



REPUBLIC OF KENYA



KENYA LAW
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**Owuor v Ramboo Colourcane Limited (Appeal 928 of 2022)
[2022] KEELRC 13571 (KLR) (20 December 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13571 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL 928 OF 2022
B ONGAYA, J
DECEMBER 20, 2022**

BETWEEN

VITALIS OWUOR APPELLANT

AND

RAMBOO COLOURCANE LIMITED RESPONDENT

(Formerly High Court Civil Appeal No. 52 of 2018 at Nairobi in the Commercial and Admiralty Division and being an appeal from the ruling and order delivered on 26.01.2018 by the Hon. I. Gichobi, Senior Resident Magistrate, Milimani Commercial Courts in Civil Case No. 7924 of 2010)

JUDGMENT

1. The appellant filed the memorandum of appeal dated February 5, 2018 and through Andrew Ombwayo & Company Advocates. The appellant's grounds of appeal are that the trial court erred in law and fact as follows:
 - a. By holding the appellant had not denied receipt of Kshs.98,000.00 under the [Work Injury Benefits Act](#) Cap 236 prior to the institution of the suit and without proof or evidence by the respondent and or at all.
 - b. By finding that it was an oversight by the trial court failing to deduct the Kshs 98,000.00 which amounted to an error apparent on the face of the record and yet, that issue was not presented to the trial court for determination at trial and was not proved by evidence.
 - c. By retrying a new issue after judgment and failed to appreciate it had become *functus officio*.
 - d. By ignoring the terms of the consent entered by parties on 11.^{05.2016} that placed before the trial court for determination only the issue of quantum damages based on the documentary



evidence adduced and which excluded the issue of the Kshs 98,000.00 payable under the Work Injury Benefits Act, Cap 236.

- e. Failing to appreciate that judgment had been entered and matter settled.
 - f. By exercising the discretion injudicially in allowing the application dated July 11, 2017.
2. The appellant prayed for orders:
- a. That the entire ruling and order of Hon I Gichobi, Senior Resident Magistrate Milimani Commercial Courts made on January 26, 2018 in NRB CMCC No 7924 of 2010 be and is hereby set aside and substituted with an order dismissing the notice of motion dated July 11, 2017.
 - b. The appellants be awarded costs of the appeal.
3. The background to the appeal is as follows. The appellant filed a plaint dated November 29, 2010 claiming and praying for general damages, costs and interest with respect of injuries suffered while in the respondent's employment. The respondent filed a defence on July 28, 2011 through Singh Gitau & Company Advocates. The respondent prayed that the suit be dismissed with costs. On May 11, 2016 the parties recorded a consent before the trial court thus:
- a. Judgment on liability be entered for the plaintiff against the defendant in the ratio of 80:20.
 - b. Parties to submit on quantum of damages to be assessed by the court.
 - c. Plaintiff's list of documents dated August 17, 2011 and supplementary list of documents dated August 10, 2012 and medical report of Dr RP Shah dated November 11, 2011 on behalf of the defendant be admitted as evidence.
 - d. Mention on June 15, 2016 for submissions.
4. The parties subsequently filed submissions and the trial court did not deliver the judgment until May 5, 2017 where the record at page 141 shows thus, "judgment delivered per the typed copy" The typed copy of that judgment delivered on May 5, 2017 is at page 68 of the record of appeal. In the ration of 80:20 liability, the trial court granted Kshs 180,000.00 less Kshs 36,000.00 making Kshs 144, 000.00 plus costs and interest at court rate from the date of judgment. The respondent thereafter filed an application for review order 45 of the Civil Procedure Rules for an order that the honourable court be pleased to review its judgment and order that the sum of Kshs 98,000.00 duly paid out to the plaintiff prior to institution of the suit be deducted from judgment or decretal sum. The trial court in a ruling delivered on January 26, 2018 found that the appellant did not deny receiving the Kshs.98,000.00 under the Workman's Compensation Act, Cap 236 prior to institution of the suit and meaning that there was an oversight on the part of the court to note the same and the same amounted to an error or mistake apparent on the face of the record to warrant review of the said judgment. The appellant has appealed against that ruling.
5. The 1st issue for determination is whether by material before the court as at time of judgment subject of application for review the issue of Kshs.98,000.00 was before the trial court. The issue is resolved by the appellant's paragraph 3 of the submissions herein by stating that the respondent had lodged a list of documents dated November 2, 2012 at page 62 to 67 of the record of appeal in which it had included the proof that the appellant had been paid Kshs.98,000.00 under Workman's Compensation Act, Cap 236.



6. The 2nd issue is whether the trial court in deciding the application considered the issue of payment of the Kshs.98,000.00 outside the parties' respective cases. It is submitted for the appellant that the issue of Kshs 98,000.00 had not been covered in the consent and it was not an issue for determination because the parties knew that the amount had already been paid and further, that the full decretal amount had already been paid as at the time the application for review was made. The court has considered the relevant consent order and it was that in making submissions and prior to the judgment, reliance was to be on the plaintiff's list of documents dated August 17, 2011 and supplementary list of documents dated August 10, 2012 and medical report of Dr R P Shah dated November 11, 2011 on behalf of the defendant and which were admitted as evidence. The respondent had filed the defendant's list of documents dated November 2, 2012 including the cheque for the payment of Kshs.98,000.00. However, the consent on admitted documents only included Dr RP Shah's Medical Report and not any other document in the defendant's list of documents. Parties had in that consent order agreed on liability at 80:20, the plaintiff against defendant. The court considers that by terms of the consent order, the trial court did not suffer an oversight as opined in the ruling when in the judgment, the payment of the Kshs 98,000.00 was not referred to or mentioned at all. The court finds for the appellant that indeed, the documents on payment of the Kshs 98,000.00 as had already been paid were not to be considered by the trial court because they were not part of the documents admitted by reason of the consent order. The parties must be bound by the consent order with the effect that the appeal must succeed. While the respondent had specifically pleaded at paragraph 7 of the defence that it had fully compensated the appellant, it entered the consent consciously locking out the material on such compensation. The effect is that the parties by the consent order had agreed to move into submissions and judgment on the understanding that the Kshs.98,000.00 already paid would not be considered by the trial court in drawing the judgment within the terms of the consent order. The court finds accordingly. While making the finding, the court considers that it can only be guided by the terms of the consent order leading to the judgment and without the benefit of whatever bargains the parties made and whatever went through their minds at recording the consent order, it must be that they consciously opted to lock out the evidence of the amount of Kshs.98,000.00 that had already been paid – they are bound accordingly.
7. It is not in dispute that as at time of the application for review the full decretal sum had been paid. The court returns for the appellant that the applicant for review was inordinately belated coming after satisfaction of the judgment and decree sought to be reviewed. Such operated as a bar to allowing the application for review.
8. By those findings the appeal will succeed with costs.
9. In conclusion the appeal is allowed with orders:
 - a. That the entire ruling and order of Hon. I. Gichobi, Senior Resident Magistrate Milimani Commercial Courts made on January 26, 2018 in NRB CMCC No. 7924 of 2010 be and is hereby set aside and substituted with an order dismissing the notice of motion dated July 11, 2017.
 - b. The appellant is awarded costs of the appeal.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS TUESDAY 20TH DECEMBER, 2022.

BYRAM ONGAYA

PRINCIPAL JUDGE

