



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT NAIROBI

CAUSE NO. 413 OF 2011

JOSEPH OGONDA OMONDI CLAIMANT

-VERSUS-

SBI INTERNATIONAL HOLDING AG (KENYA) RESPONDENT

R U L I N G

On 20th August 2014, the respondent filed a notice of motion seeking the following orders:-

1. **That this application be certified urgent and heard *ex-parte* in the first instance.**
2. **That leave be granted to the applicant to proceed with this application, during the court vacation.**
3. **That the honourable court be pleased to grant stay of execution pending the hearing and determination of this application.**
4. **That the court do makes a declaration that the decree herein has been fully satisfied.**
5. **That the costs of this application be in the cause.**

The application was made under Article 159(2)(d) of the Constitution, Section 3 of the Income Tax Act, Section 3 and 12 of Industrial Court Act, Rules 16 and 27 of the Industrial Court (Procedure) Rules, 2010 and all other enabling provisions of the law. The application is grounded on the affidavit of SHAY SKEIF and on the following grounds:-

- i. **The court awarded gross pay in the sum of Kshs 319,472=00.**
- ii. **The respondent/applicant paid the claimant a sum of Kshs 229,759=00 after deduction of tax, in full and final settlement of this matter.**
- iii. **The amount of income tax and/or PAYE deducted amounts to Kshs 89,713=00.**
- iv. **The income tax and/or PAYE is due to the Commissioner of Domestic Taxes, not the claimant.**
- v. **The claimant has commenced execution as against the applicant.**
- vi. **The applicant's properties have been proclaimed.**

vii. **The application has high chances of success.**

viii. **This application has been made without delay.**

ix. **Unless stay is granted, the applicant's rights will be prejudiced and he will suffer substantial loss.**

x. **It is just and expedient to do so.**

The application was heard *ex parte* on 23rd October 2014 by **Nderi J** and temporary stay of execution granted pending *inter partes* hearing of the application.

The claimant filed a replying affidavit opposing the application. In the replying affidavit sworn on 2nd September 2014 the claimant states that he commenced execution after the respondent failed to respond to his advocates letter seeking explanation on how the decretal sum was computed.

It is the execution by the claimant for the difference between the sum paid by the respondent of Kshs 229,759 and Kshs 319,472 awarded in the judgment that prompted the respondent to file the application before me for determination.

In the supporting affidavit Mr. Skeif states that the respondent settled the decretal sum of Kshs 319,472 by remitting Kshs 229,759 to the claimant after deduction of Kshs 89,713 being income tax and/or Pay As You Earn (PAYE) as provided under the Income Tax Act. He further depones that the respondent discharged its legal duty and the application for execution by the claimant is unwarranted.

In the Replying Affidavit the claimant states that on 28th April 2014 his advocates wrote to the respondent's advocates calling for payment of the court award as the stay period had lapsed. The respondent however paid only Kshs 229,759 being part payment of the award. On 12th May 2014 his advocates wrote to the respondent's calling for the balance of Kshs 87,713 together with party and party costs of Kshs 127,535. That following the respondents advocates response dated 15th May 2014 his advocates wrote to the respondent's advocates on 16th May 2014 demanding an explanation of how PAYE was computed. The respondent's advocates issued a tax breakdown by letter dated 26th May 2014. The respondent later paid party and party costs but failed to pay Kshs 89,713 following which the claimant's advocates advised the respondents advocates of the intention to execute for the balance. The claimant further stated in the replying affidavit that the respondent had also breached the court award by failing to issue a certificate of service to the claimant.

The claimant further stated that deduction of tax by the respondent is erroneous as there is no longer an employer/employee relationship between the claimant and the respondent, the same having been extinguished when the respondent unfairly dismissed him. That the respondent cannot purport to act as the claimant's agent in respect of PAYE when he was no longer an employee, that PAYE is only chargeable on income earned in the course of employment and compensation accruing out of a court award is not income within the meaning of the Income Tax Act. The claimant further stated that the respondent had not produced any evidence to prove that the amount deducted was remitted to Kenya Revenue Authority as PAYE. He further stated that even if income tax was to be charged, it should be based on his monthly salary of Kshs 29,220, less the monthly tax relief of Kshs 1,162 and that charging PAYE on the entire decretal sum was a perpetuation of his unfair treatment by the respondent.

The application was urged by way of written submissions. The parties largely adopted the arguments in the application and affidavits.

The respondent submitted that Section 3 of Income Tax Act provides for taxation of all income while Section 5 provides that employment income includes payments to a resident person for employment or services rendered in or outside Kenya. The respondent further relied on Section 49(2) of the Employment Act which provides that payments by an employer under that Section shall be subject to statutory deductions. The respondent submitted that it made statutory deductions from the decretal sum as

follows:

Gross pay - Kshs 319,472

PAYE - Kshs 89,713

NSSF - Kshs 206

NHIF - Kshs 320

Net pay = Kshs 229,759

The respondent further submitted that the court did not issue directions on taxation, and that the claimant did not plead or adduce evidence in respect of taxation. The respondent submitted that the taxation of the decretal sum was in conformity with the law and urged that the court finds that the respondent has satisfied the decree and the execution proceedings are unwarranted.

The claimant urged me to rely on the decision of **Justice Marete** in **Ibrahim Manyara V Registered Trustees of ASK [2014] eKLR** in which he held that the Income Tax Act does not define income to include a decree of a court as a taxable item under Income Tax Law and further that where the relationship of employer/employee has lapsed there is no relationship of principal/agent for purposes of income tax.

The claimant further urged that even if the court finds that the decretal sum should be subjected to income tax under Section 49(2) of the Employment Act, the only amount that should be taxed is six(6) months salary awarded as compensation in the sum of Kshs 175,320 based on the claimants salary of Kshs 29,220 less the monthly relief of Kshs 1,162.

The claimant submitted that tabulation of Tax should therefore be as follows:-

| <u>Gross Pay</u> | <u>Tax Rate</u> | <u>Amount</u> |
|---------------------------|-----------------|---------------|
| 10,164 | 10% | 1,016 |
| 9,546 | 15% | 1,432 |
| 9,510 | 20% | 1,902 |
| TOTAL | | 4,350 |
| Less family relief | | 1,162 |
| Monthly Tax due | | 3,188 |

The claimant further stated that the respondent was guilty of delay, the proclamation having been made on 14th August 2014 while the application was filed on 20th August 2014. That the delay is unjustified and unexplained and the court should exercise its discretion in favour of the claimant as the respondent's application is a clear case of abuse of court process. The claimant urged that the application be dismissed with costs to the claimant.

The issue I have to determine is whether the sum of Kshs 319,472 awarded to the claimant is subject to deduction of Kshs 89,713 on account of statutory deductions as was done by the respondent.

Section 49(2) of the Employment Act provides that:-

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

In my opinion the wording of the Section is quite clear. Any award of payments made under Section 49 is subject to statutory deductions. The payments are those referred to under Section 49(1). These are:-

"(a) the wages which the employee would have earned had the

employee been given the period of notice to which he was entitled under this Act or his contract of service;

(b) where dismissal terminates the contract before the completion of any service upon which the employee's wages became due, the proportion of the wage due for the period of time for which the employee has worked; and any other loss consequent upon the dismissal and arising between the date of dismissal and the date of expiry of the period of notice referred to in paragraph (a) which the employee would have been entitled to by virtue of the contract; or

(c) the equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal."

I think that the provisions of Section 49(2) are specific and do not refer to the provisions of the Income Tax Act. It refers to "statutory deductions" which are not provided for in the Income Tax Act. My understanding is that statutory deductions are those deductions that are authorized by statute. These include income tax or Pay As You Earn (P.A.Y.E), National Social Security Fund (NSSF) and National Hospital Insurance Fund (NHIF). These are common for all employees and are provided for in the various legislation specific to each of them. Other statutory deductions include payments for higher education loans, cooperative shares and loans, union dues, pensions and other deductions authorized under Section 19 of the Employment Act.

Section 49(2) provides that all these statutory deductions may be made from payments made by the employer under that section. The respondent has stated that it made deductions of PAYE, NSSF and NHIF. However from correspondence attached to the claimant's replying affidavit it is stated that NSSF and NHIF were not remitted and were included in the sums already paid to the claimant thus leaving only the amount deducted in respect of PAYE which was the subject of proclamation and therefore this application.

There is no doubt that PAYE is one of the statutory deductions referred to in Section 49(2) of the Employment Act. Whether or not Income Tax Act provides for the same is thus not the determining factor in this dispute. The claimant admitted this much in the affidavit (in the alternative to his argument that decretal sums are not subject to taxation). The claimant however contested the sums payable.

In the Kenya Revenue Authority (KRA) Guide to Employers it is provided as follow:-

"21. PROCEDURE ON LUMP SUM PAYMENTS (Gratuities, Bonuses, etc)

A: Notification

Employers are no longer required to notify the Tax Department before making payments of terminal benefits to the employees upon leaving their employment. Every employer has an obligation under Section 37 of the Income Tax Act to recover appropriate tax from any lump sum amount before releasing the difference/balance to the employee.

Employee ...

1.

2. Compensation for Termination of Employment

Liability extends to any payment, whether voluntary or obligatory made to a person to compensate him for the termination of his contract of employment or services, whether the contract is written or verbal and whether or not there is provision in the contract for such payment".

From the foregoing I find that the respondent complied with Section 49(2) of the Employment Act in deducting income tax from the decretal sum. However, the respondent must prove that the said sum was transmitted to Kenya Revenue Authority to discharge its obligation by submitting a copy of the pay advise to the claimant.

On the issue raised by the claimant that the respondent delayed in making the application for stay I find that the delay was not inordinate as proclamation was on 14th September 2014 and the application for stay was filed only six days later, on 20th August 2014 before the proclamation period of 7 days expired.

The claimant also submitted that the respondent failed to issue him with a certificate of service as ordered in the judgment. The respondent did not deny this allegation.

The end result is that I allow the respondent's application but make the following orders:-

1. The respondent submits the tax remittance certificate to the claimant as confirmation of remittance of PAYE to KRA within 14 days from date of this ruling failing which it will be deemed that the respondent has not discharged its obligation to pay the claimant the sum of Kshs 89,713 and the claimant will be free to execute for the said sum.
2. The respondent issues certificate of service to the claimant in terms of Section 51 of the Employment Act within 14 days.

On the issue of costs I order that the respondent pays the claimant's costs for this application as the respondent failed to submit proof of remittance of PAYE.

Orders accordingly.

Dated and signed at Kisumu this 16th day of June, 2015

MAUREEN ONYANGO

JUDGE

Delivered in Nairobi this 7th day of July, 2015

HELLEN WASILWA

JUDGE

In the presence of:

Kiprono..... for claimant(s)

Kuria h/b Modi..... for respondent(s)