



**IN THE HIGH COURT OF KENYA AT KISII**

**CIVIL SUIT NO. 17 OF 2016**

**BETWEEN**

**LOCAL AUTHORITIES PROVIDENT**

**FUND BOARD (LAPFUND).....PLAINTIFF**

**AND**

**KISII COUNTY GOVERNMENT.....RESPONDENT**

**RULING**

1. The plaintiff's claim against the defendant, as successor of several defunct local authorities within Kisii County, is for the recovery of KShs. 2,412,474,210.87 being the amount of the provident contribution collected by the defunct local authorities and later the defendant from employees of the defendant and the said defunct local authorities but not remitted to the plaintiff.

2. In due course, the plaintiff filed a Notice of Motion dated 22<sup>nd</sup> March 2017 for summary judgment based on certain admissions in the statement of defence filed on behalf of the defendant. The parties filed written submissions detailing their respective arguments. In its submissions, the plaintiff raised the issue that this court did not have jurisdiction to hear and determine this matter as it relates to employer/employee relationship governed by the *Employment Act, 2011* and the *Employment and Labour Relations Court Act, 2011* which provides that the Employment and Labour Relations Court has jurisdiction over such matters.

3. As the issue of jurisdiction is a primary and important issue, I must deal with it consistent with the principle so well elucidated by Nyarangi JA., in *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1* that:

*Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it, the moment it holds the opinion that it is without jurisdiction.*

4. The issue I must determine is whether this claim falls within the jurisdiction of the Employment and Labour Relations Court as it is apparent from the summary of the dispute that the claim is not one directly between the employer and employee.

5. **Article 162(2)** of the Constitution directed Parliament to establish courts with status of the High Court to hear and determine disputes relating to Employment and Labour Relations. In accordance with these provisions, the Parliament established the Employment and Labour Relations Court ("ELRC") through the *Employment and Labour Relations Court Act* ("the Act"). **Section 12** of the Act sets out the jurisdiction of that Court as follows:

*(1) The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including—*

*(a) disputes relating to or arising out of employment between an employer and an employee;*

*(b) disputes between an employer and a trade union;*

*(c) disputes between an employers' organisation and a trade union's organisation;*

*(d) disputes between trade unions;*

*(e) disputes between employer organisations;*

- (f) disputes between an employers' organisation and a trade union;
- (g) disputes between a trade union and a member thereof;
- (h) disputes between an employer's organisation or a federation and a member thereof;
- (i) disputes concerning the registration and election of trade union officials; and
- (j) disputes relating to the registration and enforcement of collective agreements.

(2) An application, claim or complaint may be lodged with the Court by or against an employee, an employer, a trade union, an employer's organization, a federation, the Registrar of Trade Unions, the Cabinet Secretary or any office established under any written law for such purpose. [Emphasis mine].

6. Although this claim is not between an employer and employee, it is a matter "relating to" and "arising out of" the relationship between an employer and employee. The core of the plaintiff's claim is that defendant failed to remit its employee's provident fund contributions. These deductions from the employees' salary and contributions to the provident fund arise directly from the employer/employee relationship. Without an employer/employee relationship, the plaintiff would not exist. To my mind this is a dispute, "relating to or arising out of employment between an employer and an employee", within **section 12(1)(a)** of the **Act**.

7. I also find that the jurisdiction of the ELRC is all encompassing as the list of matters set out in **section 12(1)** of the **Act** is only indicative and not a closed catalogue as the word preceding the list is "including". The purpose and intent of **Article 162(2)** of the Constitution was to create a specialist court dealing with matters of employment and labour relations. The term labour relations encompasses more than just the narrow employer/employee contract but matters of and concerning that relationship. The issue of deductions from the employees' salary is provided for under **section 19(1)** of the **Employment Act** leaving no doubt that this is a matter within the province of the ELRC.

8. In **Amos O. Chuchu and 39 Others v Retirement Benefits Authority and 2 Others NRB ELRC Cause Appeal No. 6 of 2014 [2015]eKLR**, the respondent objected to the jurisdiction of the ELRC on the basis that the matter was not between employer and employee as it concerned retirement benefits. The court rejecting that contention, stated that:

*[19]. Retirement benefits in their very nature arise from employment and labour relations and to secure such benefits, the Authority is established. Work benefits cannot therefore be removed from labour relations as they are a direct result of a work benefit.*

Likewise in **Samuel Oduar Okeyo v Postal Corporation of Kenya Staff Pension Scheme NRB ELRC Misc. Application No. 103 of 2007 [2017]eKLR**, the court also expressed the view that

*[3] ..... The law thus clearly indicates that disputes arising from the employment relationship are within the purview of this court and decisions from local tribunals or commissions as may be prescribed by any other written law.*

*[4] Pension and gratuity are terms and conditions of the contract of service. At the core of this dispute is the contract of service which is the anchor upon which the Applicant has sought remedy before the Tribunal. The court therefore is imbued with jurisdiction over employment matters and in my view, this is one of them.*

9. I therefore find and hold that matter of provident fund deductions and remittances falls within employment and labour relations. In light of **Article 162(2)** of the Constitution and **section 12** of the **Act**, this court lacks jurisdiction. The exclusivity of the jurisdiction of the ELRC vis-à-vis the High Court in relation to such disputes was recently emphasised and affirmed by the Supreme Court in **Republic vs Karisa Chengo & Others, Supreme Court Petition No. 5 of 2015 [2017]eKLR** where it held follows:

*[52] From a reading of the Constitution and these Acts of Parliament, it is clear that a special cadre of courts, with sui generis jurisdiction, is provided for. We therefore entirely concur with the Court of Appeal's decision that such parity of hierarchical stature does not imply that either Environment and Land Court or Employment and Labour Relations Court is the High Court or vice versa. The three are different and autonomous courts and exercise different and distinct jurisdictions. As Article 165(5) precludes the High Court from entertaining matters reserved to the Environment and Land Court and Employment and Labour Relations Court, it should, by the same token, be inferred that the Environment and Land Court and Employment and Labour Relations Court too cannot hear matters reserved to the jurisdiction of the High Court.*

10. From the foregoing, I decline jurisdiction to hear this suit. In **Daniel N. Mugendi v Kenyatta University and 3 Others NRB CA Civil Appeal No. 6 of 2012 [2013]eKLR**, the Court of Appeal observed as follows:

*And in order to do justice, in the event where the High Court, the Industrial Court or the Environment & Land Court comes across a matter that ought to be litigated in any of the other Courts, it should be prudent to have the matter transferred to that Court for hearing and determination. These three courts within similar/equal status should in the spirit of harmonization, effect the necessary transfers among themselves until such time as the citizenry is well-acquainted with the appropriate forum for each kind of claim.*

11. I therefore transfer this matter to the Employment and Labour Relations Court at Kisumu for hearing and determination.

**DATED and DELIVERED at KISUMU this 17<sup>th</sup> day of December 2018.**

**D.S. MAJANJA**

**JUDGE**

Mr Keyonzo with him Mr Chokaa instructed by V. Chokaa and Company Advocates for the plaintiff.

Mr Onsembe, Advocate instructed by the Kisii County Attorney's Chambers for the defendant.