



**REPUBLIC OF KENYA**  
**EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 1094 OF 2011**

**JOSEPH MURABU MWERO..... CLAIMANT**

*VERSUS*

**K-REP BANK LTD..... RESPONDENT**

Mr. Wanjohi for Respondent/Applicant

M/s. Weru for Claimant/Respondent

**RULING**

1. The applicant seeks clarification of the judgment of this court delivered on 9<sup>th</sup> December 2015 in which the court awarded the Claimant a sum of Kshs. 533,500/= with interest at court rates from date of filing suit till payment in full.

2. The clarification sought is whether or not the judgment sum is subject to deduction of a sum of Kshs.486,461.09/= in respect of loan given by employer to the employee.

3. The sought deduction is in terms of **section 19(1)(h)** of the Employment Act which reads:

**“19(1) Notwithstanding section 17(1) an employer may deduct from the wages of his employee**

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**(h) an amount due and payable by the employee and in accordance with the terms of an agreement in writing by way of repayment or not repayment of a loan of money made to him by that employer, not exceeding fifty per cent of the wages payable to that employee after the deduction of all such other amount as may be due from him under its section,”**

4. Secondly, the applicant made deductions to the decretal sum in respect of pay as you earn (PAYE) in terms of **section 49(2)** of the Employment Act and in line with the decision of the court in **Hosea Njeru Kagundu vs. Kenya Union Commercial Food and Allied Workers [2012] eKLR** in which case the court ruled that compensation under **section 49(1)(cc)** was subject to taxation under **section 49(2)**.

5. The applicant paid the balance of Kshs. 92,894.60 to the Claimant on 12<sup>th</sup> February 2016. The applicant therefore seeks the court to stay execution or further execution of the warrant of attachment filed on 18<sup>th</sup> November 2016 by Mbusere Auctioneers or any other instructed firm of Auctioneers by counsel for the Claimants.

6. The application is opposed vide grounds of opposition filed on 7<sup>th</sup> December 2016 in which Claimant/Respondent state *inter alia* that:

- 1) The application is a gross abuse of the process of the court, frivolous and vexatious, ex facie incompetent, fatally defective and inadmissible.
- 2) The applicant has not provided any proof that it has remitted any taxes to the Kenya Revenue authority on behalf of the Claimant.
- 3) Section 19 of the Employment Act does not apply in circumstances of this case as that section only relates to **wages** payable monthly and not court awards/judgments relating to damages.
- 4) The Applicant has not provided any agreement referred to in section 19(h) of the Employment Act entitling it to deduct any amount of money due to the Applicant from the Claimant,
- 5) In any case, any deduction under section 19(h) of the Employment Act cannot exceed fifty per cent of the wages payable.
- 6) The Applicant did not file any counterclaim in order to afford the Claimant an opportunity to defend the allegations now being raised i.e. that the Claimant owed a loan. Therefore any purported deduction is an act of bad faith.

#### **Determination**

7. With respect to deductions under **section 19(I)(h)** of the Employment Act, the section applies to deductions from the wages of an employee in the course of normal payment while the employment persists.

8. The section is not applicable to proceedings of judgment after the employment relationship had broken down and the employee had sued the employer in court.

9. The employer in the circumstances may only recover any purported outstanding loan upon filing a counterclaim to the suit and the court has made a determination as to whether the counterclaim is due and owing or not.

10. The respondent /applicant did not file any counterclaim and therefore cannot deduct from a judgment sum an alleged loan payment.

11. With regard to statutory deductions, including PAYE in terms of **section 19(2)** of the Employment Act, the employer is entitled to deduct the tax and remit it to the Revenue Authority and provide proof of remittance to the Claimant. The Respondent/applicant has not provided evidence of such remittance and ought to do so to avoid attachment in respect of the monies payable to the Commissioner of Taxes.

12. Accordingly, the Respondent/applicant has not satisfied the court that it is entitled to an injunction to stop execution of the warrants of attachment issued on 18<sup>th</sup> November 2016 to Mbusera Auctioneers and the application is dismissed. However, the execution should exclude the amount of PAYE payable to the Commissioner of Taxes.

**Dated and Delivered at Nairobi this 17<sup>th</sup> day of May 2017**

**MATHEWS NDERI NDUMA**

**PRINCIPAL JUDGE**