



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI CITY

COURT NAME: MILIMANI LAW COURTS

CASE NUMBER: HCCOMMITA/E218/2023

CITATION: KENYA REVENUE AUTHORITY VS C.I.C LIFE INSURANCE LIMITED

JUDGMENT

(Being an Appeal against the Judgment delivered on 19th October 2023 at the Tax Appeals Tribunal in Tax Appeal Tribunal Case No. 1031 of 2022)

1. This appeal arises from a judgment dated 19/10/2023 by the Tax Appeal Tribunal in No. 1031 of 2022.
2. In the said claim, the Respondent was dissatisfied with the Appellant's decision dated 8th August 2022, which upheld additional assessments for Pay As You Earn (PAYE) relating to tied-up agents. The Respondent further contested the assessment, arguing that it was erroneous since the information relied upon by the Appellant herein did not consider the facts and circumstances of the arrangement between the insurance company and the agents.
3. The Tax Appeal Tribunal allowed the appeal and set aside the objection decision.
4. The Appellant aggrieved with the Tribunal's judgment, lodged this appeal setting out the following grounds of appeal; that the Tribunal erred in fact and in law in allowing the Respondent's appeal dated 20th September 2022; by taking into account extraneous matters and failing to take into account relevant matters in arriving at its decision; failing to interrogate the true character of the contract between C.I.C Life Insurance Limited and its insurance agents on the employment status of the contracts as per the Employment Act; in prioritizing the provisions of the Insurance Act as opposed to the Employment Act on the status of the insurance agents the subject of PAYE assessment; the Tribunal misdirected itself, misapprehended and misconstrued the legal principles in the case before it and by reason thereof came to a wrong conclusion; the judgment is erroneous and based on wrong principles.
5. The Appellant thus prayed that the appeal be allowed, the decision of the Tax Appeals Tribunal dated 19th October 2023 be set aside, the objection decision dated 8th August 2023 be upheld and that the costs of the appeal be borne by the Respondents.
6. The appeal was canvassed by way of written submissions. The Appellant's submissions are dated 16th August 2024 while the Respondent's submissions are dated 3rd September 2024.

Appellant's submissions

The Judiciary of Kenya



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7. Counsel for the Appellant raised four issues for determination, that is: whether the Tribunal erred in law and in fact by finding that the Appellant failed to read the provisions of the Insurance Act, Income Tax PAYE Rules harmoniously in coming up with a definition of the term employee hence finding that the definition assigned to the term by the Appellant untenable; whether the Tribunal erred in failing to consider that the issue of taxation of employment emoluments is governed and regulated primarily by tax legislation and any definition assigned to the term employee must be derived from such legislation; whether the Tribunal erred in holding that the Respondent's Tied Insurance agents were not employees and therefore not subject to PAYE and lastly, whether the tribunal erred by failing to consider the legal and factual tests that determine whether the relationship between the Respondent and its tied life agents is that of employment or that of independent contractor.

8. On whether the tied life agents of the Respondent are employees for purposes of taxation, counsel submitted that the relationship between the life agents and the Respondent takes the nature of an employer-employee relationship. The Appellant argued that there exists an element of performance of services under certain conditions, in return for remuneration in the form of commission income derived from sales, together with benefits stipulated in their contracts of service. The Appellant referenced the definitions of an "agent" under the Insurance Act and an "employee" under the Employment Act.

9. It was further submitted that the Respondent's agents are restricted from conducting any other business with other insurance companies unless they obtain express permission, as evidenced by their contracts of engagement. In support of this position, the Appellant cited the case of *Uber BV & Others v Aslam & Others* [2021] UKSC 5 and *Ready Mix Concrete (South East) Limited v Minister of Pensions and National Insurance* [1968] 2 QB, arguing that the benefits enjoyed by the agents such as pension mirror those of ordinary employees. Moreover, the agents are bound by the Respondent's policies and are subject to its control, despite their contracts describing them as independent contractors.

10. While relying on Section 37(1) of the Income Tax Act, the Appellant submitted that the existence of an employer employee relationship necessitates that the emoluments payable to the agents be subjected to taxation. The Appellant stated that both legal and factual tests were considered to determine whether the life agents are employees or independent contractors. In support of this position, the Appellant relied on the case of *South African Broadcasting Corporation v McKenzie* [1998] ZALAC 13, submitting that the requirements imposed on the agents were those typically applicable to employees. Consequently, the Appellant argued, the Tribunal erred in holding that the tied life agents were not employees.

11. On the issue of whether the assessment amounted to double taxation, the Appellant submitted that no further taxes have been paid by the Respondent's agents, and therefore, the question of double taxation does not arise. It was submitted that the sampled agents merely filed returns in which the withholding tax withheld by the Appellant was the only credit reflected. The Appellant further submitted that, in the event that PAYE is deducted and paid accordingly, any tax already paid by the Respondent's agents would be treated as a tax credit.

12. In conclusion, the Appellant urged the court to allow the appeal and set aside the decision of the Tribunal.

Respondent's submissions

13. The Respondent in making its submissions submitted on two issues; whether the Tribunal erred in failing to interrogate the true character of the contracts and relationship between the Respondent and the tied agents and whether the demand of income tax PAYE from the Respondent is warranted in law.

14. On the first issue, the Respondent submitted that the tied agents are not employees as alleged by the Appellant. Citing the case of *Magnate Ventures Limited v David Odwori Namuhisa* [2020] eKLR, the Respondent argued that where a court is called upon to examine the nature of a relationship between parties in either a commercial or non-commercial context, the primary point of reference is



the intention of the parties as expressed in their contract. The Respondent maintained that an analysis of the relevant contracts demonstrates that the parties clearly intended to establish a relationship in which the tied agents would operate as independent contractors. This intention was expressly stated in the Appointment of Agency Manager Agreement. The Respondent further submitted that the agents were permitted to work flexible hours and were solely responsible for all expenses incurred in the performance of their duties under the contract.

15. The Respondent further submitted that the tied agents were remunerated solely through commissions, and even in cases where a retainer was applicable, the retainer was neither guaranteed nor fixed. Relying on the decisions in *Vitalis Oliewo K'omudho v AAR Health Services Limited* [2016] eKLR, *Evans Musya Musunzar v Jubilee Insurance Company of Kenya Limited* [2018] eKLR, and *Zachariah Kerauni Maosa v British American Insurance Co (K) Ltd* [2015] eKLR, the Respondent submitted that in employment matters, remuneration through commissions or a conditional retainer based on performance targets is a clear indicator that the individual is not an employee. The Respondent also pointed out that the tied agents were not entitled to annual leave or any other statutory leave as provided under the Employment Act. Citing *Kenya Hotels & Allied Workers Union v Alfajiri Villas (Magufa Ltd)* [2014] eKLR, the Respondent argued that the express exclusion of annual and other forms of leave clearly demonstrated the intention of the parties to enter into a contract for services, and not a contract of employment.

16. The Respondent submitted that it does not allocate work to the tied agents, who are instead required to independently exercise their initiative to source clients and secure business on behalf of the Respondent. In support of this position, the Respondent relied on the case of *Peter Adams Ludaava v Bonito Hotels Limited* [2022] eKLR, emphasizing that assumption of risk is one of the key tests in determining that an independent contractor is not part of the employer's business structure.

17. The Respondent further submitted that the control test is no longer conclusive in determining whether a person qualifies as an employee. Instead, a court must go beyond mere control and examine the intention of the parties as articulated in the engagement documents, as well as the actual conduct and fundamental behaviour of the parties during the subsistence of the relationship. Reference was made to the case of *Zachariah Kerauni Maosa v British American Insurance Co (K) Ltd* [2015] eKLR

18. It was the Respondent's submission that a holistic reading of the Employment Act, the Income Tax Act, and the Insurance Act, together with the relevant regulations, clearly demonstrates that tied agents in the insurance industry are not employees. The Respondent relied on the definition of a contract of service under Section 2 of both the Employment Act and the Income Tax Act, as well as the definition of an agent under Section 2 of the Insurance Act. Further, it was submitted that Sections 69(1) and (3) of the Insurance Act expressly prohibit an insurer from employing agents.

19. The Respondent also submitted that although the tied agents had taken out pension and life insurance policies from the Respondent, there was no restriction or discrimination against such agents obtaining similar cover from the Respondent, and that doing so did not amount to employment. The Respondent cited the case of *UAP Life Insurance Company Limited v Commissioner of Domestic Taxes* [2019] eKLR, and urged the Court to uphold the Tribunal's finding, which it asserted was based on a uniform and correct interpretation of the Employment Act, the Income Tax Act, and the Insurance Act.

20. The Respondent submitted that Kenyan jurisprudence has consistently affirmed that tied agents operating under the kind of contractual arrangement it uses cannot be deemed employees. The Respondent relied on the decisions in *Income Tax Appeal No. E108 of 2021; Commissioner of Domestic Taxes v Liberty Life Assurance Kenya Limited*, and *Moses Waithaka Ngunje v Liberty Life Assurance Kenya Limited* [2019] eKLR.

21. On the second issue, the Respondent submitted that the demand for PAYE was unlawful, as PAYE is only applicable where an employer employee relationship exists. The Respondent referred to Section 37(1) of the Income Tax Act and the case of *China Road & Bridge Corporation v Commissioner of Domestic Taxes* [2021] eKLR in support of its position. It was the Respondent's



contention that it had duly withheld and remitted to the Appellant the Withholding Tax payable on the commissions paid to the tied agents. That subjecting the same commissions to PAYE, would amount to double taxation on the income of the tied agents.

22. In conclusion, the Respondent urged the Court to uphold the judgment of the Tribunal dated 19th October 2023 and dismiss the appeal with costs .

Analysis and Determination

23. The jurisdiction of this court is limited by Section 56(2) of the Tax Procedures Act (TPA), which provides that “An appeal to the High Court or to the Court of Appeal shall be on a question of law only.” This means that the court is not permitted to substitute its own conclusions for those of the Tribunal based on its own analysis of the facts. However, the court must ensure that the conclusions reached by the Tribunal are supported by the evidence on record and are not perverse as was held in the case of *John Munuve Mati v Returning Officer Mwingi North Constituency & 2 others* [2018] eKLR)

24. The Appellant raised six grounds in its Memorandum of Appeal, however, the major issue for determination is whether the Tribunal arrived at the proper decision in holding that the tied up insurance agents licensed under the Insurance Act are not subject to PAYE.

25. The questions of who is an agent and who is an employee are fundamental to the determination of the issues in this matter. For purposes of context and in light of the circumstances of this case, the relevant statutory provisions applicable in defining these terms are found in the Employment Act, the Insurance Act, and the Income Tax Act.

26. Section 2 of the Employment Act defines an employee to “mean a person employed for wages or a salary and includes an apprentice and indentured learner.” Notably, the Act does not define who an agent is. Section 2 of the Insurance Act defines an agent as “a person, not being a salaried employee of an insurer, who, in consideration of a commission, solicits or procures insurance business for an insurer or broker.” The Income Tax Act does not expressly define either an agent or an employee. Nevertheless, it is worth noting that the Income Tax (PAYE) Rules define an employee with reference to gains or profits from employment or services rendered, which are payable in money.

27. The purpose of establishing the definitions of the terms agent and employee is to relate them to the objective of the Income Tax Act, particularly in the context of determining the proper tax treatment applicable to the remuneration received by tied agents. This analysis aids in assessing whether such remuneration constitutes income arising from employment, thereby attracting PAYE obligations, or whether it is income derived from a contractual relationship that falls within the purview of Withholding Tax as commission income payable to independent contractors.

28. Section 3(2)(a)(ii) of the Income Act provides that: -

“Subject to this Act, income upon which tax is chargeable under this Act is income in respect of employment or services rendered.”

29. Further, Section 5(2)(a) of the Income Tax Act provides that;-

“For the purposes of Section 3(2)(a)(ii), gains or profits, includes; wages, salary, leave pay, stick 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 after other than the year of income in which it is received shall be deemed to be income in respect of that year of income.”

30. In this regard, both salary and commission are subject to taxation. It is widely acknowledged that whether one is classified as an agent or an employee, the individual must be governed by a contract either a contract for service for an agent or a contract of service for an employee. Both the Employment Act and the Income Tax Act provide definitions for a contract of service, which are crucial in determining the nature of the relationship and the applicable tax obligations.

31. The Appellant has submitted that the relationship between the Respondent and its tied agents



constitutes a contract of service rather than a contract for an independent contractor. On the other hand, the Respondent maintains that the tied agents are not employees but independent contractors, as expressly stipulated in their contracts.

32. The Respondent, being in the business of insurance, is governed by the Insurance Act, and its actions are guided by the provisions of this Act. The definition of an agent under the Insurance Act explicitly excludes agents from being considered employees of the insurer. Therefore, agents operating within the insurer's business cannot, by definition, be employees.

33. Turning to the Appellant's argument regarding the control test and the assertion that the agents are employees of the Respondent, it is my considered opinion that the Respondent and its agents have entered into agreements, which remains uncontested. Upon reviewing the agreements, it is evident that the terms are clear regarding the nature of the relationship between the parties. Given that the Insurance Act defines who an agent is, I do not see the need for further interpretation beyond what is expressly stated in the agreements and the Insurance Act.

34. For purposes of taxation, the commissions earned by the agents are subject to Withholding Tax, which the Appellant does not appear to dispute. Accordingly, as agents, the commissions are not subject to PAYE.

35. I am guided and persuaded by the case of UAP Life Assurance Company Limited v Commissioner of Domestic Taxes [2019] KEHC 412 (KLR) relied upon by the Respondent in its submissions. The facts in this case, are similar to the facts herein and the court noted that:-

"41. All in all I find that had the Tribunal considered the relevant provisions of the Employment Act and Insurance Act alongside the Income Tax Act, it would not have arrived at the decision that the tied agents herein are employees of the Appellant. I therefore find that the appeal has merit and I allow it as prayed save for the finding on the documents to be availed by the Appellant."

36. Similarly, in the recent case of Commissioner of Domestic Taxes v Liberty Life Assurance Limited (Income Tax Appeal E108 of 2021) [2023] KEHC 1359 (KLR) (Commercial and Tax) (24 February 2023) (Judgment), this court has held that;

"In the present case, the agents were not employed for a salary but they received commissions for the work done. They could therefore not be termed as employees for purposes of paying the PAYE. The withholding tax was already paid and accounted for and any request for PAYE would amount to double taxation. To hold otherwise would mean that the respondent was deliberately breaching the Statute (read, the Insurance Act) under which it was operating."

37. Based on the analysis above, I find that the Employment Act, 2007, governs employment relationships, whereas the Insurance Act explicitly defines agents as individuals who are not salaried employees. Consequently, tied insurance agents are independent contractors and not subject to PAYE.

38. Therefore, I find no basis to disturb the judgment of the Tribunal. The upshot of the above is that the appeal is dismissed with costs to the Respondent.

Orders accordingly.

SIGNED BY: HON. LADY JUSTICE RHODA RUTTO





THE JUDICIARY OF KENYA.
MILIMANI HIGH COURT
HIGH COURT COMMERCIAL AND TAX
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