



**IN THE COURT OF APPEAL**

**AT MOMBASA**

**(CORAM: VISRAM, KARANJA & KOOME, JJ.A)**

**CIVIL APPEAL NO. 69 OF 2016**

**BETWEEN**

**KIOKO JOSEPH (Suing as the legal representative**

**of the Estate of JOSEPH KILINDA) .....APPELLANT**

**AND**

**BAMBURI CEMENT LTD. .... RESPONDENT**

*(An appeal from the ruling of the Employment and Labour Relations Court at*

*Mombasa (Rika, J.) dated 29<sup>th</sup> July, 2016*

**in**

**ELRC No. 308 of 2013)**

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**JUDGMENT OF THE COURT**

1. The crux of this appeal is whether an award of the Employment and Labour Relations Court (ELRC) for wrongful termination is subject to statutory deductions and in particular, to income tax referred to as Pay As You Earn (P.A.Y.E).

2. On 22<sup>nd</sup> May, 2015 the learned Judge (Rika, J.) of the ELRC entered judgment in favour of Joseph Kilinda (deceased) for wrongful termination of his services by the respondent. He awarded the deceased six months' salary assessed at Kshs. 635,634/=; gratuity computed at three months of his basic pay for every year of completed service; unpaid annual leave and 13 days salary. Aggrieved with the award, the respondent filed an appeal in this Court being Civil Appeal No. 61 of 2015 which was dismissed on 27<sup>th</sup> May, 2016. In its own words, this Court (differently constituted) stated,

***“The appeal, for these reasons is dismissed save for the order that the sums awarded as compensation for wrongful dismissal be made subject to statutory deductions.”***

3. Following the dismissal of the appeal, the respondent paid the deceased's estate Kshs. 5,450,704/= and withheld Kshs. 2,634,532/= which it deemed as P.A.Y.E for transmission to the Kenya Revenue

Authority (KRA). The appellant disagreed and in turn took out warrants of attachment for the withheld amount on 1<sup>st</sup> July, 2016. Apprehensive that the appellant would execute the warrants, the respondent filed an application dated 4<sup>th</sup> July, 2016 before the ELRC seeking *inter alia*, stay of execution of the warrants and a declaration that it had fully satisfied the award issued on 22<sup>nd</sup> May, 2015.

4. The application was premised on the grounds that the respondent had satisfied the entire decretal amount save for the sum it had withheld as P.A.Y.E which was payable to KRA. On his part, the appellant maintained that only a portion, and not the entire award, was subject to taxation.

5. The learned Judge, in his ruling dated 29<sup>th</sup> July, 2016 held that an award issued by the ELRC, such as the one issued in favour of the deceased's estate, was subject to taxation. In addition, the obligation of an employer to deduct P.A.Y.E applied not only to its employees but also to employees who had been terminated. The learned Judge also took cognizance that there was an error on computation of the award and directed -

***a) The disputed amount of Kshs. 2,634,532/= be deposited in an interest earning joint account in the names of the parties advocates.***

***b) The two advocates, with the aid of Kenya Revenue Authority to reconsider their respective positions, and agree on the amounts due to the claimant and the income tax department.***

***c) In the event they are not able to agree, they are liberty to invoke the dispute resolution mechanism contained in the Income Tax Act, or revert to the Court of Appeal.***

***d) Stay of execution is granted until parties resolve the dispute in the mode suggested by the court in this ruling.***

***e) The Court is not able to declare that the decree has been fully satisfied.***

6. It is that decision that has provoked the appeal before us which is predicated on the grounds that the learned Judge erred in law and fact by-

***“(i) Ordering parties to involve the Kenya Revenue Authority in determining the amount due as PAYE yet the Authority was not a party to the suit.***

***(ii) Finding that the entire decretal amount was subject to taxation.***

***(iv) Failing to order payment of the auctioneer charges despite evidence of lawful execution.***

***(v) Failing to order the payment of the outstanding decretal amount despite finding that the decree had not been fully satisfied.”***

7. Mr. Oddiaga, learned counsel for the appellant, faulted the learned Judge for directing parties to involve KRA in computation of the tax payable yet it was not a party to the suit. He submitted that there was no provision in the ***Income Tax Act*** for taxation of awards or decrees of the ELRC. If the legislature had intended so, it would have made express provisions. According to him, ***Section 37*** of the ***Income Tax Act*** which placed an obligation on an employer to withhold income tax was in respect of its employees and was not applicable where one had ceased being an employee. We understand the appellant's argument to be that the only portion of the award which was taxable under ***Section 49(2)*** of the ***Employment Act*** was the 6 months' salary granted as compensation for wrongful termination. Mr. Oddiaga urged us to allow the appeal.

8. Mr. Wesonga, learned counsel for the respondent, in opposing the appeal, reiterated that under ***Section 37*** of the ***Income Tax Act***, it is obligatory for an employer to recover the appropriate tax from lump sum amounts before releasing the balance to an employee. The award of the ELRC represented an income

earned by the deceased and was therefore taxable. He argued that the obligation on the employer to deduct tax applied not only to current employees but also employees whose services had been terminated. In that regard, he placed reliance on the ELRC decision in ***Andrew Mukite Saisi vs. Tracker Group of Companies - Industrial Cause No, 748 of 2011 (unreported)***. Mr. Wesonga maintained that the respondent acted within the law by recovering the appropriate tax from the award.

9. We have considered the record, grounds of appeal, submission by counsel and the law. **Section 19(1)(f)** of the **Employment Act** allows an employer to make deductions which are authorized by any written law from an employee's salary. The authorized deductions include statutory deductions on damages issued for wrongful termination as envisioned under **Section 49** of the **Employment Act**. The section provides in part:-

“49

**1) Where in the opinion of a labour officer summary dismissal or termination of a contract of an employee is unjustified, the labour officer may recommend to the employer to pay to the employee any or all of the following**

**a) the wages which the employee would have earned had the employee been given the period of notice to which he was entitled under this Act or his contract of service;**

**b) where dismissal terminates the contract before the completion of any service upon which the employee's wages became due, the proportion of the wage due for the period of time for which the employee has worked; and any other loss consequent upon the dismissal and arising between the date of dismissal and the date of expiry of the period of notice referred to in paragraph (a) which the employee would have been entitled to by virtue of the contract; or**

**c) the equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal.**

**2) Any payments made by the employer under this section shall be subject to statutory deductions.**” Emphasis added.

10. Furthermore, **Section 37 (1)** of the **Income Tax Act** requires an employer paying emoluments to an employee to deduct therefrom, and account for income tax thereon, to such extent and in such manner as may be prescribed. Such tax is delineated under **Section 3 (1)** of the **Income tax** in the following manner:

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“3.

**1) Subject to, and in accordance with this Act, a tax to be known as income tax shall be charged for each year of income upon all the income of a person, whether resident or non-resident, which accrued in or was derived from Kenya.**

**2) Subject to this Act, income upon which tax is chargeable under this Act is income in respect of –**

**a) gains or profits from-**

**i .....**

**ii .....**

**Section 5 (2)** of the **Income Tax Act** elaborates gains and profits as-

**“For the purposes of section 3(2)(a)(ii), “the gains or profits” includes-**

**wages, salary, leave pay, sick pay, payment in lieu of leave, fees, commission, bonus, gratuity, or subsistence, travelling, entertainment or other allowance received in respect of employment or services rendered, and any amount so received in respect of employment or services rendered in a year of income other than the year of income in which it is received shall be deemed to be income in respect of that other year of income.”**

11. It is also instructive to note that the KRA’s Employers Guide on P.A.Y.E prescribes that,

**“PROCEDURE ON LUMP SUM PAYMENTS (Gratuities, Bonuses etc)**

**A. Notification**

**Employers are no longer required to notify the Tax Department before making payments of terminal benefits to the employees upon leaving their employment. Every employer has an obligation under Section 37 of the Income Tax Act to recover appropriate tax from any lump sum amount before releasing the difference/balance to the employee.**

**1. ....**

**2. Compensation for termination of employment**

**Liability extends to any payment, whether voluntary or obligatory made to a person to compensate him for the termination of his contract of employment or services, whether the contract is written or verbal and whether or not there is provision in the contract for such payment.** Emphasis added.

12. It follows therefore from the foregoing that contrary to the appellant’s position, the entire global award was subject to taxation. Consequently, the learned Judge did not err in holding as much. This position was restated by this Court in **Directline Assurance Co. Ltd vs. Jeremiah Wachira Ichaura [2016] eKLR** thus:-

**“It is trite law that any lumpsum payment for say, terminal dues, is subject to statutory deductions for the years taken into account. Indeed in Simon Deakin and Gllian S. Morris, Labour Law at page 405, the writers observe that it is the net salary, salary after deduction of income tax, National Insurance contribution and contributions to pension schemes or similar benefits, that is used to compute any damages due to any employees. Accordingly the court erred in not subjecting the award to the mandatory statutory deduction.”**

13. In our opinion, the learned Judge correctly directed parties to involve the KRA having appreciated that they disagreed on the assessment of P.A.Y.E due. KRA is the body charged with the duty of assessing, collecting revenue and enforcing laws relating to revenue in the country. It is therefore well suited to assist and guide in the assessment of the tax payable.

14. Last but not least, we find that payment of the auctioneer’s fees was not an issue before the trial court and as such the ground fails.

15. The upshot of the foregoing is that the appeal lacks merit and is hereby dismissed with costs.

**Dated and delivered at Mombasa this 22<sup>nd</sup> day of June, 2017.**

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

**W. KARANJA**

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**JUDGE OF APPEAL**

**M.K. KOOME**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

**DEPUTY REGISTRAR**