REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. E007 OF 2021

VIPINGO RIDGE LIMITED.....APPELLANT

VERSUS

SWALEHE NGONGE MPITTA.....RESPONDENT

(Being an Appeal from the judgment of the Senior Principal Magistrate at Kilifi

[Hon J Kituku (SPM) dated 8th July 2021 in Kilifi ELRC No. 105 of 2020)

JUDGMENT

Introduction

1. This is an appeal against the decision of the Senior Principal Magistrate, Kilifi magistrate's court delivered on 8th July 2021. The Appellant raises 19 grounds of appeal. However, an analysis of the several grounds shows that they raise four (4) broad issues for consideration. These are: -

a) Whether the learned trial magistrate erred in law and fact in entertaining the Respondent's claim despite evidence that it was time barred in terms of section 90 of the Employment Act.

b) Whether the trial magistrate erred in law and fact in awarding the Respondent the prayer for house allowance despite evidence that the Respondent's salary was described as consolidated and therefore allegedly necessarily included the element of house allowance.

c) Whether the trial magistrate erred in law and fact in awarding the Respondent house allowance despite evidence that the Respondent's salary was above the minimum wage as set out in the applicable wage guidelines, a fact which allegedly meant that the higher salary necessarily covered the element of house allowance.

d) Whether the trial magistrate improperly exercised his/her discretion to award the Respondent interest on the sum awarded and costs of the claim.

2. As is the law and practice, this being a first appeal from the trial court's decision, it is my duty to evaluate the evidence on record afresh in order to reach my own conclusion on the matters in dispute. However, even as I discharge this obligation, I must bear in mind that I did not have the benefit of hearing or seeing the witnesses in the cause testify. Therefore, I should only depart from the trial court's decision where it is clear to me that it is either contrary to the law or is inconsistent with the evidence that was tendered.

Background of the Case

3. From the record, the Respondent was engaged by the Appellant as a security officer in August 2013. It would appear that the parties kept the employer-employee relationship until 4th October 2019 when the Respondent voluntarily resigned.

4. As would be expected, the parties went into the process of computing the Respondent's terminal dues in a bid to bring their longstanding relation to a close. The record shows that the Appellant worked out the Respondent's dues at Khs. 49,376/=. These were then paid out to the Respondent.

5. After these payments, the Respondent appears to have reconsidered the whole issue of his terminal entitlements. In his view, the sum of

Ksh. 49,376/= paid to him was far below what his actual terminal entitlements were. Consequently, he moved to the magistrate's court, Kilifi to seek for payment of, among others: unpaid house allowance; unpaid leave for 38 days; and service pay.

6. The Appellant disputed the claim. It filed a response in which it inter alia averred that: the Respondent's consolidated salary included an element of house allowance; in any event, such allowance even if not paid, could not be lawfully claimed from 2017 backwards as it was time barred; the Respondent was not entitled to claim service pay since the Appellant had been remitting social protection dues to the National Social Security Fund for the benefit of the Respondent; and the Respondent was paid all his terminal dues and executed a clearance form signifying receipt of payments of the dues.

7. In its judgment, the trial court whilst dismissing the other claims by the Respondent, found in his favour in respect of the claim for house allowance. It awarded the Respondent Ksh. 279,193.95 being unpaid house allowance from the date he was hired to the date he resigned. The Respondent was awarded costs of the suit and as well interest.

8. It is this decision that triggered the current appeal. The Appellant challenges the court's decision on the several grounds set out in the Memorandum of Appeal. As mentioned earlier, the grounds raise four (4) broad issues which I now proceed to consider.

Analysis of the Grounds of Appeal

9. I would like to begin with the issue of limitation of actions in relation to the claim. On this, the question raised by the Appellant is whether the Respondent was entitled to claim house allowance falling before the year 2017.

10. This claim was filed on 21st May 2020. Thus, in the Appellant's view, the case could only extend to cover claims for unpaid house allowance, if at all, that went back in time to three years from 21st May 2020, the date of institution of the suit. Put differently, only house allowance claims arising from 21st May 2017 forward could be considered by the court. Any other claims for house allowance that fell back in time beyond the 2017 date were statute barred in terms of section 90 of the Employment Act. The section provides as follows:-

> ***''Notwithstanding the provisions of section 4(1) of the Limitation of Actions Act (Cap. 22), no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof.''***

11. I understand this provision as setting up a bar to employment related claims falling outside three (3) years from the date the cause of action accrued unless they fall in the category of claims that occasion continuing injury or damage to an employee. The latter must be filed within twelve (12) months of the injury or damage ceasing to happen or termination whichever happens earlier.

12. My understanding of the phrase ''*cause of action*'' is that it refers to an incident (act or omission) which vests in an individual the right to seek legal redress. Black's Law Dictionary defines the term as the ''*factual situation that entitles one person to obtain a remedy in court from another person.*'' Therefore, in relation to claims for nonpayment of house allowance for instance, the cause of action, in my view, arises every time an employer does not remit this allowance to an employee after it has fallen due.

13. Allowances, including house allowance, are usually paid periodically according to the terms and conditions of engagement between an employer and an employee. In practice, they are paid at the end of every calendar month.

14. Thus, and proceeding on the foretasted assumption, a cause of action in relation to nonpayment of house allowance will arise every time the employer fails to remit this allowance to the employee when a particular periodic remuneration is made. For instance, if basic salary and house allowance are payable monthly and the employer fails to remit the allowance for two consecutive months, there would arise two distinct causes of action for the two defaults each arising when the employer failed to remit the allowance for the specific month in question. In other words, the failure by the employer to remit the allowance for every of the two months provides a distinct and severable cause of action in respect of the default by the employer.

15. If this understanding of the matter is correct, then it means that the law on limitation of actions would apply to each of the incidents of default to pay the allowance distinctly. And hence the argument that those individual defaults that fall outside three (3) years of the date of institution of the suit to recover the unpaid allowances would, applying section 90 of the Employment Act, be barred by limitation of action.

16. I do not think that failure by an employer to remit any allowance or other payment that is payable periodically at agreed intervals constitutes a continuing injury or damage to the affected employee in terms of section 90 of the Employment Act merely because the non-remittance has been consecutive. The consecutive failures to pay, in so far as they relate to distinct periods of payment of remuneration, are separate and severable.

17. A continuing injury or damage would, in my view, for instance arise in a case of discriminatory treatment at work which remains persistent over an extended period of time. In such case, one may not compartmentalize the discrimination unless it relates to distinct factual situations. See ***Ephraim Gachigua Mwangi v Teachers Service Commission & Board of Management Thogoto Teachers College [2018]*** in which the court said that the term ''*continuing injury*'' denotes *an injury that is still in the process of being committed.*

18. However, a number of judicial pronouncements by this court (differently constituted) hold a different view from the one I express above. In effect, it is considered in these pronouncements that a series of defaults to make periodic payments or discharge some other periodic obligations under a contract of employment results in continuing injury or damage to the affected employee. The fact of continuity, it appears, is construed from the fact that the defaults, albeit relating to distinct periods, are nevertheless in a continuum and the withholding of the specific payments or failure to discharge other periodic obligations by the employer remains persistent.

19. Arising from this interpretation, a couple of decisions by this court express the view that the limitation period for this type of causes of action begins to run from the date of cessation of the injury or damage or termination of the contract of employment (whichever happens earlier). That any suit by an aggrieved party must be filed within twelve (12) months of such cessation of injury/damage or termination (see ***Johnson Kazungu v Kenya Marine & Fisheries Research Institute [2021] eKLR, John Kiiru Njiiri v University of Nairobi [2021] eKLR)***.

20. On its part, the Court of Appeal has also had opportunity to consider the concept of continuing injury under section 90 of the Employment Act. This is particularly in its latter decision of ***G4S Security Services (K) Limited v Joseph Kamau & 468 others [2018] eKLR***.

21. In the case, terminated staff of the Appellant filed a joint claim to recover unpaid benefits some of which had been outstanding for several years since May 2008. These benefits included: pending salary; accrued leave; overtime pay; and gratuity. Most of the 469 members of staff who sued were terminated between the years 2008 and 2010. However, five (5) of them were terminated later between 2011 and 2012. They filed a consolidated action on 22nd January 2014.

22. The Appellant filed a preliminary objection on the competence of the suit in view of section 90 of the Employment Act. It contended that as the suit was filed more than three (3) years after 464 of the 469 claimants had been terminated, it was time barred.

23. The trial court dismissed the objection holding as follows:-

> **'' It is the Court's considered view that termination of employment does not extinguish payment of work emoluments and terminal benefits due and owing to the employees by fact of service rendered and so long as the emoluments and benefits remain unpaid, the same constitute continuing injury or damage within the meaning of Section 90 of the Employment Act, 2007.''**

24. On appeal, the Court of Appeal reversed the decision. Although it expresses the view that persistent failure by an employer to pay accrued employee benefits does not necessarily constitute a continuing injury to the affected employee within the meaning of section 90 of the Employment Act, the court held that a suit for recovery of such benefits ought to be filed within three (3) years of termination of the employment contract they relate to. Expressing this view, the court said thus :-

> **''In the circumstances of this case we find that such 'unpaid terminal dues' do not constitute a continuing injury as contemplated under the proviso to Section 90 of the Employment Act. The respondents assert claims arising from the termination of their employment and dues that accrued to each of them at the end of each month.''**
>
> **''In the circumstances of this case we find that the contracts of 464 respondents were terminated in 2008, 2009 and 2010 and the claim was filed in 2014. Pursuant to Section 90 of the Employment Act, the claims should have been filed within three years of the termination of employment. The claims in respect of the 464 respondents were therefore time barred.''**

25. At the same time, the court appears to imply that claims for outstanding employee benefits that may have accrued more than three (3) years before the employee's termination can still be validly lodged with the Employment and Labour Relations Court so long as this is done within three (3) years of an employee's termination. This can be construed from the fact that the court sustained part of the claim that related to the five (5) other Claimants because their termination came much later in 2011 and 2012. This was notwithstanding that some of the claims by the five (5) such as gratuity earned related to the year 2008 when there was a takeover executed between the Appellant and Armor Group International PLC.

26. From the foregoing and going by the decision of the Court of Appeal in the G4S case which is binding on this court, it does appear to me that the suit by the Claimant in the current case was not time barred. He filed his claim on 21st May 2020 following the resignation on 4th October 2019. This was within the three (3) years contemplated by section 90 of the Employment Act. If the Court of Appeal decision aforesaid is to guide me on the issue, it follows that the claims for house allowance that accrued prior to the year 2017 could still be validly entertained by the trial court so long as suit for their recovery was filed within three (3) years of the contract of service between the Appellant and Respondent coming to an end.

27. I have considered the decision of this court in **Kengo Bakari Mwandogo v Kaluworks Limited [2020] eKLR** regarding the issue of continuing injury under section 90 of the Employment Act. In the matter, the court observed as follows:-

> **''The claim for leave pay, being a continuing injury within the meaning of Section 90 of the Employment Act, ought to have been filed within twelve (12) months next after cessation.''**

28. Going by the interpretation by the Court of Appeal decision in the G4S case, it appears to me that since leave entitlement arises periodically at annual intervals, every year an employer fails to settle an employee's leave dues (where leave is not taken or is commuted) constitutes a new and separate cause of action. Therefore, failure by an employer to settle such leave dues that have accrued over extended but distinct periods of time does not result in a continuing injury claim by an employee. However, cumulatively the employee may claim two or more outstanding leave dues arising from distinct periods including those that are more than three (3) years old at the time of filing suit as long as such suit is filed within three (3) years of the employee's termination. Therefore, the Kengo decision appears to be at cross purposes with the Court of Appeal's interpretation of section 90 of the Employment Act. And as is the law, the Court of Appeal's interpretation is the one to prevail.

29. The second (2nd) issue relates to whether the trial magistrate erred in law and fact in awarding the Respondent the prayer for house allowance despite evidence that the Respondent's salary was consolidated and by implication included the element of house allowance. I

have looked at the letter of appointment executed by the parties. It sets out the terms of engagement between the parties.

30. The clause on remuneration indicates that the Respondent was to receive basic monthly salary of Ksh. 7,846/= less statutory deductions. In addition, he would receive overtime pay whenever it was applicable. The letter did not provide for house allowance.

31. On 9th March 2012, the Respondent's contract was confirmed and his salary reviewed upwards to Ksh. 13,000/=. In December 2012, the Respondent received yet another salary increment to Ksh. 14,000/=. This time, the Appellant described the salary as consolidated. The trend continued through July 2013 and May 2014 when the Respondent was given two other increments of Ksh. 15,000/= and Ksh. 20,000/= respectively both described as consolidated.

32. The Respondent argues that these payments did not include house allowance. And that he was not provided with physical housing. As a consequence, he was entitled to be paid accrued house allowance in terms of section 31 of the Employment Act.

33. On its part, the Appellant takes the position that although the Respondent's letter of appointment did not specifically address the issue of house allowance, the subsequent letters of promotion mentioned that the increased salary to be paid to the Respondent was consolidated. Therefore, it included house allowance.

34. The record shows that the Appellant called two witnesses. Both of them confirmed that the Respondent's letter of appointment neither provided for house allowance nor indicated that this allowance was part of the basic pay. The only documents they relied on to advance the argument that the Respondent was receiving house allowance are the subsequent letters of promotion which mentioned that the salary the Respondent was to receive was consolidated. In the Respondent's view, the use of the word ''consolidated'' meant the salary included house allowance.

35. I have looked at the two pay slips produced in evidence. One is for September 2019 and the other October 2019. Both of them indicate the items that comprised the Respondent's gross salary. These were: the basic pay; overtime; and leave encashment for October 2019. None of the pay slips mentions house allowance as a standalone entitlement of the Respondent.

36. Although the Court of Appeal in ***Grain Pro Kenya Inc. Ltd v Andrew Waithaka Kiragu [2019] eKLR*** states that a pay slip is not a contracting document and may not be relied on to either add or subtract from the letter of appointment, my view in this matter is that the letter of offer, pay slips, letters of promotion and letters of salary increment that were produced in evidence ought to be read together in order to give meaning to the terms of engagement between the parties to this action. Worth of noting is that the first two are indeed statutory documents issued pursuant to the requirements of sections 9, 10 and 20 of the Employment Act.

37. Section 9 of the Employment Act requires that contracts of employment whose term is three months and above be evidenced in writing. Section 97(1), (3) & (5) of the Evidence Act provide as follows:-

> " ***(1)When the terms of a contract or a grant or any other disposition of property have been reduced to the form of a document, and in all other cases which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property or such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions of this Act***."
>
> ***(3) Subsection (1) of this section applies equally to cases in which contracts, grants or dispositions of property referred to are contained in one document, and to cases in which they are contained in more documents than one.***
>
> ***(5) The statement, in any document whatever, of a fact other than the facts referred to in subsection (1) of this section, shall not preclude the admission of oral evidence as to the same fact.''***

38. My understanding of this provision is that, as a general rule, introduction of oral evidence to interpret a written contract, grant or other disposition of property particularly where the law requires the contract, grant or other disposition to be reduced into writing is impermissible. Further, the provision recognizes that a written contract, grant or other disposition may be evidenced in more than one document. However and as an exception to the general rule, the provision permits the calling of oral evidence in relation to transactions evidenced in writing only to prove matters other than the terms of the transactions.

39. If the position I express above is correct, then it follows that the letter of offer, letters of promotion and increment of salary and pay slips produced in evidence before the trial court are the only documents that may be relied on to establish the terms of the contract of employment between the parties herein. Under section 9 of the Employment Act, the contract of employment between the parties to this appeal was by law to be evidenced in writing as it had subsisted for more than three (3) months. In terms of section 97 of the Evidence Act, the parties to such contract are not permitted to rely on oral evidence to interpret it.

40. The ordinary meaning of the word ''consolidate'' is ''to combine a number of things into a single usually more effective or coherent whole.'' In my view in relation to a wage, it is to combine two or more or all of the various items that go into the remuneration package. Details of what is included in the combination remain matters of fact to be determined by evidence.

41. Whilst house allowance is ordinarily expected to be in what is described as consolidated salary, this does not necessarily, in law and fact, mean that it is automatically included. A party may provide evidence to demonstrate that this allowance did not in fact form part of the gross consolidated pay. Such evidence may be by way of entries in a pay-slip showing that the element of house allowance is omitted from the items comprising the gross pay he receives. This point is underscored in ***Charity Wambui Muriuki v M/s Total Security Surveillance Limited [2017] eKLR*** where the court observed as follows: -

> ***''Further whereas the claimant claimed her salary did not include housing allowance, she did not produce any of her pay-slips to show her pay did not include housing allowance. Clause 6 of the contract of employment provided that the claimant was entitled to a consolidated salary payable in arrears at the end of every month. A consolidated salary includes basic pay and allowances payable to an employee and housing allowance is usually one of them. It was therefore incumbent upon the claimant to demonstrate by production of her pay-slip that housing allowance was not one of the allowances paid in the consolidated salary.''*** Emphasis added by underlying.

42. Where an employee disputes that he was receiving house allowance, he in effect is disputing a term of the employment contract. Where the contract had been reduced into writing in terms of sections 9 and 10 of the Employment Act, the employer can only appropriately counter the employee's position by providing documentary evidence to demonstrate the contrary in terms of section 97 of the Evidence Act. He/she cannot rely on oral evidence to fight off the employee's contention in such case. It was therefore not helpful to the Appellant's case for its witnesses to assert in court during their oral testimony, without the backing of documents, that the Respondent had been informed that his consolidated salary included house allowance.

43. Importantly, section 10(7) of the Employment Act places the burden of proving or disproving disputed terms of a written contract of service on the employer. It provides as follows:-

> ***''If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.''***

44. Despite the letter of appointment not incorporating house allowance, the pay slips tendered in evidence not showing what was included in the basic pay and the letters of promotion and salary increment not indicating what comprised the consolidated pay, the Appellant did not provide any other written evidence to disprove the Respondent's position that the basic pay did not include house allowance. As pointed out by the Court of Appeal in ***Grain Pro Kenya Inc. Ltd v Andrew Waithaka Kiragu [2019] eKLR***, the letter of appointment being the primary contractual document between the parties should have at least captured the fact that the salary paid to the Respondent was consolidated to specifically include house allowance, this being a statutory entitlement under section 31 of the Employment Act. From the evidence on record, this was not done.

45. Having regard to the provisions of sections 9 and 10 (7) of the Employment Act and section 97 of the Evidence Act, it becomes difficult to proceed on the assumption that merely because the word ''consolidated'' is used in the letters of salary increment, the Respondent was receiving house allowance. This is particularly so because no documentary evidence was availed to demonstrate that what constituted the ''consolidated'' salary included the benefit of house allowance.

46. I have considered the authorities relied on by the Appellant on this issue. Most of them state that because the claimants' salaries had a provision for a consolidated salary, the claims for house allowance would not be allowed. However, none of the authorities state as a matter of law and fact that merely because an employee's salary is classified as ''consolidated'' will it be considered as automatically having incorporated the element of house allowance. To the contrary, the general trend in the decisions is that the use of the word ''consolidated'' simply raises a presumption of fact that the salary includes all allowances including house allowance. However, this presumption can be rebutted by evidence to the contrary. For instance, in ***Charity Wambui Muriuki v M/s Total Security Surveillance Limited [2017] eKLR***, the court suggests that an employee can rebut this presumption by providing a pay slip to demonstrate that house allowance is not part of the allowances that are included in the consolidated salary. A similar position is expressed in ***Evans Gato Orina v Aggreko International Project Limited [2019] eKLR*** when the court states thus: -

> ***''In my view, the description of the salary as consolidated meant that it was the claimant's constant gross salary and the burden of proving otherwise rests on the employee who has any other interpretation of the said written term of the contract.''*** Emphasis added.

In the cases, I understand the court as stating the view that consolidated salary usually includes all allowances unless the employee shows otherwise.

47. Further on this issue, I would like to borrow the interpretation given to the phrase ''consolidated salary'' by Abuodha J in the ***Charity Wambui Muriuki v M/s Total Security Surveillance Limited [2017] eKLR*** case. The learned Judge suggests that the term denotes ''the basic salary and allowances payable to an employee.'' These allowances may include house allowance. Of importance is that from the definition aforesaid, ''basic salary'' does not include allowances. It is to the basic salary that allowances are added to constitute ''consolidated salary.''

48. A look at the pay slips produced in evidence shows that the salary that the Appellant describes as consolidated only had the ''basic pay'' and allowances other than house allowance. If the definition of consolidated salary adopted by Abuodha J is correct, then it cannot be said that the Respondent's basic salary included house allowance merely by describing it as consolidated.

49. I would perhaps have considered the issue differently if the contract of employment under consideration was an oral one as implied under section 8 as read with section 9 of the Employment Act. In such case, the oral evidence of the parties would perhaps have impacted differently.

50. The third (3rd) issue relates to whether the trial magistrate erred in law and fact in awarding the Respondent house allowance despite evidence that the Respondent's salary was above the minimum wage as set out in the applicable wage guidelines, a fact which allegedly meant that the higher salary necessarily included the element of house allowance.

51. It is perhaps important to start considering this issue by stating that statutes on employment law usually provide for the minimum terms and conditions of engagement between employers and employees. Whilst contracting parties are free to improve on these minimums, they

are not at liberty to contract below the floor set by law. Provisions implying this position include sections 43, 47 and 48 of the Labour Institutions Act, the preamble to the Employment Act and sections 3(5) and (6) and 26 of the Employment Act (see also ***Kenya Tea Growers Association v Kenya Plantation & Agricultural Workers Union [2018] eKLR***).

52. In the dispute before me, the Appellant takes the view that since it was paying the Respondent more than was provided in the Minimum Wage Order then in force, the Respondent could not demand for more in the name of house allowance. That the payment over and above what was contained in the minimum wage must be deemed to reflect the house allowance element due to the Respondent.

53. With respect, this is an argument I do not agree with. It is clear from the documents produced as exhibits that the improved basic salary that the Respondent was earning did not expressly provide for house allowance. The fact that the Appellant was paying the Respondent more than what was provided in the applicable minimum Wage Order only means that the Respondent had been able to negotiate a better wage than that in the Wage Order. It is not permissible for the employer to renege on the improved salary by converting some of it into house allowance. And the improved basic salary did not mean that house allowance would unilaterally be waived by the employer as it is a statutory entitlement under section 31 of the Employment Act.

54. The situation would perhaps have been different if the parties had not documented the relationship between them. In such case, it may be possible for the employer to rely on oral evidence to urge the case that the payments over and above the minimum wage covered house allowance.

55. The final issue in the cause is whether the trial magistrate improperly exercised his/her discretion to award the Respondent interest on the sum awarded and costs of the claim. An order for interest is normally in the discretion of the presiding judicial officer so long as this discretion is exercised judiciously (see ***Jane Wanjiku Wambu v Anthony Kigamba Hato & 3 others [2018] eKLR***). A court exercising appellate jurisdiction should be reluctant to interfere with the exercise of this discretion unless it is demonstrated that it was improperly exercised.

56. Although the Appellant raises the ground challenging the award of interest in its memorandum of appeal, no submissions were made in respect of it. No evidence is presented to demonstrate how the trial court abused its discretion in awarding interest. In the premises, I take it that the ground was abandoned.

57. Like interest, the award of costs is also left to the discretion of the presiding judicial officer so long as the discretion is exercised judiciously. Usually, costs follow the event meaning that absent compelling reasons, costs usually go to the successful party (see ***Cecilia Karuru Ngayu v Barclays Bank of Kenya & another [2016] eKLR***).

58. I do not see how the court failed to exercise its discretion on costs judiciously. It is clear that the Respondent was the successful party before the trial court. This is despite the court having disallowed some of the Respondent's claims. The fact that some of the Respondent's claims were disallowed is not sufficient reason to suggest abuse of discretion by the trial court in awarding costs to the Respondent. It was a typical case of costs following the event.

59. Finally, I see that the Respondent was paid some amount in settlement of the Claim before he filed suit. To be specific, the Appellant paid the Respondent Ksh. 49,376/=. The amount is said to represent October 2019 salary and accrued leave dues.

60. From the clearance form produced as exhibit, the Respondent signed off these payments. However, I note from the defense as filed, that the Appellant did not plead that if accepted, such payments did constitute full and final settlement of the matter between the parties (see pars 8 and 9 of the amended response). On the contrary, paragraph 9 of the amended defense clarifies that the payments covered unutilized leave days and salary for October 2019.

61. During the trial, this issue was not persuasively pursued by the defense. Besides DW2 stating that the Respondent was paid all his dues, there was no mention of the parties executing a settlement voucher with the mind to close the matter. There was no evidence about the Respondent's state of mind when he signed the voucher to suggest whether he signed it voluntarily or under some form of coercion.

62. On appeal, this issue has not been pursued at all. There are no submissions by the Appellant on it.

63. Ordinarily, if there is evidence of a pretrial settlement and it is shown through cogent evidence that it was voluntarily executed by the parties with the intention that it settles the matter the court will decline to reopen the issue. It will decline to make any further awards. Unfortunately, this evidence is lacking in this cause. At least the Appellant did not pursue it persuasively before the trial court. Importantly, this question is not expressly set out as one of the grounds of appeal. It is therefore not open for me to determine this appeal based on it.

Determination

64. In the end, I find the appeal has no merit. It is dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED ON THE 31ST DAY OF MARCH 2022

B. O. M. MANANI

JUDGE

IN THE PRESENCE OF:

GATHU FOR THE APPELLANT

KATAME FOR THE RESPONDENT

ORDER

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M MANANI