



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA
CAUSE NUMBER 308 OF 2013

BETWEEN

**KIOKO JOSEPH [suing as the Representative of the Estate of
JOSEPH KILINDA].....CLAIMANT**

VERSUS

BAMBURI CEMENT LIMITED.....RESPONDENT

RULING

1. This Court delivered an Award in favour of the Claimant on the 22nd May 2015. It was ordered that:-
 - a. Termination of the Claimant's contract of employment was unfair.
 - b. The Respondent shall, within 30 days of this Award, pay to the Claimant: annual leave pay at Kshs. 120,000; 13 days' salary at Kshs. 105,939; 6 months' gross salary in compensation for unfair termination; and gratuity computed at the rate of 3 months' pay for each completed year of service.
 - c. Costs to the Claimant.
2. The Award was the subject of Civil Appeal No. 61 of 2015 filed at the Court of Appeal in Malindi. In its Judgment dated and delivered on 27th May 2016, that Court upheld the decision of the Lower Court, directing however, that the "*sums awarded as compensation for wrongful dismissal be made subject to statutory deductions.*"
3. Subsequently, the Respondent states it paid paid to the Claimant the total amount of Kshs. 8,882,035 on 29th June 2016. PAYE tax of Kshs. 2,634,532 was deducted. The net paid to the Claimant was Kshs. 5,450,704. The Claimant disputed the deduction and initiated execution proceedings against the Respondent. This resulted in the Application dated 4th July 2016, filed by the Respondent on 5th July 2016.
4. The Respondent prays the Court to declare it has fully satisfied the Award delivered on 22nd May 2015. The Application is supported by the Affidavit of General Counsel Betty Kanyagia, sworn on the 4th July 2016. Interim order staying execution issued on the 4th July 2016.
5. The Claimant filed a Replying Affidavit, reiterating that the decree has not been satisfied in full, and

disputing the jurisdiction of the Lower Court to intervene in the matter further, the Court of Appeal having given specific order on statutory deduction. Parties were heard on the 12th July 2016.

Respondent's Position

6. The Respondent submits that the issue which has brought the Parties back to Court is this: whether the Respondent was entitled to withhold the amount of Kshs. 2,634,532 and remit this amount, to Kenya Revenue Authority.

7. The Respondent sought the advice of the Kenya Revenue Authority, and confirmed PAYE tax is payable. The KRA availed to the Respondent its Domestic Taxes Department, Employers' Guide to PAYE, revised Edition of 2009. It is obligatory under Section 37 of the Income Tax Act, Cap 470 for Employers to recover appropriate tax from any lump sum amount, before releasing the balance to the Employee.

8. The Award represents income earned by the Claimant, and is taxable. The Respondent acted in accordance with the law. The Claimant misperceives the law, when he states he should have the whole sum awarded, and be let to pay the tax directly. He is wrong in arguing that the Respondent is not a tax agent.

9. The Respondent concedes there were errors in what was paid to the Claimant, in comparison to what was decreed by the Court. It could remedy errors in the computation and advise the Court through correspondence.

10. The issue revolves around the Award issued by this Court, and it is incorrect to say this Court is deprived of jurisdiction. It is a decree of this Court which is being executed. The Respondent urges the Court to uphold its position.

Claimant's Position

11. The Claimant holds that the Court issued a decree with specific amounts. The Respondent seeks the Court to sanction deduction on a sum of money contained in a decree.

12. The Court had ordered in its Award that the amount is paid without interest. This was perhaps based on the expectation that the Respondent would meet its obligation within the given 30 days.

13. The Respondent appealed. Appeal was dismissed. The Court of Appeal ordered the only sum which should be the subject of statutory deduction is that given as compensation for wrongful dismissal. Compensation stood at Kshs. 635,634. The Claimant asked the Respondent to make a maximal PAYE deduction on the amount at 30%. The Respondent rejected this.

14. The Court of Appeal having given an order on what is to be deducted, the Lower Court does not have jurisdiction to make further orders on the matter. There is no specific provision in the Income Tax Act, which states decree of the Court is subject to tax. The Claimant had obligation to pay Advocates' fees. What the Respondent withheld as tax, did not factor this. Not the whole Award could be taken as income. The deceased Claimant was sacked by the Respondent. He was not an Employee at the time he was awarded.

15. The Respondent computes the Claimant's Final Dues to comprise: -

- i. Gratuity at Kshs. 6,489,562
- ii. 6 months' gross salary at Kshs. 635,634
- iii. 13 day's salary at Kshs. 105,939
- iv. Accrued leave at Kshs. 120,00

Total taxable dues... Kshs. 7,351,135

Less PAYEKshs. 2,200,434

Total after tax..... Kshs. 5,150,701

Add taxed costs.....Kshs. 300,000

Total payable/ paid.... Kshs. 5,450,701

16. In his Advocates' letter dated 23rd June 2016, addressed to the Respondent's Advocates, the Claimant makes the following computation:-

i. Annual leave pay Kshs. 120,000

ii. 13 days' salary..... Kshs. 105,939

iii. Compensation for wrongful dismissalKshs. 635,535 less tax of Kshs. 190,620- Kshs. 444,943

iv. Gratuity..... Kshs. 7,309,791

v. Taxed costs..... Kshs. 300,000

Total payable..... Kshs. 8,280,693

17. Gratuity in the computation by the Respondent is stated to be Kshs, 6,489,562. Gratuity was given by the Court at Kshs. 7,303,791. The Respondent has reduced the amount by about Kshs. 800,000. There is danger in allowing Parties to tamper with the decree of the Court. The Claimant urges the Court to decline jurisdiction, and dismiss the Application.

The Court Finds:-

18. An issue relating to satisfaction of the Court's Award, cannot in the view of the Court, be outside its jurisdiction. Parties cannot go back directly to the Court of Appeal, and seek to resolve a disagreement on execution, at the Court of Appeal. The trial Court retains jurisdiction, save that it is limited by the law in determining the aspect relating to assessment of income tax. The Claimant's preliminary objection has no merit and is rejected.

19. Even without considering the dispute on income tax, there is an admitted error in the computation by the Respondent. The amount stated as gratuity, awarded at 3 months' salary for each completed year of service, did not tally with the decree. Gratuity as pleaded, and computed in the decree, was at Kshs. 7,309,791. The Respondent should have stuck with the amount stated as gratuity in the decree, instead of substituting that amount with its own figure.

20. In this ***Court's 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.

21. The Court does not have any reason to depart from this position. The Claimant herein has the obligation to pay income tax assessed on his global Court Award. It is not necessary for the Courts to always state that their Awards are subject to statutory obligations. These obligations are not issues in dispute on trial. The obligations are contained in the Statutes, and are enforceable whether the Court mentions them in its decision or not. If there are other contractual obligations, such as bank loans, mortgages and sacco loans, they are normally part of the issues in dispute. These are the obligations which must be litigated, and which cannot be deducted from the Award by an Employer, without being litigated, unless with the consent of the Parties. Statutory obligations, which include income tax, need not be declared by Courts, more so when they are not issues in dispute, and are expressly provided for under the law. In the view of this Court, it need not be declared *suo motu* by the Court that income tax is deductible from an Award of the Court, while the Income Tax Act declares tax deductible, and the Employment Act recognizes, and allows for such deduction. Notably the Court of Appeal did not decree specifically that the compensatory award be subjected to income tax; the Judgment was that the Award is subjected to statutory deductions. Secondly, the Court of Appeal did not state that income tax on gratuity and other terminal benefits is not payable. These were not matters in issue either during the trial or the appeal.

22. The Court suggested in the case of **Andrew Mukiti Saisi** that Employers must discharge their obligation under the Income Tax Act, to deduct PAYE from recurrent wages and terminal wages. The obligation applies in the case of a current Employee, and an Employee on termination. It is not correct to argue that the Claimant had been dismissed, and therefore not subject to the laws governing payment of employment income tax. If either Party has a complaint on their tax obligation or tax assessment, such Party is guided by the law to lodge a complaint with the Commissioner of Domestic Taxes under Section 84 of the Income Tax. If one is dissatisfied with the decision of the Commissioner, recourse lies in the dispute resolution mechanism created under the Tax Appeals Tribunal Act No. 40 of 2015.

23. In the view of the Court, the Respondent erred in departing from the specific sums, particularly on gratuity, given under the decree extracted by the Parties. The Claimant on his part appears to be in the wrong, in his argument that he is only supposed to pay income tax on the compensatory award. Income tax, in the understanding of the Court, would apply to the global Award. The figures computed by both Parties do not seem to meet the requirements of the law. While the Court has jurisdiction in assisting the Parties in the implementation of its Award, it does not have the primary jurisdiction in determining the amount of income tax payable. The dispute has essentially evolved into a tax dispute, calling in another dispute resolution mechanism. This Court cannot determine if Kshs. 2,634,532, which is withheld by the Respondent as income tax, or Kshs. 190,690 which the Claimant has self-assessed as his income tax obligation, is the correct figure. This is a tax dispute. Jurisdiction is primarily with the Kenya Revenue Authority and the Tax Appeals Tribunal. IT IS ORDERED:-

[a] The disputed amount of Kshs. 2,634,532 shall be deposited in an interest earning Joint Account in the names of Stephen Oddiaga & Company Advocates and Njeru and Company Advocates.

[b] The two Advocates, with the aid of Kenya Revenue Authority to reconsider their respective positions, and agree on the amounts due to the Claimant and the Income Tax Department.

[c] In event they are not able to agree, they are at liberty to invoke the dispute resolution mechanism contained in the Income Tax Act, or revert to the Court of Appeal.

[d] Stay of execution is granted until the Parties resolve the dispute in the mode suggested by the Court

in this Ruling.

[e] The Court is not able to declare that the decree has fully been satisfied.

[f] No order on the costs.

Dated and delivered at Mombasa this 29th day of July, 2016.

James Rika

Judge