



CO-OPERATIVE BANK OF KENYA LTD.....PLAINTIFF

VERSUS

ERASTUS KIHARA MUREITHI.....DEFENDANT

JUDGEMENT

1. The matter for determination before the Court, arises out a service agreement entered into between the Plaintiff and the Defendant on 6th June, 1989 (hereinafter “the agreement”). The Defendant entered into the agreement whereby he was employed by the Plaintiff as its Managing Director and Chief Executive Officer with effect from 13th May 1989. The terms of the employment were set out in the agreement and included, but were not limited to, payment or making of deductions from the Defendant’s emoluments or remuneration to the *Kenya Revenue Authority* in accordance with the *Income Tax Act, Cap 470* of the Laws of Kenya. On 1st March, 2001 the Defendant tendered his resignation, which resignation was accepted and the agreement terminated on 28th March, 2001.

2. Following the Defendant’s resignation as Managing Director, from the Plaintiff’s employ, the Plaintiff received a letter dated 4th April, 2001 from Kenya Revenue Authority, in which it stated that following an audit, issues as regards the payment of tax on certain benefits had arisen. The report was based on audits for the years 1998-2000, all of which time the Defendant was in the employ of the Plaintiff. In a letter dated 24th March, 2003 and headed “**RE: TAX LIABILITIES**”, the Plaintiff wrote to the Defendant informing him that they had paid his tax liabilities accruing from the tenancy of his employment with it to the tune of Kshs. 11,194,097/-. In the letter the Plaintiff wrote;

“The tax arose from your payments that are benefits which are taxable on the individual. The tax amounts should, therefore have been recovered from you. This is an issue that our auditors have raised with us. Furthermore, of late, the issue of organizations paying taxes on behalf of individuals has had negative repercussions for the affected organizations and the individuals.

With this in mind, and for the sake of the Bank and yourself, we seek to regularize the position and hence, request you to let us have your cheque for Kshs. 11,194,097/- in full settlement of your tax liability within the next seven days.”

3. The Defendant failed to remit the monies demanded and subsequently the Plaintiff filed suit on 31st March, 2003 against the Defendant seeking for remedies as set out therein. The Plaintiff with the leave of the court amended its Plaintiff and filed an Amended Plaintiff dated 6th October, 2003. In the Amended Plaintiff, the Plaintiff made claims as set out and particularized therein. At paragraph 3B (i) – (viii), the Plaintiff set out and reiterated the terms of the service agreement as regarded the benefits, salaries and emoluments. It was the Plaintiff’s contention at paragraphs 3E and 3F that it made deductions of the benefits described in paragraph 3B and remitted the same as tax to the Kenya Revenue Authority. At paragraph 3E the Plaintiff avers;

“E. The Plaintiff further avers that in accordance with the express provisions of the Income Tax Act Chapter 470, it was under a statutory duty and obligation to deduct from the Defendant’s income and account to the Commissioner for Income Tax the amount of tax deducted therefrom

and the tax so deducted from the income of the Defendant would be deemed to have been paid by the Defendant.”

At paragraph 3F, the Plaintiff avers;

“3F. The Plaintiff duly deducted during the continuance of the contract of employment between itself and the Defendant the appropriate amount of tax in respect of the Defendant’s basic salary, housing allowance, telephone allowance, heating allowance, furniture allowance, electricity allowance, water allowance and security allowance and remitted such deductions on account of tax to the Commissioner of Income Tax as required by the provisions of the Income Tax Act, Chapter 470.”

However, at paragraph 3G and 3H, the Plaintiff admits that it did not make deductions on certain benefits as prescribed by law and in particular set out that;

“3G. The Plaintiff, however, made no deductions from the Defendant’s income in respect of motor vehicle running and allowances, insurance premiums paid for and on behalf of the Defendant, education fees expenses (including cost of air travel) paid by the Plaintiff in respect of the Defendant’s children in accordance with the contract of employment between the Plaintiff and the Defendant.”

Further at paragraph 3H the Plaintiff avers that;

“3H. The Plaintiff did not further make full deduction in respect of security guard services provided to the Defendant at his residential accommodation”.

It is the Plaintiff’s contention, therefore, that it was the Defendant’s responsibility to ensure compliance by the Plaintiff of any statutory requirements and obligations and as such was personally liable for the failure by it to remit the taxes emanating from the accrued deductions to the tune of Kshs. 11,194,097/-. At paragraph 7B of the Amended Plaintiff, the Plaintiff contends that;

“7B. In the further alternative, the Plaintiff avers that the payment by the Plaintiff to the Commissioner of Income Tax on account of the Defendant’s personal tax liability, which payment was made by the Plaintiff under compulsion of law, constituted unjust enrichment on the part of the Defendant and the Plaintiff is entitled to recovery of the said amount of Kshs. 11,194,097/-“.

4. The allegations and claims made by the Plaintiff are refuted by the Defendant. In response to the Plaintiff and Amended Plaintiff filed by the Plaintiff, the Defendant filed his Defence and Amended Defence dated 7th May, 2003 and 29th July, 2003 respectively. He further amended his Defence and filed a Further Amended Defence dated 3rd February, 2004. At paragraph 3 of the Further Amended Defence, the Defendant denies any culpability on the issue of unpaid taxes to the Commissioner of Income Tax. In particular at paragraph 3(d) of the Further Amended Defence, the Defendant contends that;

“3(d). The Defendant denies the contents of paragraph 3E of the Amended Plaintiff and by way of Defence avers that the Plaintiff has admitted failing to adhere to express statutory provisions of the Income Tax Act Chapter 470 of the Laws of Kenya and therefore has no legal stand to institute the suit against the Defendant.”

At paragraph 3(f), the Defendant maintains that;

“3(f). The Defendant by way of defence denies the contents of paragraph 3F of the Amended Plaintiff and avers that tax was deducted from all taxable income and benefits which the Defendant was entitled to and the Defendant received all income and benefits net of tax after the same had been duly deducted as per the Income Tax Department regulations.”

5. Further in the Further Amended Defence, the contents of the Amended Defence are reiterated and it is

the Defendant's contention that he did not owe the Plaintiff Kshs. 11,194,097/- as alleged. He submitted that he received salaries and allowances net of all taxes and denied that the alleged amount accrued and was chargeable to him. It was the Defendant's contention, that during his tenure as an employee of the Plaintiff, he was advised of his tax obligations and tax measures effectuated by the Plaintiff and the sum of Kshs. 11,194,097/- was directly chargeable to the Plaintiff by the Kenya Revenue Authority and could not, therefore, be legally borne by him. At paragraph 12(vi) of the Further Amended Defence, the Defendant reiterated:

“12. (vi). The Defendant denies the contents of paragraph 7B of the Amended Plaintiff and avers by way of Defence that the payment if made (which is denied) constituted penalties and sums of monies that the Plaintiff had to pay to the tax authority as an employer and the same does not entitle the Plaintiff to recover the said sums from the Defendant and the Plaintiff as a consequence has no locus standi in instituting the present suit.”

At paragraph 23(i) of the Further Amended Defence, the Defendant reiterated:

“23(i). The Defendant avers that this suit is bad in law and has been wrongly instituted and shall apply for the same to be struck out with costs at the appropriate time.”

The issue for determination, from the above, is whether the Plaintiff is entitled to restitution for the amounts paid by it to the Commissioner of Income Tax, allegedly on behalf of the Defendant, purportedly for accrued taxes that had not been deducted from benefits, income and allowances received by the Defendant during his term of employ with it.

6. Under the *Income Tax Act, Cap 470* of the Laws of Kenya, and with regard particularly to Section 37 of the said Act, it is the responsibility of the employer to deduct and remit taxes from the salaries, emoluments and allowances of its employees. **Section 37 sub-section (1)** reads;

“37(1). An employer paying emolument to an employee shall deduct therefrom, and account for tax thereon, to such extent and in such manner as may be prescribed.”

The Section goes further to impose a penalty or sanction on an employer who does not remit taxes on behalf of its employees as prescribed. **Section 37 sub-section (2)** provides;

“37. (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 per cent 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 (1) (j).”

8. Under the provisions of the *Employment Act, 2007*, it is the duty and responsibility of the employer to ensure that all deductions, statutory or otherwise, are made without undue delay and submitted to the relevant bodies or authorities. **Section 19 sub-section (1)(f)** as read together with sub-section (4) of that Act details that all deductions made shall be remitted timely and in accordance with any written laws, in this instance, being the provisions of the *Income Tax Act*. **Section 19 sub-section (1)(f)** provides that;

“19.(1) Notwithstanding section 17(1), an employer may deduct from the wages of his employee—

(f) any amount the deduction of which is authorised by any written law for the time being in force, collective agreement, wage determination, court order or arbitration award;

At **Section 19 sub-section (4)** reads;

“(4) An employer who deducts an amount from an employee’s remuneration in accordance with subsection (1)(a),(f),(g) and (h) shall pay the amount so deducted in accordance with the time period and other requirements specified in the law, agreement court order or arbitration as the case may be.”

Further **sub-section (5)** of **Section 19** provides for the penalty and sanctions to be imposed on a defaulting employer to make such deductions and remittances. It reads;

“(5) An employer who fails to comply with the provisions of subsection (4) commits an offence and shall on conviction be liable to a fine not exceeding one hundred thousand shillings or to imprisonment for a term not exceeding two years or to both.”

9. Consequently, it is the duty and responsibility of the employer to ensure that statutory deductions, or any other deductions, are made and remitted timely and in accordance to any written laws, in this instance, the Income Tax Act. In its submissions highlighted before the court, it was the Plaintiff’s contention that it adhered to the statutory requirements under the Income Tax Act with regard to **Section 37** thereof, and therefore by extension and inference, the provisions of the *Employment Act, 2007*. It went on to highlight the provisions of **Sections 5 sub-section (2)(a),(d),(f),(h)(i) and 16 sub-section (2)(a)(iv)** of the *Income Tax Act* that touched on the issue of tax assessable and payable on the motor vehicle given to the Defendant for his use, premiums on insurance and the school fees paid for his daughters. It went on to submit that these were benefits that were enjoyed by the Defendant, which it admittedly, did not deduct per its Amended Plaintiff at paragraphs 3G and 3H. Why did the Plaintiff not make any deductions as to the benefits and allowances enjoyed by the Defendant yet knowing that these were statutory deductions that had to be made by it? In trying to answer this question, the Plaintiff relied upon **Section 37B and 52B** of the *Income Tax Act*. It was the Plaintiff’s contention that the Defendant, as its Managing Director, was aware of the statutory requirements to make tax deductions on his salary, benefits and allowances and that he acted:

“in reckless disregard of his responsibility as the Managing Director and Chief Executive Officer.”

10. To the mind of the court, there has to be a plausible reason as to why the Plaintiff ignored its statutory obligations to make deductions on tax on all salaries, benefits and allowances enjoyed by its employees. It was submitted by the Plaintiff that the Defendant, as provided under **Section 37A** of the Income Tax Act, did not **‘take all reasonable steps to ensure that the offence was not committed’** and was thus personally culpable and entitled to compensate the Plaintiff in the amount of Kshs. 11,194,097/-. Under the provisions of both the *Employment Act, 2007* and the Income Tax Act, it explicitly provides that it is the duty of the employer, in this case the Plaintiff, to ensure that all deductions, due and accruing from the employee, whether statutory or otherwise, are duly deducted and remitted accordingly.

11. On behalf of the Plaintiff, the court heard evidence from **Lawrence Karissa** who testified that until 2009 he was the Head of Finance for the Plaintiff bank. His witness statement dated 23 February 2012 gave full details of the agreement’s provisions as regards the salary, provided housing, radio alarm, the wages of two servants, the cost of electricity, telephone and water consumed by the Defendant and his family as well as the provision of a motor vehicle suitable for the Defendant’s needs for which the Plaintiff was fully responsible for all costs of licensing, insuring, running, repairing and maintaining the same. He added that the Plaintiff would pay all costs in respect of medical treatment for the Defendant, his wife and 4 children below the age of 18 years. More particularly the Plaintiff would pay the costs relating to the educational expenses for the Defendant’s 4 children up to and including undergraduate level. The Defendant also enjoyed an entertainment allowance of Shs. 8000/- per month such to be

revised from time to time at the discretion of the Plaintiff. The witness then went on to say that the Defendant, as the Managing Director and Chief Executive Officer of the Plaintiff, had overall oversight over every aspect of decision making as far as the running of the Plaintiff bank was concerned as executive authority was vested in him. Mr. Karissa then gave full details of the tax audit undertaken by the Kenya Revenue Authority. By letter dated 4 April 2001, the Authority detailed that it would be taxing staff benefits and allowances: mileage allowance and/or reimbursement, car benefits for the Managing Director, Chairman and Vice-Chairman, housing benefits for the Managing Director, educational expenses, security, personal insurance and other related expenses for the Managing Director and staff loan write-offs. The witness was examined at length on the computation in relation to the provision of the motor vehicle to the Defendant, as well as the Authority's compensation for tax payable when the Defendant left the employment of the Plaintiff and purchased the motor vehicle that he had been enjoying the use of, from it.

12. Mr. Karissa dwelt sometime in explaining the Keyman Insurance policy which had been taken out for the benefit of the Defendant, the Plaintiff paying the premium of Shs. 10 million. Again, the Kenya Revenue Authority had assessed tax on the benefit of the policy in the amount of Shs. 3,250,000/-. He also gave full details of the various amounts paid by way of school fees for the Defendant's daughters for the years 1998, 1999 and 2000. The tax which had been assessed as payable on the benefit of the school fees amounted to Shs. 4,551,453/- for the three years covered. Mr. Karissa also noted that on various dates in 1998 and 1999, the Plaintiff had paid for the Defendant's family's air fares to the UK and the USA. Such had been assessed for tax purposes at Shs. 474,241/-. In concluding his evidence, Mr. Karissa noted that the total tax imposed on the car benefits, insurance premium, the children's school fees and the air fares had come to Shs. 11,194,097/-. Finally, the witness noted that the Plaintiff was owed a tax refund by the Kenya Revenue Authority and consequently had requested, under cover of its letter of 4 July 2001, that the aforementioned tax liability of Shs. 11,194,097/- be set off against the tax refund owed. The Kenya Revenue Authority had agreed to this proposal by their letter of 23 July 2003. Mr. Karissa then briefly referred to the various sections of the Income Tax Act relating to the taxation of remuneration and benefits.

13. Under cross-examination, Mr. Karissa confirmed that he had been the Plaintiff's Head of Finance and it was his department that was responsible for tax matters on the part of the Plaintiff Bank and its employees. He stated that he had enjoyed a cordial relationship with the Defendant and that he could not recall any recommendations that he had made to the Plaintiff's Board of Directors which had been overruled by the Defendant. The witness recalled that as regards Keyman insurance, the same had been approved by the Board at its meeting on 1 April 1998 and the policy was taken out to enhance the Defendant's retirement benefits at a premium of Shs. 10 million. He then went on to say that he had not been involved in the Board decision to allow the Defendant to purchase the motor vehicle that he had been utilising while with the Plaintiff bank. Similarly, he had not been involved in the decision as to the payment of education expenses for the Defendant's children. However, he confirmed that such was one of the benefits under the agreement with the Defendant. Mr. Karissa explained the position as regards the tax audit requested by the Kenya Revenue Authority covering the years 1998, 1999 and 2000. The Plaintiff's external auditors had been involved in discussions with the Kenya Revenue Authority and the witness was not aware of any problems that the Plaintiff had with the Authority and the Income Tax Department. He agreed that the result of the tax audit had been detailed in the Kenya Revenue Authority's letter to the Plaintiff dated 4 April 2011. He confirmed that the audit had been complete by that date and that the Authority intended to tax the benefits of not only the Defendant but also the Chairman and the Vice-Chairman of the Plaintiff Bank. He agreed that the audit had been handled in-house by him and his team together with the Plaintiff's external auditors and they had been satisfied that the amounts demanded by the Kenya Revenue Authority were due and payable.

14. The witness then confirmed that the Defendant had left the employment of the Plaintiff on 28 September 2001 but had retired as its Managing Director at the end of February 2001. Thereafter, Mr. Karissa was extensively cross examined in relation to the correspondence passing between the Plaintiff and the Kenya Revenue Authority in 2003 including the set-off of the tax demanded as against the tax credit that the Plaintiff had enjoyed. I was impressed with the evidence given by Mr. Karissa before court. It was not shaken in cross-examination even when questioned concerning a letter written by the Kenya

Revenue Authority to the Managing Director of the Plaintiff bank dated 16 July 2004 which had demanded tax arrears in the amount of Shs. 14,459,766/-. Mr. Karissa agreed with counsel for the Defendant that the letter referred to the Defendant's tax matters but such was totally different from the subject matter of this suit. As regards receipts for the tax paid, the witness stated that there was no discharge receipt that had been issued by the Income Tax Department. The issue of the off-set was not closed until the letter dated 23rd of July 2003. The witness' evidence was clear as to separate payments made to the Income Tax Department in relation to the Defendant's terminal benefits but again he stressed that this had nothing to do with the amount claimed in relation to taxation on the Defendant's benefits for the years 1998, 1999 and 2000, the subject matter of this suit. The witness also agreed that there had been a debate within the Plaintiff bank on how the arrears of tax was to be paid but it had not found it fitting to take the Defendant to court in that regard. It was the Board of Directors' decision to put this matter in court and retrieve the suit sum claimed from the Defendant. Finally, Mr. Karissa was taken by counsel for the Defendant to the agreement and the words detailed in clause 4 b) being:

“In addition to the basic salary aforesaid the Employer will provide at no cost to the Employee.....”.

In his opinion, he did not think that these words meant “tax-free”. The clause was silent as regards exemption from tax. He noted that he had never been asked to interpret the agreement.

15. The Defendant gave his evidence before court on April 26, 27 September and 10 October 2012. Initially, he confirmed and adopted the contents of his recorded witness statement dated 27 March 2012 as well as his personal profile submitted under a supplementary statement dated 25 September 2012. That statement also included the 2001 Organogram for the Plaintiff bank. The Defendant's witness statement confirmed that he was employed under the agreement dated 6 June 1989 as the Managing Director and Chief Executive of the Plaintiff bank. In that capacity, he was to undertake such duties and exercise such powers in relation to the Plaintiff bank and its business as the Board of Directors should assign to or vest in him. He stated that it first came to his knowledge, as regards the tax issues being the subject matter of these proceedings, when he was served with the Summons and Plaint herein. He had not been previously aware of any tax audit that was conducted by the Kenya Revenue Authority on the Plaintiff bank. At no time had he been invited to participate in the audit nor had he been informed that he was duty bound to be part and parcel of the same. He confirmed that he received advice with regard to tax matters from the financial department of the Plaintiff bank regarding the benefits paid to him and any tax due on them. He confirmed that the Plaintiff's external auditors conducted annual audits of the Plaintiff's accounts but at no time did they bring to his attention that there were any tax anomalies as regards the failure to pay tax or the under taxing of any non-income benefits. The Defendant stated that up to the time he retired from the Plaintiff bank both as its Managing Director and as Consulting Director, he had received:

“all my benefits in full the less the tax calculated by the same financial department of which I did not question as I believed that it was a true and accurate representation of the law, taxation and proper financial compensation”.

He maintained that if there were any outstanding issues as detailed in the claim herein, then he would not have received the benefits in full. The Defendant commented briefly upon the tax anomalies, as he put it, and stated that it was his successor as Managing Director of the Plaintiff bank who had admitted liability to the Kenya Revenue Authority as regards the payment of taxes on benefits. The Defendant wound up his witness statement by making two pertinent points in his defence. Firstly he maintained that as per the agreement, he was to receive all his benefits from the Plaintiff as per the staff manual of the Plaintiff at no cost to himself. Such costs included the taxes which were now the subject matter of these proceedings. The Defendant noted that that it was PW 1, Mr. Karissa who was charged with the responsibility of ensuring that the tax law and regulations were fully adhered but that he had given no explanation why the Plaintiff had failed to adhere to the same. Finally, the Defendant noted that there had been other officers of the Plaintiff against whom the Kenya Revenue Authority had found anomalies, who had not been sued in court.

16. In giving his evidence-in-chief before court, the Defendant went into the history of his employment

with the Plaintiff bank. Producing the Organogram referred to above, he noted that the persons responsible for tax computations for individual officers of the Plaintiff bank were the General Manager Financial Management and the General Manager Administration. The Defendant went into great detail as to the responsibility of these 2 officers and it was quite apparent that he held them both responsible for the anomalies as regards tax turned up by the Kenya Revenue Authority in its said audit. The Defendant noted that he had retired as the Managing Director of the Plaintiff bank as at the end of February 2001 but had continued in the employment of the bank as a Consulting Director. In that capacity, he had a specific mandate from the Board of Directors to introduce the incoming Managing Director to the Co-operative movement. He firmly maintained that the letter from the Kenya Revenue Authority dated 4 April 2001 had never been brought to his attention in his capacity as Consulting Director. Nobody had discussed the matter with him while he was still with the Plaintiff bank. In his opinion, the tax experts should have made deductions for tax on benefits as required by the law. Nobody had ever given him notice that he was liable in respect of the benefit of the motor vehicle provided for his use. He was never given notice that such was an issue and the same position ensued for the insurance premiums, children's school fees and other benefits. The Deponent went into considerable detail as regards the Keyman Insurance noting that the policy had been assigned to him on 22 April 1999 at a price of Shs. 20,408/- well before he retired from the Plaintiff bank in 2001. The Plaintiff had paid Shs. 1 million as "a levy" to protect itself so that the Defendant would be guaranteed payment upon his retirement but not before then. The Defendant was referred to clause 4 (i) of the agreement which read:

“In addition the Employee shall be entitled at no cost to himself to participate in all the other benefits of the Employer as per the Staff Manual of the Employer as the same may be revised from time to time”.

The Defendant stated that his understanding of this clause, as a layman, was that all costs would be covered by the Plaintiff bank in respect of benefits that were to be given to him by the Plaintiff bank as the employer. His understanding was that his "take home" would not be substantially affected. There was nobody who raised issues as to the terms of his employment. He confirmed that he received his full terminal benefits on 1st March 2001 and again when he left in October 2001. He had never received any communication from the Plaintiff bank that he was liable to pay the taxation of benefits that he received.

17. Under cross-examination, the Defendant went into considerable detail as to the organisation and operation of the Plaintiff bank maintaining that its Board of Directors had the day-to-day stewardship of the running thereof. As regards the said Organogram, the Defendant detailed that there were so many sections within the mainframe of the organisational structure. However, he agreed that the General Manager Administration as well as the General Manager Finance and Planning both reported to him. He confirmed that he had been housed by the Plaintiff bank in Ngong and the plot upon which the house had been constructed was owned by him but later transferred to a company called Jese Holdings Ltd. He drew a house allowance from the Plaintiff bank to live there. He stated that he was not aware that the house allowance was taxable and that he did not transfer the property to the said company for tax efficiency reasons. However, later in his cross-examination, the Defendant admitted that he was a member of the company and a beneficiary. The rent was being paid by the Plaintiff to the said company of which the Defendant was a beneficial shareholder. The Defendant confirmed that he had taken a loan from the Plaintiff bank in the amount of Shs. 1,500,000/- to renovate the house at Ngong, owned by the company. He was to repay the loan from his salary. Further, he confirmed that he was entitled to the payment of salaries for his 2 servants and that he had instructed the Chief Manager, Human Resources at the Plaintiff bank, to pay the servants' salaries direct to their respective bank accounts. Consequently he confirmed that his two employees became employees of the Plaintiff and this was done as soon as the agreement was finalised on 13 May 1989. The Defendant then went into details concerning the purchase of a Range Rover as the vehicle for his personal use provided by the Plaintiff bank. The vehicle had also been used from time to time by the directors of the Plaintiff bank. He had purchased his own private motor vehicle which he used when the Range Rover was being utilised by other directors. The Defendant then explained the circumstances leading to the purchase of the Range Rover when he left the employment of the Plaintiff bank. Thereafter, the Defendant was extensively cross examined with regard to the Keyman Insurance policy. He explained that the Plaintiff bank had paid Shs. 10 million to purchase the policy and upon redemption, the Plaintiff bank took out Shs. 1 million so that the balance with the insurance

company was Shs. 9 million. This amount came to him upon his retirement when he picked up the policy from the insurance company at the end of February 2001.

18. Upon resuming the cross-examination of the Defendant, he recalled that one of the benefits that he enjoyed as a result of his employment with the Plaintiff bank was the payment of his children's educational expenses. Such were met directly by the Plaintiff bank, the Defendant providing details for the various payments to be made. The Defendant maintained that he was not aware that such educational allowances were taxable and he could not recollect when he had been told that they were so. He also confirmed that travelling expenses for his children to attend the schools in the U. K. and the U. S. A. were covered by the Plaintiff and sometimes he and his wife would accompany the children when the Board of Directors gave permission for him to travel. He confirmed that the expenses for he and his wife in this regard were paid for by the Plaintiff bank. However there was only the one occasion that he travelled with his children at the Plaintiff bank's expense. The Defendant was then cross-examined as regards payment of taxes to the Kenya Revenue Authority for the Plaintiff's staff. He confirmed that P. A. Y. E. returns were made to the Authority on an annual basis and each member of staff signed their individual returns as necessary. He confirmed that he had received advice from time to time as regards tax and he would deliberate with the Board of Management of the Plaintiff bank every Monday. He confirmed that there was nothing in writing to say that he didn't like the advice that he was receiving as regards taxation on remuneration. The Plaintiff employed professionals as well as external auditors for taxation advice. When it came to the audit conducted by the Kenya Revenue Authority, it was handled by the new Managing Director. He did not attend any meetings with the Authority except one involving the payment of V.A.T. with a Mr. Odundo who had come to his office to brief him as to progress with the audit. Somewhat changing his tune, the Defendant admitted that he was aware that the audit was being undertaken and that it had commenced for about a month or 3 weeks while he was still the Chief Executive of the Plaintiff bank. He also confirmed that that the Board of Directors would have been kept up-to-date with developments relating to an audit such as this. However, in his role as Consulting Director, he did not continue to sit on the Board of Directors. He did not wish to compromise his successor's position in that regard. He then stated that he could not remember whether he sat in Board meetings and whether he was fully aware of the results of the Kenya Revenue Authority audit. Finally, he concluded his cross-examination by stating that it was a shock for him to be sued by the Plaintiff bank and that he had consulted with several people who had given him the advice that he was not liable to pay for the tax on his benefits.

19. When it came to the re-examination of the Defendant, he maintained that at no time had he been involved in any discussion when the matter of the audit was raised with the Kenya Revenue Authority. He was not part of the Audit team and bore no responsibility for the audit. As he put it, he was just one of the professional employees. For the three calendar years of the audit being 1998, 1999 and 2000, the Defendant stated that he was not invited to give his in-put at that particular time. The Defendant thereafter answered several questions in clarification of his cross-examination with regard to the question of his house, the Keyman Insurance policy, the company motor vehicle or the other benefits involved in this suit. In fact, as regards the education allowance for his children, he confirmed that he had heard PW 1, Mr. Karissa say that there was no tax payable thereon. He confirmed that at no time did he get a demand note from the Kenya Revenue Authority to pay any monies. He reiterated that he only came to know about the demand when he found himself in court. On being referred to the correspondence as between the Plaintiff bank and the Kenya Revenue Authority, the Defendant confirmed that such had passed between his successor as Managing Director, Mr. Muriuki and the Authority. The correspondence had been copied in to the Plaintiff bank's external auditors Ernst & Young and the partner there responsible for the Plaintiff bank's tax affairs was a Mr. Osoro, who had never contacted the Defendant. Time and again, the Defendant repeated that it was the professionals who were the ones who dealt with tax matters not him. The team of such professionals had been inherited from him by his successor and that was how the Plaintiff bank was structured. He also detailed that there were 3 other groups involved with tax matters being the Audit Committee of the Plaintiff bank, the Internal Auditor and the external auditors. All those institutions were charged with ensuring that the Plaintiff bank operated in the legal way. He went on to say that he did not try to avoid paying tax at any one time. He did not try to avoid any tax raised on his employer as the Plaintiff had professional advisers to advise him accordingly. He had been paid his terminal dues in March and November 2001 but had never been advised by the Plaintiff that he

had any tax liabilities. The Insurance company issuing the Keyman Insurance policy (the Insurance Company of East Africa Ltd) had also never advised him of any liability to tax in that regard. It had never been explained to him that the Keyman Policy was a device deliberately structured to avoid any tax liability.

20. At the end of the hearing, the parties agreed that they would put in written submissions as regards this case. The Plaintiff's submissions went into great detail as to the income tax regime in Kenya and the imposition of tax on employees' benefits. It noted the employer's obligation to deduct and remit P. A. Y. E. and quoted **section 37A** of the Income Tax Act as regards to the imposition of penalties upon the employer for failure to deduct and remit tax. Thereafter, the Plaintiff cited several cases in support of its claim. It relied upon the case of **R v Inland Revenue ex parte Chisholm (1981) 2 All E.R 602 QBD** where at page 602-603, McNeill, J held;

“For an employee to receive emoluments ‘knowing’ that his employer had willfully (i.e. intentionally an deliberately) failed to deduct tax therefrom, with reg. 26(4) of the 1973 regulations, the employee had to have actual knowledge of the failure and it was not sufficient that the employee ought to have known or that he should have been suspicious. Thus once it had been acknowledged by the applicant through his advisors that no tax had been deducted from his emoluments and that the failure to deduct had covered a considerable period it could not in the circumstances be said that the applicant had been unaware that he had been receiving his emoluments without deduction of tax or that the failure to deduct had been willful.” (Underlining mine).

The Plaintiff submitted that it had on several occasions informed and advised the Defendant of new tax laws and regulations. The Defendant had acknowledged as much (contrary to his evidence before court) and further that he discharged all his obligations as per the advice. The Plaintiff, through its Head of Finance during the hearing of the matter on 2nd July, 2012 testified under cross examination that he had not been aware of any tax problems with the Income Tax department until the time the audit was conducted. He also stated that he knew the Defendant's contract of service, to the extent of his personal understanding, was not subject to payment of any tax. In claiming **‘intimate knowledge’** of the matter, therefore, it would have been incumbent upon him to understand that all persons are subject to taxation and exemptions, if any, as are stipulated under the Income Tax Act. In a letter dated 4th July, 2001 addressed to the Deputy Commissioner L.T.O, the incoming Managing Director Mr. Muriuki admitted that:

“...the Bank's failure to pay tax on benefits and services mentioned above was not intentional but as a result of the fact that we believed they were not liable for taxation. We have noted your recommendations and advice and are already charging taxes on all of them. We therefore, believed that the situation will not arise in future and request you to accede to our appeal.”

It seems that the Plaintiff has admitted in its letter dated 4th July, 2001 that it was now aware of the tax obligations but had failed in its mandate and obligation in making deductions from salaries on emoluments and allowances for its staff and remitting it to the relevant authorities accordingly. Particularly, such involved the car benefits for the Chairman, Vice-Chairman and the Consulting Director (the Defendant at that time).

21. The Plaintiff in admitting that it failed in its statutory mandate of deducting and remitting, how does it then seek to transfer the failure of its obligation to pay tax, upon the Defendant? In the case cited to court of **Bernard & Shaw Ltd v Shaw (Rubin Third Party) [1951] 2 All E.R 267 K.B.D** at page 267, Lyskey, J held as follows;

“Plaintiffs could not recover the amount in question as money had been received by the defendant to their use since the tax had not, in fact, been paid by the company, nor as money paid under a mistake of fact since the failure to deduct tax was not due to the any mistake of fact in paying the remuneration to the director, but to a breach, by the company, of their statutory obligations as employers to make deductions.”

Further at p.268, the Judge found *inter alia*:

“In respect of the collection of tax a statutory duty is, therefore, imposed on the employer, and if he fails to deduct tax, he is in breach of that duty and is liable to pay the tax to the revenue authorities whether he has deducted it or not.”

In determining whether an employer had the remedy to demand reimbursement from its employer for tax paid, the learned Judge found at page 270 that:

“It is next suggested that, because there is a legal liability to pay the tax to the Inland Revenue authorities, the plaintiffs are entitled to recover it from the defendant. I know of no such form of action. If the money had in fact been paid by the plaintiffs in discharge of the tax liability, it might well be that there would be a cause of action for money paid by the plaintiffs to the use of the defendant, on the basis that they were compelled by process of law to pay money which was due in respect of his remuneration as to which he would ultimately be responsible for taxation. In those circumstances, the money might be recovered, but in the present case the money has not been paid, and, until the money is paid, it seems to me that there can be no action for money paid to the use of the defendant.”

Finally, at the conclusion of his Judgement, **Lynskey J** detailed:

“So far as I can see from the regulations of 1950, an employer who fails to deduct from remuneration in respect of one period can deduct it at a later period from remuneration to the employee, but the sole remedy given to the employer by the Acts and regulations is a method by deduction. No power is given to the employer to recover from his employee sums which he ought to have deducted and did not. In the present case a right is given to the Plaintiff to deduct, but no right is given to them to claim back, and unless such a right is given, then the plaintiffs are left without remedy against the defendant unless by way of deduction from his remuneration, either present or future.”

22. The Plaintiff followed up the **Bernard Shaw** authority with a quotation from **Goff & Jones’** volume on **“The Law of Restitution”** (6th Edition) paragraph 15 – 01 which detailed as follows:

“In general anybody who has under compulsion of law made a payment whereby he has discharged the primary liability of another is entitled to be reimbursed by that other. In the great majority of the cases discussed in this Chapter, that other was liable to pay a debt or other liquidated sum. Consequently in our view, the Civil Liability (Contribution) Act 1978 will have no application and the common law will still govern.

The classic statement of the common law principle is to be found in a passage from the first edition of **Leake on Contracts**, which was quoted by **Cockburn CJ** in **Moule v Garrett** in 1872.

‘Where the plaintiff has been compelled by law to pay, or being compelled by law, has paid money which the defendant was ultimately liable to pay, so that the latter obtains the benefit of the payment by the discharge of his liability; under such circumstances the defendant is held indebted to the plaintiff in the amount.’

The basis of this right is similar to that which underlies the right to contribution. The plaintiff is allowed to recover because he has been compelled by law to make payment which has discharged the defendant’s liability to another. Whereas in contribution, the plaintiff seeks to recover only a proportionate share of this payment, in the cases discussed in this Chapter he claims to be recouped the whole of the payment since the defendant is primarily liable to pay it. He may also seek relief by subrogation.

To succeed in his claim for recoupment the plaintiff must satisfy certain conditions. He must show:

- (1) that he was compelled, or was compellable, by law to make the payment;
- (2) that he did not officiously expose himself to the liability to make the payment; and
- (3) that his payment discharged a liability of the defendant.

The plaintiff enforces his right to reimbursement by recovering his money as paid to the defendant's use. But in certain cases the plaintiff is given a right to deduct the sum equal to his payment from money which he owes the defendant. He may also become entitled, on making the payment, to the benefit of securities deposited with the creditor by the defendant to secure the debt paid by the plaintiff".

23. In the Plaintiff's view, this position was endorsed by the authority of **McCarthy v McCarthy & Capstone plc (2008) All ER 221** in which the English Court of Appeal had affirmed that it was a well-established principle that anybody who had, under compulsion of law, made a payment whereby he had discharged the primary liability of another, was entitled to be reimbursed by that other. That aside, the Plaintiff went into considerable discussion as regards its pleading at paragraph 31 of the Amended Pleadings in which it maintained that it was the Defendant's responsibility as the Managing Director and the Chief Executive of the Plaintiff bank, to ensure compliance with all applicable legal and statutory obligations. I do not consider that the cases cited by the Plaintiff as to the role of the Defendant as the Managing Director and Chief Executive of the Plaintiff had much bearing on the matters before court. Presumably, the point that the Plaintiff was making was that in his exalted position with the Plaintiff bank, the Defendant ought to have known of the liability to tax on personal benefits enjoyed by him under the agreement.

24. The Defendant at page 13 of its written submissions categorically states that he paid his taxes and received his salary net of all deductions, statutory and otherwise. He buttressed this by addressing the Court as to the Plaintiff's application dated 10th June, 2003 in which the Plaintiff had attached to its application documents marked as "LCK-2" pay-slips of the Defendant for diverse dates. They all showed that the Defendant had received his salary net of all deductions. However, as regards the pleadings, I didn't quite understand the Defendant's submission in relation to parties being bound by their pleadings and the quotation therefrom from **Bullen and Leakes and Jacobs Precedents of Pleadings 12th Edition p 17-18** as well as the citing of the case of **Gandy v Caspair Charters Ltd (1956) 23 E.A.C.A. 139**. However I did take cognizance of the case of **Napier versus National Business Agency Ltd (1951) 2 All ER 264** where it was held that the provisions of a service agreement relating to expenses that were intended to mislead the taxation authorities and evade tax was contrary to public policy. It seemed to be the Defendant's position that it was totally against public policy for employers (presumably like the Plaintiff), being tax agents for the Government, to fail to deduct tax and only to pay such when "caught". Such encouraged collusion as between employers and employees not to pay tax which could result in dire consequences for the national Government. Thereafter, the Defendant's submissions reviewed the evidence both in relation to the Plaintiff's case and indeed that of the Defendant.

25. As regards the **Bernard Shaw** case (supra) the Defendant noted that therein the company had not paid the tax but sought to recover the money that it ought to have deducted from the employee and remitted to the tax authority. The company having failed to deduct tax, it could not claim the sum back. The Defendant maintained that this authority as cited to court by the Plaintiff went against the latter's case to this end. The Defendant maintained that the salient feature of his defence was that, not only was there no evidence of payment made to the tax authority but if there was any tax payable in the hands of the Plaintiff, such was not payable in the hands of the employee, since it had already been taxed. To this end, the Defendant pointed to the P. A. Y. E. Guidelines at page 129 of the Plaintiff's documents in which it stated:

"Education fees of employee's dependants or relatives will not be taxed on the employees hand provided the same has been taxed on the employers!"

The Defendant went into considerable detail in his submissions as regards the provisions of the *Income*

Tax Act more particularly **section 37 (1)** thereof which clearly detailed:

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

Thereafter, the Defendant’s submissions went into great detail with regard to the Income Tax P. A. Y. E. Rules as to the payment of penalties etc. which I did not consider particularly relevant to the matter before court for, as far as I could see, the Plaintiff’s monetary claim against the Defendant did not include any penalties or interest claimed by or paid to the Income Tax Department. Further, I did not consider that the Defendant’s submission as regards corporate governance had any bearing in relation to the matters before court, particularly with regard to the failure to deduct tax not only in relation to emoluments but also with regard to the Defendant’s terminal benefits.

26. However, at page 19 of the Defendant’s submissions, he maintained that the Plaintiff should be estopped from seeking recoupment because it was the Plaintiff who had led the Defendant to believe that he was entitled to the benefits of his employment, free of tax. This submission seems to me to be in direct contrast to the position taken by the Defendant earlier in its submissions at page 10 where he submitted that the phrase “**at no cost**” as used in paragraphs 4 (b), (d), (g) and (i) of the agreement should be interpreted to include any tax liability which would effectively effect the take-home pay of the Defendant. As regards the estoppel point, the Defendant referred to **Virgo’s Principles of the Law of Restitution** which he maintained permitted the defence of estoppel to apply where he had been led to believe that he was entitled to certain benefits tax-free. To this end, although I was not specifically referred by the Defendant to the paragraph, it would seem that the implication of estoppel being a defence to a claim for restitution arose under Chapter 24 of the volume. The learned author had this to say at p. 675:

“Essentially the estoppel defence will be applicable where the defendant detrimentally changes his or her position in reliance on the representation made by the claimants that the benefit was validly received. Where estoppel is established the restitutionary claim will be barred completely, because it is a procedural device which prevents the claimant from arguing that the elements of the restitutionary claim had been established.

Although the defence of estoppel is potentially applicable to all three types of restitutionary claim, it is particularly relevant to claims founded on the reversal of the defendant’s unjust enrichment and especially where the ground of restitution is mistake, simply because it is in this context that there is greater opportunity for the claimant to make a representation to the defendant that the enrichment was validly received. In fact, all of the reported cases concerning the application of estoppel to restitutionary claims related to the recovery of mistaken payments. But there is no reason why the defence cannot apply where the claim is founded on other grounds of restitution and concerns other types of enrichment.”

It seems therefore that the Defendant is submitting that the defence of estoppel should apply where he was led to believe that he was entitled to certain benefits. The Defendant maintained that he could prove this by the fact that firstly, the Plaintiff had made an unequivocal representation of fact that the Defendant was entitled to receive the benefits free of tax and/or secondly, the Plaintiff owed to the Defendant a duty of accuracy which the Plaintiff breached. That latter duty arose as per **Virgo** (supra):

“where the claimant occupies a position of superiority over the defendant because he or she possesses all the information and expertise to assess the validity of the transfer of the benefit.”

The Defendant included two other authorities in his submissions neither of which I considered to be relevant to the matters before this court being **Re Rhodes, Rhodes versus Rhodes (1886-90) All ER872** and **Skyring versus Greenwood & Anor. (1824-34) All ER 104**. The first case involved maintenance for a mentally disordered person and the second as regards money paid under mistake of fact.

27. Having carefully considered the pleadings by parties, submissions and oral highlights, the court comes to the conclusion that it was incumbent upon the Plaintiff to exercise its statutory mandate in

making deduction on the Defendant's salaries and allowances. The Defendant's perceived ignorance of the law is not a defence, which is the line that the Plaintiff has attempted to employ in its submissions. However, by its own admission, it stated in the letter dated 4th July, 2001 that its failure to pay taxes:

"...was not intentional but as a result of the fact that we believed they were not liable for taxation."

The Income Tax Act, to which it has in its submissions adversely and on numerous occasions referred to, sets out taxable income, allowances, emoluments and other benefits. In my opinion, for the Plaintiff to make allegations that it believed that the benefits enjoyed by the Defendant were not taxable is inexcusable. By maintaining that the Defendant was aware or ought to have been aware that he received remuneration without deductions, the Plaintiff is shooting itself in the foot, given that it admitted to making deductions on some benefits but not on others. In contrast, the Defendant says that he relied on the expertise and knowledge of the Plaintiff's employed professionals both internally and externally, in exercise of his mandate as the Managing Director. He stated that he entrusted the responsibility of advice as regards statutory deductions to the Head of Finance, (PW 1) who also, in admitting his failure to appreciate the position, stated that he did not know and was not aware of any tax problems with the Income Tax Department until after the said audit was complete.

28. **Section 37 (1)** of the *Income Tax Act (CAP 470, Laws of Kenya)* provides that an employer paying emolument to an employee shall deduct therefrom and account for tax thereon to such extent and in such manner as may be prescribed. **Section 37 (2)** of the said Act provides for penalties as against the employer where such employer fails to deduct tax or account for tax deducted. **Section 37 (3)** of the said Act provides:

"(3) Tax deducted under this section from the emoluments of an employee shall be deemed to have been paid by the employee and shall be set off for the purposes of collection against tax charged on that employee in respect of those emoluments in an assessment for the year of income in which those emoluments are received."

That provision, it seems to me, is very much along the lines of the **English Income Tax (Earnings and Pensions) Act 2003** which was referred to in the **McCarthy** case (supra) by **Sir Andrew Morritt C.** in his well-recognised Judgement from which the **Goff & Jones** volume on **The Law of Restitution** quotation as above was relied on by the Plaintiff. In relation to that Judgement, two points emerge. Firstly was when the Chancellor referred to the finding of **Peter Smith** in the court below where he concluded that the claimant therein had no defence to the counterclaim (for restitution) on the grounds that:

"The [company] has paid the tax on his behalf which [the claimant] would otherwise be liable to pay. He has received that benefit also because he has, when his assessment return is sent in and the tax calculated, been given the benefit of that deduction and payment made by the [company]. It is only his liability in question. Merely because the revenue law is designed to ensure that the Revenue obtain early monies from somebody other than the ultimate taxpayer as a matter operation of the recovery of its tax is neither here nor there... The company is deducting monies which represents his income tax liability."

A little later on in his judgement at paragraphs 39 and 40, **Sir Andrew** detailed:

"No doubt if there is an express contractual right to recoupment it will be rare that a party will need to rely on a parallel liability imposed by law. But there is no reason in logic or justice for withholding the restitutionary remedy, which would otherwise lie, merely because the express contractual right had not been imposed. It is in just those circumstances that the restitutionary remedy is required."

So the validity of the judge's decision depends on the second point. We have had the benefit of much fuller argument than he had. Much of it involves penetrating the thicket of the PAYE system. But, when one emerges, the overall wood is, in my view, clear and may be summarised in a few sentences.

Thus:

(1)....

(2)....

(3)....

(4) The tax paid by the employer to the Revenue for which it is liable to a count under the relevant PAYE regulations whether it has deducted it from sums due to the employee or not is to be treated ‘as an amount of tax which is deducted in respect of the employee’s liability to income tax’”

In my view, the same situation as envisaged by **Sir Andrew** applies in Kenya and I would adopt his findings in the **McCarthy** case.

29. Having said that, the position taken herein by the Defendant would seem to be along the lines of that noted in the case of **Huckerby v Elliot (1969) 1 All E.R 189 Q.B.D** at page 189, where the English Appeal court in setting aside the decision of the lower court held:

“The prosecution had failed to show that the offence was attributable to any neglect on the part of the appellant for a director could properly leave certain matters to another director or official of the company.”

Further at page 194, **Ashworth, J** held inter alia;

“Where the offence is attributable to neglect, in the absence of authority on the point it would seem to me that the offence which is being committed may well be without his knowledge but is committed in circumstances where he ought to know what is going on and he fails to carry out his duty as a director to see that the law is observed.....Once one gets away from the premise that neglect means failure to see that the law is observed, one then can approach the matter if I may say so on the lines which Lord Parker, CJ has indicated, and in this case I agree that the prosecution has failed to show that the appellant was guilty of any neglect to do what she ought to have done.”

30. Indeed, the Plaintiff has failed to establish that it was the Defendant who ought to have been aware of the Plaintiff’s failure, as the employer, to comply with the P. A. Y. E. Regulations as per **Huckerby v Elliot** (supra). The Defendant knew or ought to have known that he received his remuneration without deductions as was in **R v Inland Revenue Commissioners** (supra). According to the Income Tax Act and the Employment Act, it is the sole responsibility of the employer to make any deductions, statutory or otherwise, and remit the same on behalf of the employee. Failure by the employer to exercise its statutory mandate is not excusable and no plausible reason has been raised by the Plaintiff to this end. Having said that, I find it extremely difficult to accept the evidence of the Defendant herein when he says that he was unaware of his liability to tax on his personal emoluments. One only has to read the Defendant’s impressive Personal Profile to see that he is a man well versed in the ways of the business world as well as the world of politics. It was common knowledge during his tenure as the Managing Director of the Plaintiff bank that the Kenya Revenue Authority had closed the doors on allowing companies to pay tax free emoluments to employees. In my opinion, he knew or must have known that the extensive emoluments he was enjoying as a result of his employment with the Plaintiff would be subject to taxation in his hands.

31. That leaves the provisions of clause 4 of the agreement to be considered. The Defendant will have the court find that the various phrases used in the sub-clauses viz: “at no cost to the Employee”, “the Employer shall pay all costs” and “the Employee shall be entitled at no cost to himself” meant that the Employer, being the Plaintiff as per the agreement, would cover any sum by way of taxation raised as against the Defendant by the Income Tax Department in respect of the emoluments listed. It may well be

that with the strict interpretation of the words of the agreement, the Defendant may well have enjoyed some of his emoluments on the basis that the Plaintiff would pay the tax thereon although such tax be assessable against the Defendant personally. Unfortunately for the Defendant, the agreement does not detail that the four heads of emoluments under which tax has been assessed against him make any mention of such being provided at no cost to the Defendant. For example as regards the benefit and provision of the motor vehicle subclause e) of the agreement specifies that the Plaintiff, as the employer:

“all the costs of licensing running repairing and maintaining the same including the costs so incurred when the said vehicle is used by the Employee on and about his personal occasions”.

There is no mention that the Plaintiff will cover the costs of any taxation on the provision of the motor vehicle to the Defendant. Further, I do not hold any store in the Defendant’s argument that the motor vehicle so provided was a “shared benefit”. It may well be the case that the motor vehicle was used by others within the Plaintiff bank but to all intents and purposes, it was the Defendant’s motor vehicle for his own use and he produced no evidence before court that any other officer of the bank had the use of or had used the said vehicle.

32. As regards the payment of tax on the Keyman Insurance policy, the minute of the Plaintiff’s Board of Directors at its meeting held on 1 April 1998 reads:

“(a) Managing Director’s Insurance.... the Board approved the purchase of an insurance policy for the Managing Director to enhance his retirement benefits.”

There is no mention of the Plaintiff bank picking up the cost of any tax assessed on the Defendant in relation to the benefit of this insurance policy. Similarly, in relation to the benefit of the Defendant’s daughters’ educational expenses as well as the air fares which the Plaintiff bank paid, subclause g) of clause 4 of the agreement reads:

“In addition the Employer shall pay the costs specified in the schedule hereto in respect of education expenses for the Employee’s four children up to and including the University undergraduate level.”

The Schedule attached to the agreement refers to payment of

“Tuition fees, Medical Insurance expenses and Overseas Air-Fare (Economy Class) return.....”

There is no mention of the Plaintiff being responsible and paying for the tax assessed on these benefits to the Defendant and there are no words detailed such as “at no cost to the Employee”. Accordingly, I find and hold that the Defendant is not entitled to have the Plaintiff pay for the tax assessed upon him in relation to the benefits/emoluments of the motor vehicle, the Keyman Insurance Policy as well as the educational expenses and airfares of his children.

33. One of the salient points raised by the Defendant in his submissions was that there was no proof before court that in fact, the Plaintiff had paid the tax on the benefit/emoluments on his behalf. Indeed, in his Witness Statement, the Defendant at paragraph k. stated that the Kenya Revenue Authority had indicated (it is not clear to whom) that by the time this suit was brought before court, the Plaintiff had not paid any monies and that the said set-off had not been done. Hence the Plaintiff’s motive for bringing these proceedings was, according to the Defendant, suspect. I have perused the correspondence in this connection and the first mention of the proposed off-set was contained in the then Plaintiff’s Managing Director’s letter to the Kenya Revenue Authority dated 4 July 2001. Then, the Deputy Commissioner of the Large Taxpayer Office wrote to the said Managing Director on 24 October 2001 stating that the Plaintiff’s mitigation for waiver of interest and penalties would only be considered by the Authority upon settlement of all principal taxes. That letter was followed by one from Mr. Karissa dated 14 November 2001 in which in the last paragraph thereof the author stated:

“We hope that the above concludes this issue, and as indicated in our letter dated 4 July 2001, the

agreed tax should be off-set against the overpayment of Corporation Tax”.

The letter to which the Defendant referred from the Kenya Revenue Authority was dated 23 July 2003. The letter opened with the words:

“Further to my letter dated 23/5/2003, I hereby give a breakdown of how your 1998 refund was utilised”.

In cross-examination, Mr. Karissa pointed to the P.A.Y.E. set-off detailed in that letter in the amount of Shs. 48,512,655.00. He maintained that this figure included the figure of Shs. 11,194,097.00 claimed from the Defendant, as per the Plaintiff. I have no reason to disbelieve him when one bears in mind that next to the P.A.Y.E. set-off figure the Kenya Revenue Authority’s Assistant Financial Controller, the writer of that letter, has detailed: **“[cheque dated 06/09/2001]”**. In my opinion, the Defendant has based his remarks with regard to an alleged non-payment of the tax on the one letter from the Kenya Revenue Authority dated 23 July 2003 which only referred to a 1998 Refund. That letter certainly cannot be taken to be read as stating that the tax had not been paid until the date thereof particularly when one bears in mind the aforementioned cheque dated 6 September 2001. Accordingly, I find that the tax assessed on the benefits/emoluments enjoyed by the Defendant had been paid by the Plaintiff bank to the Kenya Revenue Authority.

34. It would be remiss of me not to conclude this Judgement without referring to the Defendant’s Statement of Issues filed herein on 31 May 2004. The first issue raised was whether the Plaintiff was obliged to pay and did indeed pay on behalf of the Defendant, tax accruing on the benefits and allowances set out in paragraph 3B of the Amended Plaintiff. I answer that issue in the affirmative. The second issue was whether or not the terms and conditions set out in the agreement were altered by mutual agreement between the Plaintiff and the Defendant. I find that from time to time during the period of the Defendant’s employment with the Plaintiff that the terms and conditions of the agreement were varied for example as regards to the loan made to the Defendant for the refurbishment of his house at Ngong, as well as the provision of the Keyman Insurance policy and the Plaintiff allowing him to purchase the said Range Rover motor vehicle. As regards the third issue, I do not find that deductions were made from the Defendant’s income and remitted to the Kenya Revenue Authority in respect of the tax accruing on the benefits and allowances set out at paragraph 3B of the Amended Plaintiff. To this end, I find that after the Kenya Revenue Authority Audit, the Plaintiff was obliged to make payment for the tax assessed, which it had not deducted from the Defendant’s benefits and allowances in the first place. With respect to the 4th issue, I do find that the Defendant is under a duty to refund the money as paid by the Plaintiff to the Kenya Revenue Authority in respect of the tax accruing on the benefits and allowances as above. To this end, I would adopt the finding of the English Court of Appeal in the **McCarthy** case (supra) and hold that such tax paid is recoverable by the Plaintiff from the Defendant.

35. As regards issue number 5, I am not sure that I understood quite what it meant in that it reads:

“Whether or not the Defendant uses position as Chief Executive of the plaintiff to coerce the plaintiff and the Defendant over the same subject matter”.

As I understand it, the issue seems to imply that the Defendant knew full well that his benefits and allowances were taxable but that he used position with the Plaintiff bank to ensure that tax was not deducted therefore. There was never any suggestion raised by either the Plaintiff or the Defendant in the evidence before me that this was the case. On the contrary, the Defendant reiterated on several occasions that he was unaware that his benefits and allowances attracted any taxation. As regards issue number 6, I was not aware that there is any other suit pending in this court as between the Plaintiff and the Defendant over the same subject matter. This issue was never raised before me either in the evidence or in the submissions of the parties. As regards issue number 7 as to whether this suit was actuated by malice and bad faith on the part of the Plaintiff against the Defendant, I do not believe so. The only reference that I can recall from the evidence in this regard was the suggestion by the Defendant that the tax on his emoluments and benefits had not been paid until late 2003 in reference to the said letter from the Kenya Revenue Authority dated 23 July 2003. I have already found that payment was made much earlier in

September 2001 and consequently the bringing of this suit by the Plaintiff in March 2003, I do not consider to be have been brought on by malice. The final issue was whether or not the Plaintiff was entitled to the relief sought in the Plaint. Again I answer in the affirmative.

36. The outcome of all the above is that I enter Judgement for the Plaintiff herein in the amount of Shs. 11,194,097.00. That sum will carry interest at Court rates from the date of filing suit being 31 March 2003. The Plaintiff will also be entitled to the costs of this suit.

DATED and delivered at Nairobi this 23rd day of April 2013.

**J. B. HAVELOCK
JUDGE**