



Omol v Postbank Regulated Non-WDT Sacco Society Limited (Cause E797 of 2022) [2025] KEELRC 1008 (KLR) (28 March 2025) (Ruling)

Neutral citation: [2025] KEELRC 1008 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E797 OF 2022
SC RUTTO, J
MARCH 28, 2025**

BETWEEN

MILICENT ANYANGO OMOL CLAIMANT

AND

**POSTBANK REGULATED NON-WDT SACCO SOCIETY
LIMITED RESPONDENT**

RULING

1. By way of a judgment delivered on 8th November 2024, this Court found in favour of the Claimant as follows:
 - a. A declaration that the Claimant's termination from employment was substantively unfair.
 - b. The Claimant is awarded one (1) month's salary in lieu of notice being the sum of Kshs 140,305.00.
 - c. The Claimant is awarded Compensatory damages equivalent to seven (7) months of her last salary being Kshs 982,135.00.
 - d. The Claimant is awarded unpaid leave in the sum of Kshs 95,597.67.
 - e. The total award is Kshs 1,218,037.67.
 - f. Interest on the amount in (e) at Court rates from the date of Judgment until payment in full.
 - g. The Respondent shall also bear the costs of this claim.
2. Consequently, the Respondent/Applicant filed the instant Notice of Motion dated 9th December 2024, seeking an order to set aside, review, and or vary the judgment and decree of this Court delivered on 8th November 2024.



3. The Motion is premised on the grounds appearing on the face thereof and the Affidavit of Monicah Ndung'u, the Applicant's Honorary Secretary. Grounds in support of the Motion are that the award by the Court included Kshs 95,597/= being the award for unpaid leave.
4. It is averred that the award is an error apparent on the face of the record for the reason that the said amount was paid to the Claimant on 29th July 2022. That proof of payment is found in the Respondent's bundle of documents dated 31st January 2024 on page 71.
5. In her Supporting Affidavit, Ms. Ndungu deposes that if the orders are not granted, the Claimant will have benefited twice from her claim for unpaid leave days, yet the same was paid to her. That this is quite prejudicial to the Applicant.
6. The Claimant did not respond to the Notice of Motion.
7. When the Motion came up for hearing on 16th January 2025, the Court directed the parties to ascertain whether the component of leave days was paid to the Claimant upon separation.
8. On 5th February 2025, the parties informed the Court that the Claimant was paid accrued leave, but the same was subjected to check off hence, what was paid to her was Kshs 76,000/=. This being the case, the contention between the parties moved from whether the Claimant was paid accrued leave to whether the same was taxable.
9. As such, the Court directed both parties to file written submissions on the issue.
10. The Applicant has submitted that under Section 37 of the *Income Tax Act*, it is the obligation of an employer to recover appropriate tax from any lump sum amount before releasing the balance to the employee. The Applicant has further submitted that a court does not need to declare that income tax is deductible from an award of the Court because the *Income Tax Act* declares tax deductible and the *Employment Act* recognizes and allows for such deduction.
11. Referencing the case of Kioko Joseph (suing as the legal representative of the estate of Joseph Kilinda) v Bamburi Cement Limited (2017) KECA 360 (KLR), the Applicant has submitted that payment of leave days was subject to statutory deductions.
12. Submitting against the Application, the Claimant has argued that leave cannot be paid in the absence of a basic salary. The Claimant has further submitted that the sum of Kshs 95,597.67 appearing on her pay slip has been subjected to statutory deductions of NSSF, NHIF, and PAYE. In the Claimant's view, this was unprocedural and calculated to deny her, her rightful dues.
13. The Claimant has further submitted that the Court rightfully awarded her leave pay, but the Applicant took it upon itself to make statutory deductions on the same with no backing in law.
14. Whilst submitting that Sections 3(2) (a) (i) and 5(2) (a) of the *Income Tax Act* provide for allowances such as leave to be taxed, the Claimant argued that this can only be taxed along basic salary.

Analysis and Determination

15. It is evident that the parties herein are in concurrence that the component of accrued leave days was paid to the Claimant at the time of her exit from the Applicant's employment. Accordingly, the outstanding issue for determination by the Court is whether the said leave pay was subject to taxation. The answer to this question lies in the *Income Tax Act*.
16. Section 3(2) (a) (ii) of the *Income Tax Act* provides as follows:



- (3) (2) Subject to this Act, income upon which tax is chargeable under this Act is income in respect of–
- (a) gains or profits from–
.....
- (ii) any employment or services rendered;

17. Further along the Act, Section 5(2) (a) provides as follows:

[5] (2) For the purposes of section 3(2)(a)(ii) "gains or profits" includes–

- (a) any 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:

18. My understanding of the aforesaid statutory provisions is that payment in lieu of leave constitutes taxable allowances under the *Income Tax Act*.
19. In addition, Section 37(1) of the *Income Tax Act* imposes a statutory obligation on the employer to deduct the appropriate tax from an employee's emoluments and account for the same.
20. In light of the foregoing, and contrary to the Claimant's position, the payment in lieu of leave was subject to taxation.
21. To this end, and bearing in mind the provisions of Rule 74(1) (d) of the Employment and Labour Relations Court (Procedure) Rules, 2024, I am satisfied that there is sufficient reason to review the Court's decision with respect to the award of unpaid leave.
22. Accordingly, the Application dated 9th December 2024 is allowed and the Court's final orders in the judgment delivered on 8th November 2024, are hereby reviewed to exclude the award of unpaid leave in the sum of Kshs 95,597.67.
23. There will be no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF MARCH 2025.

.....

STELLA RUTTO

JUDGE

In the presence of:

Ms. Mutua instructed by Mr. Kivuva for the Claimant/Respondent

No appearance for the Respondent/Applicant

Millicent Court Assistant

Order

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions



of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

