



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 357 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

CAROLLY ONYANGO.....1ST CLAIMANT
ALBERT ISAGI.....2ND CLAIMANT
ELIUD MOKWERI.....3RD CLAIMANT
DENIS KINUA MWANGI.....4TH CLAIMANT
CARENE N. SIMIYU.....5TH CLAIMANT
OLIVER IYAYA SIMWELO.....6TH CLAIMANT
DAIS OMUSOLO.....7TH CLAIMANT
KENNETH BOLO.....8TH CLAIMANT
WYCLIFFE M. MORARI.....9TH CLAIMANT
CHRISTINE CHEMUK.....10TH CLAIMANT
ALPHOSE OSSORETH.....11TH CLAIMANT
AMBROSE KOSGEY.....12TH CLAIMANT
BEN ODONDI OMONDI.....13TH CLAIMANT
RAY ODUOR.....14TH CLAIMANT
RISPER JEPKOECH MASSAI.....15TH CLAIMANT
OPAR BENARD ODHIAMBO.....16TH CLAIMANT
ERICK ODHIAMBO OMUNDI.....17TH CLAIMANT
ERICK OCHIENG OMOLO.....18TH CLAIMANT
FRED OMBUI.....19TH CLAIMANT
STEPHEN OMUGU.....20TH CLAIMANT

EDWARD NYAKINYA.....21ST CLAIMANT
PHILIP JAMES MWANGALE.....22ND CLAIMANT
EZEKIAH OMOONO.....23RD CLAIMANT
GEORGE OSANO.....24TH CLAIMANT
JOSELINE MUYANGU.....25TH CLAIMANT
FRED ASHIBONDO.....26TH CLAIMANT
GEORGE WANJALA.....27TH CLAIMANT
PAUL WAKOLI.....28TH CLAIMANT
EVERLINE OMOLO.....29TH CLAIMANT
IMELLIA ACHIENG.....30TH CLAIMANT

VERSUS

JIANGXI ZHONGMEI ENGINEERING

CONSTRUCTION LIMITED.....RESPONDENT

JUDGMENT

The claim herein is filed by the 30 claimants against the respondent by claim dated 30th December and filed on 31st December 2014 seeking refund of Kshs.1,888,653,52/= on account of PAY AS YOU EARN (PAYE), Income Tax deducted from payments due to them from the respondent.

The respondent filed a memorandum of defence on 23rd February 2015. In the brief defence, the respondent denies owing the claimants the sums claimed on account of each one of them and states that the PAYE deductions were legal and the money was remitted to Kenya Revenue Authority (KRA). In the bundle of documents filed together with the memorandum of defence, the respondent has attached Kenya Revenue Authority P.A.Y.E credit slips in respect of all deductions made from money paid to the claimants.

When the case came up for hearing on 14th July 2016, it was with consent of the parties referred to the County Labour Officer, Trans Nzoia County, together with several other files involving the respondent for investigation. The report of the County labour Officer was filed in court on 14th September 2016. The court thereafter directed the parties to file submissions in respect of the claim and the report from the Labour Officer on the basis of which this judgment has been prepared.

Determination

I have considered the pleadings together with documents annexed thereto and the submission of the claimants. The respondent did not file submissions following withdrawal of their advocates, Barongo Ombasa and Company Advocates.

The facts of the case are succinctly captured in the report of the County Labour Officer as reproduced below: -

“That the 30 claimants were not bona fide employees of Jiangxi Zhongomei Engineering Construction Company Limited. These employees belonged to Elgis International Kenya and were seconded to Jiangxi Zhongomei to carry out various duties including inspecting, laboratory technical and surveying. In reality, they were not working for Jiangxi Zhongomei Engineering Construction Company Limited.

The normal daily working hours for these Egis International employees were (8) hours per day but then it was agreed between the management of Egis International and Jiangxi Zhongomei Engineering Company Limited that when these employees work over and above the normal 8 hours, then any excess hours worked shall be paid by Jiangxi Zhongomei Engineering Company Limited as overtime.

This overtime being an income to the claimants and an expense to Jiangxi Zhongomei was subject to taxation like any other earnings. Therefore, the company deducted Pay As You Earn (P.A.Y.E) from the claimants as required by the law.

The company has confirmed to have remitted all deducted tax including deductions from the claimants to Kenya Revenue Authority therefore if there is any doubt then the claimants should contact the Authority.

However, if there is any doubt by the claimants on the amount deducted and never remitted to the Authority, then before lodging a claim for refund, they should first confirm with the Authority whether the deductions were never remitted. But as at now, there is no indication that the money was not remitted to Kenya Revenue Authority.”

From the report and the pleadings, the only issue for determination is whether the respondent is liable to refund monies deducted from payments due to the claimants and remitted to KRKRKKKKKA on account of P.A.Y.E.

Both in the claim and the report of the County Labour Officer, there is agreement that the claimants were not employees of the respondent. They were employed by Egis International, which was contracted by the respondent to provide certain services as set out in the report of the Labour Officer. The claimants worked for the respondent beyond normal working hours and it is from payments made for the said extra hours that the respondent recovered P.A.Y.E.

Section 19(1) (f) of the Employment Act allows an employer to deduct from wages of an employee “*any amount the deduction of which is authorized by any written law for the time being in force.*” Section 19(4) provides that an employer who deducts an amount from an employee’s remuneration shall pay the amount so deducted in accordance with the time period and other requirements specified in the law pursuant to which the deduction is made.

In Cause No. 748 of 2011 (NAIROBI) Andrew Mukite Saisi -vs- Tracker Group of Companies; 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. The Court does not have any reason to depart from this position. The Claimant herein has the obligation to pay income tax assessed on his global Court Award.”

Section 37 of the Income Tax Act imposes a duty on the employer to deduct income tax from the emoluments of an employee and imposes a penalty on the employer for failure to do so. An employer who makes recovery of income tax from remuneration of an employee and remits the same to the Kenya Revenue Authority is therefore discharged from liability for such payment to the employee.

If the employee has any claims over such payments, the only place to make such complaints is to KRA as provided in Section 39(1) of the Income Tax Act, which provides as follows –

Section 39 (1) of Income Tax Act

An amount of import duty which has been paid under section 117 of the Customs and Excise Act in respect of capital goods, qualifying for wear and tear deductions under Part II of the Second Schedule (excluding passenger cars) imported with the prior approval of the Minister, for private investment in a project the cost of which is not less than 5 million United States dollars within a period of two years from the date of first investment expenditure, if the Minister is satisfied that the investment is capable of generating net economic benefits to Kenya, shall be set off for the purposes of collection against the tax charged on the income of the person who incurred the investment expenditure:

Provided that -

(i) the set-off of import duty shall only be made against income tax payable on the income of the person who incurred the investment expenditure arising from the investment and other activities related or similar to the investment expenditure arising from the investment in the case of an extension or replacement of such capital goods in so far as the said capital goods and the new investment have been commissioned and become productive during the year; and

(ii) the capital goods are used wholly and exclusively in the production of the taxable income; and

(iii) the private investment is a project other than an official aid funded project or a project funded directly or indirectly by the Government; and

(iv) the import duty to be set-off does not form part of the cost of the capital goods for the purposes of wear and tear deductions;

(v) the amount of import duty to be set off shall not be treated as a withholding, advance or instalment tax or as a prepayment of that person's final tax liability;

(vi) the amount of the import duty to be set off shall be applied to reduce the person's final tax liability before taking into account any withholding, instalment or advance tax already paid in respect of that year of income;

(vii) the remainder of the import duty after having been applied in accordance with paragraph (vi) of this proviso shall be applied to reduce the person's final tax liability for the following and subsequent years of income before taking into account any withholding, instalment or advance tax already paid in that year of income;

(viii) the import duty to be set off shall not be refundable except –

(a) to the extent of that amount of duty which has not been offset by the year following the year the investment is first put into use or any subsequent year; and

(b) up to the amount of the duty that would have been offset if the investor had not claimed the investment deduction on any investment.

Conclusion

Recovery of income tax from remuneration payable to employees is a legal duty of an employer. The claimants have not denied that the PAYE collected from them was sent to KRA. The foregoing being the case, the employer is discharged from liability over the said funds once the deducted money is remitted to KRA and the only claim that the claimants can make is to KRA and not the respondent.

For these reasons, the claim must fail and it is accordingly dismissed. Each party shall bear its costs.

DATED AND SIGNED AT NAIROBI ON THIS 13TH DAY OF APRIL 2018

MAUREEN ONYANGO

JUDGE

DATED AND DELIVERED AT KISUMU ON THIS 10TH DAY OF MAY 2018

MATHEWS NDERI NDUMA

JUDGE