



REPUBLIC OF KENYA

INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 1101 OF 2012

(Before D.K.N. Marete)

IBRAHIM MANYARACLAIMANT

Versus

**REGISTERED TRUSTEES OF AGRICULTURAL
SOCIETY OF KENYA (ASK).....RESPONDENT**

RULING

These are twin applications by the respondent dated 18th June, 2013 and 20th June, 2013.

Both applications are supported by the affidavits of Batram Muthoka sworn on 18th June, 2013 and 20th June, 2013 respectively.

The gist of these applications is a search for *inter alia*, orders for the release of motor vehicle Reg. KAZ 836B which motor vehicle belongs to the respondent but was attached by Jumbo Airlink Auctioneers on instructions and the authority of the claimant/respondent. The bone of contention arises out of a consent order of this court made on 4th April, 2013

The application dated 18th June, 2013 seeks the following prayers of court;

1. ***THAT*** this Honourable Court will be pleased to certify this application as urgent and order that service be dispensed with at the first instance.
2. ***THAT*** this Honourable Court be pleased to order stay of execution of the consent order dated 4th April 2013 issued by the Honourable D.K.N. Marete pending the inter parties hearing of this application.
3. ***THAT*** this Honourable Court be pleased to lift the proclamation dated 27th May 2013 done by Jumbo Airlink Auctioneers pending the hearing and determination of this application.
4. ***THAT*** this Honourable Court be pleased to order the Jumbo Airlink Auctioneers to release the motor vehicles registration number KAZ 836B attached back to the Respondent pending the hearing and determination of this application.
5. ***THAT*** this Honourable Court be pleased to restrain Jumbo Airlink Auctioneers from in any way dealing, alienating, disposing off or putting up for sale motor vehicle registration number KAZ

836B pending the hearing and determination of this application.

6. ***THAT*** the cost of this Application be provided for.

and is supported by the supporting affidavit of Batram Muthoka sworn on the same date.

The respondent vide another application by way of Notice of Motion dated 20th February, 2013 come back to court and prays for orders;

1. ***THAT*** this Honourable Court will be pleased to certify this application as urgent and order that service be dispensed with at the first instance.
2. ***THAT*** this Honourable Court be pleased to order the release the motor vehicles registration number KAZ 836B which is being held by Jumbo Airlink Auctioneers on instructions of the claimant with such conditions as this Honourable Court may deem fit and just.
3. ***THAT*** in the alternative to 2 above, this Honourable Court be pleased to allow the Respondent to deposit any such sufficient security to enable release of the said motor vehicle as the court may deem fit
4. ***THAT*** the cost of this Application be provided for.

This application again is supported by the supporting affidavit of Batram Muthoka sworn on the same date.

It is not in dispute that the parties on 4th April, 2013 entered into a consent judgement for a decretal amount of Ksh.4,851,674.00 payable to the claimant by the respondent. The respondent thereupon made a payment of Ksh.2,820,556.00. This was after calculation of taxes and payment of the same to the Kenya Revenue Authority and also deductions of amounts owing to the respondent by the claimant. These calculations were done and allegedly ratified to the claimant in advance.

The claimant in opposition sought to rely on the grounds of opposition dated 26th June, 2013 and a replying affidavit sworn by counsel for the claimant on the same date plus the annexures therein. He basis his argument on the fact that global sum payable was and still amounts to Ksh.4,851,674.00 and that the same was not conditional on terms. Further, decrees are not taxed as those are awards that are deemed to be directly owed and payable to the decree holder. Again, there is no evidence that these taxes have been deducted from the decretal sum and if the same are payable, the defendant becomes liable for the same as these are not a matter for the decree. He therefore prays that these applications be dismissed and the balance of Ksh.1,784,693.00 deposited in court be released to the claimant.

The Grounds of Opposition by the claimant/respondent are as follows;

- a. *The two applications lack merit as they both fail to address the reason for effecting attachment of the Decree.*
- b. *The decree the subject matter of the application is clear since it concerns monetary figure.*
- c. *The judgement Debtor must offer to deposit the full balance of the Decretal sum together with the Auctioneers costs/fees in a joint account the advocates on record to show goodwill on its part before release of the attached vehicle.*

In the replying affidavit sworn by Kennedy Keango Nyaencha, counsel for the claimant/respondent is that the decretal amount is Ksh.4,458,66.00 as set out in both the draft decree and the final decree. He also avers that he is not aware of any law that provides for taxation of decretal amounts in our legal system and jurisprudence that is;

7. ***THAT*** *I am not aware of any law that taxes decretal sums in Kenya.*

He also denies the sums allegedly owed by the decree holder to the judgement debtor and avers that the same have not been proven.

8. ***THAT*** *the alleged sums owed by the Decree holder to the judgement debtor are not part of the decree and however correct, have not yet been proven.*

The claimant/respondent further avers that this attachment does not have anything to do with fees owing only the subject matter but the balance of the decretal amount owing to the claimant. The claimant is also amenable to release of the motor vehicle on deposit of the amount of Ksh.1,784,683.00 being balance of decretal amount owing and also payment of proven auctioneers and storage charges.

The issue for determination from the onset is whether the judgement debtor has legitimate authority for taxation of the decretal sum and therefore the justification or otherwise of consequential attachment charges and costs thereof.

Section 3 of the Income Tax Act, Chapter 470, Laws of Kenya delineates taxes chargeable. It is headed *charge of tax*.

3.(1) Subject to, and in accordance with, this Act, a tax to be known as income tax shall be charged for each year of income upon all the income of a person, whether resident or non-resident, which accrued in or was derived from Kenya.

(2) Subject to this Act, income upon which tax is chargeable under this Act is income in respect of –

a. gains or profits from-

(i) a business, for whatever period of time carried on;

(ii) employment or services rendered;

(iii) a right granted to another person for use or occupation of property;

b. dividends or interest;

(c) (i) a pension, charge or annuity; and

(ii) any withdrawals from, or payments out of, a registered pension fund or a registered provident fund or a registered individual retirement fund;

(iii) any withdrawals from a registered home ownership savings plan;

d. (deleted by No 14 of 1982, s. 17);

e. an amount deemed to be in the income of a pension under this Act or by rules made under this Act;

f. gains accruing in the circumstances prescribed in, and computed in accordance with, the Eighth schedule.

(3) For the purposes of this section-

(a) “person” does not include a partnership; and

(b) a bonus or interest paid by a designated co-operative society, as defined under section

19A, shall be deemed a dividend.

Section 5 of the Income Tax Act brings out a detailed analysis of income from employment, among others as follows;

5(1) For the purposes of section 3(2)(a)(ii), an amount paid to

- a. a person who is, or was at the time of the employment or when the services were rendered, a resident person in respect of any employment or services rendered by him in Kenya or outside Kenya; or
- b. a non-resident person in respect of any employment with or services rendered to an employer who is resident in Kenya or the permanent establishment in Kenya of an employer who is not so resident,

shall be deemed to have accrued in or to have been derived from Kenya.

(2) For the purposes of section 3(2)(a)(ii), **“the gains or profits”** includes-

(a) wages, salary, leave pay, sick pay, payment in lieu of leave, fees, commission, bonus, gratuity, or subsistence, travelling, entertainment or other allowance received in respect of employment or services rendered, and any amount so received in respect of employment or services rendered in a year of income other than the year of income in which it is received shall be deemed to be income in respect of that other year of income.

Provided that-

- i. where such an amount is received in respect of a year of income which expired earlier than four years prior to the year of income in which it was received, or prior to the year of income in which the employment or services ceased, if earlier, it shall be deemed to be income of the year of income which expired five years prior to the year of income in which the employment or services ceased; and
- ii. where the Commissioner is satisfied that subsistence, travelling, entertainment or other allowance represents solely the reimbursement to the recipient of an amount expended by him wholly and exclusively in the production of his income from the employment or services rendered then the calculation of the gains or profits of the recipient shall exclude that allowance or expenditure; and

(iii) notwithstanding the provisions of subparagraph (ii), where such amount is received by an employee as payment of subsistence, traveling, entertainment or other allowance, in respect of a period spent outside his usual place of work while on official duties, the first two thousand shillings per day expended by him for the duration of that period shall be deemed to be reimbursement of the amount so expended shall be excluded in the calculation of his gains or profits.

These provisions of the Income Tax come out and clearly stipulate what is chargeable as tax – see Section 3 and particularly in respect to this cause what is defined as Income from Employment under Section 5 of the Act. Under no circumstances does any of these provisions of law include a decree of a court as a taxable item under the Income Tax law.

Would a decretal amount, in the circumstances be subjected to taxation as of this case? If this be the case, would this be feasible in law? My answer is no. If this were the case, the legislature would have come out clearly and provided for this. It cannot be argued that this was lost to the law maker. His, I suspect was in avoidance of creating confusion by subjecting decrees of court to taxation. This was partly because these are in most cases amorphous amounts and figures that would not necessary be in law deemed income. For example, would an amount of compensation in damages arising out of a fatal

accident claim be deemed income accruing to the aggrieved or injured property? I guess not.

Section 96 of the Act provides for the appointment and duties of agents. It provides as follows;

96(1) In this section-

“agent” means a person appointed as such under subsection (2);

“appointment notice” means a notice issued by the Commissioner

under subsection appointing an agent;

“moneys” include salary, wages and pension payments and any other

remuneration whatever;

“principal” means the person in respect of whom an agent is appointed.

(2) The Commissioner may by written notice addressed to any person-

(a) appoint him to be the agent of another person for the purposes of the collection and recovery of tax due from that other person; and

(b) specify the amount of tax to be collected and recovered.

(3) An agent shall pay the tax specified in his appointment notice out of any moneys which may, at any time during the twelve months following the date of the notice, be held by him for, or due from him to, his principal.

(4) Where an agent claims to be, or to have become, unable to comply with subsection (3) by reason of the lack of moneys held by, or due from, him he shall, within seven working days, notify the Commissioner accordingly in writing setting out fully the reasons for his inability so to comply, and the Commissioner may-

(a) accept the notification and cancel or amend the appointment notice accordingly;
or

(b) if he is not satisfied with those reasons, reject the notification in writing.

(5) Unless and until a notification is given by an agent under subsection (4)-

(a) sufficient moneys for the payment of the tax specified in his appointment notice shall be presumed to be held by him for, or due from him to, his principal; and

(b) in any proceedings, for the collection or recovery of that tax he shall be estopped from asserting the lack of those moneys.

(6) for the purposes of this section, the Commissioner may, by notice in writing, at any time require any person to furnish him within a reasonable time, not being less than thirty days from the date of service of the notice, with a return showing any moneys which may be held by that person for, or due by him to, another person from whom tax is due.

(7) Where an agent fails to pay an amount of tax specified in his appointment notice within thirty days-

(a) of the date of service of the notice on him; or

(b) of the date on which any moneys come into his hands for, or become due by him to, his principal,

whichever is later, and-

- i. he has not given a notification under subsection (4); or
- ii. he has given a notification which has been rejected by the Commissioner,

the provisions of this Act relating to the collection and recovery of tax shall

apply to the collection and recovery of that amount as if it were tax due and payable by the agent, the due date for the payment of which was the date upon which that amount should have been paid to the Commissioner under this subsection.

(8) An agent who has made a payment of tax under this section

shall for all purposes be deemed to have acted therein with the authority of his principal and of all other persons concerned, and shall be indemnified in respect of that payment against all proceedings, civil or criminal, and all process, judicial or extrajudicial, notwithstanding any provisions to the contrary in any written law, contract or agreement.

(9) A person who, in giving a notification under subsection (4), willfully makes any false or misleading statement, or willfully conceals any material fact, shall be guilty of an offence.

(10) For the purposes of this section, cases where moneys are held by an agent for, or due by him to, his principal, shall include cases where the agent-

- (a) owes or is about to pay money to the principal; or
- (b) holds money for or on account of the principal; or
- (c) holds money on account of some other person for payment to the principal; or
- (d) has authority from some other person to pay money to the principal.

The respondent does not adduce any evidence of agency on the part of the claimant and this can only be assumed for our purposes. The claimant was an employee of the respondent and presumably the relationship of principal/agent for purposes of income tax survived while this employer/employee relationship lasted. This must have ended and lapsed with the cessation of employment and therefore the respondent cannot purport to make deductions on tax on behalf of a nonexistent principal. This is not feasible or lawful.

I would also wish to walk a little longer on the issue of taxation of decretal sums especially after loss of employer/employee relationships as occasioned by termination or other cessation of employment. An agency for collection of tax ordinarily and customarily exists while this relationship subsists. It does not continue henceforth. Secondly, by virtue of their amorphous and hybrid nature, the law on income tax opts to stay clear of this to obviate a counter-productive system that breeds confusion and chaos in industrial relations.

Again, how would an employer validate action of taxation on amounts accruing from sources other than income in accordance with the law? Is a decretal amount income? To me, income in an employer/employee relationship would only arise where an employer is remunerating an employee for services rendered in the course of employment. It is an issue of *capital* directly compensating *labour*. Any amounts accruing from break-ups of this relationship would never be deemed income, even for purposes of taxation. These are the spoils of a break-up. Indeed, compensation for a bad and more often than not sour ending *inter parties*. This would not, in the least sense of the word be called a deemed

income. It is not income in terms of the Income Tax Act. It would not be taxable. And even if it was, the agency relationship between the parties would have collapsed thereby leaving the taxman to go directly to the person of the former employee for purposes of tax collection.

Section 49(1) of the Employment Act, 2007 further illustrates the fluid, amorphous and hybrid nature of claims for compensation under the employment and labour debtors laws.

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 the employee any or all of the following –

(a)...

(b)...

(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.

If, for example, this court or a labour officer exercised his discretion and opted to recompense a case for unlawful termination under this limb of law, would the same be deemed a salary and therefore taxable? The award would read thus;

- i. I award the claimant 12 months salary for unfair termination of employment, that is – Ksh.100,000.00 (being previous gross salary) x 12 months all totalling to Ksh.1,200,000.00.

Is this award a salary? Is it taxable as a salary? I note two distinct factors on this;

- i. That a salary is only payable during at the continuance of employment.
- ii. That the law provides payment of a number of months wages or salary not exceeding twelve months in such compensation.

It should be noted that the wages or salary here does not make the amount a wage or salary. The terms wages and salary are only a specified legal parameter for assessment of damages for unjustified and unfair dismissal or termination of employment. It would be foolhardy to deem the end product wages or salary and commit the same to taxation. Moreover, as earlier observed, the employer has lost his agency/principal relationship with the employee from the onset of termination of employment and therefore is estopped from such exercises.

The offshoot of my finding on this subject is that there is no known law that subjects decrees of court to taxation. The Income Tax Act aforecited is silent on this and we should so far trend that path. If the tax man wishes to rethink his position on this, we shall not disallow the same. This validates and legitimizes the action of attachment of the respondent/applicant's motor vehicle in respect of unpaid balances of the decretal amount.

I therefore find that the claimant was at all times entitled to an amount of Ksh.4,458,654.00 being the decretal amount agreed on *inter partes* by a consent judgement dated 4th April, 2013. Any amounts of deductions from amount owing to the claimant should have been factored and agreed on at this stage, and not any other. In any event, if this was deemed an oversight on the part of the respondent, the same should have been suggested, proffered and negotiated as was the case of the earlier consent order. Arbitrary and self sanitized actions by one party like in the present case are not sustainable or acceptable.

It is notable that the orders sought in the applications herein are belated in that the basic issues were resolved by consent of the parties recorded by court on 27th June, 2013 as follows;

- i. *Kshs.1,784,693.00 be deposited in court by the claimant pending hearing of the applications*

dated 18th June, 2013 and 20th June, 2013 or any other orders of court.

ii. *The motor vehicle attached KAZ 836 B, Isuzu Bus be released to the respondent upon payment of storage charges to be agreed by the parties.*

iii. *That this matter be mentioned seven days for further orders of court.*

iv. *Mention on 5th July, 2013 at 900 hours.*

Subsequently, a deposit of the balance of decretal amount of Ksh.1,784,693.00 was made to court and a release of motor vehicle KAZ 386 B, Isuzu Bus made. This ruling comes in to determine other subsequent issues in dispute therefore ousting the prayer for stay of the consent order as recorded on 4th April, 2013. It would now be imprudent to vacate consent orders which are now the backbone of these proceedings. I am therefore left with an open opportunity to determine the salient issues emanating thereof and therefore dispose of the applications *in toto*.

I therefore dismiss the applications and order as follows;

1. That the respondent be and is hereby ordered to meet and pay the claimant the amount of Ksh.1,784,693.00 being balance of decretal amount owing and unpaid to the claimant.
2. That the costs of this cause and auctioneers fees be and taxed as course in court.
3. That the costs of this application shall be borne by the respondent/applicant.

Dated, delivered and signed the 26th day of February, 2014.

D.K.Njagi Marete

JUDGE

Appearances:

1. Mr. Mutua instructed by Kithi & Company Advocates for the Applicant.
2. Mr. Nyaencha instructed by Nyaencha Waichari & Company Advocates for the Claimant/Respondent.