



Owiti v Usiku Entertainment Limited (Employment and Labour Relations Cause E075 of 2023) [2023] KEELRC 3296 (KLR) (18 December 2023) (Ruling)

Neutral citation: [2023] KEELRC 3296 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E075 OF 2023
BOM MANANI, J
DECEMBER 18, 2023**

BETWEEN

ALEX OWITI CLAIMANT

AND

USIKU ENTERTAINMENT LIMITED RESPONDENT

RULING

1. The application before the court seeks for leave to amend the memorandum of claim to introduce a plea to compel the respondent to remit various statutory deductions allegedly made against the claimant's salary in favour of various statutory bodies but which were not remitted. In addition, the claimant seeks for leave of the court to introduce a prayer to compel the respondent to furnish him with statements of the statutory deductions allegedly made against his salary from June 1, 2020.
2. The application is vehemently opposed by the respondent. According to the respondent, the court has no jurisdiction to adjudicate on the matters that the claimant seeks to introduce in the case through the proposed amendment.
3. The respondent contends that jurisdiction to determine whether an individual owes taxes to the Government of Kenya lies with the Kenya Revenue Authority through its agency, the commissioner general. Further, it is the respondent's case that the mandate to recover outstanding National Social Security Fund and National Health Insurance Fund dues lies with the National Social Security Fund and the National Health Insurance Fund respectively.
4. Thus, the respondent argues that the court has no jurisdiction over these matters. Therefore and in the respondent's view, it is of no value for the claimant to move the court to amend the memorandum of claim to include matters which are outside its (the court's) jurisdiction to determine.



Analysis

5. The claimant avers that whilst he was reviewing his tax compliance status, he realized that the respondent had not remitted his Pay As You Earn (PAYE) tax for the period between January and December 2022. As a result, it has become necessary to amend the memorandum of claim to include a prayer to compel the respondent to forward the aforesaid tax deductions to the Kenya Revenue Authority. In addition, the claimant contends that it has also become necessary to include in the said memorandum of claim a prayer to compel the respondent to provide him with records of statutory remittances that it (the respondent) has made on his behalf for the period under review.
6. The claimant relies on sections 19 and 92 of the *Employment Act* and section 37 of the *Income Tax Act* to advance his case. It is his case that once an employer has made statutory deductions from an employee's salary, he (the employer) is bound by section 19 of the *Employment Act* to remit the amount that is so deducted to the relevant statutory agency. If he (the employer) fails to do so, he is liable to be ordered to either refund the employee the amount that was deducted or forward it to the relevant statutory body.
7. The claimant contends that under section 12 of the *Employment and Labour Relations Court Act*, this court has jurisdiction to address the issue at hand. It is the claimant's view that section 37 of the *Income Tax Act* does not oust the court's jurisdiction to adjudicate on the issues that are raised in the proposed amendment.
8. According to the claimant, section 92 of the *Employment Act* underscores the fact that provisions of the Act are to be deemed to be in addition to, and not in substitution for or in derogation of, provisions of any other Act. Therefore, section 37 of the *Income Tax Act* which purports to vest exclusive jurisdiction on tax matters in the commissioner general must not be understood as derogating from the provisions of the *Employment Act* which grant the Employment and Labour Relations Court overall jurisdiction on disputes between employers and employees including disputes relating to statutory deductions made by employers to employees' salary.
9. Section 37 of the *Income Tax Act* provides as follows:-
 1. An employer paying emoluments to an employee shall deduct therefrom, and account for tax thereon, to such extent and in such manner as may be prescribed.
 2. If an employer paying emoluments to an employee fails:-
 - a. to deduct tax thereon;
 - b. to account for tax deducted thereon; or
 - c. to supply the commissioner with a certificate provided by rules prescribing the certificate, the commissioner may impose a penalty equal to twenty-five per cent of the amount of tax involved or ten thousand shillings whichever is greater, and the provisions of this Act relating to the collection and recovery of such tax shall also apply to the collection and recovery of such penalty as if it were tax due from the employer.

Provided that, instead of the commissioner imposing a penalty under this subsection, a prosecution may be instituted for an offence under section 109(1) (j).



10. Section 109(1)(j) of the aforesaid Act provides as follows:-

Any person shall be guilty of an offence if he, without reasonable excuse fails to deduct and account, or fails to account for tax, as provided by section 37 of this Act, or fails to supply prescribed certificates as is required by that section.

11. Section 2 of the *Income Tax Act* defines the term ‘Commissioner’ to mean the Commissioner-General appointed under section 11(1) of the *Kenya Revenue Authority Act* (cap. 469).
12. Section 3 of the *Kenya Revenue Authority Act* sets up the Kenya Revenue Authority. Under section 5 of the *Kenya Revenue Authority Act*, some of the functions of the Authority are to assess, collect and account for all revenues in accordance with the laws that are set out under the First Schedule to the Act. These pieces of legislation include the *Income Tax Act*.
13. Under section 11 of the *Kenya Revenue Authority Act*, one of the functions of the commissioner general is to undertake the day to day operations of the Kenya Revenue Authority. Therefore and by virtue of this provision, one of the core functions of the commissioner general is to assess, collect and account for all revenues (on behalf of Kenya Revenue Authority) in accordance with the applicable laws including the *Income Tax Act*.
14. Undoubtedly, the law assigns the duty of assessment, collection and recovery of tax to the Commissioner General on behalf of the Kenya Revenue Authority. Under section 37 of the *Income Tax Act*, if the employer fails to remit tax that has been deducted from an employee’s salary, the commissioner general is entitled to enforce collection of the unremitted tax including by imposing penalties on the unpaid amounts. The law also prescribes criminal sanctions against the employer for non-payment of taxes that have been collected from employees.
15. It is therefore correct as submitted by the respondent that the power to pursue remittance of unpaid taxes lies with the commissioner general in the first instance. The court has no jurisdiction to assume this mandate in disregard of the express provisions of statute on the subject.
16. The court cannot for instance order an employer to remit taxes to the Kenya Revenue Authority without an express request for assistance by the latter through its commissioner general in that regard. To do so would be to appropriate the mandate of the Kenya Revenue Authority.
17. The claimant has relied on section 19 of the *Employment Act* to argue that the court has jurisdiction to make such orders. However, this section donates jurisdiction to the court that will be exercising criminal as opposed to civil jurisdiction over the grievance.
18. Under section 12 of the *Employment and Labour Relations Act*, the Employment and Labour Relations Court does not exercise criminal jurisdiction. This power has been reserved for the Magistrate’s Court by virtue of section 29 (4) of the *Employment and Labour Relations Act*.
19. In my view, the provisions of sections 37(1) & (2) and 109 (1) (j) of the *Income Tax Act* read together with section 19(5) & (6) of the *Employment Act* require an employee who is aggrieved by an employer’s non-remittance of tax to raise the issue with the Commissioner General. The Commissioner General will then either invoke the tax collection procedures prescribed under the *Income Tax Act* or institute criminal proceedings in the Magistrate’s Court against the employer whereupon the court, exercising its criminal jurisdiction, will issue orders compelling the employer to remit the unremitted tax.
20. The Employment and Labour Relations Court has no power to compel an employer to remit to the Kenya Revenue Authority outstanding taxes by an employee in exercise of its (the court’s)



civil jurisdiction without the invitation of the Kenya Revenue Authority through its Commissioner General. Therefore, the aforesaid matter lies outside the jurisdiction of this court.

21. The court has considered the various decisions that the Claimant has cited to urge it (the court) to assume jurisdiction over the tax issue. I note that in those decisions, the learned Judges did not consider the fact that the court's jurisdiction to enforce tax payments under section 19 (5) & (6) of the *Employment Act* appears to be of a criminal rather than civil nature. Had this matter been considered, it is possible that the learned Judges would have come to a different conclusion regarding the invite to enforce the employer's tax obligations whilst exercising their civil jurisdiction and without an invite by the Commissioner General on whose shoulders, the mandate of enforcement of payment of taxes appears to rest.
22. Part VII of the *National Social Security Fund Act* empowers the National Social Security Fund to commence criminal and civil proceedings in an effort to recover any money that has been collected for its benefit but which has not been remitted to it (the Fund). The criminal proceedings may be commenced by the Director of Public Prosecutions or the Fund's officer with the authority of the Director of Public Prosecutions. On the other hand, civil proceedings in this respect may be instituted by the Fund's authorized officer.
23. With regard to the now defunct National Health Insurance Fund, section 42 of the repealed *National Health Insurance Fund Act* empowered an authorized officer of the Fund's Board to commence both criminal and civil proceedings to recover money that was due to the Fund. The law did not contemplate a scenario where an employee would seek to enforce remittance by the employer to the Fund of amounts deducted from him for the benefit of the Fund.
24. In effect, it is doubtful that the court is entitled to enter into the arena of enforcing payment of the above statutory deductions without the relevant statutory agencies moving it for that purpose. Therefore, the plea by the claimant to amend his memorandum of claim to pursue remittance of the various statutory deductions to the relevant statutory agencies does not appear to sit well with the law as currently framed.
25. The other matter relates to the proposed prayer by the claimant to compel the respondent to provide him with details regarding remittance of statutory deductions in respect of his accounts. In my view, records on these payments are in public domain. These records are publicly held by the various statutory agencies that oversee management of the Funds.
26. The claimant being the account holder of the accounts in respect of which the impugned payments are to have been made, has the right to approach these agencies and request to be furnished with information regarding the status of his payments for the period under review. In my view, there is absolutely no reason why a court should be asked to compel an employer to supply an employee with information which is otherwise readily accessible to the employee.

Determination

27. For the reasons appearing in the body of the ruling, I arrive at the conclusion that the application to amend the claimant's memorandum of claim as proposed is unmerited.
28. Consequently, the application is dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED ON THE 18TH DAY OF DECEMBER, 2023

B. O. M. MANANI

JUDGE



In the presence of:

..... *for the Claimant*

..... *for the Respondent*

Order

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

