



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT KISUMU
CAUSE NO 345 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

ELLY OUMA HONGOCLAIMANT

-Versus-

KENYA NATIONAL UNION OF TEACHERS

- KISUMU EAST BRANCH1ST RESPONDENT

KENYA NATIONAL UNION OF TEACHERS2ND RESPONDENT

PAUL AGALO ROCHE 3RD RESPONDENT

JOSHUA AGALO 4TH RESPONDENT

PETER OTIENDE 5TH RESPONDENT

KENYA COMMERCIAL BANK LTD(KISUMU BRANCH)..... GANISHEE

RULING

Before me for determination are 2 applications. The first is a notice of motion filed by the 1st Respondent on 15th May 2015 seeking the following orders;

1. *Owing to the urgency expressed in the certificate of urgency, service of the same be dispensed within the first instance and the same be heard ex parte in the first instance.*
2. *Pending the hearing and determination of this application inter partes, a temporary/interim order of stay of execution of the decree herein by way of garnishee or in any other way/mode.*
3. *The garnishee order absolute given on 27th April, 2015 and issued on 28th April 2015 by the court be recalled and set aside and any costs occasioned by the proclamation be met by the Plaintiff.*
4. *An order be issued for the taking of accounts for purposes of determining the correct and just amount due on the decree issued by the court (if any) before any execution can issue, if at all.*

5. *That the costs of this application be borne by the Claimant/Respondent.*

The second is Notice of Motion dated 20th August, 2015 by the claimant/Applicant seeking the following orders;

1. **THAT** this Honourable Court do issue a Garnishee Order Nisi attaching the Kenya Union of Teachers, Kisumu, East Branch, Account Number 11609 Society called KNUT Kisumu East Branch Account, maintained at Kisumu Teachers Savings and Credit Co-operative Society, for payment of Kshs.5785,635.30/- to the Claimant's Account No. 1126221147 held at Kenya Commercial Bank Limited, Kisumu Branch, pending the hearing and determination of this application.

2. **THAT** the Honourable Court be issue a Garnishee Order absolute attaching Kshs.578,635.30/- together with costs from the Kenya Union Of Teachers, Kisumu, East Branch account number 11609, called KNUT Kisumu East Branch Account, held at Kisumu Teachers Savings and Credit Co-operative Society, for payment to the Claimant's Account No.1126221147, held at Kenya Commercial Bank Limited, Kisumu Branch Account.

3. **THAT** this Honourable Court to issue such Orders as it may deem fit and just to meet the ends of justice.

4. **THAT** cost of the Application be met by the 1st Respondent.

Both applications were filed under certificate of urgency. Parties thereafter agreed that the applications be heard together by way of written submissions.

The background of the applications is that the Claimant filed two suits against the Respondents under cause No. 791(N) of 2009 and No.897 of 2011 which were eventually settled by consent in the following terms:

- (i) The 1st Respondent to pay the Claimant Kshs.3,016,149 in full and final settlement of the Claimant's claim.
- (ii) The said amount to be liquidated in monthly instalments of Kshs.100,000/- with effect from 1st March 2012 and thereafter, on the 1st day of each subsequent month until payment in full.
- (iii) In default of any one instalment, balance as at date of default date become due and claimant to be at liberty to execute decree for the same by way of garnishee proceedings.
- (v) Costs incurred by garnishee be paid by the 1st Respondent.

According to the 1st Respondent's application of 15th May, 2015 the 1st Respondent has settled the entire decretal amount as follows:-

Paid to Claimant	Shs.2,400,000
Tax paid to KRA	Shs. 756,000
Grand Total	Shs.3,156,000
Excess payment	Shs. 139,000
Paid pursuant to garnishee Order	Shs. 37,000

The 1st Respondent therefore contends that it has overpaid the Claimant by Shs.176,851. It is on this basis that it seeks the orders in its application of 15th May 2015.

The Claimant on the other hand contends that the 1st Respondent has only paid Shs.2,400,000 leaving a balance of Shs.616,149 for which he sought garnishee order. The bank was however only able to transfer shs.37,513.70 from 1st Respondents account No.1110950004 at Kenya Commercial Bank Limited, Kisumu Branches leaving a balance of Shs.578,635.30 for which it seeks the orders in its application dated 20th August 2015.

The issue for determination is therefore whether or not the 1st Respondent has paid the full decretal amount taking into account cash paid to the Claimant and remittances made to KRA. A further issue is whether the 1st Respondent had authority to make the payments to KRA and whether KRA actually received the said sum. The final issue is whether the Claimant is entitled to garnishee the 1st Respondent's account No. 11609 held at Kisumu Teachers Savings and Credit Co-operative Society for the sum of shs.578,635.30.

Both parties agree that the 1st Respondent paid Shs.2,400,000 to the Claimant by monthly instalments of Shs.100,000 from February 2012 to January 2014.

There is also no dispute on Shs.37,513.70 blocked from the 1st Respondent's account at KCB pursuant to a garnishee order.

On 7th March 2014 the 1st Respondent wrote to the Claimant and his advocate advising them about an official visit by personnel from Kenya Revenue Authority who instructed the 1st Respondent to remit 30% of the "court award" to the authority. The letter states that the 1st Respondent was waiting for official communication from KRA and in the meantime it was suspending payment of further instalments to the Claimant. No communication was sent to the Claimant or his advocates thereafter relating to the issue.

The 1st Respondent has attached a letter from a Mr. J. M. Orioro, Manager Domestic Taxes - Kisumu. The letter confirms receipt of Shs.756,000 from the terminal benefits paid to Elly Ouma Hongo, the Claimant. There is however no tabulation of how the amount was arrived at. There is also no official receipt from Kenya Revenue Authority. The letter is not copied to the Claimant.

A letter is not a confirmation of receipt of by KRA. There is also no mention in the letter of the manner in which the money was remitted.

The Claimant contends that the amount agreed on in the consent recorded by the parties was net of taxes as it was based on his net salary paid after tax.

According to the agreement reached between the Claimant and the Respondent as set out in the minutes of the meeting held on 4th March 2012 annexed as Exhibit J. 0-4 of the affidavit of Joshua Ogalo in support of the 1st Respondent's application, the payment was in respect of the following:-

1. 1 Month's Notice PayKshs. 74,712.00
2. Unpaid LeaveKshs. 4,350.00
3. Unpaid Salary IncrementKshs. 250,000.00
4. Lumpsum PaymentKshs. 542,777.00
5. Severance PayKshs. 647,955.00
6. Award in I.C No.791/09.....Kshs.1,196,336.00
7. Terminal Benefits ArrearsKshs. 300,000.00

TotalKshs.3,016,149.00

Not all the items on the table attract tax at a straight 30% rate. Some of the items such as severance pay and lump sum payment is taxed differently. It is not clear whether item 6 (Award in I.C No.791/09) is taxable.

Bullet one (1) of the minutes referred to above reads as follows:-

"The meeting resolved to draw a cheque of Kshs.100,000 (One Hundred Thousand only) on monthly basis in favour of Mr. Elly Ouma Hongo w.e.f. 1st March 2012 until the whole amount is cleared."

The court order as already set out above states that the 1st Respondent will pay the instalments until payment in full and in default of any one instalment execution shall issue.

There has not been any review of that court order to absolve the 1st Respondent from payment of any single instalment.

The Respondent has cited Article 2(1) and 3(1) of the Constitution with respect to the obligation to respect, defend and uphold the Constitution and Article 210(1) on obligation to pay tax.

The 1st Respondent has also cited section 49(2) of the Employment Act, and sections 2 and 3 also on obligation to pay tax.

The 1st Respondent further relied on the case of Hosea Njeru Kagundu v Kenya Union of Commercial Food & Allied Workers where this court held as follows:-

"For the foregoing reasons the application by the Respondent succeeds. For the avoidance of doubt, I wish to restate that all payments due from the Respondent to the Claimant in respect of the decree herein is subject to statutory deductions including PAYE as provided in section 49 (2) of the Employment Act 2007"

The 1st Respondent further relied on the case of Paul Ngolwa v Telkom Kenya Limited [2014]eKLR in which the court held as follows;

*"As held by **Maureen Onyango J in the case of Hosea Njeru Kagundu Vs Kenya Union of Commercial Food & Allied Workers Union (Industrial Court Cause No.109 of 2010)** employers have a statutory duty to deduct and remit tax derived from employee dues and Article 210 of the Constitution provides that no tax may be waived or varied except as provided by legislation"*

I find the two cases relied upon not relevant to the present case for reasons that the provision of section 49(2) relate to awards under section 49(1) of the Employment Act while what was agreed in the consent that is the subject matter herein do not constitute payments limited to section 49(1) of the Employment Act.

I also do not find the whole amount that is subject to these proceedings to be subject to income tax at 30% as stated by the 1st Respondent. The Employer's Guide to Pay As You Earn in Kenya explains how income tax is to be charged under different heads of payment such as salary notice, gratuity etc. In the present case should there have been advise from KRA it would have reflected the mode of tabulation of income tax on the different heads of payment.

The Respondent was asked several times for proof of payment to KRA, but did not provide any proof. All payments to Governments are receipted. The Respondent can only prove payments of income tax by a receipt obtained from KRA. Again even if there is a receipt, there must be a breakdown compliant with the Employer's Guide. Otherwise any payments made outside the Guidelines would not be chargeable to the terminal benefits of an employee.

The Claimant has in his application stated that the salary paid to him was net of tax. He has annexed a

letter confirming that he was paid shs.74,721 as net salary. He sought copies of payslips which he was not given by the 1st Respondent against the provisions of Section 20 of the Employment Act which requires an employer to issue an employee with an itemised pay statement to an employee.

Having failed to issue the Claimant with an itemised pay statement, it is the responsibility of the 1st Respondent prove that the payments made to the Claimant were not based on net pay after taxation.

For the foregoing reasons, I find that the 1st Respondent has failed to prove that it had paid the Claimant the full amount due under the consent judgement recorded in court by the parties on 16th March, 2012 and the claimant was within his rights to execute the order as stated therein. The only amount that has been paid is Shs.2,437,513.70 leaving a balance of Shs.578,635.30.

The Claimant is entitled to execute the same by way of garnishee proceedings in accordance with the consent agreement recorded by the parties on 16th March, 2012.

The final issue is whether the orders made on 27th April, 2012 and issued on 28th April 2015 should be recalled and set aside. The reason given by the Respondents for setting aside the orders are that the orders were issued on a date set for mention. The Respondents relied on the case of **Omega Enterprises (Kenya) Limited v Kenya Tourist Development Corporation Limited & 2 others [1998] eKLR**, in which the Court of Appeal quoted from several decision and finally delivered itself that an order which was made without a party to be affected being served "**...was illegal, invalid and of no effect and .. as it affected the interests of and without the appellant being given an opportunity to be heard, clearly in breach of the rules of natural justice and attracts ex debito justitiae the right to have it set aside**"

In Floriculture International Limited vs Central Kenya Limited & 3 Others, [1995] eKLR, the Court of Appeal quoted with approval its decision in **Mrs. Rahab Wanjiru Evans vs. Esso Kenya Ltd (Civil Appeal No.13 of 1995)** (unreported) where it held:-

"We have no doubt that where a matter is fixed for mention, as it was in this case, the learned judge had no business determining on that date, the substantive issues in the matter. He can only do so, which was not the case here, if the parties so agree and of course, after having complied with the elementary procedure of hearing what submissions counsel may wish to make on behalf of the parties, which he did not do and moreover, gave no good reasons for adopting such a procedure which is repugnant to the administration of justice."

The Claimant on the other hand submits that the orders of 27th April, 2015 were made by consent of the parties. That on the day the matter was listed as a hearing for the Claimant's garnishee application dated 4th April, 2014 although the Claimant had erroneously served a mention notice, that both parties attended court with Mr. Awele holding brief for Mr. Onsongo.

In view of the findings that I have made above, it is my opinion that this is a moot issue as the subject of the court appearance of 27th April, 2015 has already been compromised. The orders of that day were also granted by consent of the parties.

For the foregoing reasons, I dismiss the Respondents application dated 15th May, 2015 and order that the 1st Respondent pays the Claimant the sum of Shs.578,635.30 being the balance of the decretal sum owed to the Claimant.

I further do hereby issue a garnishee order absolute attaching the Kenya Union of Teachers, Kisumu East Branch Account No.11609 maintained at Kisumu Teachers Savings and Credit Co-operative Savings and Account No.1126231147 held at Kenya Commercial Bank Limited, Kisumu Branch in the total sum of Kshs.578,635.30.

The Respondents shall pay Claimant's costs for both applications.

Ruling dated, signed and delivered this 11th March, 2016

MAUREEN ONYANGO

JUDGE