

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA
CAUSE NUMBER 802 OF 2015

BETWEEN

ESTHER WAIRIMU KIMANI.....CLAIMANT

VERSUS

MILBROOK GARMENT.....RESPONDENT

RULING

1. The Court entered Judgment in favour of the Claimant for the sum of Kshs. 89,413, on 13th March 2017. The sum was based on an agreement reached between the Parties, when the matter went for conciliation before the County Labour Office, prior to coming to Court.

2. Parties agreed the Respondent pays to the Claimant a total sum of Kshs. 389,413 at the Labour Office. The Respondent paid Kshs. 300,000, which resulted in the Claimant filing this Claim, for the difference of Kshs. 89,413.

3. Judgment in her favour was obtained in default proceedings, the Respondent having failed to respond to the Claim.

4. When the Claimant applied for execution, the Respondent filed an Application dated 27th March 2017, seeking to have Judgment set aside or varied. The Application is based on the Affidavit of Respondent's Managing Partner, Vasant Mohanlal Makwana, sworn on 27th March 2017. The bottom line in the Application is that the Respondent paid the total sum agreed at conciliation, at Kshs. 389,413, less PAYE tax of Kshs. 72,996. The Respondent deposited the last installment of Kshs. 16,417 with the Labour Office, which was returned to the Respondent unpaid, after the Claimant rejected the sum, insisting to be paid the entire sum, including PAYE tax. The sum she successfully obtained in the *ex parte* Judgment, includes PAYE tax.

5. Parties agreed to have the Application considered and determined through Submissions. The Respondent filed its Submissions on 18th September 2015. The Claimant does not seem to have filed her Submissions.

The Court Finds:-

6. In this Court's Cause *Number 308 of 2013 between Kioko Joseph [suing as the Representative of the Estate of Joseph Kilinda] v. Bamburi Cement [2016] e-KLR* and *Industrial Court Cause Number 748 of 2011 between Andrew Mukite Saisi v. Tracker Group of Companies [unreported]*, it was held that Section 49 of the Employment Act 2007, makes any payments made by the Employer to the Employee, subject to PAYE tax. Section 37 of the Income Tax, 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. This position has since been approved in a decision of the Court of Appeal of Kenya [arising from Kioko Joseph], whose citation the Court has not been able to obtain at the time of preparing this Ruling.

7. The Respondent in the present dispute has availed nothing to the Court, showing it paid Kshs. 72, 996 as PAYE tax. There is no certificate of payment from KRA exhibited in the Application. Whereas it is the obligation of Employers to deduct PAYE tax from all lump sum payments made to Employees, and pay to KRA under the Income Tax Act, there are situations where Employers assume tax obligations, and agree with their departing Employees to shoulder any tax obligations due. This is not unusual in cases of redundancy, or cases where an Employee has for instance, retired on medical grounds, such was the case with the Claimant herein. The Employer is free to assume any tax obligation due from the Employee.

8. In the Agreement between the Parties, signed before the Labour Office, the Respondent undertook to pay the Claimant gratuity and pending leave, totaled Kshs. 389,413. The Parties even gave a schedule of payment, at Kshs. 60,000 every month from October 2013 to February 2014. Notably, they agreed the final installment would be Kshs. 89,413. This is the exact amount which the Claimant sought, and obtained from the Court. It is clearly stated the total would be Kshs. 389,413. Why would the Respondent bring in other stories midstream? The inference the Court draws from this agreement is that the whole amount of Kshs. 389,413 would be received by the Claimant. The Respondent would be deemed to have assumed tax obligation. Schedule of payment was specific on the timelines and amounts to be paid. The Parties left nothing to chance in their agreement at conciliation. The Respondent should not be allowed to move away from the obligations it freely accepted. The agreement is in clear terms. It must be enforced as it is. Lastly the Court has not been persuaded that there was any default in service of the Court Processes leading to the Judgment on record. The Statement of Claim and Summons were served on the Respondent, receipt acknowledged and stamped. There is no reason for the Court to set aside or vary its Judgment. Parties must respect their agreement made before the Labour Office. IT IS ORDERED:-

a) The Application dated 27th March 2017 is rejected.

b) Costs to the Claimant.

Dated and delivered at Mombasa this 9th day of November 2017

James Rika

Judge