



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT MOMBASA
CAUSE NUMBER 271 OF 2013

BETWEEN

1. JOSEPH TAMA NDUVA
2. ELIJA MASHA THOYA
3. SAMUELL MWANGI KIAMBATI
4. DAVID KIMONDIU
5. CATHERINE K MUNGANIA
6. GERTRUDE ANGWENYI NYANTARO
- 7 RONGOMA BENARD JAMBO
8. CONSTATINE ODHIAMBO BALA
9. CAROLINE WAMBUI NJURUBA
10. PETER KIARII
11. ALBERT ABEDI MAGOMERE

TUMUTI 12. FRANCIS
CLAIMANTS

VERSUS

JACARANDA HOTELS [MSA] LIMITED T/A

OCEAN BEACH RESORT..... JACARANDA INDIAN
RESPONDENT

RULING

1. Parties recorded a partial Consent Judgment on 3rd April 2014 with regard to terminal dues payable to the Claimants. They were not able to agree on the claim that redundancy was unfair and unlawful, warranting the Claimants to be compensated by the Respondent.

2. They were heard on the remainder of the dispute by Hon. Justice Stephen Radido, and Judgment delivered on 6th June 2014. It was found termination was unfair, and ordered each Claimant be paid the equivalent of 3 months' gross salary in compensation. The Respondent was dissatisfied and filed an Appeal at the Court of Appeal against the award of 3 months' salary. The Appeal has not been heard.

3. In executing the Consent Judgment, the Claimants instructed Jakimu Auctioneers to attach and sell the Respondent's movable property worth Kshs. 6,621,889. The Respondent moved to Court through an Application dated 18th August 2015, seeking to restrain the Respondent from executing. This is on the ground that Consent Judgment has been fully settled.

4. The Respondent relies on the Affidavit sworn on 18th August 2015 by its Financial Manager Peterson Kamau. He explains that in meeting the Consent Judgment, it was realized the Claimants owed loans to Equity Bank, Barclays Bank, Commercial Bank of Africa and Kongo Sacco, totaling Kshs. 7,967,848, which loans had not been factored in, in computing the Claimant's terminal dues under the Consent Judgment. The Respondent paid the Claimants terminal dues less the loan obligations and PAYE. This was communicated by the Respondent to its Advocates and to the Advocates for the Claimants.

5. According to the Respondent the Claimants went ahead and engaged Auctioneers, while fully aware there are no outstanding dues. The Respondent prays the Court to stop the execution proceedings, and mark the Consent Judgment as settled.

6. The Claimants rely on the Replying Affidavit sworn by Claimant No. 12, Francis Tumuti, on the 18th September 2015. They deny that Consent Judgment has been satisfied, and seek to be allowed to proceed with execution. Parties agreed to have the Application considered and determined on the basis of their Affidavits and Submissions. Submissions were confirmed as filed, on the 19th February 2016.

Respondent's Application

7. The Respondent submits the Claimants have not denied they owed loans to the various Financial Institutions. They only allege the payments were made in installments, exposing them to exorbitant interests charged on their loan balances. They have not shown what prejudice they have suffered.

8. PAYE tax is a statutory requirement. It cannot be suggested that deduction of PAYE tax is wrongful. Sacco deductions were made on the advice of the Sacco Officials and the Commissioner of Co-operative Development. Both the Bank Loans and the Sacco Loans have been satisfied from the Claimants' dues. The amount due to the Claimants, after these obligations were satisfied, was Kshs. 1,287,550.54, which was paid to the Claimants' Advocates. It is improper for the Claimants' Advocates therefore, to execute for an alleged debt of Kshs. 6,621,889. The Respondent prays the Application be upheld.

The Claimants' Response

9. The Claimants submit execution of the Consent Judgment was authorized by the Court, in its *ex parte* Ruling dated 17th March 2015. The Respondents failed to participate in the Application leading to that Ruling.

10. The Respondent seeks an injunction restraining the Claimants from going on with the execution. Orders of injunction cannot issue in a matter which has been concluded and judgment delivered. The Application is formally defective.

11. The Consent was clear and meant to be satisfied within 30 days of its adoption as the Judgment of the Court. The Respondent did not show Judgment was satisfied within 30 days. The Respondent gathered documents predating the Consent and forwarded them to Court without explanation. The Respondent had the duty to make payments to the Claimants' Advocates Sherman Nyongesa & Company Advocates. Amounts alleged to be paid to the Claimants' Accounts directly, cannot be considered as part of the decretal sums.

12. There is an admission that Elijah Masha was not paid his dues. The Respondent nonetheless offers no remedy to Elijah. Dealings between the Sacco and the Respondent were outside the purview of the Consent Judgment. No proof of loan repayments made to the various Banks has been shown to the Court. Indebtedness of the Claimants to the Banks was not shown. The Claimants urge the Court to reject the Application.

The Court Finds:-

13. The fundamental problem in this dispute appears to the Court, to arise from the Consent Judgment recorded by the Parties. It was not factored in, that the Claimants had Bank and Sacco Loans, when the Consent was crafted. PAYE is easier to deduct, as a legal requirement under Section 49 of the Employment Act 2007. Bank and Sacco Loans, should have been placed on the table, when the terms of the Consent were being negotiated. The existence and extent of the Claimants' indebtednesses needed to be known then.

14. It becomes impossible for the Court to resolve factual matters on the Bank Loans and Sacco Loans after the Consent has already been presented and adopted as the Judgment of the Court.

15. The Respondent is largely to blame for appending its signature to the Consent, and thereafter going on to hold meetings with Sacco Officials and declare unilaterally what amounts are owed by the respective Claimants. All matters in dispute which had been agreed upon should have been included in the Consent, with all mutual liabilities and obligations clearly captured in the Consent. It was improper for the Respondent to compute deductions and effect those deductions, without reference to the Advocates on record for the Parties. The Respondent confirms in its submissions that it took unilateral actions. In satisfying Court decisions, Parties should always avoid unilateral actions. The Respondent compounded this misunderstanding by staying out of the Court when the Claimants filed the Application seeking to be allowed to execute before taxation. Was it not known to the Respondent, at that point, that the partial decree had been satisfied?

16. The submission by the Claimants that the matters raised by the Respondent with regard to their Bank and Sacco Loans were extraneous to the Consent Judgment, looks quite persuasive. If the Court upholds this however, it would not advance settlement as intended by the Consent. Employers have a duty to make statutory deductions and other contractual deductions arising from obligations owed by Employees on termination. It would be imprudent that Bank and Sacco obligations are left un-addressed upon termination. Mutual liabilities and obligations must therefore be known, and Parties properly released from each other on termination. Employers and Employees, who ordinarily act as guarantors in these loan transactions, would be left with the burden of loan repayment. Employers have the duty to protect their businesses and remaining Employees, from the shackles of creditors. The sum of Kshs. 7,967,848 said to have been the total liability owed by the Claimants to the various Institutions, is a large sum of money, in comparison to the sum the Claimants are pursuing in execution. The Parties do not seem to have a Consent Judgment capable of execution, as wide areas of divergence have emerged after the Consent was filed. The Court is not able to heal that rift, without setting aside the Consent Judgment, and directing the dispute on terminal dues is heard on merit. Before orders setting aside the Consent issue, it is necessary for the Parties to meet, place all the issues on the table, and redraw a clear and binding Consent. IT IS ORDERED:-

- a. ***Execution proceedings initiated by the Claimants pursuant to leave of the Court granted on 17th March 2015 are stayed.***
- b. ***The Parties shall meet and review their Partial Consent, taking into account all the matters arising after the Consent was filed.***
- c. ***The Parties are at liberty to file further Consent, or move the Court in any other way, that assists them in achieving a full and binding settlement.***

Dated and delivered at Mombasa this 27th day of June, 2016

James Rika

Judge