



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 143 OF 2013

(Before Hon. Lady Justice Maureen Onyango)

JULIUS NYAROTHO.....CLAIMANT

VERSUS

NZOIA SUGAR COMPANY LIMITED.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

RULING

Before me for determination is the Respondent's application dated 14th July 2017 seeking Orders of review or setting aside of the order of 29th June 2017, marking the matter as settled.

The application is based on the grounds set out on the face of the Notice of Motion *inter alia* that:

- a. There is a balance on the decretal sum due and owing to the Claimant in excess of Kshs. 750,548.15/= with interest accruing.
- b. The matter came up for mention on 29th June 2017, to confirm further payment of the balance had been made, but counsel for the Respondent irregularly misled the Court as to the true position on payments.
- c. Counsel for the claimant one David Masake consulted with the counsel for the Respondent as to the pending payments on the material day but the position was not captured in the proceedings.
- d. It is in the interest of justice that the orders sought be granted as prayed.
- e. Partial payments made to the Claimant did not amount to discharge of the Respondent's obligation to clear the decretal amount.
- f. The Respondents will have their day in Court thus will not be prejudiced if and when the orders are granted.

The application is further supported by an affidavit of David Masake, the Counsel on record for the applicant sworn on 14th July 2017. He deposes that there was partial payment on the part of the Respondent to clear the decretal sum leaving a balance in the sum of Kshs. 750,548.15 which position was Made clear to the counsel for the Respondent vide a letter dated 2.9.2016 attached to the affidavit and marked as DM-1.

It is further contended that the Respondent tried to avoid payment of the balance through a claim for taxation on the decree. That counsel agreed with the Respondents' counsel that they would interrogate the matter further which position did not reflect in the proceedings.

That there being a pending payment on the matter it does not suffice to mark it as settled. Counsel prays for the application to be allowed in the interest of justice.

Response

The Respondents filed grounds of opposition to the application citing the grounds that the application is an abuse of court process, is vexatious and is intended to mislead the Court. Counsel also cited the ground that the application is misconceived and ought to be struck out.

Submissions

The Application was canvassed orally on 4th July 2017. On behalf of the Applicants, it was submitted that the decretal amount inclusive of interest was Kshs. 2,332,800 but the Respondent only remitted a sum of Kshs. 1,691,827.80. In the Claimant's view the decree was not fully satisfied and the Respondent's argument of taxation does not suffice.

It is submitted on behalf of the Claimant that it is incumbent upon the Respondent to release the balance of the decretal amount upon which the matter can be marked as settled.

On behalf of the Respondents Ms. Aliongo submitted that the Application is an afterthought and an abuse of Court process as there is a discharge by the Claimant who was explained to how the figure paid out to him was arrived at. That the Claimant was awarded salary which was subjected to PAYE. She cited the case of **Kioko Joseph vs Bamburi Cement Limited (2016) eKLR** where Rika J held that it was not necessary to state in the judgment that the award is subject to statutory deductions. She urged the Court to dismiss the application.

Determination

I have considered the application and grounds of opposition filed by the respondents. I have further considered the oral submissions by counsel for the parties. Judgment in this case was delivered on 17th September 2014. The claimant was awarded the sum of Kshs.2,160,000. Costs were taxed at Kshs.152,725.35 by consent of the parties.

It is not in dispute that the respondent thereafter paid the sum of Kshs.1,691,827.20 on 2nd October 2015. On 21st January 2016 the claimant brought an application dated 18th January 2016 seeking orders as follows –

- 1) The accounting officer at the Office of the President do show cause why he should not be held in contempt.
- 2) The accounting officer at the Office of the President do pay and satisfy in full the decree of this court dated 17th September 2014 plus costs and interest to date.
- 3) The accounting officer at the office of the President be committed to civil jail until the payment and satisfaction of the decree, costs and interest in full.
- 4) That the costs of this application be borne by the defendant.

The case was marked as settled on 29th June 2017. It is this settlement that the claimant wishes to review or set aside.

It is admitted by the claimant that a sum of Kshs.1,691,287.20 was paid on 18th March 2015. The respondent contends that this reduced the decretal sum of Kshs.2,442,375.35 leaving a balance of Kshs.750,548.15.

It is however the respondent's contention that it has settled the entire decretal sum as follows –

| | |
|------------------|--------------|
| Principal amount | 2,160,000.00 |
|------------------|--------------|

Interest @ 12% with effect from 17th September 2015

| | |
|------------------------------|------------|
| to 31 st May 2015 | 172,800.00 |
|------------------------------|------------|

(2,160,000 x 12/100 x 8/12)

| | |
|--|--------------|
| | 2,332,800.00 |
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Tax Thereon (PAYE)

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| Kshs.121,968 x 10% | 12,196.80 |
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| Kshs.114,912 x 15% | 17,236.80 |
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| Kshs.114,912 x 20% | 22,984.40 |
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| Kshs.114,912 x 25% | 28,728.00 |
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(2,332,800 – 446,704) x 30% = 559,828.80 (640,972.80)

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|--------------|---------------------|
| TOTAL | 1,691,827.80 |
|--------------|---------------------|

Section 49(2) of the Employment Act provides that “*Any payments made by the employer under this section shall be subject to statutory deductions.*”

In the case of **KIOKO JOSEPH [suing as the representative of the estate of JOSEPH KILINDA] -V- BAMBURI CEMENT LIMITED [2016] eKLR**, Rika J. cited with approval and followed the decision in Cause Number 748 of 2011 (Nairobi) between **ANDREW MUKITE SAISI -V- 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 held that the claimant had an obligation to pay tax assessed on the global award.

In the present case both the claimant and his counsel accepted the tabulation of tax and signed a discharge voucher for the sum of Kshs.1,691,827.20/=.

Findings

I find that the claimant accepted the decretal sum offered by the respondent

and signed a discharge voucher to that effect to facilitate the payment.

I further find that the respondent was under an obligation to deduct and remit the tax under Section 49(2) of the Employment Act and Section 37 of the Income Tax Act.

I find that the respondent paid the full decretal sum and does not owe any amount to the claimant.

The application here is thus without merit and is dismissed with no orders for costs.

DATED AND SIGNED AT NAIROBI ON THIS 21ST DAY OF JUNE 2018

MAUREEN ONYANGO

JUDGE

DATED AND DELIVERED AT KISUMU ON THIS 12TH DAY OF JULY 2018

MATHEWS NDERI NDUMA

JUDGE