



REPUBLIC OF KENYA



KENYA LAW
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**Chagaba v Artcaffe Coffee & Bakery Limited (Cause 1142 of 2017)
[2023] KEELRC 89 (KLR) (19 January 2023) (Ruling)**

Neutral citation: [2023] KEELRC 89 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1142 OF 2017
AN MWAURE, J
JANUARY 19, 2023**

BETWEEN

POLINE MAKUNGU CHAGABA CLAIMANT

AND

ARTCAFFE COFFEE & BAKERY LIMITED RESPONDENT

RULING

1. The Respondent/Applicant Art caffe Coffee & Bakery Ltd filed a Notice of Motion brought under Rule 12 (3) of the *Employment and Labour Relations Act* 2014, sections 1A, 1B and 3A of the *Civil Procedure Act*, Order 22 of the *Civil Procedure Rules* 2010 and all other enabling provisions of the law seeking orders
 - a. Spent
 - b. Spent
 - c. Spent
 - d. Spent
 - e. This Honourable Court be pleased to order that Decree dated 23rd December, 2021 arising from the consent judgment of the parties dated the 26th October 2021 has been fully satisfied by the Respondent/Applicant herein.
 - f. Costs of the Application

Claimant's Case

2. The Application is supported by the grounds on the face of the Application to the effect that despite full settlement of the decretal sums plus costs, the claimant has through her advocates, extracted a



Decree and wrongfully and illegally sent auctioneers to the Respondent's premises with warrants of attachment for an alleged outstanding amount of Kshs 68,044/. It is the Applicant's contention that the provisions of section 49 (2) of the *Employment Act* 2007 are clear on payment of dues to an employee by an employer upon determination of compensation following a termination of employment and that it has fully settled the decretal sum plus costs less statutory deductions and the applicable tax.

3. The applicant in the affidavit of Virginia Mbiriri the head of Human resource of the respondent reiterates that it is lawful for the Applicant to effect statutory deductions on the amounts due to the claimant in line with section 49 (2) of the *Employment Act* which is clear on the payment of dues to an employee by an employer upon determination of compensation following termination of employment.
4. That despite full settlement of the decretal sum plus costs the claimant has through her advocates extracted a decree and wrongfully and illegally sent auctioneers to the Respondent's premises with warrants of attachment for an alleged outstanding amount of ksh. 68,044.14.

Respondent's Case

5. The Respondent has filed a replying affidavit sworn on the 18th May 2022. The Claimant/Respondent Pauline M. Chagaba deposes that the award made to her was an all-inclusive award and the decree shows that the amount payable was ksh 301,617/= all inclusive. That the Respondent/ applicant has not paid the entire amount and therefore she was entitled to execute.

Respondent/applicant's Submissions

6. The applicant submits that the total amount of compensation payable to the claimant which is the sum of ksh 221,617. 50 was indeed paid by the applicant on the 23rd December, 2021. The payment was made in the sum of ksh 160,910/= after having subjected the total compensation to statutory deductions in line with section 49 (2) of the *Employment Act*, 2007. Also Kshs 75,178.86/- was paid as costs to the Claimant's advocate. The Applicant further argued that claims before Employment Court are premised on the employee's salary at the time of their termination.
7. The applicant relied on the cases of *DPL Festive Limited versus Elijah Ochieng Rakuru* (2022) eKLR, *Peris Njeri Kinyanjui versus Kobo Safaris Limited* (2017) eKLR, and *Julius Wahome Ndirangu & Another versus Muki Sacco Society Limited; Co-operative Bank Kenya (Garnishee)* 2010 eKLR to urge the court to so find that the decree herein has been fully satisfied.
8. The applicant also submits that the withholding tax effected by the Applicant of the amount of Ksh.3,449.00 as per the Withholding Certificate dated the 17/02/2022 exhibited as VMB-2 in the supporting affidavit was effected on the Advocate's costs of ksh 80,000/= on behalf of M/S Mwangi Wahome & Company Advocates. That it is not true as averred by the Respondent in her replying affidavit that the withholding tax was made on her behalf as is clearly evidenced by the Withholding certificate which she says is not her PIN number.
9. The claimant submits that under section 13 (1) of the *Income Tax Act*, the claimant's salary was exempt from tax to the extent so specified. That the claimant's salary at the time of dismissal was ksh 20,147. She says that since 2017 the PAYE chargeable to employees was ksh 24, 000/= and above per month. The claimant's salary was less than the taxable amount.



Issues for Determination

10. The main issue for determination is whether or not an employer is entitled to withhold tax on an award of compensation in terms of section 49 (1) (c) of the *Employment Act*, No 11 of 2007 and on costs of the advocate.
 - a. Whether in the circumstances of the case the Respondent / applicant was so entitled to withhold the taxes.

Analysis and Decision

Section 49 (2) of the *Employment Act* 2007 provides that

“ Any payments made by an employer under this section shall be subject to statutory deductions.

11. The court in the Cause No 176/2009 Peris Njeri Kinyanjui versus Kobo Safaris Limited cited by the applicant held that:

“ the compensation awarded under section 49 (1) (c) is the ‘equivalent of a number of months wages or salary not exceeding 12 months based on the gross monthly wage or salary of the employee at the time of dismissal. The Act is explicit that any such payment is subject to statutory deductions, and the applicant was entitled to deduct, and remit the amount deducted to the Kenya Revenue Authority”

12. In *Kioko Joseph [suing as the representative of the estate of Joseph Kilinda] –v- Bamburi Cement Limited* [2016] eKLR the court, cited with approval of the decision in Cause No. 748 of 2011 (Nairobi), *Andrew Mukite Saisi v Tracker Group of Companies* where it was held:-

“Wages of an Employee are protected under Section 17 of the *Employment Act* 2007. Section 19 of this law states that notwithstanding this protection, an Employer may deduct from an Employee’s wages any amount which is authorized by any written law for the time being in force, collective agreement, wage determination, court order or arbitration award. Section 49 of the *Employment Act* makes any payments made by the Employer under Section 49, subject to statutory deductions. Section 37 of the *Income Tax Act*, Cap 470 the Laws of Kenya, makes it obligatory for Employers to recover appropriate tax from any lump sum, before releasing any difference to the Employee. The Employers’ duty under this law extends to any payment, whether voluntary, consensual or obligatory. Section 37 [2] makes it a punishable offence if an Employer fails to deduct upon payment of emolument to an Employee; to account for tax deducted; and supply the Commissioner of Domestic Taxes with a certificate prescribed under the Income Tax rules. As a general rule, all income is taxable to the person who earns it, not assigned to someone else, under ‘the fruit of the tree theory.’ An Employer is not to shoulder the tax burden of an Employee. Awards of the Court are taxable.”

13. The court is of the considered view and in light of the above authorities that an employee is liable to tax on the all terminal dues for whatever the number of months the employee is awarded. The payment must emanate directly from the gross monthly salary awarded under section 49 (1) (c) of the *Employment Act*. The terminal dues are taxable so long as they are above the tax bracket which is the position in this case.



14. The court is persuaded by the case of Kioko Joseph v Bamburi (supra) where it was held that
- “The Employer’s duty under this law extends to any payment, whether voluntary, consensual or obligatory. Section 37 [2] makes it a punishable offence if an Employer fails to deduct upon payment of emolument to an Employee; to account for tax deducted; and supply the Commissioner of Domestic Taxes with a certificate prescribed under the Income Tax rules.
15. Also in the case of Julius Wahome and another v Muki Sacco Limited and co-operative Bank Limited (Garnishee) Case No 48 as consolidated with 49 Of 2017 the court held that:
- “This being a statutory requirement is mandatory. Where an award is within the taxable bracket the due deduction must be effected before the employee can be paid. The employer must retain such statutory dues under Kenya revenue authority act and must remit accordingly and in return issue the employee the necessary P9 form”.
16. In view of the foregoing the court is satisfied that the respondent applicant has satisfied the decretal amount being Kshs 301,617.50/= having paid the claimant Kshs 160,910/- and the Claimants advocate Kshs 75, 172.86/= and Kshs 65,594.14. being tax remitted to KRA and 3,449 as withholding tax having been remitted to KRA as well.
17. The application dated 5th May 2022 and in particular Prayer (e) accordingly succeeds. The Respondent /Applicant was entitled to pay the claimant/Respondent the compensation with the necessary deductions as it did.
18. As for the tax remittance certificate attached to the Respondent/Applicant’s affidavit on the deduction of withholding tax of the costs the court is satisfied that the withholding tax for the Advocates costs has been tendered to the appropriate authority. The claimant’s advocate will in any case get a credit from KRA when paying his annual income tax.
19. The court consequently allows prayer (e) of the application and orders that the Decree dated 23rd December, 2021 arising from the Consent Judgment of the parties dated 26th October, 2021 has been fully satisfied by the Respondent/Applicant herein.
20. The Applicant to supply the claimant with the requisite P 9 tax certificate and the withholding tax certificate to the claimants’ advocate.
21. Each party will bear her/its own cost.

Orders Accordingly

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 19TH DAY OF JANUARY, 2023.

ANNA N. MWAURE

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article



159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

ANNA N. MWAURE

JUDGE

