



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 59 OF 2007

MICHAEL MUIMI KIMANZI.....APPELLANT/RESPONDENT

VERSUS

JAMSONS INDUSTRIES LIMITED.....1ST RESPONDENT/APPLICANT

PRATIN KAPURCHANO SHAH.....2ND RESPONDENT/APPLICANT

RULING

1. The application dated 11th August 2016 is brought under Section 3A of the Civil Procedure Act. It seeks the following orders:

“i. THAT this honorable court be pleased to declare that the decretal sum plus costs herein have been paid in full.

ii. THAT this honorable court be pleased to mark this case as fully settled.

iii. Costs be provided for.”

2. The application is supported by the affidavit sworn by Benard Oravo Ayuko, the Legal Manager of Occidental Insurance Company Limited, the Applicants insurers.

3. The Applicants case is that judgment was entered in favour of the Respondent for the sum of Kshs.602,000/= plus costs and interest. The principal sum and costs came to a total of Kshs.769,916/=. Interest was computed at Kshs.738,972/=. The Applicants paid the entire decretal sum but withheld a sum of Kshs.110,849/= as income tax. The Applicants exhibited the withholding tax certificate. The Respondent was not happy with the issue of withholding tax and threatened to execute for the said sum of Kshs110,849/=. That is what provoked the filing of this application.

4. The application was opposed to as per the replying affidavit sworn on 7th September 2016. The Respondent was aggrieved by the decision of the Applicants to withhold tax amounting to Kshs 110,849/= especially given that the amount was paid as compensation arising from the injuries he sustained in an accident. He averred that the act of withholding tax amounts to an illegality and is unacceptable in law given the fact that the Income Tax Department is not a party to these proceedings.

5. I have considered the application and the reply to the same. I have also taken into consideration the oral submissions of the parties.

6. The bone of contention in this application is whether withholding tax is payable on interest accruing in

a compensatory suit.

7. Section 3(1) of the Income Tax Act provides that:

“3(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.”

8. The Black’s law Dictionary, 8th Edition, defines **“withholding tax”** as **“a portion of income tax that is subtracted from salary, wages, dividends, or other income before the earner receives payment.”**

9. I have looked at Section 35 of Income Tax Act which is the governing provision for deducting withholding tax from the payments made. Section 35(3) provides as follows:-

"A person shall, upon payment of an amount to a person resident or having a permanent establishment in Kenya in respect of—

(a) dividend; or (b)

(b) interest, other than interest paid to a financial institution specified in the Fourth Schedule which is resident or which has a permanent establishment in Kenya, including interest arising from a discount upon final satisfaction or redemption of a debt, bond, loan, claim, obligation or other evidence of indebtedness measured as the original issue discount, other than interest or discounts paid to a person exempt under the First Schedule or a financial institution specified in the Fourth Schedule: Provided that—

(i) where the bond, loan, claim, obligation or other evidence of indebtedness is acquired by a person exempt under the First Schedule or a financial institution specified in the Fourth Schedule from the resident person, such an exempt person or financial institution shall deduct tax from the difference between the acquisition price and the original issue price; and

(ii) where the resident person disposes of a bond, loan, claim, obligation or other evidence of indebtedness acquired from a person exempt under the First Schedule or a financial institution specified in the Fourth Schedule, tax shall be deducted upon final redemption from the difference between the final redemption price and the acquisition price, if the exempt person or financial institution certifies the acquisition price to the satisfaction of the Commissioner; Rev. 2013 Income Tax CAP. 470 I1 - 71 Issue 2

(c)

(d)

(e)

(f).....

10. Interest is defined under section 2 of the Income Tax Act as:

“interest payable in any manner in respect of a loan, deposit, debt, claim or other right or obligation, and includes a premium or deposit, debt, claim or other right or obligation, and includes a discount by way of interest and a commitment or service fee paid in respect of any loan or credit supplied.”

11. A claim as referred above is defined in the online Black’s Law dictionary 2nd edition, as:

" A legal assertion; a legal demand; Taken by a person wanting compensation, payment, or

reimbursement for a loss under a contract, or an injury due to negligence. “

12. A reading of Section 35 (3) cited above shows that all payments in respect of a claim where interest has accrued should be subjected to withholding tax. The exceptions are as stipulated in the first and fourth schedule. A personal injury claim is not exempted in these schedules. The Respondent instituted a suit in the lower court where he claimed compensation for injuries suffered due to negligence acts of the Applicants. Thus, being a compensatory suit, it amounts to a suit falling within the meaning of a claim which claim attracts interest. It is not disputed that interest accrued in this claim. The interest should therefore be subjected to taxation.

The Respondent has contended that the Income Tax Department is not a party to these proceedings and that therefore the matter of withholding tax does not arise. I am not persuaded by the said argument. I am also not persuaded by the case of **Mbugua & Mbugua Advocates v Kenindia Assurance Co. Ltd HCCC Nbi Misc. Appl. No. 742 of 2005** which this court has been referred to. The Income Tax (withholding Tax) Rules 2001 provides for recovery of withholding tax by agent. Rule 10 provides for the appointment of an agent. The said rule provides:-

“For the purposes of the recovery of tax which a person would have been liable to pay under rule 8 had he complied with the provisions of these Rules, that person shall be deemed to have been appointed an agent of his payee under section 96 of the Act.”

The agent by virtue of this provision is mandated to recover withholding tax.

14. The Applicants have exhibited a certificate of proof that the withholding tax was remitted to the Kenya Revenue Authority. The Respondent has not adduced any evidence to the contrary. In my view the Applicants falls within the category of an authorized agent under the Income Tax Act.

Section 2 of the Income Tax Act defines “authorized tax agent as follows:-

“Any person who prepares or advises for remuneration, or who employs one or more persons to prepare for remuneration, any return, statement or other document, with respect to a tax under this Act; and for the purposes of this Act, the preparation of a substantial portion of a return, statement or other document shall be deemed to be the preparation of the return, statement or other document;”

15. For the above stated reasons, I hold that the deductions made by the Applicants are covered by the foregoing provisions of the Income Tax Act. (See for example **Kenya Commercial Bank v Kenya Revenue Authority [2008] eKLR** and **Motaku Shipping Agencies Limited v Commissioner of Income Tax [2014] eKLR**). Consequently, I allow the application with costs to the Applicants.

Dated, signed and delivered at **Nairobi** this **23rd** day of **November 2016**

B. THURANIRA JADEN

JUDGE