



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 106 of 2010

HOSEA NJERU KAGONDU.....CLAIMANT

VERSUS

**KENYA UNION OF COMMERCIAL FOOD AND ALLIED
WORKERS.....RESPONDENT**

(Before Hon. Lady Justice Maureen Onyango on 13th December, 2012),

RULING

On 7th March 2012, **Hon Justice Isaac E.K Mukunya** (retired) entered judgment in favour of the Claimant against the Defendant for Kshs.3, 000,000 to be paid within 30 days and in default Claimant be at liberty to execute. The parties thereafter by a consent payment of the decretal sum by deposit of Kshs.500, 000 and the balance by installments of Kshs.100,000 on 18th of each month.

The Respondent paid the deposit of Kshs.500, 000 less Pay As You Earn (**PAYE**) of Kshs.119, 655 leaving a balance of Kshs.380, 345. On 11th April 2012. On 15th June 2012, the Claimant sent auctioneers to execute the decree for non compliance with the Court's order compelling the Respondent to file the notice of motion herein under certificate of urgency for the following orders:

- 1. That the application filed herein be certified as urgent and be heard ex parte in the first instance.*
- 2. That there be a stay of execution of the Honourable Court's decree issued on 7th March, 2012 together with all the consequential orders.*
- 3. That the decree of the Honourable Court be satisfied in accordance with the parties Consent agreement dated 28th March, 2012 and filed in Court on 7th May, 2012.*
- 4. That the decretal sum be subject to Pay As You Earn and other statutory deductions.*
- 5. That the costs of Auctioneers if any should be met by the Claimant.*
- 6. The costs of the application be borne by the Claimant/Respondent.*

The notice of motion is supported by the Affidavit of BONFACE KAVUVI sworn on the same date. The parties later discussed and agreed on all issues except issue No. 4 on taxation. The parties were heard on 2nd October 2012 when Mr. Nyabena appeared for the Claimant and Mr. Mureithi for the Respondent.

Mr. Nyabena submitted that Section 49 read together with section 50 of the Employment Act make any Court award under the said sections subject to PAYE unless there is a specific order to the contrary, that the deduction by the Respondent of PAYE on the amount paid to the Claimant was lawful and justified and that section 37 of the Income Tax Act imposes a duty on employers to tax all benefits accruing to employees that are subject to deduction of PAYE.

Mr. Mureithi for the Claimant submitted that the application by the Respondent is irregular as it is brought under Section 12 when it should have been brought under section 16 of the Industrial Court Act of 2011, that section 49 of the Employment Act guides labour officers but under section 50 the Court exercises all powers incidental to a Court.

There is an assumption that a judgment is complete and self contained. That if it is the intention of the Court that the decretal sum should be subjected to tax the same would be contained in the judgment, that the consent order by the parties after the Courts decision did not include deduction of income tax, that the issue of taxation should have been raised earlier to give the Claimant an opportunity to address the Court on the same and the Court to make a determination accordingly. He submitted that the decision to deduct tax is unfair and urged the Court to uphold the wholesome nature of the decree and dismiss the application.

The issues for determination by the Court are two following

- I. *Whether the decree is subject to deduction of PAYE.*
- II. *Whether the application is properly before the court.*

On the issue of whether the application is properly before the court, it is my opinion that the application is properly before the Court. Section 12 gives the Court wide powers to give appropriate relief. Section 16 deals with review. The application by the Respondent is not a review.

On whether the decree is subject to deduction of income tax, section 49 of the Employment Act provides for remedies for wrongful dismissal and unfair termination. The section provides that any payments made by the employer under the section shall be subject to statutory deductions. The words “**Shall**” connote that it is mandatory. The section does not give a judge an option to decide whether or not the benefits under the Section are taxable.

The finding of the Court was to the effect that the Claimant was an employee of the Respondent. The benefits awarded by the Court were based on the provisions of Section 49. The Income Tax Act requires an employer to deduct PAYE from any Taxable income of an employee derived from employment. Failure to do so is an offense.

The Constitution of Kenya provides at Article 210 that no person shall be exempt from payment of tax unless exempted by Law. In the present case there is no exemption. To the contrary the Act requires that such payments be subjected to statutory deductions.

Mr. Mureithi for the Claimant has referred the Court to 2 authorities. The first one **JANE WANJIRU GITAU VS KENYA POWER & LIGHTING COMPANY LIMITED (2006) eKLR** concerns review and is not relevant to the present case which is not a review but an application for stay of execution and a clarification of whether the decree of the Court is subject to deduction of income tax as provided in Section 49 (2) of the Employment Act.

The second Authority **TIMOTHY MANYARA & 144 OTHERS VS PYRETHRUM BOARD OF KENYA (2005) eKLR** is relevant as it was a determination of whether the judgment was subject to income tax deduction I however find that it is distinguishable from the present case as there was no provision similar to Section 49(2) of the Employment Act, 2007 at the time it was decided, and Article 210 of the Constitution 2010.

For the foregoing reasons the application by the Respondent succeeds. For the avoidance of doubt, I wish to restate that all payments due from the Respondent to the Claimant in respect of the decree herein is subject to statutory deductions including PAYE as provided in sections 49 (2) of the Employment Act 2007.

Orders accordingly.

DATED AND DELIVERED IN NAIROBI THIS 13TH DAY OF DECEMBER, 2012

**HON JUSTICE MAUREEN ONYANGO
JUDGE**

Mr. Mureithi instructed by Mbugua Mureithi & Co. Advocates for the Claimant.

Mr. Nyabena and Company Advocates for the Respondent.