



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & TAX DIVISION- MILIMANI
MISC CIVIL CASE NO. 295 OF 2018

FAULU MICROFINANCE BANK LTD.....PLAINTIFF/CLAIMANT

VERSUS

JOHN MWARA KIBOCHI.....DEFENDANT/RESPONDENT

RULING

BACKGROUND OF THE APPLICATION

Application to set aside the award

The Applicant/ Plaintiff in this application moved the court through a notice of motion dated 29th June 2018 for orders;

- a. That the Court stays the enforcement of the further arbitral award dated 29th March 2018 and the final award dated 14th November 2016 pending hearing and determination of the application;
- b. That the further award and final arbitral award be set aside for being contrary to public policy and contrary to sections 2,3, 5(2) (a) (b) and 37 of the Income Tax Act to the extent that they direct the Applicant to pay the Respondent the sum of Kshs.46,210,348/- interest at 15.8% pa on the same, less any tax liabilities from 1st September 2014 until payment in full;
- c. The Respondent be ordered to reimburse the Applicant the sum of Kshs.3,950,922/- with interest.

The application was based on the grounds;

- a. The final award published on 14th November 2016 indicated that the Respondent was entitled to terminal dues of Kshs. 76,059,017, interest at 15.8% and the claimant, entitled to payment on its outstanding loans of Kshs.29,848,650/- and interest at 15.8%;
- b. The Arbitral Tribunal in its final orders set off the outstanding loans against the terminal dues to arrive at a net sum of Kshs. 46,210,367/- which would be subjected to tax and the application of 15.8%interest;
- c. The law requires that the gross amount of the terminal dues including interest, must be subjected to (P.A.Y.E) tax before the outstanding loans and interest can be set off;
- d. The Applicant filed an application on 9th December 2016 seeking correction of the award under Section 34 of the Arbitration Act on the tax computation liability;
- e. In the Further award published on 29th March 2018, the Arbitrator declined to correct the further award on the basis that it had no jurisdiction to compute tax liability;
- f. The Respondent issued letters to the Applicant demanding payment of Kshs 17,412,274.83/- failure to which it shall seek to enforce the illegal further award.

The Application was supported by the affidavit of Ms. Sheila Maina. She stated that the Respondent was an employee of the Applicant who had an employment contract dated 8th August 2014 that was terminated. The Settlement agreement clause 4.6.1 provided that any disputes

arising out of the agreement were to be referred to arbitration. Consequently, on 6th March 2015 the parties entered into an agreement appointing a sole arbitrator to determine the final liabilities after which the tribunal published its award on 14th November 2016. The Applicant's counterclaim was awarded a total sum of **Kshs. 29,848,650/-** and was directed to pay terminal dues of **Kshs.76,059,017/-**. Both parties were awarded an interest of **15.8%** from 1st September 2014 until payment in full.

Application to Enforce the Award

The claimant brought before the court an application dated 20th July 2018 for the orders;

- a. The claimant be granted leave to enforce the arbitral award dated 14th November 2016 and the further award dated 29th March 2018;**
- b. That judgment be entered for the claimant against the Respondent for the sum of Kshs.14,227,651,56/- together with simple interest of 15.8% from January 2017 until full payment;**
- c. That the Respondents pay all costs and expenses incidental to the enforcement and execution of the two awards.**

The application was based on the grounds that;

- a. The further arbitral award dated 20th March 2018 declared that the final award dated 14th November 2016;**
 - i. The Respondent shall pay the claimant the sum of Kshs. 46,210,348/- less any tax liabilities**
 - ii. The said sum shall carry a simple interest at 15.8% p.a from 1st September 2014 until payment in full**
- b. Upon receipt of the award, the applicant calculated the amount due to him and forwarded the computation to the Respondent**
- c. Despite the demand having been made, the Respondent had refused to comply with the orders as stated above**
- d. To date, no order has been made to the court to set aside either of the awards.**

The application was further supported by the affidavit of **John Mwara Kibochi** filed on the 23rd of July 2018. He stated that, after publication of the final award the Respondent on 9th December 2016 he instituted post award proceedings seeking clarification and interpretation of four orders of the final award. His advocates computed the outstanding amount due and payable and via a letter dated 20th December 2016, notified the Respondent's advocates of the actual sum. The Applicant further stated that on 22nd December 2016, the Respondents made a partial payment Kshs 35,769,505/- and via a letter dated 17th January 2017, the claimant's advocates ordered the Respondents to pay the balance.

The arbitrator thereafter via a letter dated 29th March 2018 informed the parties that the further award was ready for collection where both parties forwarded their cheques for settlement. The further award made further declarations in respect to the final award as evidenced in **pages 74 to 81** of the Plaintiff's bundle.

SUBMISSIONS TO SET ASIDE THE ARBITRAL AWARD

In the applicants submissions dated 19th October 2018, the Applicant submitted that when a court is presented with two applications as in this case, it must determine the Application for setting aside the arbitral award first. Reliance was placed on the case of **Cape Holdings Ltd vs Synergy Industrial Credit Ltd [2016] eKLR** where the court held that;

“My view is that when applications under section 35 and 37 of the Arbitration Act are presented together, the Court should determine the one for setting aside first, and then determine the one for recognition and enforcement of award afterwards. The said order and sequence makes sense as the decision in the application under section 35 will determine the course of the application for recognition and enforcement of award. If the Court were to commence with the hearing of the one seeking the enforcement of the award, the Court may find itself in an embarrassing situation of making two contradictory decisions.”

The Applicant addressed the issues to their application as follows;

1. Whether the computation of the taxable amount by the arbitrator was consistent with the principles set out in the Income Tax Act and the KRA PAYE Guide

The Applicant relied on the preamble under the Income Tax Act which provides for what constitutes the assessing and charging of taxable income against individuals. They also relied on **section 3(1)(2)** which provides that all income gained by an employee is taxable and **section 5(2)(a) and (c)** which provides that **any gain or profit shall include any amount and any compensation received by an employee in respect of employment services rendered.**

The Applicant also submitted that taxation of employment must be on a global award and not components of it as it would amount to tax evasion as supported in the case of *Kioko Joseph [suing as the representative of the estate of Joseph Kilinda] vs Bamburi Cement Limited [2016] eKLR* where the court stated;

“...the Respondent erred in departing from the specific sums, particularly on gratuity, given under the decree extracted by the Parties. The Claimant on his part appears to be in the wrong, in his argument that he is only supposed to pay income tax on the compensatory award. Income tax, in the understanding of the Court, would apply to the global Award.....”

Under **Section 37 of the Income Tax** an employer must recover tax from an employee before releasing any difference to the employee. Consequently, the KRA Guide provides that PAYE tax shall be charged against all payments made to an employee on compensation. In *Michael Muimi Kimanzi vs Jamsons Industries Limited & Another [2016] eKLR* the court held that interest should be subjected to taxation.

The Applicant reaffirmed to the court that the claimant indeed submitted at page 101 of “SM-1” that there appeared to be a real problem with regard to computation of the arbitral award.

2. If the computation of the taxable amount by the Arbitrator was inconsistent with the principles set out in the Income Tax Act and the KRA Guide

The Applicant reiterated Article 165(6) of the Constitution invoking the court’s jurisdiction as supported in the case of *Evangelical Mission for Africa & another vs Kimani Gachuhi & another [2015] eKLR*.

The Applicant submitted that it is on this basis that the court under **Section 35(2)(b)(ii)** of the **Arbitration Act** can set aside an arbitral award inconsistent with the law as was in the case of *Christ for all Nations vs Apollo Insurance Co. Ltd. (2002) EA 366* in which the court held;

“An award could be set aside under section 35(2) (b) (ii) of the Arbitration Act as being inconsistent with the public policy of Kenya if it is shown that it was either (a) inconsistent with the Constitution or to other laws of Kenya, whether written or unwritten or (b) Inimical to the national interest of Kenya or (c) contrary to justice or morality.”

In the case of *Kenya Post Office Savings Bank & another vs The Advertising Company Ltd & another [2017] eKLR*, the court set aside an arbitral award that was inconsistent with the law. The court held that;

“In relation to the Ground of Public Policy considerations the Arbitrator had various choices to make. The first was the choice between the Income Tax Act and its Rules and the Agreement. The Act provided for income tax to be withheld in certain circumstances. The Agreement provided for the opposite. The Arbitrator adopted the approach that meant tax was not withheld nor remitted. Potentially that provides an interpretation that is at odds with the Payers responsibilities and duties under the tax legislation. It could also be argued that it facilitates tax avoidance, in exactly the way forbidden by the Withholding Tax Rules 2001. In the circumstances, such an interpretation is contrary the Act and therefore contrary to Public Policy in particular that part of the public policy that requires efficient assessment and collection of taxes in the public good.”

3. Whether the claimant should reimburse Faulu Microfinance Bank the sum of Kshs. 3,950,922 with interest.

The Applicant was advised by its advocate that it had applied the correct principle under section 3 and 5 of the Income Tax Act on the computation of tax liability but had overpaid the sum of Kshs. 3,950,922/-

SUBMISSIONS TO ENFORCE THE AWARD

In the Claimant’s submissions dated 30th July 2018, he opposed the application to set aside the arbitral award via a replying affidavit dated 30th July 2018. The Claimant addressed the issues for determination as follows;

1. Whether the court has the jurisdiction to interfere with the computation of the final award in the sum of kshs. 46, 210,348.00 less any tax liabilities.

The Claimant submitted that it was not for this court to question the calculation of the specific sums as that was in the jurisdiction of the arbitrator. He relied on the case of *Kenyatta International Convention Centre (KICC) vs Greenstar Systems Limited [2018] eKLR* where the court held that;

*“... In any event, matters to do with the propriety or otherwise of the Arbitrator awarding a specific sum, or interest or costs are matters over which only the Arbitrator had jurisdiction to deal; and which this Court would have no mandate to interfere. I would therefore concur with the decision in *D. Manji Construction Limited vs. C & R Holdings Limited [2014] eKLR* in which the Court observed that:*

“The applicant has cited some alleged erroneous decisions by the arbitrator on matters to do with completion date, double gauge windows, rate of interest awarded, final accounts, disregard of evidence, extension of time, only to mention but a few...those arguments did not really show that the law was violated as they are matters which fall within the fallibility of every person who is exercising judicial or quasi-judicial authority. They also relate to the merits and factual appreciation of the case by the arbitrator; which again falls squarely on the competence of the arbitrator as the master of facts...”

The claimant submitted that the Respondent did not show how the Arbitrator violated the law. He also submitted that the court cannot interrogate the merits of an arbitrator's decision as was reiterated in the case of Cape Holdings Ltd vs Synergy Industrial Credits Ltd [2016]eKLR where the court held that;

“The court cannot therefore go to the merits or otherwise of the Award when dealing with an application under Section 35 of the Act as this court is not sitting on an appeal from the decision of the arbitrator when considering whether or not to set aside the award.”

2. Whether the computation issue sought by the Respondent was addressed by the arbitral tribunal

The Claimant submitted that the Respondents are trying to disguise this issue as an appeal since the same issue was raised before the Arbitrator who made a determination and held that it had no jurisdiction to determine any issue on tax computation. He submitted that this was in contravention to **Section 39 of the Arbitration Act** as was supported in the case of Kenya Oil Co. Ltd & another vs Kenya Pipeline Co. [2014]eKLR where the court held that;

“The arbitrators are the masters of the facts. On an appeal the court must decide any question of law arising from an award on the basis of a full and unqualified acceptance of the findings of fact of the arbitrators. It is irrelevant whether the Court considers those findings of fact to be right or wrong. It also does not matter how obvious a mistake by the arbitrators on issues of fact might be, or what the scale of the financial consequences of the mistake of fact might be. That is, of course, an unsurprising position. After all, the very reason why parties conclude an arbitration agreement is because they do not wish to litigate in the courts. Parties who submit their disputes to arbitration bind themselves by agreement to honour the arbitrators’ award on the facts. The principle of party autonomy decrees that a court ought never to question the arbitrators’ findings of fact.”

3. Whether the final and further awards offend public policy

The Claimant submitted that the Respondent needs not only point an illegality on the part of the arbitrator but must also demonstrate that the award was obnoxious to the tenets of justice and hence the need to set it aside as was reiterated in the case of Continental Homes Ltd vs Suncoast Investments Ltd [2018]eKLR where the court held that;

“In order for this court to set aside the award for contravening public policy the Applicant must point at an illegality on the part of the arbitrator. The Applicant needs to show that the arbitration is so obnoxious to the tenets of justice that the only way to salvage the reputation of arbitration is to set aside the award. This court has no appellate jurisdiction over the arbitral award. It is therefore immaterial that this court would have arrived at a different conclusion from that reached by the arbitrator.”

The claimant further placed reliance on **Section 10 of the Arbitration Act** and the principle of finality of awards.

DETERMINATION

The court considered the parties’ pleadings and submissions; the Court is called upon to determine the following issues;

1. What is the Court’s jurisdiction in the instant applications?

2. Are arbitral awards of 14th November 2016 & 29th March 2018 contrary to public policy to be set aside?

a) Are the awards by the Arbitrator inconsistent with the principles set out in the Income Tax Act and the KRA Guide

b) Whether the Respondent should be ordered to reimburse the Applicant the sum of kshs.3,950,922 with interest.

1. What is the Court’s jurisdiction in the instant applications?

This Court derives its jurisdiction to hear and determine the issues presented in Court from; the parties choice of forum outlined in the Settlement Agreement of 8th August 2014 **Clause 4.6.1**, prescribes; disputes arising between the parties shall be resolved through arbitration.

Secondly, any issues arising thereof this Court shall only determine in terms of **Section 10 of Arbitration Act** matters stipulated by the said Act for determination by the Court.

The Respondent/Applicant sought by application dated 29th June 2018 this Court stays the Arbitral awards pending hearing and determination of the application and /or setting aside the arbitral awards for being contrary to public policy.

The Claimant /Applicant vide application filed on 20th July 2018 sought recognition and enforcement of the arbitral awards.

Therefore, the jurisdiction of this Court is in/by **Sections 35, 36 & 37 of the Arbitration Act 1995** that prescribe the recognition and enforcement of arbitral award; setting aside the arbitral award and outlines grounds for setting aside arbitral award. The Court’s jurisdiction does not extend to computation /calculation of the sums that culminate to the Arbitral awards herein and/or the tax payable from the emoluments of the Claimant, as it would amount to interrogating the merits of the Arbitral awards. This would be to sit on appeal on the

arbitral process and awards, which the Court lacks competent jurisdiction to do.

2. Are arbitral awards of 14th November 2016 & 29th March 2018 contrary to public policy and ought to be set aside?

The court is guided by the case of *Inoil Limited & another vs Total Kenya Limited & 3 others [2013] eKLR* where Ringera J held,

“Public policy is a broad concept incapable of precise definition. An award can be set aside under Section 35 (2) (b) (ii) of the Arbitration Act as being inconsistent with the public policy of Kenya if it is shown that it was either (a) inconsistent with the Constitution or any other law of Kenya whether written or unwritten, or (b) inimical to the national interest of Kenya, or (c) contrary to justice and morality.”

The Applicant submitted that the Court ought to set aside the final arbitral award and further award for being contrary to public policy as they contravene Laws of Kenya, namely; **Sections 2, 3, 5(2)(a)(b) and 37 of the Income Tax Act. The relevant provisions provide as follows;**

Section 3 (1) (2)

1) 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

2) Subject to this Act, income upon which tax is chargeable under this Act is income in respect of-

a) Gains or profits from-

i) A business, for whatever period of time carried on;

ii) Employment or services rendered;

iii) A right granted to another person for use or occupation of property;

b) Dividends or interest;

c)

i) a pension, charge or annuity; and

ii) any withdrawals from, or payments out of, a registered pension fund or a registered provident fund or a registered individual retirement fund; and

iii) any withdrawals from a registered home ownership savings plan;

d) (deleted by 14 of 1982, S. 17);

e) An amount deemed to be the income of a person under this Act or by rules made under this Act;

f)

g)

h)

Section 5(2) a) & b) ii) (b) (c) (i) (ii) (e) provide

2) For the purposes of section 3 (2)(a)(ii), “gains or profits” includes-

a) Wages, salary, leave pay, sick pay payment in lieu of leave, fees, commission , bonus, gratuity, or subsistence, travelling, entertainment or other allowance received in respect of employment or services rendered, and any amount so received in respect of employment or services rendered in a year of income other than the year of income in which it is received shall be deemed to be income in respect of that other year or income;

Provided that-

i) Where such an amount is received in respect of a year of income which expired earlier than four years prior to the year of income in which the employer or services ceased, if earlier, it shall be deemed to be income of the year of income which expired five years prior to the year of income in which it was received, or prior to the year

of income in which the employment or services ceased; and

ii) Where the commissioner is satisfied that subsistence, travelling, entertainment or other allowance represents solely the reimbursement to the recipient of an amount expended by him wholly and exclusively in the production of his income from the employment or services rendered then the calculation of the gains or profits of the recipient shall exclude that allowance or expenditure;

iii) Notwithstanding the provisions of subparagraph (ii), where such amount is received by an employee as payment of subsistence, travelling, entertainment or other allowance, in respect of a period spent outside his usual place of work while on official duties, the first two thousand shillings per day expended by him for the duration of that period shall be deemed to be reimbursement of the amount so expended and shall be excluded in the calculation of his gains or profits;

b) Save as otherwise expressly provided in this section, the value of a benefit, advantage, or facility of whatsoever nature the aggregate value whereof is not less than thirty six thousand shillings granted in respect of employment or services rendered;

c) an amount received as compensation for the termination of a contract of employment or service, whether or not provision is made in the contract for the payment of that compensation:

provide that, except in the case of a director, other than a whole time service director, of a company the directors whereof have a controlling interest therein-

i) where the contract is for a specified term, any amount received as compensation on the termination of the contract shall be deemed to have accrued evenly over the unexpired period of the contract;

ii) where the contract is for an unspecified term and provides for compensation on the termination thereof, the compensation shall be deemed to have accrued in the period immediately following the termination at a rate equal to the rate per annum of the gains or profits to termination;

d)

e) The value of premises provided by an employer for occupation by his employee for residential purposes...

f) ...

Section 37 of Income Tax provides;

1) An employer paying emoluments to an employee shall deduct therefrom, and account for tax thereon, to such extent and in such manner as may be prescribed.

2) If an employer paying emoluments to an employee fails-

a) To deduct tax thereon;

b) To account for tax deducted thereon; or

c) To supply the commissioner with a certificate provided by rules prescribing the certificate.

The commissioner may impose a penalty equal to twenty-five percent of the amount of tax involved or ten thousand shillings whichever is greater, and the provisions of this Act relating to the collection and recovery of that tax shall also apply to the collection and recovery of the penalty as if it were tax due from the employer:

Provided that, instead of the commissioner imposing a penalty under this subsection, a prosecution may be instituted for an offence under section 109 (i)(j).

3) The commissioner may remit the whole or part of any penalty imposed under this section up to a maximum of five hundred thousand shillings per employer per annum:

Provided that-

a) The commissioner may remit any amount of penalty in excess of five hundred thousand shillings per employer per annum with the prior written approval of the minister; and

b) The commissioner shall make a quarterly report to the minister of all penalties remitted during that quarter.

4) Tax deducted under this section from the emoluments of an employee shall be deemed to have been paid by that employee and shall be set off for the purposes of those emoluments in an assessment for the year of income in which those emoluments are

received.

5) Where a person who is required under this section to deduct tax fails to remit the amount of any deduction to such person as the commissioner may direct within the time limit specified in rules made under section 130, the provisions of this Act relating to the collection and recovery of tax, and the payment of interest thereon, shall apply to the collection and recovery of that amount as if it were tax due and payable by that person, the due date for the payment of which is the date specified in rules made under section 130 by which that amount should have been remitted to the payee.

5A) An employer aggrieved by the imposition of a [penalty by the commissioner or any other decision taken by the commissioner under this section may, by notice in writing to the commissioner, within thirty days, object to such imposition or decision.

5B) the provisions of this Act in respect of objections shall, mutatis mutandis, apply to objections under this section

6)

7)

Also in the Kenya Revenue Authority Employer's Guide to P.A.Y.E provides;

Procedure for Computation of Tax on Lumpsum payments (Gratuties Bonuses, etc) Notification.....

“Every Employer has an obligation under section 37 of the income Tax Act to recover appropriate tax from any lump sum amount before releasing the difference /balance to the employee. The following is a guide to Employers on how to compute tax on lump sum payment.”

Compensation for Termination of Employment....

“Liability extends to any payment, whether voluntarily or obligatory made to a person to compensate him for the termination of his contract of employment or services whether the contract is written or verbal and whether or not there is provision in the contract for such payment.”

The Respondent alluded to the following provisions as the basis of setting aside the arbitral award for noncompliance with the mandatory provisions as outlined above.

The Arbitrator found the following; as enumerated in **paragraph 224 & 225 of the Final Award of 14th November 2016** from the Respondent's counterclaim as benefits lawfully advanced to the Claimant and was due for refund to the Respondent Company;

Staff advances	Ksh	1,790,616.86
Travel Advance	Ksh	163,055.72
Staff Personal Loan	Ksh	3,894,978.14
Development Loan	Ksh	24,000,000.00
Total		Ksh 29,848,650.00

The Arbitrator found as outlined at **paragraph 226 of Final Arbitral Award**;

The Claimant's terminal dues were/are as follows;

Salary	Ksh	60,550,000.00
Pension	Ksh	6,265,000.00
Leave Days	Ksh	1,481,200.00
Leave Travel		
Allowance	Ksh	1,260,000.00
Car Benefit	Ksh	6,502,797.50
Total		Ksh 76,059,017.00

At **paragraphs 242 & 242 of Final Award**; the Arbitrator invoked jurisdiction to determine interest vide **Section 32 C of Arbitration Act** and awarded interest at 15.8% simple interest for Claimant & Respondent awards from 1st September 2014 until payment in full.

Paragraphs **225, 226 & 244 Final Award of 14th November 2016 at Pg 46 & 48**; the Respondent was entitled to its counterclaim of Ksh 29,848,650/= as outlined above owed by Claimant as outstanding loans and the Claimant was entitled to the terminal dues of Ksh 76,059,017 as terminal dues from the Respondent.

The Arbitrator *suo moto* set off outstanding loans against terminal dues before tax deduction and then directed the balance of **Ksh 46, 210,237/-** to tax before interest is applied. The Respondent deposed that the total taxable income ought to have been **Ksh 103,097,979/-** as total earnings, global figure and gross pay plus interest to the Claimant by the Respondent before deductions or setoff.

The Respondent stated that the arithmetic computation was incorrect, the deduction of outstanding loans from terminal dues without including interest first as per the award and charging interest on the net balance, the Arbitrator's award went against the Taxation principles.

The Respondent submitted that the computation was in error. The Arbitrator had no legal basis to hold that interest was not a chargeable item at **Paragraph 39** of the Further Award at **Pg 189**. What constitutes taxable income, the manner in which it is assessed and charged against individuals in Kenya is expressly provided under the **Income Tax Act Cap 470** as outlined above.

The Respondent contended that all amounts received as compensation by the Claimant must be taxed. Interest paid as compensation cannot be isolated as a separate component as it would be contrary to the Law.

The Respondent submitted that taxation of employment compensation must be on the global award and not on components of the award as this isolation would constitute tax evasion.

The Respondent relied on the case of ;

ELRC 308 2013 Kioko Joseph vs Bamburi Cement Limited [2016] eKLR & Court of Appeal Civil Appeal 69 of 2016 Kioko Joseph vs Bamburi Cement [2017] eKLR whose facts are as follows;

The facts of these cases are as follows;

In the 1st instance the ELRC awarded the deceased 6 months' salary for wrongful termination, 13 days salary gratuity and unpaid leave. The Respondent appealed, the appeal was dismissed and the ELRC award was made subject to statutory deductions. The Respondent paid deceased's estate part of the amount and withheld the rest of the amount deemed as P.A.Y.E to be transmitted to Kenya Revenue Authority (KRA) The Appellant disagreed and took out warrants of attachment for the withheld amount. The Respondent filed application before ELRC for stay of execution apprehensive the Appellant would execute. The Appellant maintained that only a portion and not the entire award was subject to taxation. The Court held that the whole award was subject to taxation. In addition the obligation of an employer to deduct PAYE applied not only to its employees but also employees that were terminated. The Court noted error in computation of tax and among other orders ordered; the contested/withheld amount be deposited in a joint interest earning account, the Advocates for the 2 parties with aid of KRA to reconsider the tax positions and agree on appropriate tax remittance and there would be stay of execution till agreement of tax.

The Appellant appealed the decision in Court of Appeal aggrieved by the said order on why KRA was joined to proceedings and was not a party in the 1st Place. Secondly, the Appellant contested taxation on the entire decretal amount and hence the decree was not fully settled. The Court of Appeal relied on the provisions of Income Tax Act and Kenya Revenue Authority's Employers Guide on PAYE outlined above. **The Court found;**

The entire global award was subject to taxation and the Trial Court correctly directed parties to involve the KRA having appreciated that they disagreed on the assessment of PAYE due. The Court relied on the case of Directline Assurance Co Ltd vs Jeremiah Wachira Ichaura [2016] eKLR that held;

“It is trite law that any lumpsum payment for say terminal dues; is subject to statutory deductions for the years taken into account...”

The Claimant objects to setting aside the award as the issues raised with regard to computation of tax are matters dealt with by the Arbitrator. The Setting aside application goes into the merits of Arbitrator's decision and findings. The setting aside application seeks to introduce fresh evidence before Court; such evidence was never presented before the Arbitral Tribunal. The Arbitral awards were/are not against public policy in Kenya as the public policy leans towards the finality of arbitral awards which ought to be accepted only subject to challenge under **Section 35 of the Arbitration Act 1995**. The Setting Aside application hinges on computation of the awards and the Court cannot question or evaluate the question of calculation of the specific sums by the Arbitrator. The Setting aside application does not impute any breach of tax law the Arbitrator violated as he directed the Respondent to pay the awards less any tax liabilities.

The issue of computation was raised before the Arbitral Tribunal and culminated with the Further award at **Pg 183-190** where the Arbitrator found no error and had no jurisdiction to compute tax. To make it the basis of the setting aside application amounts to inviting the Court to sit on appeal of the Arbitral Tribunal decisions; which is contrary as the following cases show;

DP Shapriya & Co vs Bishnit (2003) 3 EA 404 provides;

“All questions of fact are and always have been within the sole domain of the Applicant... the general rule deductible is that the Court cannot interfere with finding of facts by Arbitrator.”

Kenya Post Office Savings Bank & Anor vs Advertising Company Limited & Anor [2017] eKLR provides:

“It is a well accepted proposition that an arbitral award is final and binding on the parties; the intervention of the Court as regards an award delivered by an Arbitral Tribunal is limited strictly to the grounds set out in Section 35 of the Arbitration Act and no more...”

The parties did not contest the jurisdiction of the Arbitrator nor the legality of the award. Therefore in light of submissions above on the Court’s role, before me is a narrow dispute on how the tax element of the arbitral award is to be settled based on divergent views and computations/calculations by Counsel on behalf of the Parties.

To determine if the arbitral award is contrary to public policy it ought to be proved that the award amounts to contravention of the Constitution or Kenyan legislation. The Respondent claims the computation of tax is contrary to the **Income Tax Act** whereas the Claimant at **paragraph 231** of the Arbitral award admits and acknowledges that all lawful liabilities including PAYE would be deducted from his terminal dues. The Arbitrator awarded the Claimant Ksh 46,210,367/- less any tax liabilities after setoff of Ksh 29,848,650/- . I have weighed the rival submissions by parties and to my mind the matter rests on computation of tax. A reading of the relevant provisions of Income Tax Act confirms that any gain or profit accruing to the Claimant is subject to tax before any deductions. The Respondent/ former employer is a Tax Collecting agent and ought to withhold the tax payable for remittance to KRA. I have also noted that there has been part payment/part compliance of the Arbitral award. Cumulatively, the discrepancy of computation of tax payable from Claimant’s emoluments in this Court’s view does not amount to non compliance of Constitution and/or legislation and hence against public policy because; the original dispute before the Tribunal was termination of employment dispute which the Arbitrator determined vide the Arbitral award. It is the recognition and enforcement of Arbitral award that gave rise to computation of tax dispute. None of the parties contest the mandatory legal obligation to pay tax the contention is computation of the amount due according to the Income Tax Act and the Kenya Revenue Authority’s Employer’s manual on PAYE.

The court finds that the decision of the Arbitrator cannot be said to be against public policy as it gave reasons as to why the Tribunal was reluctant to compute the tax computation. The Arbitrator further gave recourse to the Claimant with regard to recovery of overpaid tax by the Respondent as per **pg 79 and 80 of the Final award**. In reliance to the above case(supra), Ringera J states that;

“an error of fact or law or mixed fact and law or of construction of a statute or contract on the part of the arbitrator cannot by any stretch of legal imagination be said to be inconsistent with the public policy of Kenya.”

In the case of Glencore Grain Ltd versus TSS Grain Millers Ltd. [2002] 1 KLR 606, the learned Judge at page 77 held that;

“A contract or arbitral award will be against the public policy of Kenya in my view if it is immoral or illegal or that it would violate in clear unacceptable manner basic legal and/or moral principles or values in the Kenyan society. It has been held that the word “illegal” here would hold a wider meaning than just “against the law”. It would include contracts or contractual acts or awards which would offend conceptions of our justice in such a manner that enforcement thereof would stand to be offensive”.

3. Whether the computation of the taxable amount by the Arbitrator was inconsistent with the principles set out in the Income Tax Act and the KRA Guide

Section 37 of the Income Tax Act, Cap 470 the Laws of Kenya, makes it obligatory for Employers to recover appropriate tax from any lump sum, before releasing any difference to the Employee.

The court is guided by the case of **Anne Mumbi Hinga vs Victoria Njoki Gathara [2008]eKLR** which reiterates on the principle of finality of awards. **Section 10 of the Arbitration Act** limits the court’s jurisdiction by stating that the court shall not intervene in the arbitration process except as provided in the Act.

Since the court’s jurisdiction to interfere with the computation of tax liability in matters resolved through arbitration is ousted by the parties arbitration clause and the Arbitration Act, the court is therefore guided by **Section 39 of the Arbitration Act** which offers a party an opportunity to file an application to the High Court with regard to any question of law which consequently invokes this court’s jurisdiction.

4. Whether the Respondent should be ordered to reimburse the Applicant the sum of Kshs.3, 950,922 with interest.

The Court is inclined to be guided by the principle of by finality of arbitral awards with regard to this issue and concurs with the arbitrator’s further award at **paragraph 37** which gives recourse for the Applicant to recover overpaid tax by applying to the Kenya Revenue Authority in form P9.

DISPOSITION

1. The Final Award of 14th November 2016 and Further Award of 29th March 2018 are hereby recognized and enforceable SUBJECT to the following condition(s)

2. The Claimant and Respondent through their respective Counsel shall jointly approach Kenya Revenue Authority (KRA) within 30 days of this decision and consult their respective positions with regard to tax computation in enforcement of the

Arbitral award(s). This is with a view to assessment of tax on Claimants gains and profits from Respondent in accordance with provisions of Income Tax Act and Kenya Revenue Authority's Employers Guide on PAYE and/or any other relevant law in force on tax payment.

3. In default of assessment and deduction of tax in accordance with the law as outlined above each/any party may invoke Section 39 of Arbitration Act and raise the question of law for the Court to determine.

DELIVERED SIGNED & DATED IN OPEN COURT ON 29TH JULY 2019.

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF:

MRS. MUIGWI FOR CLAIMANT

MS WAIRIMU FOR THE RESPONDENT

COURT ASSISTANT – ISAIAH OTIENO