



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 131 OF 2013

(Original Kakamega No. CC. 186 of 2011)

(Before Hon. Lady Justice Maureen Onyango)

JACKSON NYAMWANGE OKARICLAIMANT

-Versus-

THE HON. ATTORNEY GENERALRESPONDENT

R U L I N G

By an application dated 25th September, 2015 the Applicant seeks orders for review of Judgement entered in this case to the extent that the decretal sum of Kshs.1,759,900 be paid without taxing the applicant and for costs of the application. The grounds in support of the application are that his salary is below the taxable bracket and not subject to PAYE and that the County Government has failed, neglected and or refused to assess any statutory deductions as ordered by the court. The application is supported by the affidavit sworn on 25th September, 2015.

In the affidavit he states that his salary was below the taxable limit as evidenced by copies of payslip annexed thereto and that the County Government has failed to calculate the tax.

In the submissions filed by the applicant he refers to Article 210 of the Constitution and section 13 of the Income Tax Act which provide as follows:-

Imposition of tax.

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

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

(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.

EXEMPTION FROM TAX

13. (1) Notwithstanding anything in Part II, the income specified in Part I of the First Schedule, which accrued in or was derived from Kenya shall be exempt from tax to the extent so specified.

(2) The Minister may, by notice in the Gazette, provide -

(a) that income or a class of income which accrued in or was derived from Kenya shall be exempt from tax to the extent specified in the notice;

(b) that an exemption under subsection (1) shall cease to have effect either generally or to the extent specified in the notice.

(3) A notice under subsection (2) shall be laid before the National

Assembly without unreasonable delay, and if a resolution is not passed by the assembly within twenty days on which it next sits after the notice is so laid that the notice be annulled, it shall thenceforth be void, but without prejudice to the validity of anything previously done thereunder, or to the issuing of a new notice.

He further refers to the Third schedule to the Act which provides for personal relief of Shs.13,944 which he states he is entitled to. He further relies on a document annexed to his application as Annexure J.N. 4 which is The Employers Guide to PAY AS YOU EARN IN KENYA Revised Edition - 2009.

The Claimant states that the Registry has refused to draw the decree as the amount taxable is not known.

It is on the above grounds that the applicant seeks an order reviewing the Judgement of this court.

The Respondent did not file any replying affidavit or grounds of opposition but filed submissions in response to both the application and the submissions filed by the Claimant. In the submissions the Respondent states that section 19(1) (f) of the Employment Act provides for deductions from salaries of an employee of any amount authorised by written law and that PAYE is one such deduction, that the Claimant's payslip for August 2010 shows that indeed the Claimant was deducted NSSF, NHIF and PAYE and it is therefore misleading for him to allege that he does not fall within the tax bracket. It is further the Respondent's submission that section 37 of the Income Tax Act makes it obligatory for employers to recover appropriate tax from any lumpsum before releasing such lumpsum payment to an employee. The Respondent prays that it should be allowed to make the deduction.

Findings and Determination

The grounds for review of decisions of the court are provided for under Rule 33 of the Employment and Labour Relations Court Rules as follows:-

(a) if there is discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made;

(b) on account of some mistake or error apparent on the face of the record;

(c) if the judgement or ruling requires clarification; or

(d) for any other sufficient reason.

The Claimant's application does not fall under any of these heads. Be that as it may, section 49(2) of the Employment Act provides that -

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

The Statutory Dues include PAYE as provided for under the Income Tax Act. Section 19(1) (f) also permits employers to make statutory deductions from wages of Employees.

The Claimant's contention that he does not fall under the tax bracket is misplaced as the decretal sum is not his salary but money awarded to him by the court under section 49 of the Act. The orders the applicant is seeking are unlawful and unconstitutional. Such orders would if granted, be in contravention of Article 210.

The Claimant's contention that the decree has not been drawn as the tax due has not been ascertained is also misplaced as a decree would only reflect the amount awarded in the Judgement while the deduction of the PAYE would be made by the Employer at the point of payment. Should the Claimant have any issues with the amount deducted the place to make his complaint is to Kenya Revenue Authority and not to this court as the court has no powers to grant the orders sought.

For these reasons the application is dismissed. Each party shall bear his costs.

Ruling Dated, signed and delivered this 10th day of November, 2016

MAUREEN ONYANGO

JUDGE