



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**PETITION NO. 65 OF 2019**

**IN THE MATTER OF ARTICLES 22, 23, 29, 40, & 47 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF CONTRAVENTION OF RIGHTS AND FUNDAMENTAL**

**FREEDOMS UNDER ARTICLES 22, 23, 29, 40, & 47 OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF THE NATIONAL HOSPITAL INSURANCE FUND ACT, 1998**

**AND**

**IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT, ACT NO. 4 OF 2015**

**BETWEEN**

**PEAK EAST AFRICA LIMITED.....PETITIONER**

**-VERSUS-**

**NATIONAL HOSPITAL INSURANCE FUND.....RESPONDENT**

**(Before Hon. Justice Byram Ongaya on Friday 8th November, 2019)**

**JUDGMENT**

The petitioner filed the petition on 08.04.2019 through Hamilton Harrison & Mathews Advocates. The petitioner prayed for:

- a) An order of certiorari to remove into the Court and quash the demand notice dated 20.02.2019 and the notice of intended prosecution dated 25.03.2019 issued by the respondent.
- b) An order of injunction be issued restraining or prohibiting the respondent whether by itself, its officers, employees or agents from demanding any payments from the petitioner pursuant to the demand notice dated 20.02.2019 or by any other notice or in any manner, arresting, detaining, taking any enforcement action, prosecuting or instituting any legal proceedings against the petitioner.
- c) A declaration do issue that the demand for Kshs.1, 831, 050.00 set out in the demand notice of 20.02.2019 by the respondent and any demand for payment of dues relating to the petitioner's independent contractors violates the petitioner's right under Article 40 and 47 of the Constitution.
- d) A declaration do issue that the notice of intended prosecution dated 25.03.2019 issued by the respondent violates the petitioner's rights under Article 29 of the Constitution.
- e) A declaration do issue that the respondent is not liable to deduct and remit National Hospital Insurance Fund contributions due from the independent contractors it has engaged.

f) Costs of the petition.

g) Such other orders as the Honourable Court shall deem fit and just to grant.

The petition was supported by the annexed affidavit of Irene Omune, the respondent's People Partner.

The petitioner is an adventure travel company that organises tours to various destinations in Africa for both foreign and domestic tourists. The travel package includes facilitating transport, tour guides and hospitality by way of engaging drivers, cooks, and tour guides on independent contract terms. Up to 2017 the petitioner paid the independent contractors through its payroll and all deductions made were processed through the payroll. An audit revealed that the engagement was one of contract for service rather than a contract of service. Thus effective 01.01.2018 the petitioner entered into an independent contract agreement with the contractors upon the following terms:

- a) The contractors submit invoices for the period of engagement and are paid fees based on the invoices less withholding tax.
- b) The independent contractors are free to engage in other activities so long as it does not conflict with the interest of the petitioner.
- c) The independent contractors provide contractor's service to the petitioner as independent contractors and not as employees.
- d) The petitioner has no liability or responsibility for the collection or payment of any taxes, National Health Insurance Fund (NHIF) or National Social Security Fund (NSSF).

The respondent undertook an audit at the petitioner's office on 20.02.2019 and thereafter issued a demand notice dated 20.02.2019 alleging the petitioner had failed to remit NHIF deductions for the independent contractors who the respondent contends are casual employees in the sum of Kshs.610, 350.00. The respondent also imposed a penalty of Kshs.1, 220, 700 which is double the alleged unremitted sum and making a total of Kshs.1, 831, 050.00. On 04.03.2019 the petitioner informed the respondent that the demand was with respect to independent contractors and not employees. On 18.03.2019 the respondent reiterated that it expected the petitioner to pay the Kshs.1, 831, 050.00 on the basis that the independent contractors were casual employees. The petitioner's advocates wrote on 19.03.2019 clarifying that the petitioner engaged independent contractors and not casual employees. The respondent did not reply and instead issued a notice of intended prosecution dated 25.03.2019 that unless the petitioner paid the Kshs.1, 831, 050.00 within 14 days from 25.03.2019, the respondent would institute legal proceedings against the petitioner for recovery of the alleged payment and penalty. The notice was lapsing on 08.04.2019 and the petitioner filed the petition on 08.04.2019 seeking the Court's protection.

The petitioner's case is that section 15 of the National Hospital Insurance Fund Act creates two categories of contributions to the Fund being a standard contribution in the case of a person whose income is derived from salaried employment; and a special contribution in the case of a person whose income is derived from self – employment. Further section 16(1) of the Act creates an obligation on an employer of a person liable to pay a standard contribution under section 15 of the Act to deduct and to pay the contribution to the respondent's Board on behalf of the employee. The petitioner's case is that the obligation is only created where there is an employer-employee relationship. The petitioner further says that it is unreasonable for the respondent to require the petitioner to pay the Kshs.1, 831, 050.00 as demanded in circumstances of the independent contractors it has engaged.

It is the petitioner's case that its constitutional rights and freedoms have been threatened or violated as follows:

- a) The petitioner is entitled to freedom and security of the person as per Article 29 of the Constitution including the right not to be deprived freedom arbitrarily or without just cause. The respondent has threatened to arrest and detain the petitioner's directors or officers in the proposed prosecution.
- b) Article 40 protects the right to property and Article 260 defines property to include money. The petitioner is being asked to pay a sum of Kshs.1, 831, 050.00 but which is not due.

Some of the independent contractors employed by the respondent such as Sylvia Njeri Wahu; Samuel Labuta Wambua; Boniface Munyao Masia have filed affidavits confirming that they are independent contractors and they have exhibited invoices showing they are paid fees by the petitioner less 5% withholding tax. Further, they exhibit NHIF statements showing they individually remit NHIF as independent contractors. The petitioner filed the further affidavit of Irene Omune on 03.07.2019. The affidavit states that since January 2018 it started entering into agreements for independent contractors and it maintained no payroll in that regard except the excel sheet exhibited in the replying affidavit used to pay fees demanded by the contractors per submitted invoices. It was the excel sheet that the respondent's inspector perused on 20.02.2019. However for the petitioner's employees, the petitioner had deducted and remitted the necessary NHIF dues as per exhibited by-products of the petitioner's employees. The invoices for some of the named independent contractors were exhibited and the petitioner was not liable to deduct and remit NHIF dues for the independent contractors.

The respondent appeared in the matter on 15.04.2019 through J.W. Wambua & Company Advocates. The respondent opposed the petition by filing the replying affidavit and supplementary affidavit of Rose Nakhungu (Respondent's Legal Officer) on 19.06.2019 and 11.07.2019 respectively. The respondent's case is that in fact the relationship between the petitioner and the purported independent contractor amounts to a contract of service and therefore, the petitioner is liable to deduct and remit NHIF dues in accordance with the section 16 of the NHIF Act. The respondent's case is that the petitioner unlawfully stopped remitting NHIF dues at the start of the year 2018 and it ought to continue remitting as there is no law that provides for independent contracts whose names appear in a company's payroll. The respondent states that it does not look into details of individual contracts it is not party to and have no knowledge about. Under section 16 of the NHIF Act, an Employer is to deduct NHIF dues for its employees of wages that exceed an amount prescribed by the Minister which is Kshs.1000.00. The respondent's case is that the independent contractors are paid fees by the petitioner and derive a salary exceeding Kshs.1000 from the petitioner hence the petitioner ought to deduct and remit NHIF for them as per NHIF Act Section 16 – the petitioner being a standard contributor as per section 15(2) (a) of the NHIF Act. Further on 20.02.2019 the inspector asked the petitioner to produce its payroll and the

petitioner provided the document that it now calls excel sheet for payment of independent contractors.

The Court has considered the material on record including the affidavits, petition, exhibits and submissions. The Court makes findings as follows:

- 1) Under section 15 of the NHIF Act there can be a salaried person who is liable to make a standard contribution; or a person whose income is derived from self-employment who is liable to make a special contribution.
- 2) Under section 16(1) of the NHIF Act a person liable to pay a standard contribution shall make the contribution through monthly deductions from his salary or other remuneration and the employer of such a person shall be liable to deduct and to pay the contribution to the respondent on behalf of and to exclusion of that person. If on the first day of the month the person is not an employee of an employer in issue, then the employer is not liable to deduct and remit the contribution to the respondent.
- 3) At paragraph 6 of the replying affidavit the respondent states that the petitioner has been a standard contributor under section 15(2) (a) of the NHIF Act. However the Court finds that the assertion is misconceived because the petitioner is not a salaried employee and cannot therefore pass for a standard contributor.
- 4) The petitioner has established by the agreements on record that effective December 2018 it had an independent contractor's arrangement with the persons it engaged. The independent contractors are paid fees and some invoices have been exhibited. Clause 3 on fees and expenses is clear that fee is paid to the contractor. Clause 2.2 is clear that the contractor works only when the services are needed. The Court finds that it is not for the respondent to investigate and determine the relationship between the petitioner and the contractor. The Court finds that there is no doubt before the Court that the petitioner has engaged independent contractors. The dispute before the Court is that the respondent considers that the independent contractors as engaged are employees. The Court returns that once the petitioner stated that they were independent contractors, it was thereby relinquished from the statutory duty to deduct and pay to the respondent the alleged standard contribution on behalf of the independent contractors. Indeed there is no complaint by the independent contractors that they were not such independent contractors but employees. The Court will not delve into the inquiry whether the arrangement was for contract of service or a contract for service because the parties to the agreement are not before the Court in such a dispute.
- 5) The Court further finds that once the petitioner stated that the independent contractors were not employees, the respondent was entitled to pursue the individual independent contractors as self-employed persons and liable as special contributors under section 15 of the NHIF Act. In the opinion of the Court, once the explanation was given by the petitioner, it was not open for the respondent to purport to impose employment relationship. Indeed the respondent has taken the position that it does not delve into contracts it is not party to and the Court considers that positions as correct.
- 6) The Court further finds that the respondent lacked statutory or other authority to define and impose an employment relationship in a circumstance whereby the petitioner and the independent contractors were in clear agreement that there was no employment effective the date the agreements were entered into. Clause 10 was clear that the petitioner would not be liable for payment of NHIF dues by reason that there was no employment relationship. The respondent was not a party to that agreement and this Court cannot impose upon itself jurisdiction to begin interpreting the agreement as a contract of service or consultancy without such a dispute between the parties privy to the agreement having moved the Court appropriately. It is trite law that the Court shall not rewrite contracts and the Court will therefore not delve into defining and interpreting the agreement of consultancy or independent contractors in issue. It is the view of the Court that unless parties to the agreement properly moved the Court in a proper dispute, it would be without jurisdiction for the Court to purport to rearrange and rewrite the agreements of parties not actually before the Court and as advanced for the respondent.
- 7) Accordingly the Court returns that in view of the findings, it was not open for the respondent to infer or impose a contract of service in circumstances whereby the petitioner and the persons it engaged were in clear understanding that a fee was payable for the consultancy. It was clear that the services the petitioner got from the persons it engaged were seasonal in nature. It appears clear to the Court that the petitioner has innovatively and legally so devised the contract of service as the most efficient, effective and economical manner to run its business. It is not for this Court or the respondent to impose a different business model for the petitioner and the Court will respect the petitioner's business model unless it is shown to be in violation of the law but which has not been so far established to be the case.
- 8) Thus the Court finds that the petitioner has established a threatened violation to freedom and security of the person as per Article 29 of the Constitution including the right not to be deprived freedom arbitrarily or without just cause. The respondent has threatened to arrest and detain the petitioner's directors or officers in the proposed prosecution and the petitioner's case will succeed.
- 9) Further Article 40 protects the right to property and Article 260 defines property to include money. Thus the Court finds that the petitioner's right in that behalf has been threatened and unfairly so because the petitioner is being asked to pay a sum of Kshs.1, 831, 050.00 but which is not due in law.
- 10) As the petitioner has succeeded, the respondent shall pay costs of the petition.

In conclusion judgment is hereby entered for the petitioner against the respondent for:

- a) The order of certiorari removing into the Court and quashing the demand notice dated 20.02.2019 and the notice of intended prosecution dated 25.03.2019 issued by the respondent against the petitioner.
- b) The order of injunction restraining or prohibiting the respondent whether by itself, its officers, employees or agents from

demanding any payments from the petitioner pursuant to the demand notice dated 20.02.2019 or by any other notice or in any manner, arresting, detaining, taking any enforcement action, prosecuting or instituting any legal proceedings against the petitioner with respect to the matters in dispute in this petition.

c) The declaration that the demand for Kshs.1, 831, 050.00 set out in the demand notice of 20.02.2019 by the respondent and any demand for payment of dues relating to the petitioner's independent contractors violates the petitioner's right under Article 40 of the Constitution.

d) The declaration that the notice of intended prosecution dated 25.03.2019 issued by the respondent violates the petitioner's rights under Article 29 of the Constitution.

e) The declaration that the respondent is not liable to deduct and remit National Hospital Insurance Fund contributions due from the independent contractors it has engaged.

f) The respondent to pay the petitioner's costs of the petition.

**Signed, dated and delivered** in court at **Nairobi** this **Friday, 8th November, 2019**.

**BYRAM ONGAYA**

**JUDGE**