, interest paid by the respondent for late payment of his terminal benefits, and on payment in lieu of leave. The appellant maintained that the amount of money payable to him was the sum of Kshs 4,700,000.00 as well as interest on the sum as outlined in the consent.
4. In a ruling dated 25th February 2013, Rika J. held that the statutory deductions on the sum awarded to the appellant were properly made and set aside the warrants of attachment and stayed the execution. This is the ruling that sparked this appeal. In his memorandum of appeal dated 16th July 2013, the appellant raises twelve grounds of appeal which briefly summarized are that the learned Judge: misdirected himself on the principles applicable on an application

for an order of injunction; erred in converting the application before him from one of injunction to one that seeks a stay of execution and setting aside the warrants of attachment; misapprehended the consent judgment dated 12th July 2012; erred in law in his determination of who was liable to shoulder the tax burden; and in finding that the interest awarded was subject to taxation.

Submissions by counsel

5. These grounds of appeal were expounded on by **Mr. Kisaka** on behalf of the appellant. He submitted first that the learned Judge erred as there was no substantive prayer for stay of execution or setting aside the warrants of attachment. Counsel submitted that the prayer sought in the application by the respondent was one for “an order of interim injunction”. In the appellant’s view, the trial court ought to have considered this prayer alongside the principles in the *locus classicus* of ***Giella v Cassman Brown & Co Ltd (1973) EA 358*** and determine whether or not the respondent had met the threshold for the grant of the order of injunction and not converted the application into one seeking a stay of execution. In counsel’s view, the trial judge acted contrary to the principles that the court as an impartial umpire should only grant orders based on the orders sought.

6. The appellant’s second submission is that the learned Judge failed to consider that there was a consent judgment that required the respondent to pay the appellant a total of Kshs 4.7 million and that this consent did not make provision for payment of any tax by the appellant. It was counsel’s further submission that the respondent paid less the agreed amount, which was a variation of the terms of the consent without making an application to set the consent aside. Counsel therefore argued that the finding of the trial Judge that the appellant ought to bear the tax burden was misdirected since the terms of the consent were unequivocal on the amount payable. Counsel submitted that by ordering the appellant to shoulder the tax burden, the trial court unilaterally varied the terms of the consent.

7. Regarding the payment of the amount as tax, counsel submitted that even if tax was to be computed on the amount to be paid, it did not apply to tax on the interest and costs that was charged on the delayed payment as this is not income; that the costs and the interest awarded by the court ought not to have been subjected to PAYE as these are not employment benefits within the meaning of the Income Tax Act. Further, it was the appellant’s counsel’s submission that income tax is not payable on party and party costs as these are partial reimbursements made by the respondent to the appellant for costs incurred in legal representation. Counsel further contended that these payments, being made as a consequence of delayed payment of the appellant’s dues by the respondent should have been paid in full without any deduction.

8. The appellant’s final submission on this front was that the respondent did not at any time provide evidence to the trial court that there were payments made to KRA. Counsel urged us to allow the appeal in terms of the memorandum of appeal, and set aside the ruling of the Industrial Court.

9. Opposing the appeal, **Mr. Naeku**, learned counsel for the respondent saw no error in the manner that the trial judge handled the application, arguing that even though the prayer sought was for an order of injunction, a holistic reading of the entire application allowed the trial court to invoke its inherent power and discretion to grant an application for stay of execution. In counsel’s view, the court correctly noted that the issue it was required to determine was whether or not the intended execution was lawful, and give appropriate orders. Counsel argued that to hold otherwise would defeat the overriding objectives of litigation.

10. Conceding that there was a consent judgment in place, **Mr. Naeku** submitted that this did not bar any statutory deductions from being made from the sum payable to the appellant, and that the learned Judge had this in mind when determining the application. Counsel further contended that the deductions made were justified under **Section 49** of the **Employment Act**, as these were compensatory awards and terminal benefits which are subject to statutory deductions under **Section 37** of the **Income Tax Act**. As such, the respondent had an obligation to recover appropriate tax from any lump sum amount due to the appellant, and had remitted these deductions to the Commissioner of Domestic Taxes. As proof of this remittance, the respondent directed the court to a copy of a PAYE credit slip from KRA, confirming that the amount of Kshs 1,405,034.00 had been remitted to KRA on 30th August 2012.

11. **Mr. Naeku** denied that the Industrial Court varied the terms of the consent, stating that under **sections 19(1) and 49(2)** of the **Employment Act**, the dues payable to the appellant were not exempt from taxation. Counsel further submitted that party and party costs are part of income, and that the learned Judge interpreted the provisions of the law properly, and in addition correctly interpreted and adopted the reasoning of the US Supreme Court in ***Commissioner v Banks 543 US 426 (2005)*** in holding that costs included the gross taxable income of a litigant. Counsel urged this court to adopt the same reasoning. For these reasons, the respondent urged us to find that the tax deducted from the appellant’s dues was mandatory and payable as a matter of course and that the decision of the trial Judge was fair and supported by the law.

Determination

12. This being a first appeal, our role is to re-evaluate, re-assess and re-analyze the evidence before the trial court and draw out our own

conclusions. See *Kenya Ports Authority vs. Kuston (Kenya) Limited* [2009] 2 EA 212 where this Court held that:-

“On a first appeal from the High Court, the Court of Appeal should 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 that respect. Secondly, that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence”

13. We have considered the appeal, the submissions by counsel, the authorities cited and the law. The first issue for determination is whether the trial judge erred in granting orders of stay of execution while the respondent sought an order of injunction, and whether the application was incurably defective. The appellant contends that the trial court ought to have dismissed the application once it held that the respondent had not set out a case for the grant of an order of injunction. In support of this proposition, the appellant relied on the judgment of this Court in *David Sironga Ole Tukai v Francis Arap Muge & 2 Others* (2014) eKLR Civil Appeal No 76 of 2014 where it was held that:

“The court, on its part, is itself bound by the pleadings of the parties. The duty of the court is to adjudicate upon the specific matters in dispute, which the parties themselves have raised by their pleadings. The court would be out of character were it to pronounce any claim or defence not made by the parties as that would be plunging into the realm of speculation and might aggrieve the parties or, at any rate, one of them. A decision given on a claim or defence not pleaded amounts to a determination made without hearing the parties and leads to denial of justice. (Emphasis supplied)

14. Further, this Court proceeded to hold that:

“[i]t is well established in our jurisdiction that the court will not grant a remedy, which has not been applied for, and that it will not determine issues, which the parties have not pleaded. In an adversarial system such as ours, parties to litigation are the ones who set the agenda, and subject to rules of pleadings, each party is left to formulate its own case in its own way. And it is for the purpose of certainty and finality that each party is bound by its own pleadings. For this reason, a party cannot be allowed to raise a different case from that which it has pleaded without due amendment being made. That way, none of the parties is taken by surprise at the trial as each knows the other’s case is as pleaded. The purpose of the rules of pleading is also to ensure that parties define succinctly the issues so as to guide the testimony required on either side with a view to expedite the litigation through diminution of delay and expense.”

15. The application before the Industrial Court sought, in the main, orders injunctioning the appellant from attaching or in any way levying distress on the assets of the respondent, pending the hearing and determination of the application. The learned Judge observed that this prayer was inelegantly drafted, and he stated as follows:

“it is an application for injunction, but there is no substantive claim to be canvassed at the end of the application. There is no claim that is pending, and the principles under *Giella v Cassman Brown* which are widely used in resolving the question whether an injunction is merited, cannot apply here. The respondent came to court to stop execution of an existing decision. The proper way to go was the way of stay of execution...”

16. Considering whether or not the court should reject the application, the trial court held that:-

“Such a rejection would leave the main issues raised by the parties unanswered. Formal validity is important in any court process, but the tradition of the Industrial Court from its inception... is that the Court must lean more on the side of dispensation of substantive justice.”

17. The court proceeded to determine the application on its merits, since in its view, the parties canvassed it with a view to determining whether or not the appellant was entitled to execute warrants it had obtained against the respondent in order to recover the sum of money that had been paid as tax.

18. In our view, this was the appropriate avenue for the court to pursue in the circumstances of this case. While the application may have been worded in unclear terms, it contained sufficient information for the court to discern that what the respondent sought was an order restraining the appellant from attaching its goods in a bid to recover monies that the respondent had paid to KRA as tax on monies due and payable to the appellant. To hold that the application ought to have been dismissed merely because it did not explicitly ask for a stay of execution of the warrants would amount to the very miscarriage of justice that is to be obviated by the overriding principles and the requirements for courts to do substantive justice under Article 159 of the Constitution of Kenya. This ground of appeal is without merit, and it therefore fails.

19. The main crux of this appeal is whether or not the trial court erred by finding that the entire award contained in the consent Judgment was subject to taxation. In *Commissioner of Income Tax v Westmont Power (K) Ltd* (2006) 1 EA 54 the court stated that:

“Even though taxation is acceptable and even essential in democratic societies, taxation laws that have the effect of depriving citizens of their property by imposing pecuniary burdens resulting also in penal consequences must be interpreted with great caution. In this respect, it is paramount that their provisions must be express and clear so as to leave no room for ambiguity.”

19. The regime as regards income tax in Kenya is not ambiguous. **Section 3(1)** of the **Income Tax Act** (the Act) requires each person who earns any income within Kenya to pay tax. For the purposes of this Act, section 3(2)(a)(ii) of the Act defines income as the gains or profits from employment or services rendered. This is repeated at section 5(1) of the Act 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.”

and further at section 5(2) that:

“For the purposes of section 3(2)(a)(ii), “gains or profits” includes –

(a) 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 and any amount so received in respect of employment or services rendered in a year of income other than the year of income in which it is received shall be deemed to be income in respect of that other year of income.”

20. **Section 37(1)** of the **Income Tax Act** provides for the deduction of tax from any emoluments that are paid from an employer to an employee. This section, read together with **Section 19(1)(f)** of the **Employment Act** requires employers to deduct tax due to KRA from any emoluments and benefits that are due to KRA. The import of these provisions is clear: for any money paid to the appellant as a result of a gain from him rendering professional services to the respondent were subject to tax. This liability was on the payment of his terminal dues, and also extended to the interest awarded to the appellant as a gain that accrued to him as compensation for the delayed payment upon the termination of his contract.

21. 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) v 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’s 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 judgment 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 appellant’s complaint that this would amount to variation of the consent judgment is therefore baseless, and this ground fails.

22. With respect to party and party costs, the position is different. Party and party costs are awarded to refund a successful litigant for the costs that he bears in filing suit. See *Judicial Hints on Civil Procedure 2nd Edition, Law Africa Publishing*, page 94 which states that:

“The object of ordering a party to pay costs is to reimburse the successful party for amounts expended on the case. It must not be made merely as a penal measure. In the case of a criminal prosecution costs are not merely to increase the punishment of an offence. The natural limit which exists as to ordering costs of proceedings is an amount up to the sum actually incurred. Costs are a means by which a successful litigant is recouped for expenses to which he has been put in fighting in an action.”

Party and party costs are not an income, or a gain that would be subject to taxation as outlined in the Income Tax Act. In this regard, we agree with the approach taken by Odunga, J. in ***Reuben Nyanginja Ndolo v Dickson Wathika Mwangi & 3 Others [2012] eKLR (Election Petition No 11 of 2008)*** where it was observed that:

“Even if it was to be assumed that party and party costs is subject of taxation, one would have to determine what amount, in the said costs, constitute fees and what constitute disbursements. I did not understand the Mr. Mutubwa to contend that the amount remitted to Kenya Revenue Authority was only the

percentage of the fees and that the disbursements were not touched in the deduction. Without distinguishing the two, the Commission cannot be justified in contending that it has settled the amount in full. However, in strict legal sense party and party costs belong to the party as opposed to the advocate client costs. Where a client has settled the advocate's fees in full the costs purely belong to the client and not to the advocate. For one party to a litigation to determine what portion of party and party costs is payable in form of tax would amount to gate-crashing into an arena not within its mandate and uninvited. Where, however, from the amount payable it is clear that the whole sum or an identifiable portion thereof is due to the advocate in form of fees it is undoubtedly subject to the laws relating to taxation."

This case, as far as we know, was not appealed from, and we believe it represents the correct position in law. It follows that the sum of Kshs 200,000.00 that was paid as party and party costs was not liable to taxation as it was not an income or a gain to the appellant. The amount paid with regard thereto is therefore severable from the amount then due and payable to KRA and refundable to the appellant. Thus, to this limited extent, the appeal succeeds.

In view of the fact that the appellant has only partially succeeded, we direct each party to bear own costs.

Dated and delivered at Nairobi this 6th day of March, 2020

R. NAMBUYE

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true Copy of the original

DEPUTY REGISTRAR