



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAKURU

CAUSE NO. 8 OF 2012

DAVID KIMANI AND 9 OTHERS.....CLAIMANTS

-VERSUS-

GEOHERMAL DEVELOPMENT COMPANY LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 28th February, 2014)

RULING

The court delivered the ruling of 20.12.2013 to determine the application by the applicant **Geothermal Development Company Limited** who had filed a notice of motion on 2.12.2013 brought under **Rules 16 (1) (3) (4), 31(2) and 36 of the Industrial Court (Procedure) Rules 2010, Order 22 Rule 22 of the Civil Procedure Rules** and **sections 1A, 1B and 3A of the Civil Procedure Act** and all other enabling provisions of Laws of Kenya. The substantive prayer was that the court be pleased to issue permanent orders barring the respondents, their servants and or agents from attaching the applicant's property. In deciding the application, the court made orders thus:

- a. The respondent to pay the claimants **Kshs.681,836.58** less income tax due from claimants Nos. 1, 2, 5, and 6 by 15.1.2014 failing, execution for the due pay to continue.
- b. There be stay of execution until 15.1.2014.
- c. The respondent to pay costs of the application fixed at **Kshs.5,000.00**.

The applicant being dissatisfied with the orders filed an application for review on 14.02.2014. The application was made under Rule 32(1) (b), (c), (d), and (e) (3), (5) and (6) of the Industrial Court (Procedure) Rules, 2010. The applicant erroneously stated that the ruling subject of the application for review was delivered on 30.12.2013. The grounds for review were stated as follows:

1. Section 49(2) of the Employment Act, 2007 provides that any payments made by the employer under the section shall be subject to statutory deductions. The applicant stated that the effect of the section was that all payments made by the employer under the section shall be subjected to statutory deduction.
2. Under sections 3(2) (a) (ii) and 5(1) (a) of the Income Tax Act, payment made in employment or services rendered is income and taxable. Under section 105(1) of the Act, an employee aggrieved by such deduction should lodge a claim for refund to the Kenya Revenue Authority. The applicant relied on the letter by the Authority dated 19.12.2013 advising as much.

The claimants opposed the application by filing the replying affidavit of David Kimani Kangea. The claimants' case was that the respondent illegally deducted taxes from the 3rd, 4th, 7th, 8th, 9th and 10th claimants because their pay was Kshs.9,408.00 per month and they were not liable to pay any taxes under the Income Tax Act. The claimants relied on the Authority's "**Employer's Guide to Pay as You Earn in Kenya**" where clause 3 of Part II states that any individual whose gross pay plus benefits including housing provided by employer exceeds Kshs.11,135.00 per month is liable to PAYE. It further provides that if the employer is aware that the employee has income from main employment elsewhere, then PAYE should be deducted even though the earnings are less than Kshs.11,135.00 per month. It was not disputed that the claimants being Nos. 3, 4, 7, 8, 9, and 10 were not employed elsewhere and were entitled to Kshs.9,408.00 per month which was below the minimum monthly taxable income of Kshs.11,135.00. The claimants' further case was that section 105 of the Income Tax Act applied to refunds of excessive deductions and not cases of deductions that were not to be undertaken as taxation in the first instance and as was the position in this case, were illegitimate deductions.

In the Ruling subject of the application for review, the court stated as follows:

"It is not disputed that the claimants had been paid by the respondent in satisfaction of the judgment but without explanation of the deductions made from the judgment dues. The applicant has submitted that the deductions were for income tax with respect to the payments to each of the claimants.

The claimants have submitted that claimants Nos. 1, 2, 5, and 6 who earned Kshs.720.00 per day being Kshs.20,160.00 per month were liable to pay income tax in view of the provisions of section 49(2) of the Employment Act, 2007. It was further submitted that the rest of the claimants were not liable to pay taxes. The respondent did not object to that submission as respondent's counsel conceded and the court finds for the claimants in that regard.

The court has considered the submissions and finds that the claimants are entitled to be paid Kshs.681,836.58 less income tax due from claimants Nos. 1, 2, 5, and 6."

The court upholds the findings and further finds that within the framework of section 49 of the Employment Act 2007, the monthly payments to the claimants, except claimants 1,2,5 and 6, were not subject to income tax, as measured as monthly incomes and therefore not subject to such statutory deductions under the section. Accordingly, the application for review shall fail.

In conclusion, the application for review filed on 14.02.2014 for the respondent Geothermal Development Company Limited is dismissed with costs.

Signed, dated and delivered in court at Nakuru this Friday, 28th February, 2014.

BYRAM ONGAYA

JUDGE