



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**

**ELRC APPEAL NO. E017 OF 2021.**

**DPL FESTIVE LIMITED.....APPLICANT/APPELLANT**

**VERSUS**

**ELIJAH OCHIENG RAKURU.....RESPONDENT**

**RULING.**

1. This ruling relates to a Notice of Motion application dated 10<sup>th</sup> December, 2021, brought pursuant to Section 12 of the Employment and Labour Relations Court Act, 2011, Section 49 of the Employment Act, 2007 and Rule 17 of the Employment and Labour Relations Court (Procedure) Rules, 2016. The Applicant seeks Orders THAT:

i. Spent

ii. Spent

iii. This Court do Order for the release of the Decretal Sum deposited in this Honourable Court subject to the provisions of Section 49 of the Employment Act, 2007.

iv. This Honourable Court do Order the Respondent to Re-tax his Bill of Costs to accord to the Judgment of this Court.

v. Spent

vi. The Costs of this application be provided for.

2. The application is supported by grounds on the face thereof and an affidavit sworn by **Lilian Oyata** on 9<sup>th</sup> December, 2021. The crux of the application, is that in seeking to have the Decretal Sum deposited in court released to the Respondent, the Respondent asserted that the Court did not pronounce itself on the question of subjecting the Decretal Sum to the mandatory Statutory deductions.

3. The Applicant's further avers that the Respondent indicated that by this Court making a finding that the costs awarded in the Magistrates Court stands, it meant that the same as earlier taxed, would not be interfered with, notwithstanding the fact that the basis upon which it was taxed, to wit, the decretal sum, had substantially been reduced by this Honourable Court.

4. The application is opposed vide the Respondent's grounds of opposition dated 23<sup>rd</sup> December, 2021 and filed on 7<sup>th</sup> January, 2022 and a Replying Affidavit sworn by **Elijah Ochieng Rakuru**, the Respondent herein and dated and filed on even dates.

5. The Respondent's assertion is that subjecting the decretal sum to Statutory deductions, amounts to a review of the Orders of the Court. He further avers that the Applicant has neither demonstrated nor met the threshold for review of the orders of the court.

6. It is the Respondent's position that the court in its judgment subject of this ruling, did not interfere with the costs awarded by the lower court and that the costs have already been taxed and the amount of the taxation is due and owing to the Respondent.

7. Parties urged the application through oral submissions.

8. Counsel for the Applicant argued that Section 49(2) is couched in mandatory terms and the Court did not need to repeat itself, as the Section is effective by operation of law. He sought to rely on the holding in the case of **Hosea Njeru Kagundu v Kenya Union of Commercial Food and Allied Workers (2012) eKLR**, where the Court held that all payments due under Section 49 of the Employment Act, are subject to Statutory deductions.

9. On the issue of re-taxation of the Bill of Costs, Counsel argued that the award before the lower court was higher than that given by this court and it therefore follows that the Bill of costs has to be re-taxed to accord with the new award. It is his position that the Bill as currently taxed, violates the Advocates Remuneration Order.

10. Counsel for the Respondent in rebuttal, reiterated the averments in their Replying Affidavit and grounds of opposition. He further argued that what the Applicant seeks through this application, is a review of the judgment of the Court.

11. It is the Respondent's assertion, that if the court had intended that the award is subjected to statutory deductions, nothing would have prevented it from saying so.

12. The Respondent urged that the Bill of Costs in the matter before the lower court had already been taxed as at the time the court rendered its judgment. It is his case that the court would have pronounced itself on the same if it intended that the same be re-taxed.

13. The Respondent submitted that the application lacks merit and is an attempt to review the judgment of the court through the back door and deny the Respondent the fruits of his judgment.

#### **Determination**

14. I have considered the application, the grounds and affidavit in support, the grounds and replying affidavit in opposition and the Parties' oral submissions. The issues for determination are:

i. Whether the award made pursuant to the orders of this court are subject to statutory deductions

ii. Whether the Respondent's Bill of costs taxed before the decision of the Appellate court should be re-taxed to accord with the new award.

15. The Applicant's case is that it requested that the Decretal Sum deposited before this Honourable be released to the Respondent in accordance with the award made by this court vide in its decision of 2<sup>nd</sup> December, 2021, less statutory deductions. The Respondent objected the subjection of the award to statutory deductions on the basis that the Court did not pronounce itself on whether the decretal sum is to be subjected to statutory deductions.

16. Section 49(1) of the Employment Act, 2007 provides:

***“(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.”***

9. Pursuant to these provisions, the court made the following awards to the Respondent and against the Applicant:

***“i. A 1-month salary in lieu of notice.***

***ii. A 6 months' salary in compensation for unfair termination.”***

17. The question then become, whether these awards are subject to statutory deductions, and whether the court needed to pronounce itself on the same. Section 49(2) of the Employment Act,2007 states:

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

18. The provisions of Section 49(2) of the Employment Act, are couched in mandatory terms. It therefor follows, that every award made pursuant to this section is subject to statutory deductions. Secondly, arising from the wording of the section, the court does not have the latitude to subject some awards to statutory deductions and leave out others. It therefor does not need to pronounce itself on whether or not to subject the awards to statutory deductions, as it has no power not to; it goes without saying.

19. I find and hold that the award subject of this ruling is subject Statutory deductions.

**Whether the Respondent's Bill of costs taxed before the decision of the Appellate court should be re-taxed.**

20. The Respondent's position is that he submitted his taxed Bill of Costs to court at the time the court determined the appeal. It is his further position that when the court decided that "*I will not disturb the costs awarded by the lower court*", the court meant that the Bill taxed per the award of the lower court, is not to be disturbed.

21. The Applicant opposed the Respondent's position premised on the fact that the Bill of Costs that was taxed earlier, was taxed based on the award made by the lower court, which award has since changed based on the judgment made by this court on appeal. It is the Applicant's position, that the Bill of costs should be re-taxed to accord with the judgment of this court.

22. The Respondent's taxed Bill of Costs subject of this ruling, was not an issue for determination by this court at the time it rendered its judgment on 2<sup>nd</sup> December, 2021.

23. The Bill of Costs that was taxed before the court made its decision on appeal, was premised on the award given by the lower court, which award was set aside.

24. I find and hold that the Bill of Costs can only be based on the Decretal Sum payable to the Respondent in accordance with the judgment of this court.

25. In conclusion, the Court makes the following orders: -

i. That the Decretal Sum deposited in Court in this matter, be released to the Respondent subject to Statutory deductions envisaged in Section 49(2) of the Employment Act, 2007.

ii. That the Respondent's Bill of costs be Re-taxed to accord with the judgment of this Court

iii. To bring this matter to a close, each party shall bear their own costs of this application.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 27<sup>TH</sup> DAY OF JANUARY, 2022.**

**CHRISTINE N. BAARI**

**JUDGE**

**Appearance:**

N/A for the Applicant/Appellant

Mr. Rakewa present for the Respondent

MS. Christine Omollo - Court Assistant.