**REPUBLIC OF KENYA**

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

**CAUSE 1320 OF 2015**

**(Before Hon. Justice Hellen S. Wasilwa on 28th May, 2020)**

**ESTHER MUTEMBEI.....CLAIMANT**

**VERSUS**

**ORACLE SYSTEMS LIMITED.....RESPONDENT**

**RULING**

**1.** The Applicant/Respondent filed a Notice of Motion on 2/12/2019 seeking the following orders:-

***1. Spent***

***2. THAT the Honourable Court be pleased to review the ruling delivered on 11th July 2019 and fresh directions be issued on the hearing and determination of the outstanding issue in this matter.***

***3. THAT the Honourable Court shall hear and determine the dispute relating to the deduction of taxes on the settlement sum with reference to the terms set out in the Settlement Agreement between the parties herein dated 12th September 2017.***

***4. THAT costs be in the cause.***

**2.** The application is premised on grounds that:-

***1. There is a grave and fundamental error arising from the ruling of the Honourable Court dated 11/7/2019 and the directions with respect to the hearing of the issues in the dispute.***

***2. In its ruling, the Honourable Court dismissed the Applicant's Preliminary Objection on the erroneous basis that after filing the consent letter dated 13/9/2017, the parties had appeared before the Court intimating that the matter had not been settled. It was not recorded that the unsettled issue related to taxes.***

***3. The Court relied on the inaccurate and incomplete record of proceedings and erroneously concluded unequivocally that no settlement was reached contrary to the Settlement Agreement between the parties dated 12/9/2017, the grounds supporting the Preliminary Objection and submissions by both parties.***

***4. There is an apparent error on the face of the record in that the recording of the proceedings resulted in an apparent error in the ruling as the parties themselves admit (contrary to the holding of the Court) that there is a Settlement Agreement between them pursuant to which the Respondent/Claimant has been paid Kshs. 3.5 million out of an agreed Kshs. 5 million.***

***5. The substantive claim, which the Court directed should proceed for hearing, was mutually settled by the parties and cannot proceed for hearing in the circumstances as ordered by the Court.***

***6. At all material times following the filing of the consent, from the attendance in 8/11/2017 and submissions by the parties as recorded on this date, the parties were addressing or seeking to settle the issue on taxes. Consequently, in the subsequent court attendances, the court's record relating to no settlement was incomplete as regards the issue being pursued.***

***7. Upon reviewing the proceedings of the Court as recorded, the omission of the court to fully and/or actually record the submissions of the parties on the outstanding issue of taxes wrongly gave the impression that there was no settlement at all.***

***8. Following the failure to record this detail, the record of the proceedings is effectively inaccurate and incomplete. This results in a grave miscarriage of justice upon the Applicant who has already paid the Respondent the amounts agreed in the Settlement Agreement less applicable statutory deductions and could not fairly pursue an appeal in the circumstances as the same would have been considered with the inaccurate record.***

***9. The effect of the ruling is that the Court has varied contractual terms already agreed between parties rather than encourage amicable resolution of disputes and give direction to the parties in that regard within its jurisdiction.***

***10. There is no delay in filing this application as the concerns raised herein have been magnified as the Applicant prepared for hearing. There has been an unsuccessful attempt to seek consensus with the Respondent's counsel who continues to argue that he is entitled to taxes.***

***11. The Respondent has been paid Kshs. 3.5 million based on the Settlement Agreement and has enjoyed the benefit thereof since 2017. It will not be prejudiced if the court considers and determines the issue in dispute relating to whether or not taxes should have been deducted on the agreed settlement amount rather than the entire dispute between the parties which has already been resolved.***

**3.** The application is supported by the affidavit of Cosmas Apeles Wetende, an advocate of the High Court of Kenya sworn on 29/11/2019. She reiterates the grounds set out in the application.

**4.** The Respondent filed a Replying Affidavit sworn by Peter Mugalo an advocate of the High Court on 4/12/2019. He depones that the application is clearly an abuse of the court process and has been filed with the intention to defer the hearing of the main suit.

**5.** He avers that the application has not demonstrated the apparent error on record and that the issues raised are new issues, which were not before the court for determination. He further avers that the applicant in its submissions indicated that the issue for determination was whether the hearing of the matter can proceed when there is a consent dated 4/9/2017 on the file marking the matter as settled.

**6.** He avers that the issues raised in the Applicant's Preliminary Objection were in relation to the filed consent letter dated 4/9/2017 and filed on 13/9/2017. He avers that the Ruling which the Applicant seeks a review addressed the issues before the Court and directed that the parties proceed to take a date for hearing.

**7.** He contends that the Applicant has always filed applications whose aim is to delay the matter. He further contends that no reason has been given for the delay in filing the application since it was 11/7/2019 when the ruling was delivered.

**8.** He admits that the Claimant received Kshs. 3.5 Million and that the reason for proceeding for hearing was that once the court delivers its judgment, this amount will be taken into consideration. He avers that the settlement agreement was clear on the amount paid to the Respondent and the issue of taxes is not mentioned in the agreement. He avers that the issue was raised after the parties executed that agreement.

**9.** The Applicant filed a Supplementary Affidavit sworn on 6/12/2019. He depones that the apparent error is set out in the application and supporting affidavit. He further depones that the Court in paragraph 17 of the Ruling noted that there was a consent. However, in paragraph 18 it made reference to the appearance by the parties subsequent to the filing of the consent intimating that the matter had not been settled.

**10.** He avers that the Court record of 8/11/2017 and 13/5/2019 is clear that the outstanding issue upon which no agreement had been reached related only to taxes pursuant to the Settlement Agreement.

**11.** He avers that the subsequent proceedings on 11/12/2017, 1/2/2018 and 13/3/2018 make reference to no settlement without any indication that this was only limited to the issue of taxes under discussion.

**12.** He contends that the Respondent in its submissions to the Preliminary Objection that there was a Settlement Agreement and the only outstanding issue related to whether taxes were properly deducted.

**13.** He avers that the application could only in the circumstances be heard by the Court, which delivered the matter after resumption from leave on 2/12/2019.

**Applicant's submissions**

**14.** The Applicant submits that it paid the settlement sum less income tax and issued the Claimant's advocates with a Statement of Earnings and Deductions generated on 19/9/2017 evidencing payment of the settlement sum and statutory deduction of Kshs. 1.5 Million that was remitted to Kenya Revenue Authority (KRA). It submits that the issue in contention between the parties is whether the Claimant should have been paid the agreed sum of Kshs. 5 Million net of gross of taxes.

**15.** It is its submission that the deduction of taxes on the amount agreed by the parties was subject to taxes. It submits if the intention of the parties was not to have taxes deducted from the said amount the Agreement would have stated the same.

**16.** It submits that the Income Tax Act places responsibility on an employer to deduct or remit tax to KRA. It submits that section 15 (7) (e) of the Income Tax Act defines deductible income to include income from employment (including former employment) of personal services for wages, salary, commissions or similar rewards.

**17.** It relies on the case of **Carolly Onyango & 29 others v Jiangxi Zhongmei Engineering Construction Limited [2018] eKLR** where the Court held that an employer is not to shoulder the tax burden of an employee and should an employee have claims over tax the only place to lodge the complaints is to KRA under section 39 (1) of the Income Tax Act.

**18.** It submits that section 19 (1) of the Employment Act allows an employer to deduct from wages of an employee any amount, the deduction of which is authorised and that section 49 (2) of the Act provides that any payments made by an employer as compensation shall be subject to statutory deductions.

**19.** It relies on the case of **Jimmi Nhlapo Maseg v Aviation Workers Union [2014] eKLR** where the court held that Section 49 of the Employment Act does not require judicial intervention to determine that any payments made by the employer shall be subject to statutory deductions. It further relies on the Court of Appeal decision in **Kioko Joseph (suing as the legal representative of the Estate of Joseph Kilinda) v Bamburi Cement Ltd [2017] eKLR** that a lump sum payment of terminal dues is subject to statutory deductions.

**20.** It submits that it has proved that the tax being Kshs. 1.5 million was deducted and remitted to KRA and that the Claimant does not dispute the payment. It further argues that it did not agree to cushion the Claimant from her statutory obligation to pay taxes on the settlement sum provided in the Settlement Agreement. It further submits that Clause 2.2, 2.3 and 2.4 of the Settlement Agreement does not provide that the amount would be paid exclusive of statutory deductions.

**21.** In conclusion, it submits that it complied with the terms of the Settlement Agreement in paying the Respondent the Settlement sum.

**Respondent's submissions**

**22.** The Respondent submits that Clause 2.2 of the Settlement Agreement provided that the full and final settlement of the matter arising in the dispute of the Kshs. 5 million but this sum was not subject to any deductions and did not have a breakdown of how the figure was arrived at.

**23.** It submits that the distinction between the cases relied upon by the Applicant and the present case is that all the matters were heard and proceeded to deliver its judgment. She submits that there is no judgment in the present case and that the settlement Agreement does not state that the sum is in respect of unfair termination or summary dismissal. She further submits that the Agreement does not state that the settlement payment is subject to section 49 of the Employment Act.

**24.** She submits that the Memorandum of Claim filed on 31/7/2015 shows that she had various claims some of which are not subject to taxation hence the Settlement Agreement as drawn provided for a full and final payment having taken into consideration the issue of tax otherwise it would have stated that the payment was subject to section 49 of the Employment Act.

**25.** She relies on the case of **Feba Radio (Kenya) Limited T/A Feba Radio v Ikiyu Enterprises Limited [2017] eKLR** where the Court relied on the Jiwaji v Jiwaji (1968) E.A 547 that where there is no ambiguity in an agreement it must be construed according to clear words used by the parties.

**26.** She submits that the Settlement Agreement settled all rights and obligations between the parties and all inclusive, full and final was not subject to Section 49 of the Employment Act.

**27.** In its rejoinder the Applicant submits, it maintains that all payments by an employer are subject to mandatory statutory deductions unless exempted and there is no exemption on Court settlement and the deductions on the settlement amount were mandatory and lawful. It reiterates that Clauses 2.2, 2.3 and 2.4 of the Settlement Agreement is clear and not ambiguous and that an obligation set out is mandatory and obligatory as a matter of course.

**28.** I have considered the averments of both Parties. The issue in Court relates to this application by the Respondent/Applicant. They seek review of this Court's ruling delivered on 11/7/2019.

**29.** The Respondent avers that the main ground for review is that there is an error on the face of the record.

**30.** The ruling upon which the Applicant seek review is one in which this Court determined that the matter could not be marked as settled as per the consent filed herein when the Parties had after the consent appeared before Court and intimated that they were resolving the issue of taxes. This in effect implied that the matter had not been fully resolved.

**31.** I considered the consent as filed on 13/9/2017 and it was clear that the consent had not been adopted by this Court by 27.9.2017 when the Parties appeared in Court and the Claimant intimated as follows:-

> ***"We have a settlement agreement. We pray for mention in 30 days to confirm compliance".***

**32.** On 8/11/2017, the Parties appeared in Court again. The Respondent's Counsel Mrs. Wetende intimated as follows:-

> ***"We seek a mention to settle an issue on taxes".***

**33.** The Court then set the mention date on 11/12/2017 to give directions. On 1/2/2018, Mrs Wetende addressed Court and said that they had not reached a settlement.

**34.** What therefore emerges is that the Parties have not fully resolved the issues on the consent filed in Court and this Court cannot reinforce the said consent without the both Parties being in agreement.

**35.** The Applicant wants me to review my ruling of 11/7/2019. In that ruling I was asked to interpret the import of clause 2.2 of the settlement agreement which I did and said it was clear that what was to be paid to the Claimant was 5 million all inclusive. The agreement was silent on issue of taxes and I reiterated what I have indicated in this ruling above.

**36.** This Court cannot vary a consent order of the Parties. In Court of **Appeal No. 293/2014, The Board of Trustees NSSF vs Micheal Mwalo,** the Court of Appeal JJA, G.B.M Kariuki, W. Ouko and J. Mohammed, reaffirmed the law on consent judgements and cited Harun J in KBC vs Specialised Engineering Company Limited as follows:-

> "***A consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or collusion or by an agreement contrary to the policy of the court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside an agreement".***

**37.** This Court has not been asked to vary any consent agreement because before the agreement was recorded as an order of the Court, the Parties reneged on it by their actions and utterances.

**38.** Since Parties were still considering more agreements and negotiations, this Court could not be compelled to record it as an order of the Court.

**39.** That still remains the position todate. I find no reason to review my ruling above as prayed because there is no error on record pointed out by the Applicants.

**40.** Costs in the cause.

**Dated and delivered in Chambers via zoom this 28th day of May, 2020.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Onyango holding brief Wetende for Respondent – Present

Mugalo for Claimant – Present