



REPUBLIC OF KENYA



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**Obonyo v Spectre International Ltd (Cause 67 of 2019)
[2023] KEELRC 1367 (KLR) (31 May 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1367 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE 67 OF 2019**

**S RADIDO, J
MAY 31, 2023**

BETWEEN

DUNCAN OBONYO CLAIMANT

AND

SPECTRE INTERNATIONAL LTD RESPONDENT

JUDGMENT

1. The 166 Claimants sued Spectre International Ltd (the Respondent) on 19 July 2019, alleging breach of contract and failure to pay or settle terminal dues arising from redundancy.
2. The Respondent filed a Response on 10 December 2019 and on 2 March 2020, the Court referred the dispute to mediation. The Respondent did not cooperate with the Mediator and he requested the Court to appoint another Mediator.
3. On 16 February 2022, the Mediator filed a Partial Mediation Agreement which settled the questions of severance pay, notice pay on redundancy, salary arrears for 2017 and payments to casual employees, all totaling Kshs 44,407,829/-.
4. The Agreement was adopted by the Court on 23 May 2022.
5. On 31 May 2022, the Respondent informed the Court that it had paid the monies due to the Provident Fund and Sacco and requested 30 days to file the evidence.
6. The Court allowed the request, but the Respondent did not file any evidence and the parties proposed that the outstanding dispute proceed to hearing.
7. The Respondent also requested for leave to file an Amended Response.
8. On 19 July 2022, the Respondent filed an Amended Response.



9. The parties also filed hundreds of pages of documents and the hearing commenced on 24 November 2022, and further proceeded on 31 January 2023 and 6 March 2023.
10. The Court, thereafter directed the parties to file and exchange submissions. The Claimants filed their submissions on 31 March 2023 and the Respondent on 3 May 2023.
11. In their submissions, the Claimants did not specifically identify or isolate the Issues for determination, but the submissions generally addressed the twin questions of Sacco and Provident fund contributions.
12. For the Respondent, it isolated 6 Issues, to wit:
 - i. Whether the Court has jurisdiction to hear the dispute?
 - ii. Whether the Claimants have locus standi to pursue the instant claim?
 - iii. Whether the claims for Sacco dues and Provident Fund dues are time-barred?
 - iv. Whether the Claimants are entitled to the alleged Sacco dues?
 - v. Whether the Claimants are entitled to the alleged Provident Fund dues?
 - vi. Whether the Claimants have discharged their burden of proof?
13. The Court has considered the pleadings, evidence and submissions by the parties.

Jurisdiction

Limitation

14. The Respondent objected to the claims by the Claimants on the basis that they were caught by the 3-year time-bar set out in section 90 of the [Employment Act, 2007](#).
15. The Claimants did not bother to address the question of limitation in their submissions.
16. The Claimants moved the Court on 19 July 2019.
17. The heads of claims prayed for in respect to the unremitted Sacco and Provident Fund contributions went back to 2012/2013.
18. The Claimants separated with the Respondent after a redundancy notice on 7 December 2017.
19. Working backwards from the date the Claimants instituted the Cause herein on 19 July 2019, any claims prior to 19 July 2016 are caught by the law of limitation as prescribed by section 90 of the [Employment Act, 2007](#) and the Court has no jurisdiction to entertain the same.
20. The Court can, therefore, only entertain the heads of claim relating to unremitted deductions (Sacco and Provident Fund) from 19 July 2016, to the date of separation, December 2017.

Alternative dispute resolution

21. The Respondent also objected to the jurisdiction of the Court on the ground that the dispute should have been channelled under and through the mechanisms outlined in section 35 of the [Co-operative Societies Act](#) and section 53A of the [Retirement Benefits Act](#).

Co-operative Societies Act}}

22. Section 35 of the [Co-Operative Societies Act](#) provides that:



Failure to remit the sum deducted

- (1) Where an employer of a person who is a member of a co-operative society has, under the instructions of the employee, made a deduction from the employee's emoluments for remittance to the co-operative society concerned but fails to remit the deductions within seven days after the date upon which the deduction was made, the employer shall be liable to pay the sum deducted together with compound interest thereon at a rate of not less than five per cent per month.
 - (2) The Commissioner may, on behalf of the society, institute legal proceedings in court for recovery of the sum owing under subsection (1) without prejudice to any other mode of recovery and such sum shall be a civil debt recoverable summarily.
 - (3) The Commissioner may, by written notice, appoint any person, bank or institution to be an agent of the society for the purposes of collection and recovery of a debt owed to the society.
 - (4) The agent shall pay the amount specified in the notice issued under subsection (3) out of any moneys which may, at any time during the twelve months following the date of the notice, be held by him for the employer or are due from him to the employer.
 - (5) Where an agent claims to be or to have become unable to comply with subsection (3) by reason of lack of moneys held by or due from him, he shall give a written notification to the Commissioner stating the reasons for his inability and the Commissioner may —
 - (a) accept the notification and cancel or amend the notice accordingly; or
 - (b) if he is not satisfied with the reasons, reject the notification in writing.
 - (6) Where an agent fails to notify the Commissioner or the notification is rejected, it shall be presumed that the agent has sufficient moneys for the payment of the amount specified in the notice.
 - (7) Where an agent fails to pay the amount specified in the notice within thirty days from the date of service or the date on which any moneys come into his hands for or become due to him from the employer, the agent shall be liable for the amount specified in the notification as if he were the employer.
 - (8) In any proceedings for the collection or recovery of the amount specified in the notice, it shall not be a defence for the agent to claim lack of the moneys.
 - (9) This section shall apply notwithstanding that the failure under subsection (1), to remit the sum deducted may constitute an offence under some other law for which the employer has been prosecuted, or is being, or is likely to be prosecuted.
 - (10) In this section "employer" includes any person, firm or organization holding remuneration or payment for produce of a member of a co-operative society and the term "employee" includes any person who receives remuneration or payment for produce from such persons or firm or organization
23. It is the provisions of section 35(1) and (2) of the Act which appear material to the instant objection.
24. In brief, the provisions contemplate the payment of compound interest where the employer fails to remit Sacco deductions and also donates the power to the Commissioner for Co-operative Development to institute recovery proceedings on behalf of the Sacco for the unremitted deductions.



25. However, there is rider that the power donated to the Commissioner is without prejudice to any other mode of recovery including summary proceedings for civil debts. The power to institute court proceedings given to the Commissioner is discretionary.
26. With and because of the rider and discretion, the Cause cannot, in the Court's view, be defeated on the question of prematurity or failure to utilise alternative dispute avenue through the office of the Commissioner for Co-operative Development.

Retirement Benefits Act}}

27. Section 53A of the *Retirement Benefits Act* is in the following terms:

Proceedings for recovery of deductions from employers

- (1) Where an employer, having with the agreement of an employee who is a member of a scheme, made a deduction from the employee's emoluments for remittance to the scheme, fails to remit the deduction within fifteen days of the deduction, the scheme may, after giving such employer not less than seven days' notice, institute proceedings for the recovery of the deduction.
 - (2) A notice under subsection (1) shall be in writing and copied to the Authority, and shall:
 - (a) require the employer to pay the sum deducted to the scheme within seven days of the notice; and
 - (b) inform the employer that if he fails to pay such sum before the expiration of the notice, proceedings for the summary recovery of the sum shall be filed in court without further reference to him.
 - (3) Any sum which is the subject of proceedings for summary recovery under this section shall attract a compound interest at the rate of three percent per month.
 - (4) Without prejudice to any proceedings instituted under the provisions of this section, a person who refuses or fails to comply with a notice given to him under subsection (1) commits an offence and shall be liable to a fine not exceeding five hundred thousand shillings, or in the case of a natural person, to imprisonment for a term not exceeding three years, or to both.
 - (5) Where an offence under subsection (4) is a continuing offence, the person convicted shall, in addition to the penalty prescribed in that subsection be liable to a further fine of one thousand shillings for every day or part thereof during which the offence continues.
28. It is correct that section 53A (1) of the Act gives a scheme a legal mandate to sue to recover unremitted deductions.
 29. The legal mandate is given in permissive terms:

the scheme may, after giving such employer not less than seven days' notice, institute proceedings for the recovery of the deduction.
 30. Considering the use of the permissive term, may, the Court is of the view that the employee is not legally divested of the right to sue for the recovery of the deducted but not remitted contributions where the Scheme has failed to use its discretion to sue.



Locus standi: Provident Fund and Sacco as legal entities

31. According to the Respondent it was not open to the Claimants to sue on account of funds or contributions which were due to the Provident Fund and the Sacco because the two entities were legal persons capable of suing.
32. The Respondent, thus asserted that the Cause was defective.
33. To support the argument, the Respondent sought solace in a passage in *Agricultural Finance Corporation v Lengetia Ltd & Jack Mwangi (1985) eKLR* that:

As a general rule a contract affects only parties to it, it cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. The fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract.
34. The Court fails to buy into the assertions by the Respondent on privity of contract for the simple reason that the instant action is in relation to monies deducted from the Claimants' salaries by the Respondent upon the written instruction of the Claimants. The further instructions were to remit the Funds to the Sacco and the Provident Fund.
35. It would not be out of place to infer that the contract was between the Claimants and the Respondent (the Respondent did not produce any contract between the Respondent and the Sacco or Provident Fund) and thus there was privity of contract.
36. By dint of sections 19(1)(a), (f) and (g) of the *Employment Act, 2007*, the Respondent was deducting monies from the salaries of the Claimants upon written instructions (allowing the deductions and directing where the deductions should be directed).
37. Section 19(5) and (6) of the Act envisages legal proceedings against the employer with the authority given to the Court to order a refund of the unremitted deductions either to the employee or intended beneficiary, such as the Sacco or Provident Fund.
38. The Claimants as employees who had instructed the Respondent to deduct and remit the contributions remained the principals based on the written instructions given to the Respondent.
39. The interests of either the Provident Fund and/or Sacco in the unremitted contributions, therefore, remained inchoate.
40. And it is only through a statutory intervention that the Provident Fund and Sacco could sue for the recovery of the contributions.
41. The Court finds that the Claimants had the locus standi to sue.

Recognition agreement

42. The Respondent also objected to the jurisdiction of the Court on the basis that the Claimants had not exhausted the alternative dispute mechanisms set out in the parties' recognition agreement.
43. The Respondent did not file a copy of the recognition agreement to enable the Court to ascertain whether it had alternative dispute resolution avenues deferring the jurisdiction of this Court (it also did not address the question in the submissions).



Trade union membership

44. The Respondent further objected to the competency of the Cause on the ground that since the Claimants were members of a trade union (Kenya Chemical and Allied Workers Union) which had a recognition agreement with it, the claims in respect to the redundancy could only be agitated by the trade union.
45. The parties settled the question of redundancy dues during conciliation, and thus this objection has been overtaken by events.

Sub judice

46. Further, the Respondent contended that the instant Cause was sub judice because there was a pending Nairobi Insolvency Petition No. E014 of 2020, Retirement Benefits Authority v Spectre International Ltd Staff Provident Fund, seeking the winding up of the Provident Fund.
47. The Court finds that the insolvency dispute does not render the causes of action advanced herein sub judice as the same are not related.

Res judicata

48. The Respondent also drew the Court's attention to Kisumu Cause No. 275 of 2016, Kenya Chemical & Allied Workers Union v Spectre International Ltd (reported as Kenya Chemical & Allied Workers Union v Spectre International Ltd (2018) eKLR), to argue that this Cause was res judicata because the claims for salary arrears for 2013 had been adjudicated on in the said Cause.
49. The Respondent, however, failed to place before the Court the pleadings and judgment in the aforesaid Cause to support the contention of res judicata (a reading of the judgment in the Cause (online) indicates it was a claim for salary arrears for 2013 and 2014, which is not the subject of this judgment).

Merits of the Cause

Unremitted Provident fund/Sacco contributions

50. The Claimants asserted that the Respondent deducted Provident Fund and Sacco contributions from their salaries but failed to remit the deductions to the Provident Fund and/or Sacco.
51. To support the head of the claim, the Claimants produced copies of payslips to demonstrate that the deductions were effected from their salaries.
52. The Claimants also called witnesses who testified that the Respondent failed to remit the contributions to the Fund and/or Sacco it had deducted.
53. The Respondent's witness acknowledged that it made deductions from the Claimants' salaries and he also contended the same were remitted through the bank but that he did not have records to support the contention in Court.
54. The witness (current Managing Director at the time of the hearing) also admitted under cross-examination that the Respondent last remitted the Provident Fund/(Sacco) deductions in 2012, while the Claimants worked up to 2017/2018.
55. When challenged to produce records that the deductions were remitted to the Provident Fund and Sacco, the witness stated that the administrators of the Fund/Sacco could produce the records.



56. Since the deductions were made from the payroll, it was the Respondent who had custody of records to show when and how the deducted contributions were sent to the Provident Fund and Sacco. Such records could include cheques issued by the Respondent or bank statements with the attendant payroll product(s).
57. The records of remittance of the contributions of the deductions were peculiarly within the knowledge of the Respondent.
58. It failed to produce the records.
59. No satisfactory explanation for the failure was provided to the Court.
60. The Claimants have proved on a preponderance of evidence through the payslips produced in Court that the Respondent deducted from their salaries contributions towards the Provident Fund and Sacco and that the contributions were not remitted.
61. In light of the conclusion on limitation above, the Court finds that the Respondent is liable to the Claimants for deducted but unremitted Provident Fund and Sacco contributions from 19 July 2016 up to the time of separation.

Conclusion and Orders

62. Flowing from the above, and in light of the demand that a Court grants an appropriate remedy, the Court issues the following orders:
 - i. A declaration is hereby issued that the claims prior to 19 July 2016 are caught up by the limitation prescribed by section 90 of the *Employment Act, 2007*.
 - ii. A declaration is hereby issued that the Respondent is liable to refund the Claimants' contributions deducted towards Sacco contributions but not remitted to the Sacco.
 - iii. A declaration is hereby issued that the Respondent is liable to refund the Claimants' contributions towards the Provident Fund but not remitted to the Fund.
 - iv. An order is hereby issued that the parties meet, compute and agree on the amounts declared as due in (ii) and (iii) above and file a report with the Court within 45 days.
63. For clarity, the mediation agreement adopted by the Court on 23 May 2022 forms part of this judgment.
64. The parties are granted the liberty to apply.
65. The Claimants have partly succeeded. They are awarded costs on half-scale.

DELIVERED VIRTUALLY, DATED AND SIGNED IN KISUMU ON THIS 31ST DAY OF MAY 2023.

RADIDO STEPHEN, MCIARB

JUDGE

Appearances

For Claimant Omondi, Abande & Co. Advocates

For Respondent Awele Jackson Advocates LLP

Court Assistant Chrispo Aura

