



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT MOMBASA

APPEAL NO. E-002 OF 2021

DANIEL OBATA OSEMOAPPELLANT

VERSUS

EXON INVESTMENTS LIMITEDRESPONDENT

(Being an Appeal from the ruling of Honourable Principal Magistrate Lesootia Saitabau

delivered on 25th January 2021 in Mombasa CM ELRC 626 of 2019)

J U D G M E N T

1. The Appellant herein was the Claimant in Mombasa Chief Magistrate's Court Employment Case No. 626 of 2019, wherein he had sued the Respondent herein vide a statement of claim dated 28th June 2019, seeking Judgement against the Respondent for:-

- a) A declaration that the termination of the Appellant's employment was unfair, illegal and unjustified.**
- b) An order directing the Respondent to pay the Appellant a calculated sum being ksh.697,972, as particularized under (sic) paragraph 13 and 14 of the Statement of Claim, with interest at court rates from the date of filing the suit.**
- c) An order directing and/or compelling the Respondent to issue a certificate of service in accordance with Section 51 of the Employment Act 2007.**
- d) Costs of the suit and interest thereon.**

2. The Respondent defended the claim. It filed a Response to Claim dated 6th August 2019 wherein it pleaded, *inter-alia*, that if the Appellant was ever terminated from employment as alleged, the same was done regularly and within the law.

3. Hearing of the claim proceeded on 9/12/2019 when the Appellant testified and produced documents as exhibits. He (the Appellant) was cross-examined and re-examined, upon which the Appellant's case was closed. The Respondent closed its case without calling any witness; and thereupon parties are shown to have filed their respective submissions.

4. Vide its judgment delivered on 18th September 2020, the lower court declared the Appellant's termination as unfair, and awarded him terminal dues amounting to ksh.313,829.94, costs of the claim and interest at court rates from the date of judgment until payment in full. The court also ordered that the Appellant be issued with a Certificate of Service.

5. Before issuance of the decree and certificate of costs, the Respondent filed a Notice of Motion dated 5th October 2020, under a certificate of urgency, seeking orders:-

- a) That the Application be certified urgent, service be dispensed with (sic) thereof and the same be heard *ex-parte* in the first instance.**
- b) That the court be pleased to order an interim stay of execution of the judgment delivered electronically on 18th September 2020 and any decree therefrom pending the hearing and determination of the application.**
- c) That the application be heard inter- partes on such a date and time as the court may decree.**

d) That the court be pleased to order a stay of execution of the judgment delivered electronically on 18th September 2020 for a reasonable period of time to enable the Respondent (sic) comply with the said judgment.

e) That the Respondent/applicant be allowed to settle the decretal sum in reasonable monthly instalments.

f) That costs of the application be provided for.

6. On 6th October 2020, the lower court certified the application as urgent and granted an interim order of stay of execution of the court's judgment, and fixed the application for **inter-partes** hearing on 22nd October 2020. The Appellant filed grounds of opposition to the application and thereupon the Respondent filed written submissions on the application.

7. The lower court delivered its ruling on 25th January 2021 and allowed the said application in the following terms:

a) That the decretal sum be liquidated in instalments, and kshs. 50,000 be paid within seven (7) days of the court's ruling.

b) That the 1st instalment of ksh. 20,000 be paid on the 30th (sic) February 2021.

c) That the 2nd and subsequent instalments of ksh.20,000 be paid on 30th day of succeeding months, and in default of payment of any instalment, the orders would be deemed vacated and the claimant would be at liberty to execute.

d) That costs of the application dated 5/10/2020 be borne by the claimant/applicant.

8. It is to be noted that the application dated 5/10/2020 had been made/filed by the Respondent, but not the Claimant (the Appellant herein).

9. The appeal before me challenges the orders made in the lower court's said ruling.

10. On 1st February 2021, the Appellant filed a Memorandum of Appeal dated 29th January 2021, setting forth the following grounds of appeal:-

a) The Hon. Magistrate erred in fact and in law by allowing the application dated 5/10/2020 without considering the applicable law.

b) The Hon. Magistrate erred in law by granting orders for settlement of a decretal sum by instalments yet no bona fides nor financial standing (or incapacity) was demonstrated and proved by the Applicant/Respondent.

c) The Hon. Magistrate misapprehended the law and granted orders for payment of the decretal sum of ksh.406,307.00 for a long period (approximately 17 months) which prejudices the decree holder, the order for payment of ksh.20,000 per month is not only unreasonable but oppressive.

d) The Hon. Magistrate erred in law by condemning the Appellant to shoulder the costs of the application dated 25/1/2021 (sic).

e) The Hon Magistrate erred in law by making orders against the Appellant to pay costs of the application dated 5/10/2020 yet no material was placed before him to warrant issuance of such orders

f) The Hon. Magistrate granted orders for payment of a decretal sum in instalments in favour of the employer without considering the conduct of the employer/respondent prior to the suit; further, the court failed to note that the employer had not even engaged the employee in negotiations for payment (sic) through instalments before rushing to court.

11. The Appellant seeks orders that this court sets aside the lower court's ruling dated 25/1/2021, vacates the orders compelling the appellant to pay costs of the application dated 5/10/2020, varies the orders for payment of the decretal sum by monthly instalments of ksh. 20,000 and in its place assesses and makes orders for payment of the outstanding decretal amount in its entirety or alternatively by reasonable instalments.

12. The six grounds of appeal set out by the appellant amount to a single lamentation by the Appellant that without reasonable cause and legal basis, the lower court allowed an employer whom it had already found liable for unfair termination of the Appellant's employment to settle the decretal sum by unreasonably paltry monthly instalments of ksh.20,000 that would see the decretal sum take seventeen months to liquidate, and at the appellant's cost.

13. Rule 32 of the Employment and Labour Relations Court (Procedure) Rules, 2016 provides as follows:-

(1) "The Registrar shall issue an order in execution of an order or decree.

(2) Rules on execution of an order or decree shall be enforceable in accordance (with) Civil Procedure Rules".

14. Order 21 Rule 12(2) of the civil Procedure Rules provides as follows:

“After passing of decree, the court may on the application of the judgment debtor and with the consent of the decree- holder or without consent of the decree-holder for sufficient cause shown, order that the payment of the amount decreed be postponed or be made by instalments on such terms as to the payment of interest, the attachment of the property of the judgment debtor or the taking of security from him, or otherwise as it thinks fit.”

14. In making an order for payment of a decretal sum by instalments, and especially where the decree-holder has not consented to liquidation of the decretal sum by instalments, a court must act on sufficient cause that the judgment debtor is obligated by the afore-cited law to show. It was held in the case of **Keshavji Jethbhai & Bros Limited –vs- Saleh Abdalla [1959] EA 260** as follows:-

“...it is laid down that the mere fact that the debtor is heard pressed or unable to pay in full at once is not sufficient reason for granting instalments and that ordinarily should be required to show his bonafides by urging prompt payments of a fair proportion of the debt.... prompt payment of a fair proportion of the debt is a condition precedent for the granting of the discretion of granting instalments. Each case has to be decided on its own merit, the predominant fact being of course the bonafides of a debtor.”

15. The Respondent did not, in asking the court to allow it to liquidate the decretal sum by instalments, disclose its financial status to the court, and did not demonstrate that it could not pay the entire decretal sum at once. Indeed, the Respondent did not discharge the obligation of establishing sufficient cause, which rested on it.

16. Although the lower court granted the application dated 5/10/2020 in exercise of its discretionary power, a court’s discretion must always be exercised judiciously, and must be exercised within the parameters of the applicable law and laid down rules of procedure. Failure to do so opens otherwise discretionary orders to scrutiny by an appellate court, which may either set aside or vary such orders.

17. The debt involved arose from an award made by the lower court in favour of the appellant for unfair termination of employment by his employer, the Respondent. The decretal sum is shown to have stood at ksh406,307 at the time of filing the appellant’s appeal. Counsel for the appellant submitted that liquidating the aforesaid sum by monthly instalments of ksh.20,000 as ordered by the lower court will take a total of seventeen months. This position has not been controverted.

18. Subjecting the appellant to such a long wait before he can fully reap the fruits of the valid decree that he holds, and especially when no sufficient cause was shown by his employer why the decretal sum could not be paid at once or within a shorter period, will be unjust.

19. Having perused the entire record and having considered rival submissions filed by counsel for both parties, I make the following orders:-

a) The lower court’s ruling dated 25/1/2021 is hereby set aside, and is substituted with an order directing the Respondent to pay the outstanding balance of the decretal sum, plus interest at court rates, by two equal monthly instalments with effect from 1st November 2021, and in default of any one instalment, execution to issue.

b) Costs of the application dated 5/10/2020 filed in the lower court and costs of this appeal shall be paid by the Respondent

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 21ST DAY OF OCTOBER 2021

AGNES M.K. NZEI

JUDGE

ORDER

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

AGNES M.K. NZEI

JUDGE

Appearance:

Mr. Mokaya for the Appellant

No appearance for the Respondent