



**Commissioner of Domestic Taxes v Liberty Life Assurance Limited (Income Tax Appeal E108 of 2021) [2023] KEHC 1359 (KLR) (Commercial and Tax) (24 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1359 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
INCOME TAX APPEAL E108 OF 2021**

**A MABEYA, J**

**FEBRUARY 24, 2023**

**BETWEEN**

**COMMISSIONER OF DOMESTIC TAXES ..... APPELLANT**

**AND**

**LIBERTY LIFE ASSURANCE LIMITED ..... RESPONDENT**

*(Being an appeal from the judgment of the tax appeals tribunal delivered at Nairobi on 30th April 2021 in Tax Appeals Tribunal Appeal no 356 of 2019.)*

**JUDGMENT**

1. By a letter dated 27/3/2014, the appellant informed the respondent that it had assessed the PAYE at Kshs. 168,257,154/- inclusive of penalties and interest for the period January 2013 to November 2017. The respondent objected to the assessment and the objection decision was given on 12/6/2019.
2. The respondent contested the objection decision at the Tax Appeals Tribunal (“the Tribunal”) on the grounds that the appellant had erred in imposing PAYE on emoluments paid to insurance agents. By its judgment of 30/4/2021, the Tribunal upheld the respondent’s appeal.
3. Aggrieved by the judgment, the appellant preferred this appeal vide a Memorandum of Appeal dated 25/6/2021. The appellant raised five grounds which can be summarized as follows: -
  - a) That the Tribunal erred in holding that the respondent did not harmoniously read the provisions of the *Insurance Act*, *Employment Act*, *Income Tax Act* and the Income Tax PAYE Rules in determining the definition of an employee.
  - b) That the Tribunal erred to consider that the tax legislation should be used to determine the definition of an employee.



4. The respondent opposed the appeal by a Statement of Facts dated 6/8/2021. The respondent contended that it had contracted agents to sell insurance products to customers as well as hire employees to carry out the day today activities. That the [Insurance Act](#) prohibited Insurance companies from employing agents and could only contract them as independent contractors. That the respondent enters into contracts for service with the agents and contracts of service with their employees.
5. It was further contended that the respondent remitted PAYE with respect to its employees and deducted withholding tax with respect to the agents. That the Tribunal held that the respondent had remitted its taxes and the appellant had not lost any revenue. The respondent stated that the definition of employee ought to be derived from the [Employment Act](#) 2007 whereas the [Income Tax Act](#) states the manner in which an employee should be taxed.
6. The appeal was canvassed by way of written submissions which I have considered.
7. Counsel for the appellant submitted that there was indeed a contract of service between the respondent and the agents based on the rights and the responsibilities in their agency agreements. That the benefits enjoyed by the respondents such as pension, medical aid and annual bonus were similar to those of an ordinary employee. It was submitted that based on the substantive level of control the respondent exercises on the agents, there was an implication that the contracts were of service.
8. On the other hand, the respondent submitted that there is statutory definition of whether or not a person is an employee or independent contractors. That the [Insurance Act](#) provides that an agent could not be a salaried employee and that the respondent was prohibited from employing its agents. It was contended that the contracts for the employees were different from those for the agents. That the respondent remitted PAYE for its employees and withheld withholding Tax on behalf of its agents.
9. Counsel submitted that the respondent did not control the manner in which the agents performed their duties as they operated their own business entities, had their own offices and some their own employees. It was submitted that the agents were licensed to work for different Insurance companies.
10. I have considered the record of appeal, the statement of facts and the submissions by the parties. From the grounds of appeal, the main issue of determination is whether the Insurance agents were employees for purposes of taxation and therefore liable to PAYE.
11. The Tribunal held that an insurance agent could not be a salaried employee of the insurer and that the appellant ought to have read the provisions of the statutes harmoniously bearing in mind that the [Income Tax Act](#) did not provide for treatment of the insurance agents.
12. It is the appellants case that the respondent's agents fell within the description of an employee and that there existed a contract of service between them based on the rights and the responsibilities of the agents. It was contended that the agency manager agreements gave the rights and responsibilities which required the agents to show loyalty to the respondent company by conducting business only for the respondent. It was further contended that the agents enjoyed benefits that were similar to those enjoyed by the employees such as pension, medical aid and an annual bonus.
13. On its part, the respondent contended that section 69 of the [Insurance Act](#) prohibited an insurance company from employing its agents. That the insurance regulatory Authority had not faulted the respondents' contractual relationship with its agents. It was further contended that there was a difference between the contract entered for the agents and for the employees.



14. Section 2 of the *Insurance Act* defines an agent as: -
- “A person, not being a salaried employee of an insurer who in consideration of a commission, solicits, procures insurance business for an insurer or broker.”
15. The *Employment Act*, 2007 gives the definition of an employee as;
- “a person employed for wages or a salary and includes an apprentice and indentured learner;”
16. In view of the foregoing, it is apparent that the law differentiates an employee from an agent. Further, section 69 of the *Insurance Act* prohibits insurance companies from employing agents. I have looked at the contracts entered into by the agents and it is clear that the intention of the parties was to enter into a contract for service and not a contract of service.
17. It was the appellant’s contention that the respondent exercised a substantive level of control on its agents through the contracts and as such the contract conditions and terms of engagement implied that the contracts were of service. The Court’s view is that it is immaterial that the agents were receiving bonuses and benefits that were enjoyed by the employees as well. The test is the level of control that the company had over the agent as well as the obligations of the latter in execution of his/her contract with the company.
18. In *UAP Life Assurance Company Limited v Commissioner of Domestic Taxes* [2019] Eklr, the court held: -
- “It is evident that the guiding definition of an employee and employer is under the *Employment Act*. The *Employment Act* is the substantive and primary legislation on employment matters, as clearly indicated in the preamble thereto that; it is an “Act of Parliament to repeal the *Employment Act*, declare and define the fundamental rights of employees, to provide basic conditions of employment of employees, to regulate employment of children, and to provide for matters connected with the foregoing” It is noteworthy that the Income Act does not define an employee, but the Income Tax (PAYE) Rules defines an employee as
- (a) “gains or profits from employment or service rendered which are payable in money;
  - (b) the value of house provided by the employer ascertained under sections 5(3) of the Act; and
  - (c) the value of the benefit or facility by the employee, where the total value exceeds three thousand shillings per month.”
19. It must be recalled that a contract of employment is a contract of service and not a contract for service. A contract for service is defined by Black’s Law Dictionary, 10<sup>th</sup> Edn as; ‘a contract for a job undertaken by an independent contractor, as opposed for an employee.’ On the other hand, both the *Employment Act* and *Income Tax Act* have definitions of a contract of service. Section 2 of *Income Tax Act* defines a contract of service as;
- “an agreement, whether oral or in writing and whether expressed or implied, to employ or to serve as an employee for a period of time, and includes a contract of apprenticeship or indenture learnership, under which the employer has the power of selection and dismissal



of the employee, pays his wages or salary and exercises general or specific control over the work done by him, and for the purpose of this definition an officer in the public service shall be deemed to be employed under a contract of service.”

19. From the foregoing, the Court is of the view that the *Employment Act*, being the statute that primarily deals with matters employment is the best suited to give the definition of an employee.
20. In the present case, the agents were not employed for a salary but they received commissions for the work done. They could therefore not be termed as employees for purposes of paying the PAYE. The withholding tax was already paid and accounted for and any request for PAYE would amount to double taxation. To hold otherwise would mean that the respondent was deliberately breaching the Statute (read, the *Insurance Act*) under which it was operating.
21. In the upshot, I find no basis to disturb the judgment of the Tribunal and hereby upholds it. The appeal lacks merit and is dismissed with costs to the respondent.

It is so decreed.

**DATED AND DELIVERED AT NAIROBI THIS 24<sup>TH</sup> DAY OF FEBRUARY, 2023.**

**A. MABEYA, FCIArb**

**JUDGE**

