



**Njoroge v Tea Board of Kenya (Appeal 80 of 2021)  
[2022] KEELRC 1373 (KLR) (4 July 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1373 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
APPEAL 80 OF 2021  
MA ONYANGO, J  
JULY 4, 2022  
(FORMALLY NAIROBI HCCA NO. 567 OF 2013)**

**BETWEEN**

**PETER N. NJOROGE ..... APPELLANT**

**AND**

**TEA BOARD OF KENYA ..... RESPONDENT**

*(Being an appeal and cross appeal from the judgment and decree of the Chief Magistrate's Court at Milimani Commercial Courts delivered on 30th September 2013 by Hon. C. Obulutsa (Mr.) Acting Chief Magistrate in CMCC No. 4510 of 2008 – Peter N. Njoroge v Tea Board of Kenya)*

**JUDGMENT**

1. The Appeal herein arises from the decision of the Learned Magistrate, Hon. C. Obulutsa, Chief Magistrate's Court at Milimani Commercial Court in Civil Case No. 4510 of 2008 between the parties herein in respect of the Judgment delivered on 30<sup>th</sup> September, 2013. The grounds of appeal are as follows:
  - a. The Learned Magistrate erred and was wrong in not holding that the Appellant's non- attendance at board meetings of the Respondent and for which he claimed payment on account of that exclusion was occasioned by the Respondent and its Board of Directors and consequently the Respondent was liable therefor.
  - b. The Learned Magistrate erred and was wrong in holding that because only "allowances" were been earned by the Appellant if and when, he attended such meetings, and because he had not attended the meetings because of his



exclusion from such meetings, the Appellant had not suffered loss and damage for which he could be compensated.

- c. The Learned Magistrate erred and was wrong in holding that because allowances are a specific sum of money for which the Appellant was being paid for attending meetings and because he had not attended the meeting he had not suffered loss when in fact such allowances were in the nature of income to the Appellant which he used to earn for attending board meetings of the Respondent and were not moneys for re-imbusement to the Appellant for expenses incurred.
  - d. The Learned Magistrate erred and failed to appreciate that on the evidence, the Appellant had proved his Claim against the Respondent on a balance of probability and was entitled to Judgment.
2. The Appellant prays that the appeal be allowed with costs and Interest thereon, the lower court judgment be set aside and be substituted with judgment in his favour as against the Respondent in the sum of Kshs.434,596/- together with interest thereon.
3. The Respondent being dissatisfied with part of the judgment and decree of the Trial Court in respect of the award of costs of the dismissed suit filed a Memorandum of Cross Appeal dated 27<sup>th</sup> September, 2021 and sets out the following grounds of appeal: -
  - a. The Honorable Learned Magistrate erred in law by awarding costs to the Appellant, having properly made a factual finding that the Appellant had failed to establish his claim for special damages on a balance of probabilities, and dismissing the same.
  - b. The Honourable Learned Magistrate's decision violated the mandatory proviso to Section 27 (1) (CPA), given that there was no good reason for him to make such order.
  - c. The Learned Magistrate erred in law by holding the Appellant had partially succeeded as the statement is not anchored on any paragraph of his judgment, consequently, it could not form a basis for awarding costs to the Appellant.
  - d. The Honourable Learned Magistrate erred in law by issuing a biased and discriminatory order for payment of costs of the suit against the Respondent without any justifiable grounds.
4. The Respondent/Cross Appellant sought the following Orders from this Court: -
  - a. That the limb of the lower court's order and decree directing that costs of the dismissed suit be paid to the Appellant be set aside.
  - b. That the Appellant's Appeal against the dismissal of the suit by the lower court be dismissed and costs of the Appeal and of the lower court's suit be awarded to the Respondent.
5. Directions on the request for filing of written submissions in opposition and support of the appeal and cross appeal were issued by this Court and both parties filed their respective submissions.



### Submissions by the Parties

6. In his submissions the Appellant states that the trial magistrate erred in law in finding that he had not proved his case for special damages in respect of sitting allowance of Kshs.837,214/- on the ground that he did not attend the meetings.
7. The Appellant submitted that his failure to attend the meetings was due to the fact that he was not allowed to do so. That the allowances were not reimbursements as contended by the Respondent and held by the trial magistrate. The Appellant contended that he was entitled to sitting allowances by dint of his terms of service as a member of the board as set out in the letter dated 30<sup>th</sup> March, 2005 addressed to the Respondent's Chairman from the Permanent Secretary. The letter is attached at page 36 of the record off appeal.
8. The Appellant urged this Court to enter Judgment in its favour for Kshs.288,000/- being the allowances payable for attending board meetings, this being money he would have earned and was denied.
9. With respect to the claims for lunch, travel allowances and accommodation for attendance at Nairobi Show in the years 2004 and 2005, the Appellant conceded that the same cannot be awarded as he did not attend and/or incur any expenses under these heads.
10. On the Cross Appeal, the Appellant submits that the same is devoid of merit urging this Court to dismiss it with costs to the Appellant.
11. In conclusion the Appellant submitted that his Appeal is merited and urged this Court to set aside the lower court judgment and substitute it with Judgment in his favour in the sum of Kshs.288,000/- as against the Respondent together with interest thereon from the date of filing suit. He further prayed for costs of the appeal.

### Respondent's Submissions

12. The Respondent on its part urged this Court to uphold the lower court Judgment in dismissing the claim for specific damages. It maintained that the specific damages sought were not specifically pleaded and proved hence the trial Magistrate's decision to dismiss the claim. For emphasis the Respondent relied on the decision in the cases of *Capital Fish Kenya Limited v The Kenya Power & Lighting Company Limited* (2016) eKLR and *David Bagine v Martin Bundi* (1997) eKLR on special damages.
13. The Respondent further submitted that the Appellant was not its employee and as a result is not entitled to payment of salaries or wages. It however maintained that the Appellant was duly paid for all board meetings attended, with the last one being on 23<sup>rd</sup> April, 2004.
14. The Respondent further submitted that the Appellant did not attend any of the meetings quoted for the reason that his directorship had expired by effluxion of time.
15. On the cross appeal, the Respondent submitted that the Appellant having not been successful in his suit in the lower Court, he is not entitled to costs. For emphasis the Respondent relied on the decision in the case of *Super Marine Handling Services Limited v Kenya Revenue Authority* [2010] eKLR where the Court held that costs ought to be awarded to a successful litigant.
16. In conclusion the Respondent urged this Court to find the Appeal without merit and to dismiss it with costs and further allow its cross appeal as prayed.



## Analysis and Determination

17. As a first appellate Court, this Court has a singular duty to re-evaluate the entire case and come up with its findings as was held in the case of *Selle v Assorted Motor Boat Company* 1968 EA Company 1968 EA 123-126 where the Court stated as follows:

“Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial. Judge’s findings of fact appear earlier that he has clearly failed on some part to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

18. The appeal herein was on one ground only, being the non-payment of allowances that were claimed as special damages in the Plaint filed by the Appellant.

19. The Appellant maintained that he was entitled to payment of such allowances for reason that the same was provided for under his terms of service and that his failure to attend the meetings was not deliberate but occasioned by the Respondent.

20. I have perused the record of appeal and confirmed that indeed the Appellant did not attend any board meetings during the period he is claiming payment of sitting allowance.

21. I do agree with the Learned Trial Magistrate’s decision that the Appellant was not entitled to payment of any allowances as he did not attend any of the board meetings during the period between 23<sup>rd</sup> April, 2004 and 24<sup>th</sup> July, 2006 for which his claim relates. Allowing the same would be tantamount to unjust enrichment on the part of the Appellant which cannot be encouraged by this Court. Reference is made to the cases of *Elizabeth Wakanyi Kibe v Telkom Kenya Limited* [2014] eKLR and *D.K. Njagi Marete v Teachers Service Commission* [2013] eKLR.

22. Further, having pleaded the same as special damage the Appellant was under obligation to specifically pleaded and prove the same. As held by the Trial Court, sitting allowances are only payable where the meetings are attended. No allowance is payable for meetings not attended. I therefore agree with the Trial Magistrate that the claim for anticipatory damages is not payable, having been dependent on attendance.

23. In the circumstances I find the appeal filed herein without merit and dismiss it with costs to the Respondent.

24. The cross appeal, is also on one (1) ground, that the award of costs to the Appellant, was an error on the part of the Learned Trial Magistrate.

25. The Respondent submits that the Trial Magistrate erred in awarding costs to the Appellant, his claim having failed. The Respondent submitted that costs follow the event and therefore cannot be awarded to an unsuccessful litigant.

26. In the last paragraph of the judgment, the Trial Court held as follows: -

Having considered the evidence and submissions, the court finds that in respect to the claim for special damages, the plaintiff has failed to establish his case on a balance of probability.



“The allowances claimed are anticipatory and cannot be availed as they are subject to meetings attended.

The claim for special damages is hereby dismissed. Since the suit succeeds partly; the plaintiff to have costs.”

27. I have perused the entire judgment and cannot find the portion where the suit succeeds partly. I agree with the Respondent that this was in error as the suit in the lower court was dismissed in entirety.
28. The cross appeal therefore succeeds. The order of the Trial Court for payment of costs is set aside and replaced with an order that the suit in the lower court is dismissed with costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 4<sup>TH</sup> DAY OF JULY 2022**

**MAUREEN ONYANGO**

**JUDGE**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1** of the *Civil Procedure Rules*, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of **Section 1B** of the *Civil Procedure Act (Chapter 21 of the Laws of Kenya)* which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**MAUREEN ONYANGO**

**JUDGE**

