



Egerton University v Miruka (Employment and Labour Relations Appeal E010 of 2022) [2023] KEELRC 3310 (KLR) (20 December 2023) (Judgment)

Neutral citation: [2023] KEELRC 3310 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
EMPLOYMENT AND LABOUR RELATIONS APPEAL E010 OF 2022**

**HS WASILWA, J
DECEMBER 20, 2023**

BETWEEN

EGERTON UNIVERSITY APPELLANT

AND

ROBERT MIRUKA RESPONDENT

JUDGMENT

1. This appeal arose from the Ruling and the Orders of the Honourable I. Orange, delivered on 3rd June, 2022, arising from the Appellant's Application Notice of Motion dated 11th March, 2022, in Nakuru Chief Magistrate Court Civil Case No. 260 of 2021. The Appellant, being aggrieved by the said Ruling Lodged a Memorandum of Appeal dated 8th June, 2022, based on the following grounds:
 1. That the learned trial magistrate erred in law and in fact in disregarding the Appellant's application, annexures, submissions and authority on whether the consented amount was to be subjected to tax under PAYE.
 2. That the learned trial magistrate erred in law and in fact in dismissing the Applicant's Application without basis.
 3. That the learned trial magistrate erred in law and in fact in failing to accord due regard to matters concerning PAYE and consents on services rendered.
2. The Appellant sought for the following Orders; -
 1. **This Appeal be allowed with costs.**
 2. The ruling of the trial court delivered on 3rd June, 2022 be set aside and an order be made finding that the Applicants complied with the consent orders of the consent dated 30th November, 2021.
 3. **The costs of the appeal be borne by the Respondent.**



3. The Application that led to the filing of this Appeal was one by the Appellant (Respondent in the trial Court) dated 11th March, 2022, filed pursuant to Order 51 Rule 1 of the Civil Procedure Rules and Section 1A, 1B, & 3A of the Civil Procedure Act and all enabling provisions, seeking for Orders that;
 1. That this Application be certified as urgent and service thereof be dispensed with in the first instance.
 2. That pending the hearing and determination of this application inter-partes, there be interim orders for stay of execution of the order issued by court on 9th December, 2021 and/or any other consequential orders.
 3. That pending hearing and determination of this application, there be stay of execution of the proclamation notice and warrants of attachment of Motor Vehicle Registration No. KBQ 488 D Pick-up Dimax.
 4. That pending the hearing and determination of this application, the Honourable Court be pleased to order the unconditional release of Motor Vehicle Registration Number KBQ 488 D Pick-up Dimax to Applicant herein.
 5. That the Claimant and his Advocates be hereby restrained from attaching or threatening attachment against the Respondent henceforth, having been fully paid the amount due to him.
 6. That costs of this application be costs in the cause.
4. The basis of the Application is that, on 30th November, 2021, the parties entered into a consent, for the Respondent to pay the sum of Kshs 823,647.45, albeit in installments, being payment of the part-time teaching claims due to the Respondent herein. Consequently, the Appellant paid the first installment on 21st December, 2021 by depositing three (3) Cheques of Kshs 146,580, Kshs 324,900 and Kshs 50,400 to the Respondent's Advocates.
5. The last balance of Kshs 397,379.75/= (after tax) was then paid on 22nd February, 2022 to the firm of M/s Ngware Ngwaru & Co Advocates through the Electronic Funds Transfer (EFT).
6. Despite paying the said money in full settlement of the Respondent's claim, at 12.05 of 22nd February, 2022, the Respondent (Claimant in the trial Court) through its advocates instructed Legend Auctioneering Services to attach the Appellant's Motor Vehicle Reg No KBQ 488 D Pick-up Dimax which they valued at Kshs 600,000.
7. That the attachment of the subject motor vehicle was irregular and unprocedural since the Applicant had already paid the consented amount in full. On that basis, the Applicant urged the Court to release the said vehicle unconditionally.
8. The Application was opposed by the Respondent by his replying affidavit sworn on 23rd March, 2022 who stated that it filed a claim on 14th September 2021 seeking teaching claims amounting to Ksh.1,839,000/= owed by the Respondent. However, that the Appellant sought for an out of Court settlement and during the meeting, it claimed to have done verification and revised the rates of teaching claims from Kshs. 1,839,000 to Kshs. 823,647.45 after tax.
9. Following the said meetings, they recorded a consent to have the agreed amount of Kshs. 823,647.45 plus costs of Kshs. 330,600 excluding tax paid in three installments. The consent was then executed by both parties, filed and adopted by the Court as judgement of the Court.
10. Consequently, the Appellant herein made the 1st installment of a sum amounting to Kshs. 196,980 against the agreed figure in the consent of Kshs. 300,000, defaulting by Kshs. 103,000. Further that



the Appellant defaulted in remitting the 2nd installment for over one month, forcing them to extract the orders and instruct auctioneers to do recoveries.

11. That as soon as the Auctioneers served the Appellant with proclamation Notice, the Appellant paid Kshs 397,379.75 totaling to Kshs. 521,880, leaving yet a balance of Kshs 301,767.45. Therefore, that they were justified to proclaim against the Appellant. It added that in the event, the Court finds the Application merited then, to direct the Appellant to deposit a sum of Kshs. 301,767.45 in a joint interest earning account in the names of the advocates for the parties.
12. In the supplementary affidavit by the Appellant herein, the Appellant stated that, the evidence before court shows that the Respondent was paid Kshs 849 115.35 over and above the Kshs. 823,647.45/= that had been consented upon by the parties and the actions of the Respondent are aimed at amending the consent to stretch the amount to his previous claim of Kshs. 1,839,000, which is not tenable in light of the consent judgement entered for the parties.
13. After hearing both parties, the Hon. Issac Orenge dismissed the Application with costs to the Respondent.
14. Dissatisfied with this Orders, the Appellant filed another Application dated 15th June, 2022, seeking stay of execution of the Orders of the Court issued on 3rd June, 2022 and staying advertisement and sale of its motor vehicle Registration Number KBQ 488D, pending hearing of this Appeal, which the trial Court allowed on the 9th September, 2022 on condition that the Appellant deposits the alleged balance of Kshs 301,767. 45 in an interest earning Account, within 30 days.
15. Upon receiving the said Orders, the parties embarked on hearing of this Appeal, which the Court directed to be canvass by written submissions with the Appellant filling on 31st October, 2023 and the Respondent filed on 30th October, 2023.

Appellant's Submissions.

16. The Appellant submitted on grounds 1 and 3 jointly and grounds 2 separately.
17. With regard to ground 1 and 3, it was submitted that the parties had indeed consented to Kshs. 823,647.45 being the amount to be paid to the Respondent by the consent dated 30th November, 2021 and that the money due was to be paid to the Respondent and the Tax remitted to the government in accordance to the provisions of the *Income Tax Act* and the *Kenya Revenue Authority Employer's Guide* on PAYE. Therefore, that the amount payable to the respondent for the services rendered as per the consent dated 30th November, 2021 was to be subjected to statutory deductions (Tax).
18. He argued that at page 32 of the Record of Appeal, the Appellant gave a breakdown of the agreed sum, the Tax paid in respect of the monies to be paid to the respondent and the Net amount that was paid to the respondent for the services rendered and annexed cheque deposits at page 29-31 of the record and further copies of EFT as proof of payment made to the respondent. In the end that the net pay received by the Respondent was the sum of Kshs. 594,359.75 as per the disclosed Net pay at page 32 of the Record of Appeal, a fact which is not disputed by the Respondent.
19. The Appellant submitted that Section 19(1)(f) of the *Employment Act*, 2007 mandates every employer to deduct and remit Tax from the earnings of an employee. Accordingly, that since the money subject of this Appeal was employment proceeds, the said amounts were always subject to Tax.



20. Further that Section 37 of the *Income Tax Act* requires an employer to remit Tax on behalf of an employee at all times. While section 3 (1) of the *Income Tax Act* Cap 470 Laws of Kenya requires every person who has an income to have the said income subjected to Tax as it provides that;
- “Subject to, and in accordance with, this *Act*, a tax to be known as income tax shall be charged for each year of income upon all the income of a person, whether resident or non-resident, which accrued in or was derived from Kenya”
21. Additionally, that section 3 (2) (a) (ii) of the *Employment Act* is clear that Tax is chargeable in respect of gains from any employment or services rendered, the Appellant did not err when it subjected the Respondent's award captured in the consent to Tax.
22. It was argued that even though the consent was silent on the sum being taxed, the same was obvious that it ought to be subjected to statutory deductions and therefore the Appellant was right to have subjected the said amount to statutory deductions(tax). To support their case, the Appellant relied on the case of *Kioko Joseph (Suing as the legal representative of the Estate of Joseph Kilinda v Bamburi Cement Ltd* [2017] eKLR in which the Court of Appeal judges upheld the High Court's decision of subjecting an award of a former employee was awarded to Tax and stated that;
- “in our opinion, the learned Judge correctly directed parties to involve the KRA having appreciated that they disagreed on the assessment of PAYE due. KRA is the body charged with the duty of assessing, collecting revenue and enforcing laws relating to revenue in the country. It is therefore well suited to assist and guide in the assessment of the tax payable.”
23. The Respondent therefore submitted that having submitted that the agreed sum of Kshs. 823,647.45 was properly subjected to statutory deductions (Tax), the trial magistrate's ruling delivered on 3rd June, 2022 dismissing the Appellant's Application ought to be set aside and a decision be made acknowledging that the amount payable to the Respondent as per the consent was properly subjected to statutory deductions (Tax) and therefore the respondent was fully paid what was due to him.
24. With regard to the second grounds, it was submitted that the Application dated 11th March, 2022 was filed for purposes of contesting the proclamation that had been done by the respondent despite the appellant having fully settled the entire amount as per the consent dated 30th November, 2021. It was argued that the Appellant has demonstrated that the respondent was paid Kshs. 849,085.35 plus advocate's costs of Kshs. 330,600.00 as opposed to Kshs. 823,647.45 which had been consented to by the parties. Thus the trial Court erred in dismissing the Application.
25. It was argued that the trial court dismissed the Appellant's stay application because it failed to consider the appellant's evidence as brought out in the application dated 11th March, 2022 and submissions dated 27th April, 2022 to the effect that the appellant had fully settled the claim as per the terms of the consent dated 30th November, 2021. Further, that the warrants of attachment were therefore erroneous in the circumstances.
26. The upshot of the Appellant's submissions is that the appeal filed herein is meritorious and the same ought to be allowed and the lower court's ruling delivered on 3rd June, 2022 set aside and substituted with a decision finding that the appellant fully settled the respondent's claim in terms of the consent dated 30th November, 2021.
27. Further that the court should also find that the respondent having been fully paid the sum consented to less statutory deductions was in error in pursuing execution and therefore the warrants of attachment were un-procedural.



28. The Appellant urged this Court to award it Costs of the appeal, those of the primary claim and the sum of Kshs. 301,767.45 which was deposited in a joint interest earning account in the names of the advocates for the appellant and respondent as a condition for stay be released to the appellant.

Respondent's Submissions.

29. The Respondent submitted from the onset that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in *Mwanasokoni v Kenya Bus Service Ltd.* (1982-88) 1 KAR 278 and the case of *Kiruga v Kiruga & Another* (1988) KLR 348.
30. The Respondent also relied on the case of *Nkuba V Nyamiro* [1983] KLR 403, where the court stated:
- “A court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.”
31. Based on the foregoing, the Respondent submitted on three issues; whether the Appellant complied with the terms of the consent dated 30th November 2021, whether the grounds raised by the Appellant in the Memorandum of Appeal were raised in the trial court and who is liable to pay costs of this suit.
32. On the first issue, the Respondent defined consent judgement as; “A judgement, the provision and terms of which are settled and agreed by the parties to the action” while “agreed judgement” which is analogous to “consent judgement” is defined as a judgement entered on agreement of the parties, which receives the sanction of the court and it constitutes a contract between the parties to the agreement, operates as adjudication between them and when court gives its sanction, it becomes a judgement of the court”.
33. Similarly, that in the instant case, a consent was recorded to have the agreed amount of Ksh.823,647.45/= plus legal costs of Kshs. 330,600/= excluding tax paid in three installments. This Judgement was adopted by the Court as its Judgement, as such the consent was as good as a judgement made independently by the Court. In this they relied on the case of *Feba Radio (Kenya) Limited T/A Feba Radio v Ikiyu Enterprises Limited* [2017] eKLR where the Court relied on the *Jiwaji v Jiwaji* (1968) E.A 547 that held that where there is no ambiguity in an agreement it must be construed according to clear words used by the parties.
34. Accordingly, that whereas the Applicants paid a sum of Ksh.521,880, the payment was not done in strict compliance with the terms set out in the consent order and in any case, that they have not fully complied. Further that the Appellant has not explained to this court the reasons for non-compliance in payment of the remaining sum of Ksh.301,767.45/= excluding tax and an additional legal fees of Ksh 330,600/= excluding tax. That it is for these reasons that the Respondent took steps to initiate execution process.
35. The Respondent maintained that the Respondent has not complied with the consent judgement, when the said consent judgement has not been set aside. In this, they relied on the case of *Benson Mbumbu Gichuki v Evans Kamande Murjua & 2 Others* [2004] eKLR, where the Court held that
- “the remedy for any failure to perform the installment provisions in the consent judgement was to enforce the judgement itself by execution and not to seek to Set aside the judgement itself.”



36. The Respondent relied also on the case of *Kenya Commercial Bank Ltd v Specialised Engineering Ltd Harris Sheld*, where the Court stated that;

“A consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or collusion or by an agreement contrary to the policy of the court or where the consent was given without sufficient material facts or misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside agreement.”

37. On the second issue, it was submitted that the *Practice Directions on standardization of Practice & Procedures in the High Court*, 2021 provides under paragraph 34 that submissions shall not raise or address any new issue(s) ground(s) or point(s) of law, not contained in the pleadings filed before the Court.

38. Accordingly, that the submissions made by the Appellant on the issue of PAYE is a new issue that was never canvassed by the parties in the trial court, thus it cannot be determined at this stage. Moreover, that the issue of PAYE was not included in the consent. To support their case, the Respondent relied on the case of *Ibrahim Manya v Registered Trustees of Agricultural Society of Kenya* where the court held that

“The offshoot of my finding on this subject is that there is no known law that subjects’ decrees of court to taxation. The *Income Tax Act* afore cited is silent on this and we should so far trend that path. If the tax man wishes to rethink his position on this, we shall not disallow the same.”

39. The Respondent also relied on the case of *Am Bahaji & Company Limited V Kenya Ports Authority* [2020] eKLR where the Learned Judge held as follows;

“I therefore find that the Respondent was at all times entitled to an amount of USD.1,136,552.12 being the decretal amount agreed on inter parties by a Consent filed and adopted as a Judgment of the court on 13th May, 2020. If it was an oversight on the part of the Applicant not to factor in any statutory deductions, then the court is of the view that the same should have been suggested, proffered and negotiated as was the case in the earlier Consent Order. It is therefore the finding of this court that the Applicant was under no obligation to retain portion(s) of the subject payments and to remit the same to the Kenya Revenue Authority on account of Withholding Tax since the Decretal Sum does not amount to an ‘income’ for purposes of withholding tax under the *Income Tax Act*.”

40. On the costs of this Appeal, the Respondent submitted it is a settled legal principle that costs follow events and that a successful party in litigation is entitled to fruits of litigation being costs. Accordingly, he urged this Court to dismiss the Appeal for being res judicata and an abuse of the court’s processes and compel the applicant to pay the remaining balance of Ksh.301,767.45/=excluding tax that is owing, additional legal fees of Ksh.330,600/= excluding tax as per the consent dated 30th November 2021 and costs of the Appeal.

41. I have examined all the averments and submissions of the parties herein.

42. The main contention in this appeal is whether the Appellant was required to pay tax out of the consented amount payable to the respondent.



43. The appellants have insisted that this amount was payable but the trial court when considering this issue ruled that tax payment was not part of the consent and so the appellants being aggrieved with this position filed this appeal.

44. In considering this issue, I refer to the consent of the parties herein which was dated 30/11/2021.

45. The consent read as follows;

“By consent, the parties have agreed to have this suit resolved and wish to have it marked as fully and finally settled with no order as to costs subject to the following terms:

That the Respondent confirms that the part time teaching claims due and outstanding to the claimant is kshs.823,647.45 (Kenya Shillings Eight Hundred And Twenty Three Thousand Six Hundred and Forty Seven and Forty Five Cents) which they propose to pay as follows:

Kenya shillings Three Hundred Thousand (Kshs.300,000/=) as 1st installment by 17th of December 2021,

Kenya Shillings One Hundred and Seventy Four Thousand Five Hundred and Forty Nine and Fifteen Cents (Kshs.174,549.15) on every 17th of subsequent months until the money owed is paid in full.

The Respondent to pay Kenya Shillings Three Hundred Thousand (kshs.330,600/=) as fees to be paid by 17th December, 2021.”

46. It is worth recalling that the claimant had sought to be paid kshs.1,839,000/= in his claim. However vide a consent, this amount was reversed to kshs.823,647.45/= and the mode of payment agreed upon as follows;- 300,000/= as 1st instalment and the balance to be paid in monthly instalments of 174,549.15/= till payment in full.

47. In satisfaction of this 1st instalment, the appellant paid to the respondent the 1st instalment of 196,980/= with some default.

48. If indeed the appellants intended that the amount payable be subject to tax, this intention would have been demonstrated even in the 1st instalment payment and also in the consent order.

49. The payments made were not proportionate to any tax payment and it is clear that the intention was to pay the respondent kshs.823,647.45/= net and costs of kshs.330,600/=. This consent was adopted by the court.

50. As stated in *KCB LTD v Specialized Engineering LTD (Supra)*, a consent order is binding on all the parties unless it is proved to have been obtained by fraud.

51. The consent order signed by the parties was silent on issue of PAYE payable and even the mode of payment sent out omitted to discuss any other payable variables.

52. It is my finding that the trial magistrate was guided accordingly in making his findings and there is no error made which would warrant this court disturbing the Judgment of the lower court.

53. I therefore find that the appeal has no merit and is dismissed accordingly with costs to the respondents.

DATED AND DELIVERED IN OPEN COURT THIS 20TH DAY OF DECEMBER, 2023.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE



In the presence of:-

Wanjiru holding brief for Ombere for Respondent – present

Oteyo for Appellant – present

Court Assistant – Fred

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