IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, KIAGE & KANTAI JJ.A)

CIVIL APPEAL NO. 333 OF 2013

BETWEEN

ERASTUS KIHARA MUREITHI……....APPELLANT

AND

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

(*Appeal from the Judgment of the High Court of Kenya at Nairobi (Havelok, J.) dated 23rd April, 2013*

in

H.C.C.C. NO. 175 OF 2003)

****

JUDGMENT OF THE COURT

By this appeal, the appellant **Erastus Kihara Mureithi** seeks to overturn the judgment and decree of the High Court Havelock J, which granted the claim by the Co-operative Bank of Kenya the (respondent) for the sum of **Kshs. 11,194.097** plus interest at 14% per annum as well as costs.

That claim, as gleaned from the plaint dated 31st March 2003 and amended on 6th October 2003, was for monies paid for, on behalf of and to the benefit of the appellant in respect of income tax chargeable, accrued and payable by the appellant arising from various benefits paid to him during his tenure as the respondent's Chief Executive Officer and Managing Director. The said sum was particularized in the plaint as comprising;

- **Motor vehicle benefit – Kshs. 2,918,403**
- **Insurance premiums – Kshs. 3,250,000**
- **School fees for the appellant's children – Kshs. 4,551,453**
- **Other benefits including air tickets and security services at the appellant's residence.**

The gravamen of the respondent's claim was captured in the plaint as follows;

> ***"6. The plaintiff avers that the said amounts were taxes imposed by the Commissioner Income Tax on the defendant's income in accordance with the provisions of the Income Tax Act, Chapter 470 arising from benefits enjoyed by the defendant during his employment in the***

plaintiff as aforesaid and which tax the defendant caused the plaintiff to pay on his behalf by reason of his position as Chief Executive and Managing Director of the plaintiff.

7. In the alternative and without prejudice to the foregoing, the plaintiff claims from the defendant the said amount of Kshs. 11,194,097 being additional monies paid for and on behalf of and to the benefit of the defendant without consideration over and above the defendant's contractual emoluments and in respect of which the plaintiff is entitled to a refund.

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 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."

To that claim the appellant filed a written statement of defence which likewise underwent amendments and was finally captured in the Further Amended Defence dated 3rd February 2004. He denied liability to the appellant in the sum claimed or any other sum; denied that the emoluments and benefits or allowances founding the claim were income to himself; averred that his income and benefits were net of tax which was the responsibility of the respondent; and hoisted the payment to himself of terminal benefits net of appropriate taxes as demonstrative that he did not owe tax obligations. The appellant denied that the respondent paid the sum of Kshs. 11,194,097 as tax on his behalf and denied the existence of any obligation to pay and denied ever enjoying the car benefit or insurance premiums the same having been benefits and expense of the respondent. The appellant averred that the respondent had no right to institute the suit and lacked *locus standi* to do so and reiterated that no monies were paid to the Kenya Revenue Authority (KRA) by the respondent on the appellant's behalf. He asserted that the suit was defective, impelled by malice and contrary to the Income Tax Act Cat 470. He thus sought its dismissal.

After hearing evidence called on behalf of the parties and considering the submissions and authorities tendered by their respective counsel, the learned Judge rendered the impugned judgment which provoked this appeal. In his memorandum of appeal the appellant raises no fewer than nineteen grounds of complaint which are to the effect, in précis, that the learned Judge erred by;

- **Finding by way of personal opinion, unbacked by evidence or proof, that Kshs. 11,194,097 was paid to KRA by the respondent.**
- **Misreading the provisions of the two statutes regarding the employer's tax obligations and relying on an alleged tax audit which made no reference to the appellant.**
- **Failing to appreciate the applicability of the doctrine of Estoppel to the case.**
- **Failing to find that the respondent's alleged cause of action was founded on an illegality.**

The appellant besought this Court to reverse the learned Judge's decision and substitute it with an order dismissing the respondent's claim against him with costs.

At the hearing of the appeal learned counsel **Mr. Gathenji** appeared for the appellant leading Mr. Kabiru and addressed us on the appellant's foresaid complaints generally. He reiterated that proven payment to KRA of the sum claimed by the respondent was fundamental to the suit and this appeal but no such payment was made and therefore there existed no factual nor legal basis for recoupment of the same as this must necessarily be founded on a payment of the exact sum claimed. He maintained that no such money was paid by the respondent and nor was it the subject of any specific set-off. He directed our attention to a letter dated 23rd July 2003, by KRA addressed to the respondent on the subject of refunds and in none of the particularized sums does the figure of Kshs. 11,194,097 appear. He also pointed out that the suit was filed on 1st April, 2003 and the letter in question was at clear variance with what the respondent pleaded. This was compounded, in counsel's view, by the fact that the respondent seems to have negotiated and entered into some kind of compromise over its tax liability with KRA without involving or informing the appellant of such negotiations and compromise, thereby exposing him to prejudice. Counsel maintained that the respondent processed and paid the appellant's terminal dues

without raising any issue or caution about any pending or potential tax liability, which, moreover, could not lie as against him. Mr. Gathenji rested the appellant's case by pointing out that KRA's letter to the respondent dated 16th July 2004, demanding from it Kshs. 14,459,766 in respect of the appellant was proof that the respondent never paid the sum claimed.

Mr. Ohaga learned counsel for the respondent defended the learned Judge as having had a basis for finding on a balance of probabilities that the amount owing from the appellant as tax had been paid to KRA by the respondent. That payment was made by way of a set-off against a tax credit, counsel contended, that was sufficient proof of payment. He stated that a tax audit by KRA incurred deficiencies in the manner in which the respondent had dealt with its tax obligations and the appellant was not unaware of the same before he left his Position as Managing Director in April 2001, but serve for a little longer as a Consulting Director. Counsel submitted that the learned Judge was justified in finding that the amount claimed was part of some Kshs. 48,412,615 payee set off detailed in KRA's letter of 23rd July 2003. That figure was itself part of a total refund set-off of Kshs. 192,258,275. He contended that as the amount claimed was not in the nature of special damages, the respondent shouldered no objection to render particulars. He urged us to find the matter before the learned Judge called upon him to exercise a discretion and so we should not be quick to interfere with his said discretionary decision. Counsel cited in aid the case of ***MBOGO vs. SHAH*** **[1968] EA 93**.

Making a brief reply to those submissions, **Mr. Gathenji** countered that the claim for Kshs. 11,194,097 was a liquidated one and there was an obligation for it to have been specifically pleaded and strictly proved and the respondent failed on both scores. Counsel argued that the appellant would definitely have challenged the computations leading to the claimed sum but the respondent denied him the chance to face KRA himself and it could not be allowed to benefit from its default to the appellant's detriment.

We have gone into some detail in setting out the case of the respective parties as presented before the court below and urged before us cognizant of our role as a first appellate court to rehear the case by re-evaluating and analyzing the whole of the evidence before the learned Judge before drawing our own independent inferences of fact. We do so conscious that we have not had the advantage the learned Judge had of hearing and observing the witnesses as they testified. We therefore give the learned Judge's conclusions a measure of respect but are at liberty to depart therefrom if the evidence on the whole compels a different conclusion. See ***Rule 29(1)*** of the Court of Appeal Rules; - ***SELLE vs. ASSOCIATED MOTOR BOAT CO. LTD & OTHERS*** **[1968] EA 123.**

Having carefully examined the record, the impugned judgment, the submissions of learned counsel and the law, we cannot but conclude that the fate of this appeal turns on the central question of whether or not the sum claimed was in fact paid by the respondent to KRA, for the appellant's benefit. We are struck by the nebulous basis of the respondent's claim for Kshs. 11,194,097 against the appellant. From the three paragraphs of the plaint quoted earlier in this judgment , it is not only well-nigh impossible to tell the precise nature of the legal or factual foundation for the sum claimed, it is an undecipherable riddle trying to establish the date of the claim and therefore the cause of action, whatever it be, when it arose or accrued. The respondent's contradictory or inconsistent bases for the claim, presented in the alternative are that;

- ***the appellant caused it to pay tax on his behalf by reason of his position as Chief Executive Officer and Managing Director or***
- ***The Kshs. 11,194,097 was additional monies paid for and on behalf of and to the benefit of the appellant without consideration over and above his contractual emoluments or***
- ***The payment was on account of the appellant's personal tax liability made under compulsion of law, amounted to unjust enrichment and thus recoverable.***

What is signally unclear from the respondent's pleadings is the date when such payment is supposed to have been made. Indeed, from our perusal of the record there is no telling the date and the manner of such payment. The evidence tendered was suggestive of that sum of money having been part of a set-off against a larger tax credit that the respondent was entitled to from KRA but this is unbacked by any communication or correspondence from the two entities making specific reference to the sum of Kshs.

11,194,097 as attaching to the appellant and how the same is arrived at.

What we see on the record, instead, is a jumbled up collocation of inconsistent totals. In the letter from the respondent to KRA dated 4th July 2001, for instance, its managing director presented its "principal tax liability position as per [its] records" under several heads. One of them titled "Managing Director's (the appellant's) Benefit" it stated as follows;

> ***"We have recomputed the liability under this category and came up with a figure of Kshs. 5,025,694.00. This differs slightly with your assessment of Kshs. 6,595,177.00 with the difference being accounted for by the fact that we are not charged any tax on some of the benefit (in particular security) for which tax has already been paid."***

Nine days later on 13th July, 2001, Ernest and Young, the Certified Public Accountants wrote to the respondent's managing director attaching copies of tax computations in respect of PAYE and withholding tax, which they considered not in dispute. These came to a total of Kshs. 74,119,866. Against the appellant were car benefit of Kshs. 2,658,986; guard, school fees and air ticket of Kshs. 5,025,694 and insurance premium of Kshs. 3,250,000. These figures when added up amount to **Kshs. 10,934,683**. Finally, there is the letter dated 16th July 2004 from KRA and addressed to the respondent for the attention of Mr. Karissa its General Manager, Finance and Administration and who was the witness called to testify on behalf of the respondent. The said letter is referenced "MR E MUREITHI – TAX ARREARS **KSHS. 14,459,766**." By it, that amount was being claimed by KRA from the respondent who was requested to send its cheque in settlement of the same **without delay**.

The obvious implication of the disparate figures alleged to be due from the appellant on account of tax liability is manifold including;

> ***(i) No exact or consistent sum is established to have been owing from the appellant***
>
> ***(ii) No single document produced and no communication seems to exist that pin-pointed the figure of Kshs. 11,194,097***
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> ***(iii) There is no evidence that the respondent did pay or advise a set-off of Kshs. 11,194,097 to KRA on behalf of the appellant at any given date***
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> ***(iv) On the strength of the letter from KRA dated 16th July 2004, which was more than a year after the suit claiming recoupment of Kshs. 11,194,097 allegedly paid to KRA by the respondent for the appellant, KRA was demanding tax arrears of Kshs. 14,459,766 in respect of the appellant from the respondent clearly indicative of non-payment and non-settlement of the same as at the filing of the suit.***

Our foregoing findings address the main complaint by Mr. Gathenji that a condition precedent to a claim in recoupment is proof of payment of the sum claimed on behalf of the person claimed from. It cannot be doubted as a matter of law and good conscience that if a person derives a benefit or advantage as a result of a payment forced on another person by law of that which the first person ought to pay, then the person making payment should be able to recover the sum from the one on whose behalf the compelled payment was made. Now, whether one calls it *recoupment*, *reimbursement* or simply *restitution*, the claim does lie. It is a claim recognized at common law quite distinct from claims cognizable in contract or in tort. And there is a concurrent duty to pay on the part of the beneficiary recognized at equity as a matter of conscience and principle in that it would be unconscionable for a person to enjoy the benefit, of another's legally compelled payment on his behalf since such a benefit if retained or not reimbursed, would amount to an unjust enrichment and a duty to restitute therefore arises. Lord Wright in the English Appeal Case of ***FIBROSA SPOLKA ACKLYJNA vs. FAIRBAIN LAWSON COMBE BARBOUR LTD*** **[1943] AC 32** at P 61 spoke of the essence of restitution thus;

> ***"It is clear that any civilized system of law is bound to provide remedies for cases of what has***

been called unjust enrichment or unjust benefit, that is, to prevent a man from retaining the money of, or some benefit derived from, another which it is against conscience that he should keep. Such remedies in English law are generally different from remedies in contact or in tort, and are now recognized to fall within a third category of the common law which has been called quasi-contract or restitution."

See, Generally, H.G. Beale (Gen. Ed); **CHITTY ON CONTRACTS** Vol. 1, General Principles, 31st Edition (2012) chapter 29.

The same Court of Appeal in ***Mc CARTHY vs. Mc CARTHY & STONE PLC*** **[2007] EWCA 664** considered a case bearing some similarities with the matter before us. The court there held that it was a ***"well-established that, in general, 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,"*** so that an employer who had paid to the Revenue Authority income tax payable from an employee's dues was entitled to recover the same from the employee the payment having been by compulsion of the law that imposed on the employer the duty to deduct and pay. In the course of his leading judgment, the Chancellor Sir Andrew Morrit set out the basis upon which the employer would make its claim and the conditions it would have to satisfy as follows;

"The company does not now seek to rely on the claims based on a contract express or implied. The principle on which the company relies is not in dispute. It is set out in Goff & Jones The Law of Restitution (6th edn, 2002) pp 423-424 para 15-01) in the following terms:

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 …. 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 C.J. in Moule v. Garrett [(1872) LR 7 Exch 101, [1861-73] All ER Re 135]:

"Where the plaintiff has been compelled by law to pay, or being compellable by law, has paid money which the defendant was ultimately liable to by, 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 learned Chancellor then proceeded to state that;

"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."

With respect, we find that reasoning highly persuasive. We think, in particular, that the conditions for successful recoupment are sensible for there can be no right of reimbursement, recoupment or recovery unless it is shown that the claimant made payment in fulfillment of a legal obligation as opposed to out of the largesse or magnanimity of a volunteer, and that such payment had the effect of benefitting the person claimed from or discharging or at any rate reducing his liability to the extent of that payment.

It must follow that at the heart of a claim in restitution, by whatever appellation may be lent to it, must be proof that the person claiming has actually made payment under the circumstances described for, or to the benefit of the person claimed from. Absent proof of payment, no claim for restitution can hope to succeed. In ***BENARD SHAW LTD vs. SHAW*** **[1951] 2 ALL ER 267,** for instance, the centrality of that prior payment was apparent. There, in facts that are a reflection of what we are dealing with in this appeal, a company paid to one of its directors remuneration for his services without deducting income tax

as required by the UK's income tax regime. On receipt of a claim by the Revenue Authority against the company for the payment of income tax on the amounts so paid, the company sought to recover from the director the amount of tax which should have been deducted. The court held that the company could not recover the amount in question because it had not in fact paid the tax. It could also not be recovered as money paid under mistake of fact since the failure to deduct tax was not a mistake of fact but a breach by the company of its statutory obligations as an employer to make the deductions. In the course of the judgment Lynskey J stated, convincingly, as follows;

> ***"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."*** (Our emphasis)

Applying those principles and lines of reasoning to the case before us, it seems clear to us that the respondent's claim against the appellant in its various permutations could not possibly have succeeded. As we have indicated hereto before, the sum of Kshs. 11,194,097 does not anywhere appear in the copious correspondence between the respondent and KRA. That exact figure first makes an appearance in the plaint and in the witness statement of the respondent's sole witness. Nowhere does KRA claim the exact amount nor the respondent state that it is remitting that amount or instructing its set-off against the tax credit alluded to. In the absence of such evidence we think, with great respect, that the learned Judge had no proper or any basis upon which to accept Mr. Karissa's attempt to squeeze the sum into a larger sum of Kshs. 48,512,655 as appeared in KRA's letter to the respondent dated 23rd July 2003. It is clear from the said letter that it contains a breakdown of how the respondent's 1998 tax refund amounting to Kshs. 192,258,175 was utilized. It includes a "PAYE set off 48,512,615" with a note **"[cheque dated 06/09/2001]"** but has no mention of the sum claimed and no reference to the appellant. Nor is there any other communication between KRA and the respondent making that essential nexus. The state of the evidence then was, on a balance of probabilities, wholly insufficient to establish payment.

Having come to that conclusion, we do not consider ourselves called upon to determine any of the other issues raised in this appeal such as whether the respondent could properly purport to pass on to the appellant the consequences of its dereliction of its statutory duty as an employer to deduct and remit tax; Estoppel, and the whole question of construction of the terms of the contract of employment that stated the respondents was to receive certain benefits "at no cost to himself." Nor need we explore the full meaning and effect of the ***KRA's Employers Guide to Pay as You Earn in Kenya (Revised Edition) (2002)*** which provides, among other things, that "education fees of employees' dependants or relatives will not be taxed on the employees had provided the same has been taxed on the employers' hand" and that" there are certain instances when an employer wishes to pay his employees salaries negotiated net of tax [and] the employer bears the burden of tax on behalf of such employees." Those can await another occasion in another case.

In sum, and for the reasons adumbrated herein, this appeal succeeds. The judgment and decree of the High Court is set aside in entirety. It is substituted by an order that the respondent's suit at the High Court is dismissed with costs. The appellant shall have the costs of this appeal also.

Dated and delivered at Nairobi this 12th day of May, 2017.

M. K. KOOME

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR