



**REPUBLIC OF KENYA**

**EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 1343 OF 2010**

*(Before Hon. Lady Justice Hellen S. Wasilwa on 2<sup>nd</sup> December, 2019)*

**CHARLES MUTHAMA.....CLAIMANT**

**VERSUS**

**WANANCHI GROUP (K) LIMITED.....RESPONDENT**

**RULING**

1. The Respondent/Applicant, Wananchi Group (K) Ltd filed a Notice of Motion application on 13/06/2019 against the Claimant/Respondent, Charles Muthama brought under Order 22, Rule 22 of the Civil Procedure Rules and Sections 1A, 3A 63(e) of the Civil Procedure Act. It seeks for orders that there be a stay of execution of any and/or all decree arising from the Court's awards delivered on 08/10/2015 and the Court of Appeal's decision dated 15/12/2017 against the Claimant, his advocates and/or auctioneers.
2. Further, that the decretal amount has been fully satisfied by the Applicant and that costs of this application be provided for in any event.
3. The Application is based on the grounds that: On Tuesday 4<sup>th</sup> June 2019 in satisfaction of the decretal sum, it made a payment of Kshs. 1,513,089/- to the Claimant's advocate's Equity Bank Account No. 0020277366678 at Fourways Branch which must have reflected the same day as it was a same bank transaction.
4. That on Friday 7<sup>th</sup> June 2019, the Claimant's advocate sent Mambu Auctioneers to proclaim for Kshs. 2,849,746/- and that its advocates wrote to the Claimant's advocates on the same day seeking to understand the reason for proclamation and whether it was for PAYE that had been deducted in accordance to the law.
5. That their said letter was not responded to and their telephone calls were ignored and when they contacted his advocate through whatsapp messaging, he responded saying: ***"You have my balance. Pay up. There is a balance of 25k, sort out we close this matter. See your letter and the RTGS. Amounts vary."***
6. That the Claimant's advocate was referring to the fact that its advocate had erroneously cited the settled amount as Kshs. 1,538,089/- instead of Kshs. 1,513,089/- and that its advocate responded explaining that the same was a typo and there was no need to continue harassing a party who had fully settled.
7. That the Claimant's advocate then promised to re-look but on 12/06/2019, the said advocate wrote, ***"my instructions are that PAYE is not deductible as per the contract"*** which statement was a complete turn from his previous position that the balance due is Kshs. 25,000/=.
8. That the auctioneer is likely to commence the process of attachment as the 7 day notice lapses on Friday 14<sup>th</sup> June 2019 and stands to unjustly and unfairly enrich himself with a double payment of the alleged outstanding amount.
9. That the application herein raises serious issues of law, fact and is arguable and that it is in the interest of justice that the orders the Applicant seeks be granted.
10. The Applicant also filed a Supporting Affidavit sworn by its Legal Manager, Michael Maina who avers that a decree was extracted exparte by the Claimant/Respondent and goes ahead to give a tabulation of the ***Kshs. 1,513,090.***
11. That the Applicant's advocate has written to the Claimant/Respondent's advocate and provided legal authorities clearly showing that PAYE must be paid as provided by statute but that the Claimant's advocate insists on proceeding with the unlawful proclamation and

auction. He avers that in the circumstances, this application should be allowed with costs.

12. The Respondent filed his Replying Affidavit dated 09/07/2019 averring that the consent settlement entered by the parties on 13/03/2019 did not make provision on the taxes due on the decretal amount.

13. That the Applicant has made an erroneous deduction of tax while there is no longer an employer/employee relationship between it and him and that the terminal benefits were paid way after the said relation was extinguished and thus the decretal sum does not amount to emoluments.

14. That the Income Tax Act and the Rules thereto do not expressly provide for tax deduction on terminal benefits with PAYE only being chargeable on income earned in the course of employment and that compensation accruing out of a court award is not income within the meaning of the Income Tax Act.

15. That the Applicant cannot purport to act as its agent in respect of PAYE when he is no longer its employee and that the Applicant has further not produced any evidence to prove that the amount deducted was remitted as PAYE to Kenya Revenue Authority. He believes that the Applicant charging PAYE on the decretal sum is a perpetuation of its unfair treatment to him and urges this Court to dismiss the Respondent's Application herein with costs.

16. The Applicant then filed a Further Affidavit on 03/09/2019 sworn by Michael Maina who avers that it is trite law that an employer is an agent of KRA and therefore any lump sum payment for say terminal dues is subject to statutory deductions for the years taken into account. That the Applicant has been intending to remit the PAYE but since the Claimant left employment in 2010, attempts to obtain his PIN Certificate from him have been unsuccessful as shown in annexure marked **MM1**.

### **Respondent/Applicant's Submissions**

17. The Applicant submits that the total amount paid to the Claimant/Respondent less tax is Kshs. 3,613,090/= and that under **Section 37 of the Income Tax Act, Cap 470**, it is the obligation of an employer to recover appropriate tax from any lump sum amount before releasing the balance to the employee.

18. That the statutory protection to the employer is subject to certain conditions as discussed in the case of **Kioko Joseph [suing as the representative of the estate of Joseph Kilinda] –v- Bamburi Cement Limited [2016] eKLR** where James Rika J, cited with approval 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.”*

19. That on tax deduction on terminal dues, the case is similar as **Section 49(2) of the Employment Act** provides that any payments made by the employer under the said section shall be subject to statutory deductions. It cites the case of **Directline Assurance Co. Ltd v Jeremiah Wachira Ichaura [2016] eKLR** to support this submission.

20. That the obligation of an employer to deduct PAYE from recurrent wages and terminal wages as under the Income Tax Act applies to a current employee and an employee on termination. That also, a court does need not to declare that income tax is deductible from an award of the court because the Income Tax Act declares tax deductible and the Employment Act recognizes and allows for such deduction.

21. It is submitted by the Applicant that execution over the tax amount should not take place as supported by **Article 210 of the Constitution of Kenya**, which provides that no person shall be exempt from payment of tax unless exempted by law.

22. That in this case therefore the statutory deductions were conducted strictly within the provisions of the law and it relies on the case of **Andrew Mwanjala Mwandawiro –v- SDV Transami Kenya Limited [2016] eKLR** where this Honourable Court held as follows:-

***“It is therefore my finding that the subtraction of the awarded amount is in order and the claimants should not execute on a valid tax deduction. The application before Court is therefore valid and I allow it and order that execution of the statutory dues by the claimants be stayed and is ordered inapplicable.”***

23. Further, that the claim by the Claimant for the taxed amount after the settlement of the decretal sum is ill informed and that the Claimants should be estopped from raising a further claim in the cause herein as this is not supported by the Decree and income tax laws. That Linnet Ndolo J in supporting this position held in the case of **Margaret Auma Ingwe v Kenya Power and Lighting Company Limited [2016] eKLR** that the Claimant had no legal basis to execute on an amount she knew had been charged as tax.

#### **Claimant/Respondent's Submissions**

24. The Claimant/Respondent submits that the issue for consideration is whether PAYE ought to be deducted from the benefits payable to him for unfair termination. That **Section 37 of the Income Tax Act** expressly provides for statutory deductions in respect to employee's emoluments and that **Rule 2(a) of the Income Tax Rules** expressly provides that: ***“emoluments” means gains or profits from employment or services rendered which are payable in money.*** That the decretal amount awarded by this Court does not amount to gains or profits as a result of employment and its taxation would thus not be feasible in law.

25. That in the case of **Ibrahim Manyara –v- Registered Trustees of Agricultural Society of Kenya (ASK) [2014] eKLR**, D.K. Marete J made a strict and holistic interpretation on application of the income tax law on terminal benefits awarded under section 49 of the Employment Act and held as follows:-

***“...Would a decretal amount, in the circumstances be subjected to taxation as of this case? If this be the case, would this be feasible in law? My answer is no. If this were the case, the legislature would have come out clearly and provided for this. It cannot be argued that this was lost to the law maker. His, I suspect was in avoidance of creating confusion by subjecting decrees of court to taxation. This was partly because these are in most cases amorphous amounts and figures that would not necessary be in law deemed income. For example, would an amount of compensation in damages arising out of a fatal accident claim be deemed income accruing to the aggrieved or injured property? I guess not.***

***...I would also wish to walk a little longer on the issue of taxation of decretal sums especially after loss of employer/employee relationships as occasioned by termination or other cessation of employment. An agency for collection of tax ordinarily and customarily exists while this relationship subsists. It does not continue henceforth. Secondly, by virtue of their amorphous and hybrid nature, the law on income tax opts to stay clear of this to obviate a counter-productive system that breeds confusion and chaos in industrial relations.***

***Again, how would an employer validate action of taxation on amounts accruing from sources other than income in accordance with the law? Is a decretal amount income? To me, income in an employer/employee relationship would only arise where an employer is remunerating an employee for services rendered in the course of employment. It is an issue of capital directly compensating labour. Any amounts accruing from break-ups of this relationship would never be deemed income, even for purposes of taxation. These are the spoils of a break-up. Indeed, compensation for a bad and more often than not sour ending inter parties. This would not, in the least sense of the word be called a deemed income. It is not income in terms of the Income Tax Act. It would not be taxable. And even if it was, the agency relationship between the parties would have collapsed thereby leaving the taxman to go directly to the person of the former employee for purposes of tax collection.***

***...It should be noted that the wages or salary here does not make the amount a wage or salary. The terms wages and salary are only a specified legal parameter for assessment of damages for unjustified and unfair dismissal or termination of employment. It would be foolhardy to deem the end product wages or salary and commit the same to taxation. Moreover, as earlier observed, the employer has lost his agency/principal relationship with the employee from the onset of termination of employment and therefore is estopped from such exercises.***

***The offshoot of my finding on this subject is that there is no known law that subjects decrees of court to taxation. The Income Tax Act aforesaid is silent on this and we should so far trend that path. If the tax man wishes to rethink his position on this, we shall not disallow the same. This validates and legitimizes the action of attachment of the respondent/applicant's motor vehicle in respect of unpaid balances of the decretal amount.***

***I therefore find that the claimant was at all times entitled to an amount of Ksh.4,458,654.00 being the decretal amount agreed on inter parties by a consent judgement dated 4th April, 2013. Any amounts of deductions from amount owing to the claimant should have been factored and agreed on at this stage, and not any other. In any event, if this was deemed an oversight on the part of the respondent, the same should have been suggested, proffered and negotiated as was the case of the earlier consent order. Arbitrary and self sanitized actions by one party like in the present case are not sustainable or acceptable.”***

26. The Claimant/Respondent submits that consequently and in light of the above specific holding, they urge that the Respondent's Notice of Motion dated 13/06/2019 be dismissed with costs.

27. I have examined all the averments and submissions of both Parties. What is evident is that the Parties argument is whether or not tax is payable on a Court's decretal amount especially in relation to an employee's terminal benefits.

28. Section 49(2) of Employment Act 2007 states as follows:-

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

29. Other than this provision of law, In **Kioko Joseph Kilinda** (supra), it was held that under Section 49 of Employment Act, the employer is obligated to deduct statutory deductions for all payments made.

30. I agree with the above proposition entirety and find that the Respondent herein was mandated by law to deduct tax and remit to Kenya Revenue Authority for any payments due to the Claimant. Whether the Respondent has made the remittance or not that is his problem with the Kenya Revenue Authority so long as the Respondent remits to the Claimant a Certificate of Tax remittance commonly called P9.

31. In the circumstances, I find this application has merit and I allow stay of execution pending reconciliation of the decretal sum paid against tax remittances to be done by the Deputy Registrar. There will be no order of costs.

Dated and delivered in open Court this **2<sup>nd</sup> day of December, 2019.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

No appearance for Parties.