



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 410 OF 2002

A.M. BAHAJI & COMPANY LIMITED.....PLAINTIFF

VERSUS

KENYA PORTS AUTHORITY.....DEFENDANT

RULING

1. This **Ruling** determines the Defendant's/Applicant's **Notice of Motion** Application dated **6th July, 2020**. The application seeks for:-

a. Spent;

b. There be a Stay of Execution of the Decree herein pending the hearing and determination of this application inter-partes;

c. The suit be marked as compromised and settled;

d. The Costs of this application be provided for.

2. The application is premised on the grounds stated on its face and is supported by an **Affidavit** sworn by **Turasha J. Kinyanjui** together with annexures thereto.

3. In her **Supporting Affidavit**, the Applicant deposed that **Judgment** was entered for the Plaintiff/Respondent as against the Defendant/Applicant on **30th October, 2019**. That following subsequent negotiations between the parties, it was agreed that the Decretal amount payable to the Plaintiff by the Defendant would be **USD.1,136,552.12** in terms of a **Consent Letter** filed in court on the **13th May, 2020** and an additional **Kshs.2,137,200/=** payable as costs to the Plaintiff's advocate.

4. According to the Defendant/Applicant it remitted the said sums to the Plaintiff through its advocate on **4th May, 2020** save for **USD.104,419.97** deducted on interest as **Tax Payable to Kenya Revenue Authority** pursuant to the provisions of **Section 10** of the **Income Tax Act**. It is submitted that the Defendant has an obligation in law to make a withholding tax deduction and the Plaintiff/Respondent should not insist that the amount of **USD.104,419.97** is still due and outstanding.

5. In response to the application, the Plaintiff filed a **Replying Affidavit** sworn by its Director, **Abdi Mohamed Bahaji**. He deposed that the Consent amount that was agreed on by the parties was not subject to any deductions. Therefore it cannot be said that the Decree is fully discharged because the Plaintiff has not paid an amount of **USD104,419.97** plus accrued interest of **USD9,404.97**.

6. According to the Plaintiff, had the parties intended the amount to be deducted, nothing could have been hard than stating so in the Consent. The only deduction conceded to by the parties was for **USD220,000/=** discount to the Defendant. Be that as it may, the Plaintiff was of the view that since **27th April, 2020** to-date, the Defendant has not shown any evidence that indeed it remitted any amount to **Kenya Revenue**

Authority as alleged.

7. It is further averred that the subject amount in the Decree was awarded as a **Judgment** of the court and cannot be subject to deduction under the provisions of **Section 10** of the **Income Tax Act**. It follows that the allegations by the Defendant that it will remit the deducted amount as at **20th July, 2020** is unsubstantiated and cannot hold.

8. The application was canvassed by way of written submissions. Both parties obliged by filing their respective submissions. The

Defendant's/ Applicant's submissions were filed on 7th September, 2020 whilst the Plaintiff filed its on 10th September, 2020.

The Applicant's Submissions

9. The Defendant/Applicant submitted that the interest the Respondent was entitled to under the Decree falls under **Section 10** of the **Income Tax Act 2010** as well as under the **Income Tax (Withholding Tax) Rules, 2001**. Therefore the Defendant is obliged to deduct tax from payment made to the Plaintiff and remit the same to **Kenya Revenue Authority** on account of the Plaintiff.

10. By virtue of **Clause 5(h)(iii)** of the **Third Schedule** to the **Income Tax Act** the Defendant submits that it is qualified to deduct **Withholding Tax** at the rate of 15%. In support of the submissions, reliance was placed on the case of **Ocean Freight (E.A) Limited... Vs... Commissioner of Domestic Taxes [2020]eKLR**, where the Court cited with approval the decision of **Rowlatt J. in Cape Brandy Syndicate...Vs...I.R.C 1KB 64, 71**. The Court held thus:

“... in a taxing statute one has to look at merely what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing implied. One can only look fairly at the language used”

The Respondent's/Plaintiff's Submissions

11. The Plaintiff/Respondent on its part submitted that the Defendant was in breach of the terms of the Consent by purporting to unilaterally deduct taxes on the Decretal sum. In any event, according to the Plaintiff/Respondent, the Decretal sum is as a result of a **Judgment** of the court and cannot be subjected to tax deductions.

12. The Plaintiff further submits that the suit cannot be said to have been compromised because the Defendant has not fully discharged its payment obligations. It is further submitted that the Consent recorded by the parties can only be set aside on grounds of fraud or collusion and therefore the Defendant is bound to honour the terms of the Consent. In support of its submissions the Applicant relied on the cases of **Ibrahim Manyara... Vs...Registered Trustees of Agricultural Society of Kenya [2014] eKLR**, **Brooke Bond Liebig (T) Ltd...Vs...Mallya [1975]E.A 266** and **Diamond Trust Bank Kenya Ltd...Vs...Plt and Panels Ltd [2004] E.A 23**.

Analysis and Determination

13. Having set out the parties' respective stands as above, I am of the considered view that the borne issue for determination from the onset is as to whether the Defendant/Applicant is legally entitled to subject taxation on the Decretal sums awarded by virtue of a **Consent Letter** signed by both parties and filed on the **13th May, 2020**. And secondly, whether an order that his suit be marked as compromised and settled should issue.

14. The Applicants case is that it is obliged under law and especially **Section 10** of the **Income Tax Act**, to make deduction on the interest or any other income earned by the Plaintiff then remit the same to **Kenya Revenue Authority**. Emphasis was laid on the definition of **'interest'** under the Act as ***"interest payable in any manner in respect of a loan, deposit, claim or other right or obligation"***. The Defendant relied on **Clause 5(h)(iii)** of the **Third Schedule** to the **Income Tax Act**, to posit that it was obliged to deduct interest at rate of 15%.

15. The argument put forth by the Plaintiff/Respondent in response seems to me to be two-thronged. One, that if parties intended that deductions on tax to be made, they would have stated so in the Consent. Secondly, that Court Decrees are not to be subjected to deduction. The Respondent buttressed the assertion by an excerpt from the case of **Ibrahim Manyara...Vs... Registered Trustees of Agricultural Society of Kenya (Supra)**.

16. I will begin by considering **Section 3(1)** of the **Income Tax Act** which provides as follows:

“Subject to, and in accordance with, this Act, a tax to be known as income tax shall be charged for each year of income upon all the income of a person, whether resident or non-resident, which accrued in or was derived from Kenya.”

17. The **Income Tax Act** provides for taxation of various categories of income. For instance, the Act provides for the taxation of income from businesses (**Section 4**), income from employment (**Section 5**), income from the use of property (**Section 6**) and income from management or professional fees, royalties, interest and rents (**Section 10**).

18. It is not in dispute that on **13th May, 2020** the parties entered into a **Consent Judgment** for Decretal amount of **USD.1,136,552.12** and further **Kshs.2,137,200/=** to account for the Plaintiff's Advocate's costs. The question which then arises is whether the agreed Decretal amount is an income to be subjected to taxation as envisaged under the **Income Tax Act**. Was the Defendant justified to withhold tax as it did?

19. In **Black's Law Dictionary, 8th Edition**, ***"withholding tax"*** is defined as ***"a portion of income tax that is subtracted from salary, wages, dividends, or other income before the earner receives payment"***.

20. Based on this definition in the **Black's Law Dictionary** as read together with **Section 3** of the **Income Tax Act**, under no circumstances does any of the definitions include a Decree of a court as a taxable item under the **Income Tax Law**. If the intendment of the **Income Tax Law** was to have a Decree of court taxable under its provision, the legislature would have come out clearly and provided for this.

21. To that extend, I agree with the decision in the case of **Ocean Freight (E.A) Limited....Vs....Commissioner of Domestic Taxes[2020]**

eKLR (supra) to the extent that, in a Taxing Statute, one has to look at merely what is clearly said. There is no presumption as to what a “withholding tax” is and nothing is to be implied. A court Decree or interest arising thereof is not mentioned as a form of income and this court cannot presume the contrary.

22. Considering similar facts under similar circumstances, the court in the case of **Ibrahim Manyara...Vs...Registered Trustees of Agricultural Society of Kenya(ASK) [2014]eKLR**, had the following to say;

“...His, I suspect was in avoidance of creating confusion by subjecting decrees of court to taxation. This was partly because these are in most cases amorphous amounts and figures that would not necessary be in law deemed income. For example, would an amount of compensation in damages arising out of a fatal accident claim be deemed income accruing to the aggrieved or injured property? I guess not.”

23. Perhaps to shine more light, the court outlines what would amount to an ‘*income*’. The same is defined under the **Black’s Law Dictionary** as “*the return in money from one’s business, labour, or capital invested*”. Therefore, it cannot be gainsaid that a Decretal amount is a form of income and it would be a travesty to include it as income to fit within the gloves of the Applicant. This is why I agree with the finding in the case of **Ibrahim Manyara...Vs...Registered Trustees of Agricultural Society of Kenya (Supra)** that “**The offshoot of my finding on this subject is that there is no known law that subjects decrees of court to taxation. The Income Tax Act aforesaid is silent on this and we should so far trend that path. If the tax man wishes to rethink his position on this, we shall not disallow the same.**”

24. There is also no evidence that the Applicant has remitted the amount deducted despite alleging that the remittance was to be done on **20th July, 2020** under the **Affidavit** sworn in support of the application. Clearly there is some suspicion on the part of the Plaintiff/Respondent that the amount deducted might not end up with the taxman and that it would be safer with the Decree Holder (the Respondent herein) as only then would the trail on the Decretal sum will be easily identified.

25. I therefore find that the Respondent was at all times entitled to an amount of **USD.1,136,552.12** being the Decretal amount agreed on *inter parties* by a **Consent** filed and adopted as a **Judgment** of the court on **13th May, 2020**. If it was an oversight on the part of the Applicant not to factor in any statutory deductions, then the court is of the view that the same should have been suggested, proffered and negotiated as was the case in the earlier Consent Order.

Conclusion

26. It is therefore the finding of this Court that the Applicant was under no obligation to retain portion(s) of the subject payments and to remit the same to the **Kenya Revenue Authority** on account of **Withholding Tax** since the Decretal Sum does not amount to an “**income**” for purposes of **withholding tax** under the **Income Tax Act**.

27. In the resultant, I direct that any deductions made on account of **Withholding Tax** by the Applicant is not supported by any law and therefore the same is illegal and that any sum so deducted ought to be refunded to the Respondent within **14 days** of the date of this **Ruling**.

The present application is therefore dismissed with costs.

It is so ordered.

DATED, SIGNED and DELIVERED at MOMBASA on this 24th day of November, 2020.

D. O. CHEPKWONY

JUDGE

In view of the declaration of measures restricting court operations due to the **COVID-19** pandemic and in light of the directions issued by His Lordship the Chief Justice on **15th March 2020**, this Ruling has been delivered to the parties online with their consent. They have waived compliance with **Order 21 Rule 1** of the **Civil Procedure Rules** which requires that all Judgments and Rulings be pronounced in open Court.

D. O. CHEPKWONY

JUDGE