REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT AT NAIROBI

CAUSE NO. 361(N) OF 2009

FRANCIS OYATSI…….....…….....……CLAIMANT

VERSUS

NZOIA SUGAR COMPANY LIMITED…….....……..……RESPONDENT

RULING

1) When the matter appeared before me on 21st May 2013, the parties agreed to proceed and duly signed a consent to that effect. Mr. Simiyu's application was prior in time and Mr. Oyatsi stated that he would take his Preliminary Objection as part of grounds of opposition.

2) Mr. Simiyu urged the Respondent's Notice of Motion Application of 19th February 2013 which was supported by the Affidavit of Rita Muhongo and the exhibits attached to the said Affidavit. He had also filed written submission dated 20th March 2013 together with a List and bundle of Authorities. He had in addition filed a Replying Affidavit on 18th March 2013 in response to the Claimant's Application of 6th March 2013. His application sought the Stay of execution of this Court's Order of 5th February 2013 pending Appeal. He also sought to have the execution stopped as entire decretal has been paid in full. Notice of Appeal against the Orders of 5th February 2013 has been filed. He sought stay so that his intended Appeal is not rendered nugatory by ensuring the *status quo* is maintained. He submitted that the preconditions for the grant of such orders have been met. Firstly, the Respondent filed the application without delay and secondly has offered security in terms of a bank guarantee. Thirdly, substantial loss would occur because the amount in dispute has already been paid.

3) He submitted that if stay is not granted the Respondent will be required to pay an extra 3.9 million shillings. Having offered security in terms of Bank guarantee, there will be no prejudice suffered by the Claimant. He relied on Civil Appeal case of **Mukuma V. Abuoga (1988) KLR 645**.

4) He also submitted that the entire decretal sum has been paid. He stated that the Respondent paid to the law firm of Shapley & Barret and Company Advocates a sum of Kshs. 10,080,026/- and paid a sum of Kshs.3,978,541/- to the Kenya Revenue Authority being the statutory deductions pursuant to the provision of Section 49(2) of the Employment Act as well as Article 210 of the Constitution of the Republic of Kenya. The evidence of those payments is annexed as exhibit No. 7 in the Affidavit of Rita Muhongo. The total amount paid is Kshs. 14,058,567/-. That is the exactly the amount in the warrants of attachment which were issued by this Court on 16th January 2013 annexed to the application as Exhibit No. 6. He submitted that so far there is no dispute that the law firm received the money or that KRA received the taxes paid. He referred to the case of **Hosea Njeru Kagondu v. Kenya Union of Commercial, Food and Allied Workers [2012] eKLR**.

5) His position is that decree arose out of employer and employee dispute, that being the case this Court

has no option to decide whether the benefits are taxable or not. In this case no evidence of exemption from tax has been availed to enable execution to continue for sum which has been paid to KRA. This issue also arose in the case of **Andrew Mukita Saisi v. Tracker Group of Companies Industrial Cause No. 748 of 2011 (Nairobi)** unreported.

6) The case here is exactly the same here. The Court need not even state what is obvious. Since there is no dispute tax has been paid to KRA, if the Claimant feels that money belongs to him, his recourse lies in pursuing KRA and not executing against the Respondent in this case. If the Court were to rule otherwise it would be unconstitutional and thereby establish a very dangerous precedent.

7) The third point is that Industrial Court dispenses substantial justice as opposed to technical justice. This is pursuant to section 3 and 20 of the Industrial Court Act as well as Rule 24 (5) of the Industrial Court (Procedure) Rules 2010. He conceded that the Respondent has made several efforts by filing a number of applications but at the end of it all, the Respondent decided to pay the decretal sum less tax as it pursues its rights at the Court of Appeal. This Court exercising substantial justice should look at that as the main issue – whether payment has been made or not. Alternatively if the Court decides the Claimant is entitled to exemption or not that is what the Court should determine. If the Court Rules the amount has been paid, then the execution should stop forthwith. If the Court finds the Claimant ought not to pay tax then the bank guarantee should be sufficient security and thereby stop the process of execution. Either way execution should stop.

8) He also dealt with the Claimants submissions and stated that the claim for contempt of Court is misplaced. This is because the notion that the Respondent was seeking directions from KRA instead of this Court is false because payments were made on 7th February 2013. The payment to KRA as well as payment to Shapley & Barret were on that day. When execution proceeded even after payment on 11th February 2013 is when the Respondent wrote to the Commissioner General to confirm whether they had done the right thing. A response from the Commission was received on 12th February 2013. If KRA's views were sought before the payment then the Claimant would have had a semblance of a case. By the time the Respondent was engaging KRA, the decretal sum had already been satisfied in full. In addition, the Claimant should use the right procedure in seeking to find the Respondent to be in contempt of any court orders. For instance no leave has been sought nor granted. The Respondent is a limited liability company and there is no evidence laid before this Court on the claim of contempt by the company. No authorized officer or director of the company are aware about any orders breached. The orders of 5th February 2013 were made on basis of misleading information provided by the Claimant's counsel. On contempt, the orders alleged to be in contempt were done in observance of the law specifically Section 49(2) of Employment Act and Article 210 0f the Constitution of Kenya. We are persuaded that it would be an absurdity to hold a person who is obeying the law to be in contempt of court.

9) He submitted contempt is a serious issue and the Court must be satisfied of the same to a very high standard before finding a party to be in contempt of its orders. He referred to case of **Republic v. County Council of Nakuru *ex-parte* Edward Alera t/a Genesis Reliable Equipment & 2 Others [2011] eKLR**. The main holding is there is need to follow procedure before holding a party to be in contempt. Also refer to case of **Emma Wanjiku Ndungu v. Frava Njoroge & 4 Others [2012] eKLR** committal proceedings being quasi criminal in nature they attract more strigent requirements than the ordinary civil process. Whereas we are in civil proceedings the correct threshold for contempt proof beyond reasonable doubt. Our submissions are that the Claimant has <u>not</u> shown the sufficient proof that would rather allow this Court to find that the Respondent has been in contempt of Court. We want to go further by adding that the Claimant has not even met the proof in civil cases, that is, proof on balance of probabilities. Even the lower bar has not been met.

10) As regards *res judicata*, he submitted that his application is not *res judicata*. He submitted that whereas the Court heard and gave a full judgment against which an appeal has been filed does not bar this Court from hearing any other application properly brought before this Honourable Court.

11) He submitted that there are 3 issues which form the basis of his application and which have not been adjudicated upon by any other Court. The first issue is whether there should be stay of execution pending

appeal against orders of 5th February 2013. It is specifically on the orders of that day and not the Judgment or any other orders in any other forum. The second issue which has not been dealt with is whether the decretal sum has been fully paid or not. The third issue which has not been determined is whether the Claimant is a special person from whom taxes should not be deducted in compliance with Section 49(2) Employment Act and Article 40 of the Constitution. The issues before the Constitutional Court concerned the validity of the oath of office of the Judge who heard the matter. The constitutional court never dealt with these 3 issues highlighted above. The matter before Court of Appeal is challenging the Judgment of Hon. Madzayo. These 3 issues have never been decided on merit. For *res judicata* to apply the issue must have been comprehensively decided by the Court on merit. Refer to **Wanguhu v. Kania Civil Appeal No.101 of 1984 (Nakuru)**. This position was upheld in **Ukay Estate Limited v. Shah Hirji Manak Limited and 2 Others Civli Appeal No. 243 of 2001 (Nairobi)**

12) Finally, he submitted on representation of the Respondent. He submitted that the firm Wekesa and Simiyu are properly on record for the Respondent. The Industrial Court Procedure Rules do not have any clear position on the change of advocate where there is Judgment. We fall back on the procedure on Civil Procedure Order 9 Rule 9(b) which allows a change by filing a consent in Court. The consent allowed Wekesa & Simiyu Advocates to come on record in place of J. A. Guserwa Advocates. That consent was adopted by an order of this Court on 19th February 2013. He did not see any prejudice that would be suffered by the Claimant if Respondent hires a new advocate as has been done before. He thus wished to urge that even today; if Claimant wanted to change advocates it should be permissible.

13) In closing he stated that this Court should grant prayers sought by Respondent in Application dated 19th February 2013 with costs and dismiss the Application dated 6th March 2013 with costs and that the parties should be allowed to pursue their rights in the Court of Appeal.

14) Mr. Oyatsi In response to the Respondent's application stated that he had filed Submissions on 11th March 2013 and in addition had also filed Submissions on 18th March 2013 in support of the Claimant's Notice of Motion Application dated 16th March 2013. He wished to adopt those submissions and added the following highlights. He firstly stated that there is a misconception and fallacy on part of the Respondents in their Application which becomes apparent and easy to understand if you look at prayer 1 of the Application, Ground 1 states – On 8th February 2013 the Respondent paid 10,080,026/- as net. The fallacy relates to the reference **terminal benefits** payable to the Claimant. He submitted that there is no such thing. He submitted that for purposes of clarification, when a party comes to court with a claim for unlawful termination and seeks payment o terminal benefits, it becomes part of the claim. After adjudication of the claim the Court grants a decree or award and from that moment what is payable is decretal sum. He submitted that if the Respondent had understood that distinction this dispute would not have been there. Mr. Oyatsi submitted that the Court did not decree the Respondent should pay to the Claimant terminal benefits. What the Court decreed is that the Respondent should pay the Claimant a specified sum in the decree. Had the Court made an order that there be terminal benefits paid then there would be basis. Section 49 which Respondent is clinging on where a Respondent comes to court seeking terminal benefits it is upon the Respondent to bring forward all the grounds of defence that apply to prove either the claim is not payable altogether or it is payable but not as quantified by the Claimant. That is where Section 49 comes in. There is a statutory provision to extinguish the claim or embellish the claim. He submitted that the Court has to determine if defence raised applies. Does Section 49 apply or not. Once the decree is passed it is conclusive of the entire dispute. He referred the Court to the warrants of attachment which are orders of this Court directed to the Broker. The sum to be paid to plaintiff is Kshs. 14,058,567/-. There is a breakdown given in the warrants. He submitted that the Respondent says they have paid this amount less tax and posed the question 'Where is this, in this warrants of attachment so stated?' He submitted that the warrants do not in any place refer to the term terminal benefits. The warrants of attachment refer to a decree.

15) There is warrant of sale also attached. It is from Registrar addressed to the Court Brokers who is an agent of the Court. He is not an agent of the Decree Holder and the sum on the warrants for execution of the decree is Kshs. 14,058,567/-. It is execution of the decree not execution of terminal benefits. The Application is based on the grounds that the Respondent has paid is misplaced, misconceived and an

abuse of the court process.

16) Mr. Oyatsi stated that argument alone, kills all the arguments by his learned friend that decretal sum has been paid or that the Claimant is not exempt from tax. To compound matters further with that misconception, the Respondent could be excused for its ignorance if it had not come to this Court seeking the same relief and the Court clarified the matter by its Ruling of 5th February 2013. After Ruling of 5th February where Court made it very clear of the matter being now in Court of Appeal and the Court *functus officio* the litigant took it upon itself and become the Court and decided Section 49 supersedes the Judgment of the Court. Up to this moment they hold the Respondent should not be punished as it has followed the law as per Section 49 by remitting the funds to KRA. He submitted that if we were to follow and even adopt the argument an issue arises. Is it an order, statutory provision or command? The Constitution of Kenya establishes the judiciary, court orders are supreme, they are the expression of the constitutional mandate and have to be obeyed. He submitted that we do not have to go far. There was a petition in the Constitutional Court which parties said even if they do not agree with it they have to follow it. What Respondent said is that irrespective of what the Court said in respect of the claim, provisions of Section 49 override the order. The Respondent chose deliberately disobey the Court Order and stated that it is following this provision of Section 49 Employment Act. Mr. Oyatsi stated that the Submission by counsel are unfortunate, they undermine the whole purpose of these proceedings. It brings the question why is the Respondent here seeking the Court's decision. He took up the issue of if there should be hearing of the Respondent. The case he relied on is case of **Ndirangu v. CBA**. His submission is that taking the gross misbehavior of the Respondent, it is his submission that the Respondent does not deserve to be heard before purging the contempt which was the failure to comply with the commands of this Court.

17) He then submitted on his Application of 6th March 2013 which deals with contempt on the face of the Court. The submissions dealt with the second aspect of contempt. He submitted that there is contempt of Court which is committed on face of court. He gave the example that if he abused the Court while here or the clerk or cause a disruption then this is contempt punishable by Court where the Court is able to see. There is the second one which is contempt committed outside the Court that requires extraction of order, leave and the filing of application. The contempt he seeks to have enforced is one which has been committed before Court. He then went on to highlight part of his submissions filed on 18th March 2013. The first is at page 6 – Refer to paragraph 31. In the case before Court an application was brought seeking stay of execution on the same ground on 19th January. The Court dismissed, in fact struck it out because Court was deceived when it granted the *ex-parte* orders and the Court was *functus officio*. Unlike, the case cited the parties before this Court went ahead and disobeyed the Court's Ruling. Having done so they come with orders of stay seeking to have the court ratify of justify their defiance. He submitted that this is an attempt to demean the Court's authority. That kind of contempt is not the kind that requires leave et cetera. He relied on cases cited in the submissions. Mr. Oyatsi stated that there is a duty for counsel not to mislead the Court and when that happens it amounts to contempt. The counsel knew very well there was no decree passed by the Court commanding payment of specified sums in a decree. Counsel with full knowledge of that filed an application before the Court and states the Respondent has paid the terminal benefits for Claimant. This is an attempt to mislead and deceive the Court. He submitted that indeed that deception worked when they went before a judge who is not aware and they have orders in force. The deception worked, the same counsel appeared in Court on 19th January 2013 *ex-parte* and obtained an order of stay. The same counsel appear before Court on 5th February 2013 and the Court gave a Ruling in the presence of counsel which he knew and understood. There has been submission that counsel advised the Respondent to make payment as per submissions. They have not just made errors in pleadings but they have aided and abetted in the commission of this contempt. In law the consequences of the contempt are to be borne in the same manner as the Respondent. He thus submitted that the application of 19th February 2013 be dismissed and the application of 6th March be allowed.

18) Mr. Simiyu in a brief reply stated that he had only 2 points – firstly, the Court record will confirm that the application of 19th January 2013 was dismissed on 5th February 2013. The Respondent had not paid decree at that point. The decree was paid subsequently on 7th February 2013. When the present application was filed on 19th February 2013 the Respondent was saying that it had paid do not execute

any further. That is the distinction. The circumstances were different. It is not the same application. Lastly, having listened to his senior Mr. Oyatsi carefully, nothing was placed before the Honourable Court to persuade the Court to depart from the 2 decisions of fellow judges in this Court – Lady Justice Onyango and Justice Rika on the aspect that decree or award is subject to statutory deductions. The Court need not have even said it. It is there by itself. In the absence of Court of Appeal decision, he urge this Court to stay with its brother and sister judges and say this decree of 14 million is subject to tax deduction of 3 million. He urged the Court to use its inherent powers to dispense justice at the expense of the technicalities and alleged contempt. He stated that he would be glad if Court makes final decision. On that score parties closed their rival submissions and the Court reserved its Ruling to today. The parties had filed copious amounts of literature and have provided the Court with a plethora of authorities. I will not delve into each and every one of them. If need be I will cite them or refer to them.

19) The issues I have distilled that fall for determination are

i. Was the decretal sum subject to statutory deductions as per Section 49 of the Employment Act?

ii. Should execution proceed or not?

iii. Did the Respondent commit contempt of Court in paying the decretal sum less statutory deductions?

20) The first issue has been framed by me as whether the decretal sum was subject to statutory deductions as per Section 49 of the Employment Act. My answer will be guided by the law. The Constitution under Article 210 provides as follows:-

210 (1) No tax or licencing fee may be imposed, waived or varied except as provided by legislation

(2) If legislation permits the waiver of any tax or licensing

(a) a public record of each waiver shall be maintained together with the reason for the waiver; and

(b) each waiver, and the reason for it, shall be reported to the Auditor-General.

(3) No law may exclude or authorise the exclusion of a State officer from payment of tax by reason of—

(a) the office held by that State officer; or

(b) the nature of the work of the State officer.

21) The law makes it clear that taxes are to be paid. The Employment Act, 2007 provides as follows under Section 49(2).

49 (2) Any payments made by the employer under this section shall be subject to statutory deductions.

22) The Section is clear. It relates to any payments by made by an employer under this Section. I am not an employer under the Section and if the Section was to be taken in isolation it does not bind. The Court is however bound by Section 50. Section 50 of the Employment Act provides as follows:-

50. In determining a complaint or suit under this Act involving wrongful dismissal or unfair termination of the employment of an employee, the Industrial Court shall be guided by the provisions of section 49.

23) I am to be guided by Section 49 when determining a complaint or suit involving wrongful dismissal or unfair termination of the employment of an employee. Hon. Madzayo heard a dispute involving the

termination of the Claimant's contract of employment with the Respondent. The judge was dealing with an issue squarely within the remit of Section 50 and 49 of the Employment Act 2007.

24) The Constitution is the supreme law of the Land and it binds all and supersedes the statutes passed in the country. There is clearly no exemption on taxes as per Article 210. That is why even I pay taxes. I would hold that the answer to the first issue is in the affirmative. The sum, being one to which Section 50 of the Employment Act applies was subject to tax deductions.

25) The second issue is whether execution should proceed. In other words, has the Respondent laid sufficient basis for the for grant of the order of stay? In the case before me, the Respondent has paid a total of Kshs. 14,058,567/-. The sum is made up as follows - Kshs. 10,080,026/- to the Claimant's counsel and the balance of Kshs. 3,978,541/- to the Kenya Revenue Authority being the statutory deductions pursuant to the provision of Section 49(2) of the Employment Act as well as Article 210 of the Constitution of the Republic of Kenya. In addition, on 21/3/2013 the parties by consent agreed to have a bank guarantee put in place by the Respondent for Kshs. 3,978,541/- with a reputable bank. The vehicles which had been attached were to be released. This is the security the Respondent refers to in its submissions. No order for stay of execution shall be made unless the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant. The preconditions for grant of stay have been met and I would therefore answer the second issue in the negative. Execution must cease.

26) The final issue is one which has arisen out of the Application of the Claimant. The Claimant contends that the Respondent has been in breach of Court orders and has thus committed contempt *in facie curiae*. One may be found guilty of contempt of court as a result of his failure to obey a lawful court order or for showing disrespect to the judge, or for disrupting the proceedings, or because of publishing material deemed likely to jeopardize a fair trial or impede the administration of justice.

27) The general power to punish for contempt is found in the Judicature Act cap 8 Laws of Kenya. The relevant Section provides as follows:-

> *5. (1) The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and that power shall extend to upholding the authority and dignity of subordinate courts.*
>
> *(2) An order of the High Court made by way of punishment for contempt of court shall be appealable as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the High Court.*

28) The power to punish for contempt possessed by this Court is the same as the power possessed by the High Court of Justice in England. The term contempt of Court is of ancient origin and was used in England since the thirteenth century. It is based on the duty to prevent any attempt to interfere with the administration of justice. It is a well established principle that the jurisdiction of a Court to punish for contempt arises out of the inherent jurisdiction of the Court to enforce its own orders. It is distinct from any criminal proceedings that may be initiated arising out of the same set of facts. A person found in contempt of court is known as a contemnor. To prove contempt, the accuser or prosecutor must prove the following four broad elements of contempt:

(a) That there is in existence of a lawful order,

(b) The person accused of contempt had knowledge of the order

(c) The person accused of contempt had ability to comply with the order; and finally

(d) The person accused of contempt failed to comply with the order

29) The ingredients must all be in place. The order must be lawful and the accused person must have had knowledge of the order and had failed to comply with the order in spite of having the ability to comply. The proof required is slightly above balance of probabilities but below proof beyond doubt which is applicable in criminal cases. In the case before me, Mr. Oyatsi has not proved on a balance of probabilities that the Respondent committed the alleged contempt. In the premises I cannot hold the Respondent to be in contempt. In any event, no official is cited for contempt. While at times contempt proceedings may take place without leave, such are limited to the contempt *in facie curiae.*

30) Parties may be well placed to read Sweet & Maxwell's treatise – **The Supreme Court Practice 2009** which has ample material on contempt.

31) The upshot of the foregoing is that the Claimant's application for contempt is not allowed. The stay application by the Respondent is allowed pending the hearing and determination of the Appeal. The Bank Guarantee now in place shall continue to be the security for the stay I have granted.

It is so ordered.

Dated and delivered at Nairobi this **14th** day of **June** 2016

Hon. Mr. Justice Nzioki wa Makau

Judge