



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 438 OF 2010

JOAN WANJIRU THAIRU.....1ST CLAIMANT
RACHEL WAMBUKU MWIHAKI.....2ND CLAIMANT
JOHN MBOCHIO MUIGAI.....3RD CLAIMANT
JAMES MUNGAI KIMANI.....4TH CLAIMANT
SAMUEL GECHERU AMOS.....5TH CLAIMANT
HARUN AFANDE MUGUTSI.....6TH CLAIMANT
ELIUD YABWETSA LUGUYANI.....7TH CLAIMANT
DOUGLAS KAMINJO WANDURA.....8TH CLAIMANT
BONIFACE NGUGI WANJIRU.....9TH CLAIMANT

VERSUS

BATA SHOE COMPANY..... 1ST RESPONDENT
4M ENTERPRISES LIMITED..... 2ND RESPONDENT

RULING

1. The Claimant/Applicants filed an application before this Court after a decision of the Deputy Registrar of this Court on the consent.
2. The 1st Respondent was at the receiving end of this application dated 3rd July 2014. The Application of 3rd July 2014 was to the effect:
 1. That the Court be pleased to dismiss the purported preliminary objection dated 27th March 2014 with costs to the Claimants/Applicants.
 2. That the 1st Respondent be ordered to pay one half of the decretal sum of Kshs. 438,893/-

plus taxed costs and interest within 7 days and in default execution to issue.

3. That the Respondent to pay costs and interest due less 80,000/- paid by the 2nd Respondent.

4. That the Deputy Registrar or Taxing Officer of the Honourable Court be and is hereby directed to proceed with the taxation of the Claimant/Decree holders bill of costs dated 23rd July, 2013 as required under the law.

5. That the Honourable Court do issue such orders and give such directions as it may deem fit and just to grant in the circumstances.

6. That the costs of this application and the notice of preliminary objection be paid by the Respondent.

3. The grounds upon which the application was premised were on the face of the application and there was a supporting affidavit by Alfred Nyabena Advocate who deposed that the consent entered into by the Claimants and the 2nd Respondent was specific to the 2nd Respondent.

4. The Respondent was opposed and filed an affidavit sworn by Priscah Chege. In the affidavit she deposed that the Respondent raised a preliminary objection dated 27th March 2014 to the taxation proceedings to which the Deputy Registrar delivered a Ruling on 9th May 2014 citing lack of jurisdiction to interpret the Consent filed on 30th September 2013 and adopted as an order of the Court on 24th February 2014. The taxation proceedings were stayed pending the interpretation of the consent adopted by the Court. She deposed that the instant application was bad in law for seeking the usurpation of the Deputy Registrar's power as taxing officer. The Respondent held that the consent altered and varied the decision of the Court and the 2nd Respondent assumed full liability for the judgment and went on to agree on judgment to be entered against itself. The Respondent urged that the issue of costs was *res judicata* by application of the law and cannot be reopened by the Court.

5. The parties appeared before the Court represented by counsel and argued their respective positions on 4th February 2015. The Claimant/Applicants were represented by Mr. Nyabena while the 1st Respondent was represented by Miss Bonyo. Mr. Nyabena argued that the matter had proceeded for taxation before the Deputy Registrar and a preliminary objection was raised on two points of law and the Deputy Registrar determined one point by dismissing it and on the second she ruled she had no jurisdiction and referred it to the Court. The preliminary objection was that the matter was fully settled by consent between the Claimants and the 2nd Respondent. He submitted that the 1st Respondent having refused to be party to the negotiations cannot claim to take advantage or pretend to interpret the consent. He stated that the Claimants and the 2nd Respondent agreed that the 2nd Respondent settles half the decretal amount and pays costs of 80,000/- as their share of costs in the suit and the other half was to be enforced against the 1st Respondent. He submitted that there is nowhere where the judgment of the Court was set aside.

6. Miss Bonyo was off course opposed. She submitted that the affidavit of Priscah Chege raised various points. An objection was taken before the Deputy Registrar that in consent between the Claimants and 2nd Respondent the issue of costs was rendered *res judicata* as the consent was very specific in words. The Deputy Registrar held that she could not interpret the consent which had been adopted as an order of the Court and was to await the determination of the issue. The 1st Respondent expected the Claimants to file an interpretation application but what the Claimant/Applicants had filed was a judicial review application as the Court was being called upon to compel the Deputy Registrar to proceed with taxation while at the same time asking the Court to act as taxing officer. The 1st Respondent argued that the consent entered into between the Claimants and the 2nd Respondent altered the judgment of the Court. Miss Bonyo submitted that in the face of the application the Court was being asked to delve into the preliminary objection raised before the Deputy Registrar. By dint of

the fact that the preliminary objection was argued before the Deputy Registrar it has already been subsumed and counsel was asking the Court to reopen the proceedings and she submitted that this was an abuse of the Court process. She stated that nowhere does the application seek interpretation of the consent but asks the Court to sit in review of the Deputy Registrar's decision which is a jurisdiction granted to the Court but the same has not been invoked properly. She submitted that rules of procedure must be adhered to and the Claimant should have brought a proper application.

7. Mr. Nyabena in his brief reply submitted that the Claimant/Applicants had not brought a review application but a notice of motion application. He stated that the Claimants were not seeking the Court to sit as a taxing master and that they sought costs to be paid less 80,000/- paid by the 2nd Respondent. He submitted that the consent was very clear and parties had not varied the judgment. He posed a question as to why the 1st Respondent was pursuing an appeal if the judgment had been fully satisfied by the 2nd Respondent.

8. By way of brief background, the case was compromised between the Claimants and the 2nd Respondent. The consent was to the following effect:

“By consent of the Claimants and the 2nd Respondent;

1. Judgment be and is hereby entered in favour of the Claimants as against the 2nd Respondent for the sum of Kshs. 438,893.00 being one half of the aggregate award given in favour of the Claimants in the judgment entered by this Honourable Court on 5th July 2013.
2. That costs of the suit against the Respondent be assessed at Kshs. 80,000.00.
3. That the total decretal sum in 1 and 2 above being Kshs. 518,893.00 be and is hereby entered in full and final settlement of the decree herein as against the 2nd Respondent.
4. That the decretal sum in 3 above be settled in two equal instalments of Kshs. 259,446.50 each on 7th October 2013 and 7th November 2013 respectively and in default, the Claimants be at liberty to proceed to execution.”

9. The genesis of the application before the Court was this consent between the Claimants and the 2nd Respondent. The 1st Respondent ingeniously argues that the consent altered the decision of the Court. Consent is defined by **Blacks's Law Dictionary Ninth Edition** as agreement, approval, or permission as to some act or purpose. The Ruling of the Deputy Registrar in *pare materia* stated the following:

“the notice of preliminary objection herein cannot dispense the matter conclusively without guidance and clarity on the interpretation of the consent. The matter herein shall therefore proceed for interpretation before any further action is taken in taxation of costs. The parties are at liberty to move the court.”

10. The application in part seeks some order that this Court cannot grant. The preliminary objection by the 1st Respondent is not before me for determination. The Claimant/Applicants seek an order compelling the Deputy Registrar to tax the matter. This is not akin to asking this Court to tax the matter though any attempt to urge the Court to set the costs payable would amount to asking the Court to sit as Taxing Master which is a preserve of the Deputy Registrar. In as far as I can see, the interpretation of the consent is sought where the Claimants seek that the Honourable Court do issue such orders and give such directions as it may deem fit and just to grant in the circumstances.

11. The consent entered into by the parties was clear. It was not an alteration of the judgment of the Court. The judgment stands until set aside or varied by the appellate Court. In the consent, the Claimants and the 2nd Respondent agreed on payment of the decretal sums payable by the 2nd

Respondent and nowhere did the consent vary the judgment to impose full liability on the 2nd Respondent. The consent is a contract between two parties in this suit and the consent received judicial sanction in the form of an order of the Court. It did not vary the judgment of the Court in any way. The judgment was for entry of judgment for the Claimants against the Respondents jointly and severally. The only shield the 1st Respondent would have had is if the 2nd Respondent had settled the entire decretal sum plus the costs in respect of the suit. If that had been done there would have been no pursuit of the 1st Respondent for any balance.

12. The issue of *res judicata* was raised by the 1st Respondent. *Res Judicata* is according to **Black's Law Dictionary Ninth Edition**, Latin for a thing adjudicated and refers to matters that have been definitively settled by judicial decision. The issue of costs has not been settled definitively by judicial decision except insofar as the joint and several nature of the decree issued. The Claimants and 2nd Respondent clearly intended that the 2nd Respondent pays a portion of the costs which the 2nd Respondent and Claimants agreed to cap at Kshs. 80,000/-.

13. The upshot of the foregoing is that the consent does not impair the pursuit of the 1st Respondent for the unpaid portion of the decretal sum including unpaid costs, if any, herein. Taxation of the bill of costs may proceed before the Deputy Registrar. The application thus succeeds with costs to the Claimants/Applicants.

Orders accordingly.

Dated and delivered at Nairobi this 23rd day of **March** 2015

Nzioki wa Makau

JUDGE