



**Oswie v Spectre International Co Ltd & another (Cause 421 of 2017)
[2023] KEELRC 3194 (KLR) (6 December 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3194 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE 421 OF 2017
S RADIDO, J
DECEMBER 6, 2023**

BETWEEN

FREDRICK OTIENO OSWE CLAIMANT

AND

SPECTRE INTERNATIONAL CO LTD 1ST RESPONDENT

EQUITY BANK LIMITED 2ND RESPONDENT

JUDGMENT

1. Fredrick Otieno Oswe (the Claimant) was an employee of Spectre International Co Ltd (Spectre) from May 2008.
2. On or around 8 February 2010, the Claimant applied for a loan from Equity Bank Ltd (Equity). Equity approved the loan. The security was the Claimant's salary.
3. The loan was to be repaid in 60 monthly instalments of Kshs 14,729/-.
4. On 9 February 2010, the Claimant signed a Loan Authorisation Form instructing Spectre to make monthly deductions from his salary (through the payroll) and remit to Equity.
5. On 15 November 2017, the Claimant instituted the instant Cause alleging that Spectre had not remitted the loan deductions to Equity despite making deductions from his salary (leading to loan arrears of Kshs 624,579 as of 14 March 2018).
6. The Claimant also alleged that Spectre had made deductions from his salary beyond the 60 months.
7. The sum of the conduct of Spectre, the Claimant asserted was in breach of contract, illegal and fraudulent.
8. The Claimant sought the following orders:



- i. An order of permanent injunction do issue restraining the Respondents jointly and severally by themselves, or whether acting through their agents, servants, employees and/or anybody claiming title under the Respondents otherwise jointly and severally forthwith from unlawfully and or illegally deducting and or receiving proceeds any sums from the Claimants salary on account of the aforesaid loan facility and or charging any interest thereon.
 - ii. That the Respondents do jointly and severally tender an honest and accurate statement of accounts of the proceeds of the deductions from the Claimant's salary on account of the said loan and that any excess sums paid by the Claimant be refunded to him.
 - iii. A declaration that the 1st Respondent is liable to settle the outstanding loan arrears with the penalties and interest thereon on account of the loan facility that was advanced by the 2nd Respondent to the Claimant herein.
 - iv. The 1st Respondent do pay the Claimant the unpaid salary arrears of Kshs 164,836/- together with interest thereon from the date when it fell due until payment in full.
 - v. Costs of this suit together with interest thereon at such rate and for such period of time as the Honourable Court may deem fit to grant.
9. Spectre filed a Response out of time but after securing leave wherein it denied liability.
 10. Equity in its Response supported the Claimant's assertions.
 11. The Cause was heard on 12 October 2023. The Claimant, Managing Director with Spectre and a Credit Manager with Equity testified.
 12. The Claimant filed his submissions on 2 November 2023, Equity on 17 November 2023 and Spectre on 24 November 2023.
 13. The Court has considered the pleadings, evidence and submissions.

Res judicata

14. In its submissions, Spectre resisted the competence of the Cause on the ground that it was *res judicata*. The Court notes that *res judicata* is not one of the Issues the parties identified for its adjudication.
15. Nevertheless, the Court will consider it because it goes to jurisdiction.
16. According to Spectre, the Claimant had been a party to Kisumu Cause No. 67 of 2019, *Duncan Obonyo & Ors v Spectre International Ltd* where a mediation settlement had been reached settling all the issues in dispute.
17. The Court has looked at the pleadings and proceedings in Kisumu Cause No. 67 of 2019. The cause of action therein was a breach of contract in relation to the Provident Fund, Sacco contributions deducted by the Respondent and not remitted to the Provident Fund and Sacco, and salary arrears.
18. The action was presented by about 68 former employees of Spectre.
19. When the hearing of this Cause commenced, the Claimant abandoned the claim for salary arrears as it was settled in Kisumu Cause No. 67 of 2019.
20. The instant action, therefore, primarily concerns a loan advanced by Equity to the Claimant and the failure by Spectre to regularly remit the loan repayments to Equity from the payroll.



21. The actions in both proceedings are distinct and not related and, therefore, the plea of res judicata has no factual or legal basis and is rejected.

Limitation

22. Limitation was not listed by the parties as an Issue for determination but, again because it goes to jurisdiction, the Court will consider it.
23. Spectre contended that the action advanced by the Claimant was caught up by the limitation because the loan was to run from 8 February 2010 to 30 March 2015, and since the action was commenced more than 6 years thereafter, the action offended section 4(1) of the *Limitation of Actions Act*.
24. The breaches complained of by the Claimant occurred from the inception of the loan facility in February 2010 and continued until around May 2016.
25. As between the Claimant and Spectre, the action is premised on an employer/employee relationship and, therefore, the applicable limitation law is section 90 of the *Employment Act*, 2007.
26. The alleged breaches/injuries by Spectre continued on a monthly or regular basis until the Claimant separated with Spectre in January 2018.
27. The Cause was instituted on 15 November 2017 during the subsistence of the employment relationship.
28. The question of limitation either under the *Limitation of Actions Act* or the *Employment Act*, 2007 does not consequently arise.

Breach of contract

29. The Claimant's complaints were that Spectre did not regularly remit deductions made from his salary towards the loan repayment and further that Spectre made deductions beyond and above what had been agreed.
30. The Claimant produced copies of his bank statements from Chase Bank Ltd and KCB Bank Ltd. The statements leave no doubt that Spectre made monthly deductions from the Claimant's salary for repayment of the loan.
31. Equity also produced copies of the loan account statements and the statements indicate intermittent remittance of the loan repayments. The remittances were not made every month.
32. The statements shows a loan balance of Kshs 624,579/- as of 1 March 2018.
33. The loan repayments were scheduled to end on or around 30 April 2015.
34. The Claimant gave written instructions to Spectre to make deductions from his salary every month. The instructions were in tandem with the provisions of section 19(1)(g) of the *Employment Act*, 2007.
35. The instructions also required Spectre to remit the deductions to Equity. The bank statements placed before the Court show deductions were regularly made from the Claimant's pay but were not regularly remitted to Equity.
36. As the employer, Spectre was expected to keep records but it did not place before the Court any records to demonstrate that it paid out to Equity all the monthly instalments as they fell due.
37. The Court has no hesitation in finding that Spectre was in breach of contract as contemplated by section 19(g) and (h) of the *Employment Act*, 2007.



38. The missteps by Spectre led to the loan not being cleared on schedule. Spectre must bear the liability for the same.

Refund of overpayments

39. The Claimant further asserted that Spectre made deductions from his salary beyond the 60 months agreed and that these deductions went on for 8 months.

40. A simple calculation indicates that the deductions totaled Kshs 117, 832/-.

41. In the submissions, the Claimant claimed over deductions for more than 8 months (no amendment was sought).

42. The bank statements produced in Court corroborate the testimony that the deductions were made beyond the agreed 60 monthly instalments, and the Court finds for the Claimant in the sum of Kshs 117,832/-.

Conclusion and Orders

43. In light of the above, the Court orders:

- i. A declaration is hereby issued that the 1st Respondent is liable to settle the outstanding loan arrears together with interest and penalties due to the 2nd Respondent from the Claimant.
- ii. An order is hereby issued directing the Respondents to render an honest, truthful and accurate statement of account to the Claimant on the loan account/repayments and any excess payments be refunded.
- iii. An order is hereby issued awarding the Claimant Kshs 117,832/- as against the 1st Respondent.

44. The 1st Respondent to meet the costs of the Claimant and the 2nd Respondent.

DELIVERED VIRTUALLY, DATED AND SIGNED IN KISUMU ON THIS 6TH DAY OF DECEMBER 2023.

Radido Stephen, MCI Arb

Judge

Appearances

For Claimant Maube Muyeya & Co. Advocates

For 1st Respondent Awele Jackson Advocates LLP

For 2nd Respondent Olel, Onyango, Ingutiah & Co. Advocates

Court Assistant Chrispo Aura

