



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT MOMBASA**

**CAUSE NUMBER 739 OF 2016**

**BETWEEN**

**KASSIM ABDULATIFF ABDALLA MOHAMED.....CLAIMANT**

**VERSUS**

**BARCLAYS BANK OF KENYA LIMITED.....RESPONDENT**

Rika J

Court Assistant: Benjamin Kombe

Mogaka Omwenga & Mabeya Advocates, for the Claimant

Miller & Company Advocates, for the Respondent

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**RULING**

1. On 25<sup>th</sup> November 2019, the Parties filed a Consent Judgment on the following terms:-

a. Judgment be and is hereby entered for the Claimant against the Respondent in the sum of Kshs. 6,000,000 only.

b. Respondent's Counter – Claim be marked as withdrawn.

c. The decretal sum be settled within 14 days from the date of filing this Consent, failure to which the Claimant be at liberty to execute. The decretal sum to be deposited by way of RTGS into Claimant's Advocates' Bank Account whose details are as follows:-

(Details given)

d. Each Party to bear its own costs of the Claim and the Counter – Claim.

e. This matter be marked as fully settled.

2. The Court recorded Judgment in terms proposed by the Parties above, on 26<sup>th</sup> November 2019.

3. On 17<sup>th</sup> December 2019, the Respondent filed an Application, under Certificate of urgency seeking orders, *inter alia*, that:-

- The Honourable Court be pleased to order stay of execution of decree of the Judgment entered by consent on 26<sup>th</sup> November 2019, pending determination of the Application.
- All and/or any orders and actions consequential already taken upon the said Judgment be set aside until disposal of this Application.

- The Court be pleased to make a finding that the Respondent has fully complied with the Consent Judgment recorded in this Court on 26<sup>th</sup> November 2019.

4. The Application is anchored on the Affidavit of Respondent's Head of Employee Relations, Vaslas Odhiambo, sworn on 13<sup>th</sup> December 2019.

5. Vaslas explains that pursuant to the Consent Judgment, the Respondent paid as agreed, the amount of Kshs. 6,000,000. The amount was subject to P.A.Y.E. which was deducted and forwarded to K.R.A. The actual amount paid to Claimant's Advocate's was Kshs. 4,376,601. Kshs. 1,623,398 was P.A.Y.E.

6. The Claimant's Advocates wrote to the Respondent's Advocates on 11<sup>th</sup> December 2019, threatening to execute, unless the full amount of Kshs. 6,000,000 was paid by the Respondent. The Respondent holds, execution would be unlawful, as it has satisfied decree. Deduction and remittance of P.A.Y.E. was made in compliance with Section 37 of the Income Tax Act Cap 470 the laws of Kenya, read with Section 49(2) of the Employment Act, 2007.

7. The Claimant opposes the Application, relying on the Affidavit, of his Advocate Mr. Peter Omwenga, sworn on 15<sup>th</sup> January 2020.

8. He states, the Claim had a value of approximately Kshs. 110,135,608. The Respondent had initially offered to settle the Claim out of Court, at an all – inclusive figure of Kshs. 4,376,607. Claimant rejected this.

9. Upon further consultation, it was agreed that there be settlement for an all-inclusive figure of Kshs. 6,000,000. It is on the understanding that this was an all-inclusive figure, unaffected by any form of deduction, that the Claimant accepted settlement. The Claimant is therefore entitled to execute on the balance.

10. An order for interim stay of execution, on the sum of Kshs. 1,623,398, issued on 17<sup>th</sup> December 2019. The Application was argued orally on 6<sup>th</sup> February 2020. Parties underscored their respective positions, captured in their Affidavits.

#### **The Court Finds:-**

11. It is correct submission, that Section 37(1) of the Income Tax Act, requires an Employer paying emoluments to an Employee, to deduct therefrom, income tax, commonly known as P.A.Y.E, and remit to the KRA.

12. Section 49(2) of the Employment Act states that all payments made by the Employer to an Employee, in remedy for wrongful dismissal and unfair termination, shall be subject to statutory deductions.

13. The obligation of the Employer under these provisions, to deduct and remit income tax, was underlined in the Court of Appeal decision, **Kioko Joseph (suing as the legal representative of the estate of Joseph Kilinda) v. Bamburi Cement [2017] e-KLR.**

14. The outcome of the Application herein depends on the interpretation of the Consent Judgment recorded by the Court. The Claimant states the sum of Kshs. 6,000,000 was all-inclusive, having been offered the same sum less P.A.Y.E. back in March 2019, and rejected the sum. The Respondent's position is that the sum, was to be paid less P.A.Y.E.

15. Legislation, and Judicial Authorities on the subject, compels the Court to agree with the Respondent.

16. In **Industrial Court (Nairobi) Cause No. 748 of 2011, Andrew Mukite Saisi v. Tracker Group of Companies Limited, (unreported)**, Parties recorded a Consent Judgment, whereof the Employer was to pay the Employee an amount which was described as *full and final settlement*.

17. The Employer went ahead to deduct and remit P.A.Y.E. from the amount stated to be *full and final settlement*.

18. The Employee applied for execution, while the Employer prayed the Court to find that P.A.Y.E. was deducted and remitted to KRA lawfully. The Respondent asked the Court to stay execution.

19. The Court upheld the Employer's position, observing that all income is taxable to the Person who earns it, and not assigned to someone else, under the *fruit of the tree theory*. The Court observed, there are situations where an Employee on termination, may negotiate a final package, *net of tax*. In such situations, the Employer assumes income tax obligation. It was held that Consent Judgment on record did not indicate that the Employee's exit package, was *net of tax*.

20. The Consent Judgment in the current dispute similarly, does not disclose if the sum of Kshs. 6,000,000 was *net of tax*. There is no clause stating it to be so. It is not even stated in the Consent, that the sum of Kshs. 6,000,000 was intended to be *all-inclusive*. The Court has not seen correspondence between the Parties in March 2019, where the net sum of Kshs. 4,376,607 was offered by the Respondent to the Claimant, and declined.

21. P.A.Y.E. has already been remitted to KRA. As held in the case of **Mukite**, the Court cannot ask the Respondent to pay to the Claimant, what has already passed onto the Government. If the Claimant feels strongly that there is any money wrongly paid to the Tax Authorities, it is open for him to pursue refund with the Commissioner of Domestic Taxes.

22. In the absence of any statement in the Consent Judgment, that the sum of Kshs. 6,000,000 was offered *net of tax*, the presumption is that it was taxable, and the Respondent did not err in deducting and remitting P.A.Y.E.

**IT IS ORDERED:-**

- a. **The Respondent has fully satisfied Consent Judgment recorded on 26<sup>th</sup> November 2019.**
- b. **There shall be no execution by the Claimant, in pursuit of the sum of Kshs.1,623,398.**
- c. **No order on the costs.**

**Dated and delivered at Mombasa this 12<sup>th</sup> day of March 2020.**

**James Rika**

**Judge**