IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, KOOME & MWERA, JJ.A)

CIVIL APPEAL NO.120 OF 2012

BETWEEN

SIMBA COLT MOTORS LIMITED……APPELLANT

AND

JAMES GITAHI MWANGI……RESPONDENT

(Being an Appeal from the Award of the Industrial Court at Nairobi (Mukunya, Udoto & Alumande (Members), dated 1st February, 2011

in

H.C.C.C. No.448(N) of 2009)

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JUDGMENT OF THE COURT

On first February, 2011, the ***Hon. Justice I. E. K. Mukunya***, sitting with 2 members delivered the award, the subject of the present appeal, after hearing the parties in the Industrial Court Cause No.448(N) of 2009.

The respondent filed a memorandum of claim dated 7th August, 2009 against the appellant pleading that he was employed by the latter as its fleet/government sales manager with effect from 3rd July, 2000 at a salary of Sh.45,000/= p.m. and also to earn commission on sales effected. The appellant reviewed the terms of employment on 9th June, 2003, fixing the commission payable on sales at 4.5% while the salary remained the same. The terms were backdated to 11th July, 2000. The respondent averred further that between 2001 and 2009 he sold vehicles worth Sh.2,706,695,821/= on which he expected to be paid Sh.121,801,312/=, at 4.5% commission. But that sum was not paid to the respondent. Instead, the appellant paid the commission to one Hitesh Patel. As a result, he resigned on 20th May, 2009 and claimed his 20 days salary – Sh.73,333/=; 92 days of accumulated leave – Sh.337,333/=; fleet incentive pay between May, 2002 – June 2008 Sh.2.81m plus Standard

Commission Sh.1.52m for May 2009. He also claimed a further Sh.144,000/= for bull bar sales he effected. In his judgment, the learned judge came to a total of Sh.126,687,978/= as claimed by the respondent, who also prayed for costs and interest at 12% p.a. until payment in full.

In the memorandum of response dated 25th September, 2009 the appellant opposed the prayers laid by the respondent. It added a counter claim of one month salary in lieu of notice. It was also its averment that the claim that pre-dated 17th August, 2006 was time-barred. That the respondent was employed on the terms which were reviewed in 2003 granting him 4.5% commission based on his own sales and not the gross motor vehicle sales of the appellant. It was added in the response that the respondent was paid Sh.2,388,500/= in July, 2003 as special incentive commission for his sales between 2001 and 2003, and that the respondent was not the only sales person of the appellant; there were other sales persons including 3rd parties who also sold vehicles on behalf of the appellant on commission. The appellant denied owing any sums stated in the claim, maintaining that it paid any commission due to the respondent with his monthly salary. And specifically regarding the claim of salary for 20 days in May, 2009, it was averred that the respondent resigned irregularly from employment without giving the one month notice provided for in the terms of employment and so such a sum as claimed was not payable. Instead a month salary was due to the appellant as pleaded in the counter claim.

While the respondent testified on his own behalf, the appellant called one ***Ameet Naranchaara Shroff***, its General Manager to testify on its behalf. Each side produced bundles of documents as exhibits. The witnesses were examined on them. To determine the dispute the learned judge remarked that:

> ***"During the hearing the parties relied on their written memorandum. Their representatives in their oral submission (sic) repeated the averments contained therein and repeated the demands and prayers thereof."***

In the award the court set out:

> ***"ISSUES IN DISPUTE***
>
> 1. ***Non-payment of special incentive commission;***
>
> 2. ***Salary for days worked;***
> 3. ***Accrued leave;***
> 4. ***Fleet incentive and bull bars;***
>
> 5. ***Standard Commission."***

While giving evidence the parties were represented by the same learned counsel who appeared before us. ***Mr. Khaseke*** for the appellant and ***Mr.***

Wamaasa for the respondent. After hearing all the evidence and admitting such documents as each side put forth, the trial court concluded that:

> ***"The issue for determination is whether he is entitled to payment of Sh.126,687,978/= as claimed or at all and whether the claim which pre-dates 16th August, 2006 is time-barred as urged by the respondent."***

We set out the five issues in dispute the learned judge stated at the beginning of the award to be determined, and the *single issue* for determination he concluded with because this was a point vigorously argued before us on the basis that the trial court fell in error by stating 5 issues at the beginning and then at the end determining only one issue. This point will become clearer as we set out the parties' respective submissions before us.

In its determination, the trial court evaluated the evidence for and against the claims and found, *inter alia*, that:

> ***"The respondent does not have any specific defence against these claims as are claims on fleet incentive, standard commission and bull bars. The claims have been established on a balance***

of probabilities."

As for the appellant's claim for one month's salary in lieu of notice, the court found that:

> ***"This is reasonable in that the claimant resigned from employment without giving one month's notice as required by the contract of service contained in the letter of appointment annexed to the Memorandum of Claim as Appendix JGM 1. The claimant should pay to the Respondent Sh.110,000/= being one month's salary in lieu of notice."***

To conclude, the court delivered itself:

> ***"Upon careful consideration of this dispute including the contents of the written memoranda, the appendices annexed thereto, the evidence of the witnesses and the oral submissions, the Court holds that the Claimant is entitled to payments of his Claim, between 16th August, 2006 and May, 2009. The respondent is hereby ordered to calculate and pay the Commission claimed by the Claimant for the period between 16th August, 2006 and May, 2009 as made as the Respondent who has duty to maintain employment records under section 74 of the Employment Act has failed to show the sales made by the Claimant. The Respondent also to pay the other claims made in the memorandum less Sh.110,000/= being one month's salary in lieu of notice, payment is to be made within THIRTY (30) days."***

The claim for costs by the respondent was rejected on the ground that he had failed to present his complaint to the labour officer first as provided for in ***section 47 of the Employment Act***. The court went on to direct that in default of payment of the awarded sum by the appellant, the respondent be at liberty to execute the decree.

At the hearing of this appeal, it was intimated that the respondent proceeded to compute a sum of Sh.78 million as the decretal sum and moved to execute. On his part the appellant put forth a sum of Sh.6m which the respondent initially declined to take but later accepted. We were made to understand that the respondent made this computation on a formula he thought applicable while the appellant's offer was based on a sum that had been put forward when the parties attempted a mediation or reconciliation.

The foregoing decision provoked the present appeal. The appellant filed a 10-point memorandum in which the Industrial Court was faulted for rendering an inconclusive and ambiguous award contrary to Rule 27 of the Industrial Court (Procedure) Rules 2010; failure to determine whether the special incentive commission at 4.5% was to be based on the sales effected by the respondent per month or on the gross motor vehicle sales of the appellant; for shifting the burden of proof onto the respondent; not appreciating the tax returns produced by the appellant to show that the claimed commissions were paid together with the salary; for awarding the respondent commissions on fleet incentive, bull bars plus standard commission without evidence; for directing the appellant to calculate and pay the respondent's claim based on inconclusive commission sheets; for failing to determine all issues in dispute and for rendering the award in favour of the respondent against the weight of the evidence and the general circumstances of the case. The appellant therefore asked us to find the entire proceedings in the trial court a nullity, warranting being set aside with costs.

At the hearing ***Mr. Khaseke*** combined the ten grounds into four broad ones and submitted in the following manner: that the trial court started off with stating five issues to be determined but ended by condensing them into one issue only and finding for the respondent on that one issue. We have already started the 5 issues that featured at the beginning of the award and the single one that the court proceeded to determine. We heard that because each of the claims set out in the memorandum of claim – whether it was on the special incentive, salary due or commission on the monthly sales effected by the respondent as opposed to the gross sales of the appellant had been denied, the trial court ought to have determined each of those aspects including the basis on which the 4.5% commission was payable. That the trial court did not do that yet it concluded with lumping together all the claims put forth by the respondent and finding that they were payable. That going by the memorandum in response, individual claims were required to be proved or disproved by evidence of respective sides before conclusion.

Counsel urged us to find that the composite approach prejudiced the appellant because for some claims, the respondent had offered no evidence, while on the contrary where the court stated that the appellant had not provided evidence – a thing it had in fact done. The examples where the respondent was granted payment while he proffered no evidence included the claim on bull bars and fleet incentive. That while the respondent had answered in cross-examination that the letter of his appointment did not provide for commission on bull bars, he had no documentary evidence to claim fleet incentive commission of Sh.2 million. On the other hand, the appellant had exhibited the respondent's income tax-returns for the period in question, indicating that the respondent was paid his commissions and due taxes deducted. Thus, it was argued, the court fell into error by making an award on items not supported by evidence while dismissing the defence which exhibited tax returns to show that commissions were paid and nothing was outstanding.

Mr. Khaseke continued to submit that the specific commission claims constituted special damages. They were pleaded and had to be proved. In this regard, the case of ***Kenya Wildlife Services vs Rift Valley Agricultural***

Services Ltd [2014] eKLR was cited with emphasis that the respondent failed in that regard and so was not entitled to the award on this item.

Mr. Khaseke's also emphasized the point that since it was the duty of the trial court to compute the commissions, it had first to determine the issue then move to calculate/compute what was deserved. But that it did neither, there is nothing for them to remit to that court to compute. Counsel continued that parties had placed before the trial court evidence to enable it to determine the issues and proceed to compute, yet it abdicated its duty to do the computation, and instead placed that burden on the appellant, contrary to the holding in ***Telkom Kenya Ltd vs John Ochanda [2014] eKLR*** which stated that it is the judicial function of the court to calculate, assess or fix damages and not for a party or otherwise.

Mr. Wamaasa's position was that the trial court was right to find that the appellant was liable to pay commissions earned on the motor vehicle units which the respondent sold. The appellant was furnished with the relevant documents in this regard yet it proceeded to pay the commissions to a 3rd party called ***Hitesh Patel***. That when the respondent sold units worth Sh.522m, he earned special incentive commission of Sh.23.5m worked out at the rate of 4.5% as agreed. The appellant did not pay this sum on the annual basis also as agreed, and it did not produce payslips to show that the commissions were paid along with the respondent's monthly salary. Asked whether the respondent was not equally bound to produce the original payslips to demonstrate that the commissions were never paid, counsel told us that he did not do so since that was not necessary in the case.

On the issue that the trial court was bound to but it did not compute the commissions or other reliefs claimed by the respondent, ***Mr. Wamaasa*** conceded that but added that his client, nonetheless, calculated a sum of Sh.78m which, the court approved and he proceeded to execute. The appellant then paid Sh.6m and that is where the matter stood. In the circumstances, counsel told us that we could allow the appeal but remit the matter to the Industrial Court for computation or assessment of the damages or such dues as the respondent was entitled to, because a balance of over Sh.70m was still owed by the appellant.

In his short response ***Mr. Khaseke*** did not agree that the matter be remitted to the Industrial Court to compute and assess the dues of the respondent because that court had not determined the issues or aspects to which the reliefs were based, including whether the special incentive commission payable, was to be calculated on the respondent's total sales of motor vehicles or on the appellant's gross motor vehicle sales. That in the circumstances, the respondent had neither filed a cross-appeal nor a notice to affirm the trial court decision, leaving the ambiguous award as it was delivered.

This being a first appeal, we are obliged to invoke the principle enunciated in ***Selle vs Associated Motor Boat Co. Ltd & Others [1968] EA 123*** and in many other decisions of this Court to the effect that on such an appeal, this Court undertakes a fresh trial of the case but depending on the recorded evidence. It has no obligation to be bound by the findings of fact of the trial court. It then arrives at its own conclusions and thus determine the appeal accordingly.

In that connection, we embark on the re-evaluation of the evidence recorded by the trial court, recognizing that we will not have the advantage of seeing and hearing the witnesses as the trial court did.

The respondent, told the trial judge that he came from a place called Thindigua, Kiambu. He was employed by the appellant company for 9 years since 3rd July, 2000 as a fleet/government sales manager. He solicited motor vehicle purchase tenders from the government, being paid a salary of Sh.45,000/= together with commission on sales. The respondent produced a bundle of documents, including his letter of appointment. The letter of appointment did not contain the formula of calculating the commission but there was a schedule produced for that purpose. He sold 1,043 vehicles worth Sh.3,092,575,460/= of commission, as per the sheets he prepared and the appellant's managers signed. The commission earned was never paid and so he complained to the appellant who, on 9th June, 2003, issued him with the letter reviewing his terms. This letter mainly focused on the special incentive commission which was to be calculated at 4.5% of the monthly sales backdated to 1st July, 2001. However, the commissions earned were never paid to the respondent but were instead paid to one ***Hitesh Patel***. That payment included the fleet incentive dues earned up to April, 2009. The respondent felt frustrated and resigned on 20th May, 2009 after having accumulated 106 days of leave besides unpaid commissions. His terminal dues were not paid and so he instructed an advocate to sue for a total of Sh.127,891,257/= which he went on to break down as enumerated. His claim of commission was not based on the appellant's total motor vehicle sales turnover but his own. The respondent disputed that ***Hitesh Patel*** was the appellant's duly appointed sales agent and also denied owing the appellant any money.

In cross-examination, the respondent told the trial judge that he entered into an employment contract with the appellant voluntarily and as per the terms of the letter of appointment. He also resigned voluntarily. His salary was Sh.45,000/= p.m. although he had claimed to be paid Sh.73,000/= for the 20 days he worked in May, 2009. He also claimed to be paid for 92 days of leave not taken. Coming to the claim for fleet incentive, the respondent told the court that:

> ***"I claim fleet incentive. This is based on Commission from 2002 to 2008 which comes to sh.2,810,000/=. I have no documentary evidence to back this."***

And as for the special incentive commission the respondent answered:

> ***"I claim special incentive at 4.5% of monthly salaries (sic) 124,686,591. The claim as in (the) demand letter and in memorandum of claim are different. There is no document which I prepared and presented to the respondent to back my claim."***

Before the foregoing, the respondent had told the trial court, regarding the claim for bull bars that:

> ***"Bull bar entitlement not provided for in letter of appointment."***

The respondent produced one payslip for July, 2003 showing that he was paid commissions in arrears. He denied that Multiline Distributors of ***Hitesh Patel*** were also agents of the appellant, although the company was paid the commissions the respondent had earned and so he wrote a letter on 6th June, 2003 to complain that that was a fraud on him. He was not paid his dues because the calculations he had presented were faulty.

The respondent was re-examined briefly, essentially on what his memorandum of claim contained as well as what he had said in examination-in-chief. He clarified that he claimed Sh.73,000/= for 20 days worked in May, 2009 because as at the time of his exit his salary was Sh.110,000/= for the month of April, although he did not produce the payslip. The respondent's case closed and that of the appellant opened when it placed ***Ameet Narinchandra Shroff*** (DW1) in the witness box.

The General Manager (Sales) with the appellant for 20 years, the witness knew the respondent from the time of his employment in 2000, on a basic salary of sh.55,000/= (or Sh.45,000). He also earned

commission on sales, for procuring tenders from the central government and local authorities. When the respondent sold vehicles, he completed commission sheets which DW1 approved and payments were made. In 2003, a dispute arose over these commissions and the respondent's terms were reviewed with the commission set at 4.5% of monthly sales. Then DW1 said:

> ***"He was paid commission for monthly sales but he never claimed the 4.5%."***

DW1 produced income tax return forms (P9) showing that the respondent was paid salary plus commission and at no time did he complain that he was never accordingly paid. He left employment and still raised no complaint in that regard. He did not give notice to resign. Multiline Distributors were genuine sales agents of the appellant and no commission due to the respondent was paid to that firm. ***Shroff*** prayed for dismissal of the claim and asked for an award of a month's salary in lieu of notice by the respondent.

In cross-examination, DW1 repeated more or less what he had said in examination-in-chief except to add that he had no evidence to show that commission based on 4.5% factor was paid to the respondent who was, nonetheless, paid whatever he claimed and all was contained in the income tax returns between 2004 and 2008 as exhibited.

Both sides made final submissions and the judgment under review was delivered.

In our view, only two or three broad points, stand to be determined in this appeal, namely:

i. whether the trial court determined the issues in dispute;

ii. whether the appellant ought to have been directed by the court to compute the award and pay the respondent;

iii. whether to remit the cause to the Industrial Court for computing the dues.

To begin with whether the trial court determined the issues placed before it, the appellant posited that it did not, while the respondent thought otherwise. We are cognizant of the fact that the decision before us is an award by the Industrial Court. It is not a judgment as understood and defined by the Civil Procedure Act but still it is a decision which judicially determined issues in dispute. It would thus not be amiss to consider that an award is a judgment, which should conform in most, if not, all aspects attributed to drafting and delivering a judgment in any civil litigation. According to ***Black's Law Dictionary, 9th Edition***, it defines an award as:

> ***"A final judgment or decision, especially one by an arbitrator or by a jury assessing damages."***

And a judgment is:

> ***"A court's final determination of the rights and obligations of parties in a case."***
>
> ***as a guide,***

In our view, whether a decision of a court is called an award or a judgment, it must finally determine the issues between parties. Ever mindful that the final determination impugned here was an award of the Industrial Court which determined the claims put forth by the respondent and denied by the appellant, it is worth repeating that the dispute was lodged by invoking the provisions of the ***Employment Act No.11 of 2007*** and ***the Labour Institutions Act No.12 of 2007***. Perusal of the two Acts do not readily yield the definition of award or the manner in which it should be drafted. However, if we may resort to the ***Civil Procedure Rules Order 20 rules 4, 5 of the Civil Procedure Rules*** offers the following:

> ***"4. Judgments in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision.***

5. ***In suits in which issues have been framed, the court shall state its finding or decision, with reasons therefor, upon each separate issue."*** (Underlining supplied.)

When arguing this appeal, the parties were in agreement that the award in question be subjected to the rigorous focus applied to a civil judgment particularly when issues framed were not determined. ***Mr. Khaseke*** told us that the trial court formulated 5 issues in dispute but only ended with combining them all in one issue, namely whether the respondent was entitled to be paid the total of Sh.126,687,978/= as claimed and that is the issue that was determined. To ***Mr. Khaseke*** such a procedure and form of the award did not resolve the individual claims raised by the respondent and denied by the appellant, regarding the total sum claimed.

Mr. Wamaasa did not concede this point by ***Mr. Khaseke*** that the trial court failed in this regard but on our part we are persuaded by ***Mr. Khaseke*** that the trial court was bound to determine each of the 5 issues in dispute it stated clearly at the beginning of the award. The court framed those issues and was therefore obligated to make a finding on each of them with reasons therefor. That the trial court failed to do so, we are satisfied, this ground should succeed. We say so because the respondent based his claim on the items stated in the issues, which the appellant denied in its memorandum in response. Both sides gave evidence on those aspects. Therefore the trial court was required to determine whether the respondent proved or failed to prove each aspect of claim giving rise to the total of Sh.126.7 million sought to be recovered. The trial court failed in that regard and so we allow this ground.

The next ground to consider is whether the trial court was right to direct that the appellant do calculate and pay the commission claimed. This point does not need to detain us much as ***Mr. Wamaasa*** conceded it thus:

> ***"I agree that the trial court did not compute the claim…,"***

and on that basis counsel asked us to remit the case to the Industrial Court to undertake the task of computation.

While determining the case of ***Telkom Kenya Ltd vs John Ochanda & Others [2014] eKLR,*** this Court cited, with approval, the position stated in ***Kenya Revenue Authority vs Menginya Salim, Murgani [2010] eKLR*** that:

> ***"There is the obvious misdirection on the part of the learned judge in imposing upon the appellant the very obligation that the law resides in the courts, to conduct computations and declare the entitlement of claimants before them. It is not a task that can, without a species of violence to the judicial tradition, be placed upon defendants. The assessment of damages is purely a judicial function that cannot be delegated."***

The Court added:

> ***"We reiterate that it would be a serious abdication of the judicial function were the same to be delegated to the parties who came to the courts for that very determination. Such delegation is a nullity for all purposes and the challenge to the learned judge's ruling on that score is well-founded and upheld."***

We need say no more. The trial court herein abdicated its role to assess/compute the entitlements in the suit before it by ordering that the appellant do undertake the same. We uphold this ground of appeal.

And lastly, whether we should direct that the trial court do undertake the computation afresh. We do not think so. The principles upon which we can order such aside, it is clear here that the trial court having failed to determine each issue placed before it, it is untenable to direct a computation simply because there is no basis upon which such an exercise can be undertaken. A suit cannot be tried in instalments; or parties cannot be given a second bite of the same cherry in a matter that was concluded and partly executed.

We have noted from the evidence tendered for instance that the respondent did not have evidence to support his claim of Sh.2,810,000/= on account of fleet incentive and bull bar entitlement was not even provided for in the letter of appointment. Further, he laid a claim for salary 20 days worked based on a salary of Sh.110,000/= in the month of April, 2001. He did not produce the relevant payslip yet his appointment letter gave him only Sh.45,000/= a month. So had the trial court considered each issue in dispute against the evidence tendered, it could not order that the respondent's total claim of Sh.126.6m be computed and paid. It had not been proved at all or in full. The claims appeared to constitute special damages. They were so pleaded. But they were not proved as required. In this regard, we refer to ***Kenya Wildlife Services Case*** (supra) wherein it was quoted that:

> ***"…after stressing the need for a plaintiff in order to succeed on a claim for specific damages … the character of the acts themselves which produce the damage, and the circumstances under which those acts are done, must regulate the degree of certainty and peculiarity with which the damage done ought to be stated and proved. As much as certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist on more would be the vainest pedantry."***

In our view and in the light of the foregoing, we do not think that in the circumstances of this case where the respondent did not prove the special damages claimed satisfactorily or at all, we are disinclined to direct that a fresh computation be undertaken by the Industrial Court. Such will be an exercise in futility. The respondent is, however, not left empty –handed in this case for he has since been paid Sh.6 million. In sum, we decline to order or remit this case to the trial court to undertake a fresh computation.

We could have left it all at that because it was not a subject of appeal – the issue of costs on the "counter-claim" where the appellant was awarded one month's salary to be paid by the respondent in lieu of notice. The appellant succeed on this point. But since it did not seek costs on that, we take it that the trial court, in the exercise of its discretion, thought that none fell to be awarded. We say no more.

In the result, we allow this appeal by setting aside the trial court's decision with costs to the appellant here and in the Industrial Court.

Dated and delivered at Nairobi this 25th day of September, 2015.

W. KARANJA

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

J. W. MWERA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR