



Twiga Construction Co Ltd v Isiche & another (Both suing as administrators of the Estate of the Late Shadrack Elly Isiche) (Civil Appeal 515 of 2012) [2023] KEHC 27413 (KLR) (Civ) (15 June 2023) (Ruling)

Neutral citation: [2023] KEHC 27413 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
CIVIL APPEAL 515 OF 2012
DO CHEPKWONY, J
JUNE 15, 2023

BETWEEN

TWIGA CONSTRUCTION CO LTD APPLICANT

AND

MARY OYELLO ELLY ISICHE & RHODA MANDE KWENDO (BOTH SUING AS ADMINISTRATORS OF THE ESTATE OF THE LATE SHADRACK ELLY ISICHE) RESPONDENT

The appropriate party to pay withholding tax on interest earned from a decretal sum deposited in a joint interest earning account

The appellant sought for and was granted stay of execution and an order was issued directing that half of the decretal amount to be paid to the respondents and balance be deposited in a joint interest earning account in the names of the parties' advocates. The court held that the appellant should meet all expenses relating to satisfying the decree since it was the one which sought a stay of execution, it was incumbent upon it to meet all costs incidental thereto. The court further held that the appellant was the proper party to pay the withholding tax.

Reported by Kakai Toili

Tax Law – withholding tax - withholding tax on interest earned from a decretal sum deposited in a joint interest earning account - who was the proper party to pay withholding tax on interest earned from a decretal sum deposited in a joint interest earning account.

Words and Phrases - withholding tax – definition of withholding tax - a portion of income tax that is subtracted from salary, wages, dividends, or other income before the earner receives payment - Black's Law Dictionary, 8th Edition.

Brief facts

The dispute in the matter revolved around the question of determining who was the proper party to pay withholding tax on interest earned from a decretal sum deposited in a joint interest earning account.



Specifically, the legal question was whether withholding tax payable to Kenya Revenue Authority should be borne by the appellant or the respondent.

Issues

Who was the proper party to pay withholding tax on interest earned from a decretal sum deposited in a joint interest earning account.

Held

1. The Income Tax Act defined deemed interest as meaning an amount of interest equal to the average ninety-one-day Treasury Bill rate, deemed to be payable by a resident person in respect of any outstanding loan provided or secured by the non-resident, where such loan was provided free of interest. Interest on the other hand was defined as (other than interest charged on tax) meaning interest payable in any manner in respect of a loan, deposit, debt, claim or other right or obligation, and included a premium or discount by way of interest and commitment or service fee paid in respect of any loan or credit or an Islamic finance return. Interest was categorized as a taxable income from the Income Tax Act.
2. The order directing opening of a joint interest earning account between the parties' advocates was made pursuant to the appellant's application for stay of execution. The court granted the appellant stay on condition that half of the decretal amount be deposited in a joint interest earning account. The respondents having obtained judgment in their favour before the trial court, they were entitled to the decretal amount but due to the existence of the appeal, that money had to be deposited in a joint account.
3. The appellant should meet all expenses relating to satisfying the decree since it was the one which sought a stay of execution, it was incumbent upon it to meet all costs incidental thereto. The respondents were entitled to every cent of the decretal sum under the decree.

Appeal dismissed; the appellant was the proper party to pay the withholding tax.

Citations

Cases

1. Kamanzi, Michael Murimi v Jamesons Industries Limited & Another (Civil Appeal 59 of 2007; [2016] KEHC 5916 (KLR); [2016] eKLR) — Mentioned

Statutes

1. Income Tax Act (cap 470) — section 3(1); 10 — Interpreted

Texts

1. Garner, BA., (ed) (2004), Black's Law Dictionary (St Paul Minnesota: Thomson West; 8th edition)

Advocates

None mentioned

RULING

1. This matter coming for ruling on whether withholding tax payable to Kenya Revenue Authority should be borne by the Appellant or the Respondent.
2. This matter was mentioned on 29th March 2022 and both parties confirmed having filed their written submissions on the issue and were ready to take a ruling date. The appellant's submissions are dated 15th November, 2021 while the respondent's submissions are dated 22nd November, 2022.



Appellant's Submissions

3. The Appellant submitted that it filed a Memorandum of Appeal on 5th October, 2012 challenging a Judgement in Nairobi CMCC No.4750 of 2010 which had been delivered in favour of the Respondent where damages were amounting to Kshs.2,680,050/=.
4. The Appellant sought for stay of execution and on 5th February, 2013 an order granting stay of execution was issued directing that half of the decretal amount be paid to the Plaintiff and balance be deposited in a joint interest earning account in the names of the parties' advocates. A joint interest earning account was opened with I & M bank with an initial deposit of Kshs.1,335,000/=.
5. The Appellant submitted that on 20th December 2017 a Judgment on the Appeal was delivered where the decision of the trial court was affirmed.
6. The Appellant's advocates subsequently paid to the Respondent's advocates the sum of money in the joint account inclusive of interest accrued as well as costs due in the subordinate court less the sum of Kshs.92,904.28/= which had been deducted as withholding tax on interest earned.
7. An issue arose between the parties' advocates as to who should bear the costs of the withholding tax. The Appellant cited several provisions of the law and authorities on withholding tax which this court will consider.
8. The Appellant submitted the Respondent contends that the said monies were compensation and not income and as such they should not bear the deducted withholding tax charges. The Appellant cited the case *Michael Muimi Kimanzi v Jamsons Industries Limited & Another* [2016] eKLR.
9. It was submitted for the Appellant that the *Income Tax Act* considers interest to be an income but an income which is subject to withholding tax. A certificate of withholding tax was issued by the bank in respect of the deducted sum as evidence that the said sum was remitted to Kenya Revenue Authority. The Respondents' advocates were joint account holders with the Appellant's advocates and as such are privy to this information. If the Respondents feel aggrieved in respect of the withholding tax deducted, he should claim the same from the relevant entity.
10. The Appellant contended that the order directing the setting up of a joint interest earning account was made to safeguard the interest of the Respondent. The Respondent may argue that the ownership of the said monies plus interest came upon their success of the appeal hence unfairness in deducting the withholding tax. The withholding tax was deducted in accordance with the law and the appellant should not therefore bear the cost of the same as it would be unjust.
11. Finally the Appellant asked this court to rule in its favour by finding that interest is indeed income which is subject to withholding tax and the appellant ought not to bear the charges of the deducted withholding tax.

Respondents' Submissions

12. The Respondent submitted that the Appellants after lodging this appeal sought for orders of stay which were granted on condition that the appellant do deposit in an interest earning account in the joint names of the parties. Both advocates opened a joint account and deposited the decretal sum which was to earn interest at 8.5%.
13. The Appellant's appeal was dismissed on 20th December 2017 and the Appellant was ordered to pay costs to the Respondents. The decree in the lower court was to the effect that the Appellants were to pay the decretal sum together with costs and interest until payment in full.



14. The Appellant lost the appeal which meant that it was supposed to pay the decretal sum together with costs and interest at 12% per annum. However, since the money had been deposited in an interest earning account which was attracting interest at 8.5% then the Appellant was only going to pay the difference between 12% and 8.5% which is 3.5% per annum as interest.
15. The Respondent contended that it is the Appellant which benefitted after the decretal amount was deposited in an interest earning account as the interest earned from the bank managed to slash the interest to 3.5% from 12%. For the decretal amount to attract 8.5% interest there had to be withholding tax that had to be deducted from the account which is now the subject of the dispute before this court.
16. It was the Respondent's submissions that withholding tax should be paid by a party who is benefitting from the interest earned after the decretal sum was deposited in an interest earning account.

Analysis and Determination

17. I have considered the written submissions by both parties in support and in opposition to the issue before court and the cited authorities. I find the issue relevant for determination is who bears the charges of the withholding tax or properly put who should pay the withholding tax.
18. 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".
19. Further, Section 3(1) of the *Income Tax Act* provides that:
"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."
20. Section 10 of the *Income Tax Act* provides that;
 - (1) For the purposes of this *Act*, where a resident person or a person having a permanent establishment in Kenya makes a payment to any other person in respect of;
 - (a) A management or professional fee or training fee;
 - (b) A royalty or natural resource income;
 - (c) Interest and deemed interest;
 - (d) The use of property;
 -"
21. The *Act* defines interest as follows "deemed interest" means an amount of interest equal to the average ninety-one day Treasury Bill rate, deemed to be payable by a resident person in respect of any outstanding loan provided or secured by the non-resident, where such loan is provided free of interest.
22. Interest in the other hand is defined as "interest" (other than interest charged on tax) means interest payable in any manner in respect of a loan, deposit, debt, claim or other right or obligation, and includes a premium or discount by way of interest and commitment or service fee paid in respect of any loan or credit or an Islamic finance return.



23. From the above definitions, it is clear that interest is categorized as a taxable income from the *Act*. The issue before court revolves around payment of withholding tax on the interest earned from the sum deposited in a joint interest earning account.
24. It is important to note that the order directing opening of a joint interest earning account between the parties' advocates was made pursuant to the Appellant's application for stay of execution. The court granted the Appellant stay on condition that half of the decretal amount be deposited in a joint interest earning account.
25. The Respondents having obtained Judgment in their favour before the trial court, they were entitled to the decretal amount but due to the existence of the appeal, the said money had to be deposited in a joint account.
26. I am of the considered view that the Applicant should meet all expenses relating to satisfying the decree since it is the one which sought a stay of execution, it was incumbent upon it to meet the all costs incidental thereto.
27. I find the submissions by the Respondents more convincing and I am therefore persuaded that they have made out a case to warrant the grant of orders in their favour. I find and hold that the Plaintiff is entitled to every cent of the decretal sum under the decree.
28. For the foregoing reasons, I make a finding that the Appellant is the proper party to pay the withholding tax.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 15TH DAY OF JUNE, 2023.

D. O. CHEPKWONY

JUDGE

