



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT ELDORET

COURT NAME: ELDORET LAW COURT

CAUSE NUMBER: ELRCA/2/2017

CITATION: KENYA FLOURSPAR LIMITED VS MOSES SEGITE

RULING

1. By a Motion dated 25th March, 2021 the Appellant /Applicant sought orders among others that the sum of Kshs. 303,917/= held in a joint account No TD-300-0010125 in the names of Kalya & Company Advocates and Nyaundi Tuiyot & Company held at Housing Finance Company Kenya Limited vide cheque deposit receipt dated 24th March, 2009 be and is hereby released to the firm of Kalya & Company Advocates and further that the balance be and is hereby released to the firm of Nyaundi Tuiyott & Company Advocates and a statement of account be issued, thereafter the account be closed.

2. The application was premised on grounds among others that:

i. Judgement was entered in the lower court in favour of the Respondent herein as against the Appellant /Applicant at Kshs. 967,836.05.

ii. The appellant appealed against the said judgement

iii. At the Appeal, the lower court's judgement was partially upheld to the extent that the Respondent was entitled to severance pay of Kshs. 285,180/=.

iv. The Respondent thereafter appealed against the superior court's judgement to the court of appeal.

v. The court of appeal delivered its judgement on 29.1.2021 dismissing the appellant's appeal and upholding the superior courts judgement.

vi. After delivery of judgement the applicant sought to have money in the account released but the application was dismissed with costs assessed at Kshs. 36,340/= in favour of the respondent.

vii. That prior to the delivery of judgement at the court of appeal, the applicant was awarded costs against the respondent on an application seeking stay of delivery of judgement which was dismissed.

viii. The said costs were assessed at Kshs. 17,603.25/= vide a ruling delivered on 15th March, 2021.

ix. It was a condition for stay of execution pending the hearing and determination of the appeal herein that the entire decretal amount of Kshs. 967,836.05/= be deposited in a joint escrow account in the names of both counsels on record.

x. The said decretal amount was deposited into account No TD-300-0010125 at Housing Finance Company of Kenya Limited Eldoret Branch on 24/3/2009. At the time of opening the account the counsel responsible at the time on behalf of Nyaundi Tuiyott & Co. Advocates and a signatory to the account is now a judge of the High Court of Kenya.

xi. For that reason, the judge cannot by law be allowed to execute documents on behalf of the firm.

xii. The attempt to effect change to signatories did not bear any fruit.

xiii. It would be prudent for the court to give orders for the release in the manner prayed for.

xiv. Kshs. 285,180/= and costs of 36,340/= less our costs of 17,603.25/= ought to be released to the Respondent's Counsel as per the final judgement of the court.

xv. The amount due to the appellant is Kshs. 303,917/=.

xvi. The balance ought to be released to the firm of Nyaundi Tuiyott & Company Advocates.

3. The application was further supported by the affidavit of Joseph K. Songok who deponed more or less the same facts as the grounds upon which the application was premised.

4. In the submission in support of the application Mr. Chebet for the appellant submitted among others that the appellant at the High Court appealed against the entire judgement of the subordinate Court and the High Court proceeded to conclude that after reevaluating the evidence before the trial Court, the Court would allow the appeal, set aside the trial Court's judgement and find and hold that there was wrongful termination of employment through redundancy and awarded the respondent severance pay at Kshs. 285,180/=.

5. According Counsel the memorandum of appeal filed at the Court of Appeal by the appellants made no claim for interest of the suit the same having been set aside by the High Court judgement.

6. Mr. Chebet further submitted that section 29(3) of the Employment and Labour Relations Court Act provided that where a suit involved a liquidated amount that is claimed and specified at the time of filing a statement of claim and the Court orders that the amount claimed or part of it be paid to the Claimant, it may in addition to that order that interest be paid on the liquidated amount awarded at Court rates.

7. From the provisions of section 29(3) Counsel submitted, it was clear that awarding interest is a discretionary exercise which the honourable judge exercised judiciously.

8. According to Counsel, the respondents had recourse to Appeal which it exercised by filing a second appeal to the court of Appeal. The respondent therefore had an opportunity to challenge the learned Judge's decision in failing to award interest but never did. The High Court having set aside the Lower Court's judgement, the Court of Appeal could never have addressed the issue of interest where it was never expressly submitted for determination.

9. In support of the submissions counsel relied on the case of John Osewe and 46 Others v. Ragbir Singh Sadhu Kisumu ELRC No 16 of 2013 where the Court held among others that the award on interest by the Court was made entirely at the discretion of the Court.

10. According to Counsel, the respondent having failed to raise the issue of interest at the appropriate forum and the issue on the subject matter having been determined through the Court of Appeal judgement, renders the Court herein functus officio and entertaining the issue at this stage was res judicata.

11. The respondent's Counsel Ms Lutta on her part submitted that while rendering its judgement on the 1st Appeal, the Court did not make mention of the interest that had been awarded by the trial Court since the issue was not appealed on by the appellants. According to Counsel, the interest awarded to the respondent by the trial Court was attached to the principal sum awarded and the respondent having partly succeeded on appeal, there is no justification why respondent should be denied interest.

12. In support of the submission Counsel relied on the case of Kenya Power and Lighting Company Limited v. Andy International (2021) eKLR.

13. On the issue of costs, Counsel submitted that this follows the event as provided under section 27(1) of the Civil Procedure Act.

14. Having carefully considered the application herein and submission by Counsel, there seems to me to be only one main issue to be determined which is whether this court should order interest on the decretal to be paid or not and as a corollary whether the respondent should be awarded costs of this application.

15. The respondent has not seriously contested the orders sought in the application save that the funds be released with interest on the decretal sum at Court rates.

16. The trial Court awarded the respondent herein the sum of Kshs. 967,836.05. This sum was stated in the judgement to attract interest.

17. The appellant being dissatisfied lodged a first Appeal to the High Court and the Court (Radido J) partially allowed the appeal and revised the award to Kshs. 285,180/=. The Learned Judge made no mention on the issue of interest on the decretal sum.

18. As was held by Lady Justice Chepkwony in the KPLC v Andy International relied on by Counsel for the respondent, the interest awarded by the trial Court was attached to the decretal sum. The decretal sum was partially set aside by the 1st Appellate Court and further the issue of interest was never canvassed before the two appellate Courts. It therefore remained attached to the decretal sum albeit revised by the 1st Appellate Court and upheld by 2nd Appellate Court. To this extent the respondent is entitled to interest on the decretal sum of Kshs. 285,180/= from the date of delivery judgement of the trial court and at Court rates.

19. On the issue of costs, the respondent did not entirely oppose the present application. He was only concerned with the issue of interest on the decretal sum. In that regard therefore, each party will bear their own costs of the application.

20. In conclusion the Court allows the Motion dated 25th March, 2021 as prayed.

21. It is so ordered.

GIVEN under my hand and Seal of this Court on 2021-12-01 11:49:59

SIGNED BY: HON. JUSTICE J. N. ABUODHA (ADMINISTER JUSTICE)

THE JUDICIARY OF KENYA.

ELDORET ELRC

EMPLOYMENT AND LABOUR RELATIONS COURT

DATE: 2021-12-01 11:49:59