



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 465 OF 2014

WILLIAM KILONZICLAIMANT

VERSUS

BAMBURI CEMENT LIMITED.....RESPONDENT

RULING

INTRODUCTION

1. On 26.6.2015, I delivered a judgment herein in favour of the claimant in the sum of kshs. 10,251,916.24 plus costs and interests. The Respondent was dissatisfied and appealed to the Court of Appeal but the appeal was unsuccessful. The respondent then paid the judgment debt less PAYE of kshs. 2,460,778. The claimant was not satisfied and he executed for the balance of kshs. 2,460,778.

2. In order to protect herself from the execution, the respondent has brought the Notice of Motion dated 4.7.2016 seeking declaration that she has fully satisfied judgment dated 26.6.2015. The Motion is supported by the affidavit sworn by Betty Kanyagia on 4.7.2016. The gist of the affidavit is that terminal benefits of an employee like in this case is taxable and the respondent had an obligation in law to deduct PAYE from the judgment debt herein.

3. The claimant has opposed the Motion and contended that there is no legal basis to subject money paid under a decree of the court to PAYE. According to him the said decreed money is not emoluments under the Income Tax Act (ITA).

4. The Motion was argued in the open court on 18.7.2016 by counsel for the two parties.

Respondent's Case

5. Mr. Njeru, learned counsel for the respondent urged the court to allow the Motion because the decree sum had fully been settled less PAYE. That his client sought guidance from Kenya Revenue Authority (KRA) and confirmed that the decreed sum herein is subject to income Tax and she was legally bound to deduct the tax and remit it to KRA. He relied on the guide from KRA to employers on PAYE, 2009 Edition.

Claimant's Case

6. Mr. Odiagga, learned counsel for the claimant opposed the Motion and relied on the Replying affidavit by the claimant. He submitted that money paid on the basis of a Court decree is not subject to PAYE

except an award of compensation given under section 49(2)(c) of the EA. He further submitted that only the sum of Kshs. 2,194,861 awarded as compensation for unfair termination was subject to PAYE. He relied on the court of Appeal decision in the appeal against the judgement herein to support the foregoing contention. In the said Appeal, ***Bamburi Cement Ltd vs. William Kilonzi***, the Appellant Court upheld my judgment but faulted it for not directing that the sum awarded as compensation under section 49(1)(c) of the EA was subject to the PAYE.

7. As regards the 2009 edition of the Employers Guide to PAYE, Mr. Odiagga submitted that such guide was not a statute. In that respect the counsel argued that employers are only bound to follow the Income Tax Act. He further urged that the definition of Income under the ITA does not include money paid on the basis of judgments of the Court. According to him judgment debt does not arise from employer-employee relationship but a decree of the court. That subjecting a decreed sum to PAYE would amount to amending the decree of the court.

Analysis and Determination

8. The issues for determination herein are:-

a. Whether a judgment debt decreed in favour of an employee is subject to PAYE.

b. Whether the decreed herein has fully been settled.

PAYE in respect Judgment of Debts

9. There is no dispute that under section 49(2) of the EA, any award made under section 49 of the Act is subject to taxation. The awards includes salary in lieu of notice and section 49(1) (c) of the Act and compensation under section 9(1) of the Act.

10. In addition to the foregoing, section 3(1) of the ITA imposes income tax on income of a person in a financial year which accrues to him in or derived from Kenya. Section 3(2) (9) outlines the taxable income to include gains or profits from Employment. Section 5(2) of the ITA defines gains or profits to include gratuity received in respect of Employment in a year of income other than the year of income when it was received and any amount received as compensation for the termination of a contract of employment whether or not the compensation is provided for in the contract of employment.

11. After careful consideration of the submissions by counsel and the said legal provisions, I am satisfied that the award of terminal dues awarded to employees by the court is taxable income within the meaning of section 3(2) and (c) of the ITA. Consequently, the judgment debt herein is subject to deduction of PAYE from whole decreed sum under the ITA. The foregoing finding does not in any way contradict the decision of the Court of Appeal supra, because the appellate court judges only faulted my decision with request to section 49(2) of the EA and never considered the ITA.

Settlement of Decree herein

12. In view of the foregoing finding, I find that the respondent rightfully deducted PAYE from the entire decreed sum. Consequently, I find and hold that the decree of this court has fully been settled by the payment of the Kshs. 8,882,035 to the Claimant.

Disposition

13. For the reasons stated above, the Notice of Motion dated 4.7.2016 is allowed as prayed. No order as to costs.

Dated, Signed and delivered this 9th day of **September, 2016.**

O. N. MAKAU

Judge