REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI

Civil Appeal 38 of 2005

KENYA PORTS AUTHORITY …………………………. APPELLANT

AND

SILAS OBENGELE ………………………………….….. RESPONDENT

(Appeal from judgment and decree of the High Court of Kenya at Mombasa (Khaminwa, J) dated the 24th day of October, 2003

In

H.C. C. C No. 654 of 1995)

****

RULING

This matter comes before me for the settlement of the terms of the judgment as per the draft order filed herein in this Court on 21st April, 2009. The draft order was prepared by Mr. Obura, the learned counsel for the respondent, in Civil Appeal No. 38 of 2005.

When the matter was placed before me for the approval of the draft order, Ms Malik, the learned counsel for the appellant, expressed the view that she had no problem with the order as drawn save the issue of tax. She was of the view that the element of tax should have been reflected in the judgment and the draft order. To support her submission Ms Malik relied on the provisions of Income Tax Act as regards deductions which the appellant is mandated to effect and also on this Court's decision in **Warren Kenya Ltd. & Another V. Kabena [1987] KLR 227**.

In response to the foregoing submission, Mr. Obura argued that the issue of tax had not been raised during the appeal and that ***section 37*** of the income Tax Act does not apply to court judgments. He further submitted that it would be upon the recipient of the money to declare it.

I have carefully considered the submissions before me and I am of the view that indeed the area of dispute is very narrow. In our judgment delivered on 25th July, 2008 we concluded thus:-

"***In our view therefore, considering the facts and circumstances of this case the trial court should have discounted a percentage of the award made on salary for accelerated payment. However, considering that the respondent's salary would probably have been adjusted upwards through annual increments***

or promotion the trial court should have but did not take that into account. Such an increment would probably have affected the total pension. Bearing the foregoing in mind we interfere with the award on the head of salary by increasing it by a conservative 5%. We would then discount the total award by 3% to allow for the accelerated payment with the net result that the award on loss of salary is increased by two per cent.

As regards pension, we think that the respondent would be entitled to the difference between what he should have been paid had he retired normally, and what he was paid by the appellant. In his plaint the respondent claimed shs.876,988.20 as loss of pension.

In his evidence he stated that had he retired normally he would have been paid Kshs.5,013,635.80.

The appellant worked the pension on the basis of an annual salary of K£10,806 and added £600 housing, and multiplied the total figure by 319 months to get K£7277 as pension. They divided by 500 to get ¼ of the pension, which was paid in cash. After the payment £5457, Kshs.15 and 42 cents remained. They then added a gratuity of £27288 , Kshs.17 and 10 cents to bring the total to £22,7460, Kshs.12 cents 52, which is equivalent to a rounded sum of Kshs.700,000/-.

The respondent did not explain how he arrived at the figure of K.shs.5,013,635.80. In our view therefore the pension loss by the respondent should be worked out on the basis of the number of months he would have worked had he retired at the age of 55 years less what he was paid. As we do not have the figures with us the Deputy Registrar of the superior court with the assistance of the parties to work out the exact sum due on this head.

We set aside the awards on loss of telephone facilities, loss of annual leave , loss of insurance cover and loss of traveling warrants. The superior court judgment is varied to the extent we have indicated above.

The appellant has succeeded in part. However, in view of that and the fact that it provoked the litigation, the order which commends itself to us on the issue of costs is that each party shall bear own costs in this appeal."

It was pursuant to the foregoing that the parties appeared before the Deputy Registrar for exact sum due to be worked out. From what was calculated by the Deputy Registrar, Mr. Obura proceeded to prepare the draft order. As already indicated Ms Malik had no problem with the draft order as drawn except that she was of the view that tax element ought to have been taken into account.

I must start with the decision of this Court in **Warren Kenya Ltd. & Another v. Kabena (supra)**. It so happens that I was the trial Judge in that case and that during the hearing, Mr. Harris, the learned counsel for the respondent, (**Warren Kenya Ltd. & Another**) addressed me at some length on the issue of taxation and deductions. That issue was raised in the appeal and that is why a decision was made on it. In the present appeal nobody raised the issue of tax during the appeal. I have deliberately reproduced a large portion of our judgment to show clearly how we dealt with various heads of the claim by the respondent.

From Ms Malik's submissions it would appear that this Court is being asked to review, or vary its own decision. That would be contrary to well settled principle that this Court will refuse invitations to review, vary or rescind its own decision. In **Musiara Ltd. v. Ntimama [2004] 2 KLR 172** at p. 179 this Court stated:-

"***We reiterate that this Court has always refused invitations to review, vary or rescind its own decisions except so as to give effect to its intention at the time the decision was made for to depart from this rule would be a most dangerous course in that it would open the doors to all and sundry to challenge the correctness of the decisions of this Court on the basis of arguments thought of long after the judgment or decision was delivered or made. It matters not whether the judgment or ruling has been perfected or not. See*** *Lakhamshi Bros Ltd v. Rajah & Sons [1966] EA 313* ***and*** *Somani's v. Shirinkhanu (No 2)*

[1971] EA 79. ***The only exception, of course, is where the applicant has been wrongly deprived of the opportunity of presenting his argument on any particular point, which might lead to the proceedings being held to be null and void. A consideration which, as presented itself in the latter authority, but, is absent in the matter now before us."***

In view of the foregoing there can be no room for taking into account tax element at this stage of the matter .

As already stated I thought the area of dispute was very narrow and at one time I had thought that counsel appearing for the parties could settle the matter without necessarily subjecting me to writing this ruling. Both Ms Malik and Mr. Obura appeared sufficiently clear on what should be said or done but they would rather have the Court do that. I was reminded of David Patrick, a Barrister and fellow of All souls college oxford who in his humorous book wherein he says about judges as follows:-

"***They repeatedly do what the rest of us always seek to avoid: to make decisions. And they carry out this tricky and delicate function in public."***

I have been asked to make a decision in this matter which I thought did not warrant arguments. It is, however, my function to listen to arguments and make decisions thereon.

Having considered all that has been urged before me I am satisfied that the order as drawn reflects the decision of this Court and there can be no room for review or variation . In the circumstances, the draft order filed herein is approved as drawn.

Dated and delivered at Nairobi this 18th day of September, 2009

E.O. O'KUBASU

………………………………

JUDGE OF APPEAL

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

DEPUTY REGISTRAR.