



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 370 OF 2011

JIMMI NHLAPO MASEGE.....CLAIMANT/RESPONDENT

versus

AVIATION & ALLIED WORKERS UNION.....RESPONDENT/APPLICANT

RULING

1. The Respondent/Applicant in the Application dated 3rd September 2013 seeks variation of the consent order entered into by the parties. There is also the limb taken that the award does not take into account the computation of statutory deductions. The Application is opposed by the Claimant who filed Grounds of Opposition on 6th September 2013.
2. In order to vary a consent order there must be good grounds. I will do no better than to quote my brother Justice Musyoka in **C W N v P N K [2013] eKLR** where he stated thus:-

The principles governing the review of a consent order were discussed by the Court of Appeal for Eastern Africa in *Ismail Sunderji Hiram vs. Noorali Esmail Kassam* (1952) 19 EACA 131, where it was stated that a consent order or judgment recorded in court has the effect of decree or order passed upon a new contract between the parties which supersedes the original claim or cause of action. It is generally good consideration and the court cannot interfere with it except in circumstances which offer a good ground for varying or rescinding a contract between the parties. The Court of Appeal in *Brooke Bond Liebig (T) Ltd vs. Mallya* (1975) EA 266 identified the grounds upon which a consent order or judgment may be set aside to include fraud, collusion or any other reason which would enable a court set aside an agreement. Such orders or judgments can ordinarily only be varied or set aside by consent.

3. There are no circumstances displayed that suggest collusion, fraud, or any other reason that would be a good ground to carry or set aside the consent.
4. Regarding the payment of statutory deductions, the law is very clear. Under Section 49 of the Employment Act 2007, the law provides as follows:-

49. (1) Where in the opinion of a labour officer summary dismissal or termination of a contract of an employee is unjustified, the labour officer may recommend to the employer to pay to the employee any or all of the following -

(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.

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

5. The Court when making any determination under the Employment Act need not state that the sums are subject to statutory deductions. The law requires that any compensation to an employee be in accordance with Section 49 of the Employment Act. It does not require judicial intervention to determine that any payments made by the employer under this section shall be subject to statutory deductions. In the case before me, it goes without saying that there must be payment of the statutory deductions which are tax and NSSF and NHIF dues.
6. From the foregoing and in the premises the application is not for grant. It is dismissed with costs to the Claimant.

It is so ordered.

Dated and delivered at Nairobi this **16th** day of **January** 2014

Nzioki wa Makau

JUDGE