



**REPUBLIC OF KENYA**

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

**CAUSE NO 2134 OF 2015**

**ELECTINE MERINA BWIRE.....CLAIMANT/1<sup>ST</sup> RESPONDENT**

**R. NANGALAMA T/A HERBOS AUCTIONEERS.....2<sup>ND</sup> RESPONDENT**

**VERSUS**

**KRYSTALLINE SALT LIMITED.....RESPONDENT/APPLICANT**

**RULING**

1. The Applicant's application brought by Notice of Motion under certificate or urgency dated 2<sup>nd</sup> October 2017 seeks the following orders:

- a) A permanent injunction restraining the Claimant and the 2<sup>nd</sup> Respondent, their servants or agents from executing the warrants of attachment issued to the 2<sup>nd</sup> Respondent against the Applicant;
- b) That the matter be marked as settled;
- c) That the 1<sup>st</sup> and 2<sup>nd</sup> Respondents pay the costs of the application.

2. The application, which is supported by an affidavit sworn by Anthony Kilonzo, Advocate is based on the following grounds:

- a) That the parties herein agreed to settle the matter out of court which agreement culminated to a consent filed on 4<sup>th</sup> July 2017;
- b) That on 16<sup>th</sup> August 2017, the Applicant forwarded to the Claimant's Advocates a cheque for Kshs. 332, 622 being full settlement of the consent amount less statutory deductions as provided for under Section 49(2) of the Employment Act;
- c) That on 17<sup>th</sup> August 2017, the Claimant's Advocates wrote to the Applicant's Advocates inquiring why the amount paid was less by Kshs.121,125;
- d) That the Applicant's Advocates responded by letter dated 18<sup>th</sup> August 2017, explaining why the amount paid was less by Kshs. 121,125;
- e) That on 22<sup>nd</sup> August 2017, the Claimant's Advocates wrote to the Applicant's Advocates demanding payment of the disputed Kshs.121,125 and alleging that the consent agreement made no provision for statutory deductions;

f) That vide its letter dated 22<sup>nd</sup> August 2017, the Applicant's Advocates forwarded to the Claimant's Advocates proof of payment of Kshs. 121,

125 to Kenya Revenue Authority, being remittance of statutory deductions payable from the consent amount;

g) That on 29<sup>th</sup> September 2017, the 2<sup>nd</sup> Respondent obtained warrants of attachment against the Applicant for recovery of Kshs. 456,197;

h) That on the same day, the Claimant's Advocates wrote to the 2<sup>nd</sup> Respondent notifying him that Kshs. 332,622 had already been paid by the Applicant and that the outstanding balance was Kshs. 123,575;

i) That the 2<sup>nd</sup> Respondent served the Applicant with a seven day proclamation notice on 30<sup>th</sup> September 2017.

3. In a replying affidavit sworn by the Claimant/1<sup>st</sup> Respondent on 16<sup>th</sup> October 2017, she depones that she instructed her Advocates to record a consent towards settlement of her claim. She adds that in giving her Advocates the go ahead to settle the matter, there was no mention of statutory deductions.

4. This application turns on the question whether the amount agreed upon by consent, as payable to the Claimant/1<sup>st</sup> Respondent was subject to statutory deductions. The consent dated 28<sup>th</sup> June 2017 and filed in court on 4<sup>th</sup> July 2017 states as follows:

*“By Consent of both parties, Judgment be and is hereby entered in favour of the Claimant in full and final settlement of this suit on the following terms and conditions:*

*1. Severance pay at Thirteen (13) years worked of Kshs. 282,097.00*

*2. Three (3) months compensation of Kshs. 112,839.00*

*3. Balance of amount owing of Kshs. 8,811.00*

*4. Costs of the suit of Kshs. 50,000.00*

*5. Payment of the decretal sums and costs to be paid within 45 days from the date of this consent.”*

5. The Claimant/1<sup>st</sup> Respondent contends that statutory deductions were not part of the aforesaid consent. The Applicant on other hand maintains that it was legally bound to deduct and remit statutory tax to the Kenya Revenue Authority.

6. Section 49 of the Employment Act, 2007 provides for remedies for wrongful dismissal and unfair termination. Subsection 2 thereof provides as follows:

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

7. The consent executed by Counsel for the parties on 28<sup>th</sup> June 2017 and filed in court on 4<sup>th</sup> July 2017 sets out specific payments under Section 49 of the Employment Act. It is clear therefore that these payments were subject to statutory deductions which the Applicant was obliged to make and remit to the relevant authority.

8. The Court was referred to the decision in *Javan Were Mbango v H. Young & Co (EA) Ltd [2012] eKLR* where it was held that an employer is entitled to make a deduction of any amount authorized by

any written law for the time being in force. This is the correct legal position and having received explanation by the Applicant's Advocates, the Respondents had no reason to proceed with execution.

9. The Applicant's application therefore succeeds and is allowed with costs to be paid by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

10. Orders accordingly.

**DATED AND SIGNED AT NAIROBI THIS 4<sup>TH</sup> DAY OF JANUARY 2018**

**LINNET NDOLO**

**JUDGE**

**DELIVERED IN OPEN COURT AT NAIROBI THIS 19<sup>TH</sup> DAY OF JANUARY 2018**

**MAUREEN ONYANGO**

**JUDGE**

Appearance:

Miss Kanyiri for the Applicant

Mr. Owino for the Respondents