



**Gwakou v Kariuki & 3 others (Being sued as Representatives of Consolata Fathers Society); Absa Bank of Kenya PLC, formerly Barclays Bank of Kenya Ltd & another (Third party) (Cause E286 of 2023) [2025] KEELRC 2705 (KLR) (3 October 2025) (Ruling)**

Neutral citation: [2025] KEELRC 2705 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E286 OF 2023  
SC RUTTO, J  
OCTOBER 3, 2025**

**BETWEEN**

**WINNEYFRED ANYANGO GWAKOU ..... CLAIMANT**

**AND**

**FATHER ZACCHARY KARIUKI ..... 1<sup>ST</sup> RESPONDENT**

**FATHER PETER OCHIENG ..... 2<sup>ND</sup> RESPONDENT**

**BROTHER CLARENCE LUKUNGU ..... 3<sup>RD</sup> RESPONDENT**

**FATHER JAOKIM NJANI ..... 4<sup>TH</sup> RESPONDENT**

**BEING SUED AS REPRESENTATIVES OF CONSOLATA FATHERS SOCIETY**

**AND**

**ABSA BANK OF KENYA PLC, FORMELY BARCLAYS BANK OF KENYA LTD ..... THIRD PARTY**

**OLD MUTUAL INVESTMENT GROUP LTD ..... THIRD PARTY**

**RULING**

1. The Claimant filed an Amended Memorandum of Claim dated 1<sup>st</sup> July 2024, seeking the following reliefs against the Respondents:
  - a. A declaration that the Respondents’ failure to remit payments to the provident fund is wrongful, unlawful, arbitrary, callous, and in breach of the employment contract;
  - b. A declaration that the Respondents’ deduction of pension contributions from the Claimant’s salary without remitting the same to a provident fund is unlawful and constitutes a breach of contract;



- c. An order directing the Respondents to pay the Claimant KES 8,781,818, being the total arrears of unremitted pension contributions from 1st September 1990 to December 2012, together with accrued interest from the year 2000 to 30<sup>th</sup> April 2024;
  - d. An order compelling the Respondents to pay the Claimant's costs of the claim, plus interest at 10% per annum on the sum stated in (c) above, from 30<sup>th</sup> April 2024 (the date of valuation) until payment in full; and
  - e. Such further relief as the Court may deem just.
2. In response, the Respondents filed a Chamber Summons Application dated 17<sup>th</sup> April 2025, seeking to join Absa Bank of Kenya Plc (formerly Barclays Bank of Kenya Ltd) and Old Mutual Investment Group Ltd as third parties to the suit.
  3. The Application is supported by the Affidavit of Clarence Lukungu, sworn on even date, and is premised on the grounds that the Respondents intend to seek indemnity and/or contribution from the proposed third parties should any liability be found due from the Respondents to the Claimant.
  4. It is averred that the Respondents established a Provident Fund in the early 1990s with the proposed 1<sup>st</sup> Third Party, then operating as Barclays-Trust Investment Services Limited, into which employees contributed 10% of their salaries during the first three years and 15% thereafter.
  5. That the Respondents duly remitted all employee contributions to the said Provident Fund until December 2008, when it transitioned to the Jubilee Insurance PPP Group Scheme. However, upon retirement, some employees of the Respondents were unable to access the contributions remitted to the proposed 1<sup>st</sup> Third Party.
  6. It is further averred that the proposed 1<sup>st</sup> Third Party later informed the Respondents that the Provident Fund had been de-registered in 2001, and further, that in 2002 the proposed 2<sup>nd</sup> Third Party had acquired Barclays-Trust Investment Services Limited from the proposed 1<sup>st</sup> Third Party.
  7. According to the Respondents, it was never notified by either of the proposed Third Parties of the fund's de-registration or of the acquisition of Barclays-Trust Investment Services Limited. Consequently, it continued remitting contributions to the scheme until 2008, which the proposed 1<sup>st</sup> Third Party continued to receive. That despite repeated requests, the proposed Third Parties have failed or refused to account for the funds.
  8. The Respondents contends that since the Claimant seeks recovery of the said funds from the Respondents, it is in the interest of justice that the proposed Third Parties be enjoined, to enable the Court to determine the proper party liable.
  9. The Application was opposed. On its part, the proposed 2<sup>nd</sup> Third Party filed a Replying Affidavit sworn by Nannette Miingi on 13<sup>th</sup> June 2025.
  10. It is noteworthy that the proposed 1<sup>st</sup> Third Party did not file a substantive response addressing the factual matters raised by the Respondents.
  11. In her Replying Affidavit, Ms. Nannette Miingi, who identifies herself as the Company Secretary and Internal Legal Counsel of the proposed 2<sup>nd</sup> Third Party, deposes that the proposed 2<sup>nd</sup> Third Party is neither a necessary nor proper party to these proceedings, and that the Respondents' attempt to enjoin it is both improper and unjustified.



12. She avers that the proposed 2<sup>nd</sup> Third Party was not privy to the employment contract between the Claimant and the Respondents, and that any obligations or liabilities arising from that employment relationship cannot be enforced against it.
13. She further states that until 15<sup>th</sup> October 2002, the proposed 2<sup>nd</sup> Third Party was a wholly-owned subsidiary of the proposed 1<sup>st</sup> Third Party, before a change of control saw it become a subsidiary of Old Mutual Asset Managers (EA) Limited.
14. According to Ms. Miingi, the Consolata Provident Fund was managed by the proposed 2<sup>nd</sup> Third Party in its capacity as fund manager. Its role, according to her, has always been strictly administrative and fiduciary in nature, confined to managing the fund's assets on behalf of the Respondents and acting solely on the instructions of the Fund Trustees. She is categorical that the proposed 2<sup>nd</sup> Third Party was not responsible for remitting contributions to the Fund.
15. She further deposes that although the Claimant alleges non-remittance of contributions by the employer, there is neither any allegation nor evidence that the proposed 2<sup>nd</sup> Third Party mismanaged, misappropriated, or failed to disburse funds under its management. Ms. Miingi reiterates that the proposed 2<sup>nd</sup> Third Party bore no responsibility for the remittance of the Claimant's contributions into the Fund.
16. Ms. Miingi further avers that a comprehensive review of the proposed 2<sup>nd</sup> Third Party's records confirms that all contributions remitted by the Respondents during the relevant period were properly managed and disbursed in accordance with the instructions of the Fund Trustees.
17. She adds that the proposed 2<sup>nd</sup> Third Party does not hold any funds in the Consolata Provident Fund account that could be applied towards satisfying a decree against the Respondents.
18. In Ms. Miingi's view, the proposed 2<sup>nd</sup> Third Party cannot be held liable for any unpaid contributions that were never remitted to the Fund, since the obligation to remit lay solely with the Respondents.
19. She further states, on the advice of counsel which she verily believes to be true, that the Respondents' Application does not meet the threshold under Order 1 Rule 15 of the [Civil Procedure Rules, 2010](#) for, the joinder of a third party, for the following reasons:
  - a. The proposed 2<sup>nd</sup> Third Party is not connected to the subject matter of the suit in a way that renders it a necessary or proper party for the determination of the issues between the Claimant and the Respondents;
  - b. No relief or remedy is sought by the Claimant against the proposed 2<sup>nd</sup> Third Party, nor is any allegation of wrongdoing or breach made against it; and
  - c. The Claimant's allegations concern breaches by the employer relating to non-remittance of contributions under her employment contract, to which the proposed 2<sup>nd</sup> Third Party was not privy and over which it had no control or responsibility.
20. It is Ms. Miingi's position that the intended joinder of the proposed 2<sup>nd</sup> Third Party is a misdirected attempt to hold it liable for the Respondents' alleged breaches, without any factual or legal foundation.
21. On 3<sup>rd</sup> June 2025, the Court directed that the Application be disposed of by way of written submissions.



## Submissions

22. In support of the Application, the Respondents submitted that the essence of the Third-Party notice is that ABSA Bank of Kenya PLC (formerly Barclays Bank of Kenya Ltd) and Old Mutual Investment Group were, either directly or indirectly, responsible for the custodianship and management of the Claimant’s pension fund at various times between 1991 and 2008. In the same vein, the Respondents submitted that the Third Parties have not disputed their role in managing and holding custody of the Respondent’s Provident Fund Scheme. Their function as custodians is therefore not in contention.
23. It was further averred that once the Respondents remitted employee contributions into the designated custodial accounts, the legal and operational responsibility for the integrity of the fund transferred to the custodians. In support, the Respondents referenced Section 40 of the [Retirement Benefits Act](#), arguing that custodians and managers are obliged to take reasonable care to ensure that the management of a scheme is conducted in the best interests of its members and sponsors.
24. The Respondents further submitted that the Third Parties’ contention that they cannot be held liable because the Claimant’s contract was with the employer is misplaced. In this regard, the Respondents posited that it does not seek to transfer employment obligations but merely to enforce the custodians’ duty to account for the funds entrusted to them.
25. On its part, the proposed 2<sup>nd</sup> Third Party submitted that the Respondents bear both the legal and evidentiary burden of demonstrating that the proposed joinder satisfies the requirements of Order 1 Rule 15, and that the Court must be satisfied that a proper basis for joinder has been established. In support of this position, reliance was placed on [Kenya Commercial Bank v Suntra Investment Bank Ltd](#) [2015] eKLR.
26. It was further submitted that the proposed 2<sup>nd</sup> Third Party’s role was solely that of a fund manager, responsible only for managing contributions remitted to the Provident Fund. On this score, it was submitted that the obligation to deduct and remit contributions rested entirely with the Claimant’s employer, not the proposed 2<sup>nd</sup> Third Party. That consequently, it cannot be held liable for any contributions that were never received from the Respondents.
27. According to the proposed 2<sup>nd</sup> Third Party, no triable issue arises between it and the Respondents.
28. On the other hand, the Claimant submitted that any claim against the intended Third Parties relating to the management of the pension funds constitutes a separate matter, which should be pursued under the statutory dispute resolution framework provided by the [Retirement Benefits Act](#), rather than in this Court.

## Analysis and Determination

29. The issue for determination is whether the proposed Third Parties are proper and necessary parties to these proceedings.
30. The legal foundation for issuing a notice and joining a third party is Rule 30 of the [Employment and Labour Relations \(Procedure\) Rules \(2024\)](#) which provides as follows:
  - “ 30 Where a respondent claims as against any other person not already a party to the suit (hereinafter called the “third party”)—
    - (1) that the respondent is entitled to contribution or indemnity; or



(b) that the respondent is entitled to any relief or remedy relating to or connected with the original subject-matter of the suit and substantially the same as some relief or remedy claimed by the claimant; or

(c) that any question or issue relating to or connected with the said subject-matter is substantially the same question or issue arising between the claimant and the respondent and should properly be determined not only as between the claimant and the respondent but as between the claimant and respondent and the third party or between any or either of them, the respondent shall apply to the Court within fourteen days after the close of pleadings for leave of the Court to issue a notice (hereinafter called a “third-party notice”) to that effect, and such leave shall be applied for by summons in chambers ex parte supported by affidavit.

(2) A copy of such notice shall be filed and served on the third party according to the rules relating to the service of summons.

(3) The notice shall state the nature and grounds of the claim and shall, unless otherwise ordered by the court, be filed and served within fourteen days of leave.”

31. It is apparent from the foregoing Rule that a respondent may initiate third-party proceedings in a claim where they have been sued but believe that another party bears responsibility for the claim.
32. The essence of the Respondents’ application is that it established a Provident Fund in the early 1990s with the proposed 1<sup>st</sup> Third Party, operated by the then Barclays-Trust Investment Services Limited, into which employees made contributions. The Respondents remitted all deductions faithfully until December 2008, when they moved to the Jubilee Insurance PPP Group Scheme. Upon retirement, some employees were unable to access the funds held by the proposed 1<sup>st</sup> Third Party.
33. The proposed 1<sup>st</sup> Third Party later informed the Respondents that the Fund had been de-registered in 2001 and that, in 2002, the proposed 2<sup>nd</sup> Third Party acquired Barclays-Trust Investment Services Limited.
34. The Respondents contend that they received no notification of the de-registration or the acquisition and continued remitting contributions until 2008, which the proposed 1<sup>st</sup> Third Party continued to receive. Despite repeated attempts, the proposed Third Parties have failed or refused to account for the funds.
35. It is on the basis of the foregoing that the Respondents seek the joinder of the proposed third parties to these proceedings.
36. The proposed 2<sup>nd</sup> Third Party acknowledges that until 15<sup>th</sup> October 2002, it was a wholly-owned subsidiary of the proposed 1<sup>st</sup> Third Party, and thereafter became a subsidiary of Old Mutual Asset Managers (EA) Limited. It further admits managing the Consolata Provident Fund as fund manager but contends that the obligation to deduct and remit contributions rested with the Respondents, and that it cannot be held liable for contributions never received from them.



- 37. It is evident from the Amended Statement of Claim that the Claimant’s claim focuses on her pension contributions between 1990 and 2012, a period that extends well into the time during which the proposed 2<sup>nd</sup> Third Party managed the Respondent’s Provident Fund.
- 38. Further to the foregoing, the proposed 2<sup>nd</sup> Third Party annexed to its affidavit a statement of account for Consolata Primary School, covering 1<sup>st</sup> January 1995 to 22<sup>nd</sup> October 2024, demonstrating its management and custodianship of the Respondent’s Provident Fund.
- 39. With respect to the proposed 1<sup>st</sup> Third Party, as previously observed, no substantive response was filed addressing the factual issues raised by the Respondents in the third-party application. Needless to say, the factual assertions made by the Respondents regarding the management of the Provident Fund by the proposed 1<sup>st</sup> Third Party remain unrebutted.
- 40. In any event, a review of the record shows that the Respondents and the proposed 1<sup>st</sup> Third Party have previously corresponded regarding the Respondents’ Provident Fund.
- 41. The proposed 2<sup>nd</sup> Third Party contends that the cause of action between the Claimant and the Respondents namely, the alleged non-remittance of Provident Fund contributions is entirely distinct from any dealings the Respondents may have had with the proposed 2<sup>nd</sup> Third Party, which acted solely as a service provider to the Fund, and therefore that no common issue arises between them. However, this does not appear to be the case for the reasons set out below.
- 42. From the Claimant’s standpoint, the Respondents failed on certain occasions to remit her pension contributions despite having deducted the same from her salary. The Respondents, on the other hand, maintain that it faithfully remitted all deductions to the Provident Fund held by the proposed 1<sup>st</sup> Third Party from 1<sup>st</sup> January 1991 until December 2008.
- 43. In her Amended Statement of Claim, the Claimant alleges that when she inquired about the whereabouts of her pension deductions, the Respondents informed her that the funds had been remitted to Barclays Bank (the proposed 1<sup>st</sup> Third Party) from January 1991 to 2008.
- 44. According to the admission of the proposed 2<sup>nd</sup> Third Party, until 15<sup>th</sup> October 2002 it was a wholly-owned subsidiary of the proposed 1<sup>st</sup> Third Party. That further, it managed the Consolata Provident Fund as the Fund Manager.
- 45. It therefore emerges that the issue between the Respondents and the proposed Third Parties is closely connected to the cause of action in the main suit, as it relates to the Claimant’s pension contributions and raises a potential basis of liability of the Third Parties to the Respondents.
- 46. To this end, the Court is satisfied that the Respondents have demonstrated a valid reason for joining the proposed Third Parties to the suit.
- 47. Accordingly, the Respondents’ application dated 17<sup>th</sup> April 2025 is allowed and the proposed third parties are hereby joined in the proceedings.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 3<sup>RD</sup> DAY OF OCTOBER 2025.**

.....  
**STELLA RUTTO**

**JUDGE**

In the presence of:



Ms. Wekesa instructed by Mr. Odhiambo for the Claimant

Mr. Wamae for the Respondents

Ms. Nimo for the proposed 1<sup>st</sup> Third party

Mr. Mureithi for the proposed 2<sup>nd</sup> Third Party

Millicent Court Assistant

## ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**STELLA RUTTO**

**JUDGE**

