



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Suit 108 of 2004

TIMOTHY MANYARA & 144 OTHERS.....PLAINTIFFS

VERSUS

PYRETHRUM BOARD OF KENYA.....DEFENDANT

RULING

On the 12th of November 2004, the plaintiffs and the defendants entered into a consent whereby they compromised part of the suit filed by the plaintiffs herein. In the said consent the parties to this suit agreed that ninety nine plaintiffs were to be paid various sums as pleaded by the plaintiffs under paragraph 19 of their plaint. The total sum that the said plaintiffs were to be paid by the defendant was calculated at Kshs 8,168,568.84. The parties agreed that the said sum, including costs on the said sum would be paid within thirty days of the said consent being adopted as an order of the court. The parties to this suit further agreed that all other matters which were in dispute were to be determined by the court in a full trial. The said consent of the parties to this suit was adopted as the order of the court on the same day, the 12th of November 2004. When the defendant paid the plaintiffs the said sum that it had agreed to pay, it deducted a sum of Kshs 2,363,089/10 and remitted the same to the Kenya Revenue Authority on account of what the defendant assessed to be the income tax payable by the said ninety nine plaintiffs. The plaintiffs were not amused by the turn of events and sought to execute for the said amount of Kshs 2,363,089/10 against the defendant.

On 22nd of December 2004, the defendant filed a notice of motion under the provisions of **Section 3 and 3A of the Civil Procedure Act and Orders VI rule 12, L Rule 1 and 12 of the Civil Procedure Rules** seeking the orders of this court to declare that the defendant had fully satisfied the judgment entered pursuant to the consent filed by the parties to this suit on the 12th of November 2004. The grounds in support of the application are stated on the face of the application. In summary, the defendant is contending that it was legally obligated to deduct the said sum of Kshs 2,363,089/10 from the said sum paid to the plaintiffs and pay the same to the Kenya Revenue Authority on account of the Income Tax that was supposed to have been paid by the said plaintiffs. The defendant further contended that it should not be made to pay the said amount to the plaintiffs for to do so would amount to the defendant being punished for undertaking what it was required by law to do. The defendant was further apprehensive that if the said amount was paid to the said ninety nine defendants, it would suffer unjustifiable loss which they would not be able to make good as it would be unable to recover the same from the plaintiffs. The application is supported by the annexed affidavit of Kevin Infanta Mpaka. The said Kevin Infanta Mpaka, the Corporate Secretary of the defendant, swore two supplementary affidavits in further support of the application. The application is opposed. The 1st plaintiff, Timothy Manyara, swore an affidavit in opposition to the application. In brief, the plaintiffs have argued that the said consent was arrived at, after the plaintiffs and the defendant had negotiated and agreed at the said figure which was recorded in the

said consent and adopted as the judgment of the court. The plaintiff contend that during the negotiations, the issue of the payment of the income tax was not raised by the defendant. In any event, the plaintiffs argued that since they were retrenched in the year 2001 without being paid their salaries and their terminal dues, they could not be described to be the employees of the defendant.

At the hearing of the application, I heard the able submissions made by Mr Orege, Learned Counsel for the defendant and Mr Wamaasa, Learned Counsel for the plaintiffs. I have considered the submissions made. I have also carefully read the pleadings filed by the parties to this application. The issue for determination by this court is whether the consent entered between the parties to this suit and adopted as the judgment of the court on the 12th of November 2004 can be interpreted to imply that the payment of the said agreed amount to the plaintiffs by the defendant was subject to income tax being deducted from it.

The law as regard the circumstances in which a consent judgment may be interfered with was set out in the case of **Brooke Bond Liebig (T) Ltd –versus- Mallya [1975] E.A. 266** at 269, where Law, Acting President of the then Court of Appeal of East Africa held that

“The circumstances in which a consent judgment may be interfered

with were considered by this court in Hirani v. Kassam (1952)19

E.A.C.A. 131 where the following passage from seton of judgments

and orders 7th Edn, Vol. 1, p. 124 was approved:-

“Prima facie, any order made in the presence and with the

consent of counsel is binding on all parties to the proceedings

or action, and on those claiming under them And cannot be

varied or discharged unless obtained by fraud or collusion, or by

an agreement contrary to the policy of the court ... or if consent

was given without sufficient materials, or in misapprehension or

in ignorance of the material facts, or in general for a reason which

would enable the court to set aside an agreement.”

In **Diamond Trust Bank of Kenya Ltd –vs- Ply and Panels Ltd [2004]1 E.A. 23** at page 40, Githinji J. A. held that

“The compromise of a disputed claim made bona fide is a

good consideration and the court cannot be interfered with

it except in the circumstances which would afford a good ground

for varying or rescinding a contract between parties – Hirani –vs- Kassam

(1952)19 EACA 131. That case has been followed in subsequent cases

by the Court of Appeal – see Brooke Bond Liebig(T) Ltd –versus- Mallya

[1975] EA 266; Wasike versus Wamboko [1982-88]1KAR 625. In Wasike's case (supra) Hancox JA stated the law very succinctly at 626 thus, "It is now settled law that a consent judgment or order has contractual effect and can only be set aside on the grounds which would justify setting a contract aside."

In this case, the plaintiffs and the defendant compromised part of the plaintiffs' claim. All the materials were before the plaintiffs and the defendant. The defendant being the former employer of the plaintiffs had with it all the records including, the sum claimed by the plaintiffs. When the parties negotiated and reached the compromise which was recorded in court on the 12th of November 2004, the defendant had all facts relevant to the recording of such a consent within its grasp. The defendant cannot now claim that when the compromise was recorded it was assumed that the amount paid to the plaintiffs would be subject to income tax being deducted therefrom.

I am not persuaded that the defendant made this application in good faith. It is the defendant's failure to pay the salaries due to the plaintiffs that led to the suit being filed by the plaintiff against it in the first place. If the defendant had paid the plaintiffs in time most probably the plaintiffs would not have had to pay any income tax as their salaries were below the threshold of what constitutes taxable income. In the circumstances therefore, I do not see any valid reason that has been made by the defendant to persuade me to set aside the valid consent entered between the parties and adopted as a judgment of this court on the 12th of November 2004. If the defendant wanted to put a caveat that the payment of the said decretal amount was subject to the payment of income tax on the same, nothing could have been easier than for the parties to say so in the consent entered.

In the premises therefore, I find no merit whatsoever in the application filed by the defendant on the 22nd of December 2004. The said application is dismissed with costs. I order that the defendant pays the plaintiffs the balance of the agreed decretal sum of Kshs 2,363,089.10 within twenty one (21) days of today's date in default thereof execution to issue.

The plaintiffs shall have the costs of the application.

DATED at NAKURU this 28th day of June 2005.

L. KIMARU

JUDGE