



**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 2733 (KLR) (3 October 2025) (Ruling)**

Neutral citation: [2025] KEELRC 2733 (KLR)

**REPUBLIC OF KENYA  
 IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
 CAUSE E286 OF 2023  
 SC RUTTO & RC RUTTO, JJ  
 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, FORMERLY BARCLAYS BANK OF KENYA LTD ..... THIRD PARTY**

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

**RULING**

1. Through an Amended Memorandum of Claim dated 1<sup>st</sup> July 2024, the Claimant seeks the following reliefs against the Respondents:
  - a. A declaration that the Respondents' failure to make payments to the provident fund is wrongful, callous, unlawful, arbitrary, and a breach of the employment contract;
  - b. A declaration that the Respondent's action of deducting pension contributions from the Claimant's salary but failing to remit the deducted sums to a Provident fund is unlawful and a breach of the employment contract;



- c. An order for the Respondent to pay the Claimant KES 8,781,818 being the total unpaid pension contribution arrears owed to the Claimant from 1<sup>st</sup> September 1990 - December 2012 as well as the interest accrued on the contributions from the year 2000 to 30<sup>th</sup> April 2024;
  - d. An order for the Respondent to pay the Claimant's costs of this claim plus interest at 10% per annum on prayer (d)(sic) above from 30<sup>th</sup> April 2024, being the date of valuation, until payment in full; and
  - e. Any further reliefs as the court may deem fit.
2. Following the filing of the Memorandum of Claim, the Respondents brought a Chamber Summons Application dated 17<sup>th</sup> April 2025, seeking orders to enjoin Absa Bank of Kenya Plc (formerly Barclays Bank of Kenya Ltd) and Old Mutual Investment Group Ltd as third parties in the suit.
  3. Upon service of the Third-Party Notice, the proposed 1<sup>st</sup> Third Party lodged a Preliminary Objection dated 30<sup>th</sup> May 2025, anchored on the following grounds:
    1. That this Honourable Court lacks jurisdiction to entertain and determine the dispute forming the subject of the Claim and the Application.
    2. That there exists no employer–employee relationship between the Claimant and any of the Respondents or the intended Third Parties.
    3. That pensioners pursuing claims arising from pension schemes or provident funds do not fall within the category of persons permitted to institute applications, claims, or complaints before this Court pursuant to Section 12(2) of the *Employment and Labour Relations Court Act*.
  4. On 3<sup>rd</sup> June 2025, the Court directed that the Preliminary Objection be canvassed by way of written submissions.

### Submissions

5. In support of the Preliminary Objection, the proposed 1<sup>st</sup> Third Party argued that this Court lacks jurisdiction to entertain both the Claim and the Application on the ground that there exists no employer–employee relationship between the Claimant and the Respondents, or with the Intended Third Parties. It was further submitted that the Claimant retired in July 2021 and, therefore, no longer maintains any employment relationship with the Respondents.
6. Citing the decision in *Albert Chaurembo Mumba & 7 Others v Maurice Munyao & 148 Others* [2019] eKLR, the proposed 1<sup>st</sup> Third Party contended that the Claimant approaches the Court in the capacity of a pensioner and consequently, the dispute herein arises purely from a pension matter, and not from a trade or employment dispute as contemplated under Section 12 of the *Employment and Labour Relations Court Act* (ELRC Act).
7. It was further submitted by the proposed 1<sup>st</sup> Third Party that this Court lacks jurisdiction to determine disputes concerning pension schemes or provident funds.
8. Placing reliance on the case of *Samuel Kamau Macharia & Another v Kenya Commercial Bank & 2 Others*, Supreme Court Civil Application No. 2 of 2011, the proposed 1<sup>st</sup> Third Party maintained that Section 12 of the *ELRC Act* does not confer jurisdiction upon this Court to deal with pension-related matters, which fall under the purview of the *Retirement Benefits Act*.
9. It was the proposed 1<sup>st</sup> Third Party's further submissions that the claim is barred by the doctrine of exhaustion of administrative remedies.



10. In further support of its submissions, the proposed 1<sup>st</sup> Third Party made reference to the decisions in *Kenya Ports Authority v Industrial Court of Kenya & 2 Others*, Civil Appeal No. 236 of 2012, and *Tom Kusienya & 11 Others v Kenya Railways Corporation & 2 Others*, Constitutional Petition No. 353 of 2012.
11. Submitting in support of the Preliminary Objection, the Respondents argued that this Court's jurisdiction is expressly circumscribed by Article 162(2)(a) of the *Constitution* and Section 12 of the *ELRC Act*, which limit the Court's mandate to disputes arising from employment relationships, trade union matters, and collective bargaining agreements. According to the Respondents, the Claimant approaches the Court in the capacity of a pensioner rather than as an employee.
12. The Respondents further submitted that the legislative intent is unambiguous in excluding pension matters from the jurisdiction of this Court, and that the Court cannot arrogate to itself jurisdiction where none has been conferred by statute.
13. Referring to the decision in *Albert Chaurembo Mumba & 7 Others v Maurice Munyao & 148 Others* (supra), the Respondents contended that even assuming jurisdiction were to be found, the Claimant's suit would still be incompetent for failure to exhaust the statutory dispute resolution mechanisms provided under the *Retirement Benefits Act*. In their view, pension disputes ought to be lodged with the Retirement Benefits Authority.
14. To buttress its position, the Respondents relied on the cases of *Geoffrey Muthinja & Another v Samuel Muguna Henry & 1756 Others* [2015] eKLR and *Bethwell Allan Omondi Okal v Telkom (K) Ltd & 9 Others* [2017] KECA 743 (KLR).
15. In opposition to the Preliminary Objection, the Claimant submitted that the issue of whether the Respondents were her employers had previously been raised and conclusively determined in the Respondents' Preliminary Objection dated 13<sup>th</sup> July 2023 and the Notice of Motion dated 18<sup>th</sup> July 2024, both of which were heard and determined on their merits.
16. To this end, the Claimant urged the Court to affirm its earlier determination on the existence of an employment relationship between herself and the Respondents, in the interest of justice and to forestall unnecessary re-litigation. In support, reliance was placed on the case of *Kenya Commercial Bank Limited & Another v Muiri Coffee Estate Limited & 3 Others* [2016] KESC 6 (KLR).
17. The Claimant further argued that the crux of the dispute concerns the Respondents' failure to remit pension contributions as required, resulting in outstanding sums due to her. She contended that the matter relates to pension deductions, whether made or omitted, that were not transmitted to the Provident Fund, contrary to the agreed terms of her employment.
18. Referencing the case of *Sarah Mang'oli v Kenya Medical Research Institute & Another* [2020] KEELRC 595 (KLR), the Claimant submitted that Sections 46 and 47 of the *Retirement Benefits Act* limit the jurisdiction of the Retirement Benefits Authority to disputes between members and scheme administrators, managers, custodians, or trustees. In her view, the present dispute does not fall within that category to trigger the statutory dispute resolution mechanisms under the *Retirement Benefits Act*.
19. The Claimant maintained that the reliefs she seeks emanate directly from her former employment relationship with the Respondents. In further support, the Claimant referred the Court to the decision in *Abdullahi Ali Mohammed v Kenya Ports Authority & Another* [2016] KEELRC 1032 (KLR).
20. The Claimant was emphatic that the present dispute is not one of pension administration, but rather a contractual breach by the employer in failing to remit agreed contributions. On that basis, she argued



that the matter is distinguishable from the authorities relied upon by the proposed 1<sup>st</sup> Third Party, which involved disputes between pensioners and scheme administrators.

21. The Claimant further posited that the dispute falls squarely within Section 12(1)(a) of the *ELRC Act*, as it arises directly from the employer–employee relationship. In her view, the obligation to deduct and remit pension contributions is a direct consequence of that relationship.
22. The proposed 2<sup>nd</sup> Third Party did not file any written submissions on the Preliminary Objection but indicated its support for the submissions advanced by the proposed 1<sup>st</sup> Third Party.

### **Analysis and Determination**

23. To my mind, the sole issue for determination is whether this Court has jurisdiction to hear and determine the present dispute.
24. The gravamen of the Preliminary Objection by the proposed 1<sup>st</sup> Third Party is that this Court lacks jurisdiction on the ground that there exists no employer–employee relationship between the Respondents and the proposed Third Parties.
25. The proposed 1<sup>st</sup> Third Party and the Respondents have taken the common position that the Claimant has invoked this Court’s jurisdiction in her capacity as a pensioner rather than as an employee, hence their contention that the Court lacks jurisdiction.
26. In advancing their respective arguments, the proposed 1<sup>st</sup> Third Party and the Respondents have extensively relied on the decision of the Supreme Court in *Albert Chaurembo Mumba & 7 Others v Maurice Munyao & 148 Others* [supra].
27. This Court has carefully considered that precedent and finds that the controversy in that case was between pensioners and the trustees of a pension scheme. In this regard, the Apex Court underscored the nature of the dispute in the following terms:

“At the risk of repetition, it is not in dispute that the controversy is between members, beneficiaries and dependants of a pension scheme on one hand and the Trustees of the Scheme on the other hand.”
28. The present dispute, however, is distinguishable. Unlike in the Albert Chaurembo case, the Claimant has not sued the trustees or administrators of a pension scheme or provident fund, but her former employers, alleging breach of their contractual duty to remit her pension contributions.
29. Accordingly, the Claimant’s grievance arises from obligations under the contract of employment and therefore falls within the realm of an employment dispute, rather than a pension administration matter.
30. Indeed, the Claimant has anchored her case on the employment contract and not on a trust deed or scheme rules. Her complaint is premised on the Respondents’ alleged failure to discharge their contractual duty to deduct and remit pension contributions, which she contends amounts to a breach of the Respondents’ obligations under the contract of employment, thereby placing the matter squarely within the jurisdiction of this Court.
31. In light of the foregoing, the position advanced by the proposed 1<sup>st</sup> Third Party and the Respondents that this dispute falls within the jurisdiction of the Retirement Benefits Authority pursuant to Section 46(1) of the *Retirement Benefits Act* cannot be sustained.



32. It is instructive to note that in the Albert Chaurembo case, the Supreme Court affirmed that the import of Section 46(1) of the Retirement Benefits Act was that any member, beneficiary or dependents of the scheme who were aggrieved or dissatisfied by any decisions made by a manager, administrator or trustees of the scheme while exercising their powers under the provisions of the relevant scheme rules or the Act under which the scheme was established, could if he or she wished make a written request to the CEO to review such decisions with a view to ensuring that such decisions were in accordance with the provisions of the relevant scheme rules or the Act under which the scheme was established and above all, lawful.
33. The present claim, however, does not fall within that statutory framework. As stated herein, the Claimant has not come before this Court as a member of a pension scheme challenging the decisions of trustees or administrators of a pension scheme, but rather as a former employee pursuing remedies for the Respondents' alleged breach of contractual obligations to remit pension contributions.
34. Indeed, in its more recent decision in Kenya Tea Growers Association & 2 Others v The National Social Security Fund Board of Trustees & 13 Others [2024] KESC 3 (KLR), the Supreme Court clarified its holding in the Albert Chaurembo case and affirmed that what the ELRC lacks is jurisdiction over disputes between pensioners and scheme trustees, which are governed by dedicated statutes and the common law.
35. The Apex Court further observed that even where a dispute may not directly arise from an employment relationship, the introduction of mandatory contributory amounts from employee earnings under statute can generate justiciable grievances within the ELRC's mandate.
36. Therefore, the fact that the employment relationship between the Claimant and the Respondents has since ceased does not in itself divest this Court of jurisdiction. What is material is that the Claim is anchored on alleged breaches of the employment contract, specifically the Respondents' failure to remit pension contributions as required.
37. In sum, this Court finds that it is properly seized of the matter, and the Preliminary Objection dated 30<sup>th</sup> May 2025 by the proposed 1<sup>st</sup> Third Party is without merit and is dismissed with an order that costs shall be in the cause.

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

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**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

Ms. 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**

