



REPUBLIC OF KENYA

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT
NAIROBI**

CAUSE NO. E699 OF 2025

**CLEMENT MUTHUA NDUNG’U.....
.....CLAIMANT**

-VERSUS-

**GERTRUDE’S GARDEN
CHILDREN’S HOSPITAL.....1ST
RESPONDENT**

**ZAMARA ACTUARIES ADMINISTRATORS
& CONSULTANTS LIMITED.....2ND
RESPONDENT**

RULING

Introduction

1. By a Memorandum of Claim dated 22nd July 2025, the Claimant sued the Respondents seeking the following reliefs:-

a) A declaration that the Claimant is entitled to his Gratuity for the period of 1992 to 2001.

b) A declaration be made that the failure by the Respondents to pay the Claimant his accumulated Gratuity for the period of 1992-2001 amount to a violation of his rights as an employee.

c) An order do issue compelling the Respondents to pay the Claimant the entire accumulated Gratuity calculated using his last salary for the period of 1992 to 2001.

d) General damages.

e) Any other order and or directions that this court may deem fit to grant.

2. The 1st Respondent filed a Notice of Preliminary Objection dated 28th August 2025 urging the court to strike out the suit on the following grounds:-

a) Section 46 of the Retirement Benefits Act requires that disputes arising from a Retirement Benefits Scheme should be referred to the Chief Executive Officer of the Retirement Benefits Authority for determination.

b) This Honourable court lacks jurisdiction under section 12 of the Employment and Labour Relations Court Act to determine a dispute arising from a retirement benefits scheme.

c) This Honourable court lacks jurisdiction under Section 12 of the Employment and Labour Relations Court Act to determine the suit as the Claimant left the 1st Respondent's employment on 7th November 2023.

d) By filing this suit, the Claimant is attempting to oust the dispute resolution mechanism set out under the Retirement Benefits Act.

e) This court lacks jurisdiction as a court of first instance and the suit should be struck out with costs to the 1st Respondent.

3. The 2nd Respondent, also, filed a Notice of Preliminary Objection dated 5th September 2025 seeking for striking out of the suit against it on the following grounds:-

a) This Honourable court lacks jurisdiction under Section 12 of the Employment and Labour Relations Court Act to determine a dispute arising from retirement Benefits Scheme.

b) The Claim contravenes Section 46 of the Retirement Benefits Act which requires disputes arising from a Retirement Benefits Scheme to be first referred to the Chief Executive Officer of the Retirement Benefits Authority with a view to ensuring that they are determined in accordance with the provisions of the relevant scheme rules or the Act under which the scheme is established.

c) The Claim contravenes Section 48 of the Retirement Benefits Act which requires that an appeal from the decision of the Chief Executive Officer should be lodged with the Retirement Benefits Appeals Tribunal established under Section 47 of the same Act.

Facts

4. The Claimant was employed by the 1st Respondent from 1st August 1992 as a Laboratory Technologist to November 2023 when he left employment. Between 1992 to January 2001 he was entitled to gratuity as part of employment but on 1st February 2001, the 1st Respondent discontinued the gratuity scheme and joined the Hospital Staff Retirement Benefits

Scheme administered by the 2nd Respondent. The 1st Respondent promised the Claimant that his accumulated gratuity for the August 1992 - January 2001 would be transferred to the new scheme and that, he would be notified when the process of the transfer of his gratuity commenced.

5. By a letter dated 3rd April 2003, the 1st Respondent confirmed to the Claimant that the actual transfer of his accumulated gratuity had not been done and that it would be done by installments when the Hospital was able to afford. The Claimant has filed documents which, according to the 2nd Respondent, is evident that the accrued gratuity for 1992 - 2001 was transferred to the new scheme in 2007 as unregistered contribution. The Claimant maintains that the gratuity was never transferred to the pension scheme as he was not notified as promised by the employer
6. According to the Respondents, the Claimant was paid all his Retirement Benefits and if he feels that he was underpaid, the right forum to approach is the Chief Executive Officer of the Retirement Benefits Authority under section 46 of the Retirement Benefits Act, and not this court.
7. The Preliminary Objections were disposed of by written submission. Having considered the pleadings and the submissions filed, the only issue for determination is whether this court lacks jurisdiction to entertain the Claimant's suit.

Analysis

8. The objection by the 2nd Respondent is fairly straight forward. To begin with there was no employment contract between it and the Claimant. Its role in Claimant's retirement benefit was that of administration of the employer's Pension Scheme. Under section 2 of the Retirement Benefit Authority, Administrator of a scheme is defined as:

“ a person appointed by trustees to administer a scheme in accordance with such terms and conditions of service as may be specified in the instrument of appointment”.

9. Section 46 of Retirement Benefit Authority then provides that:

“ (1) Any member of a scheme who is dissatisfied with a decision of the manager, administrator, custodian or trustees of the scheme may request, in writing, that such decision be reviewed by the Chief Executive Officer with the a view to ensuring that such decision is made in accordance with the provision of the relevant scheme rules or the Act under which the scheme is established”.

10. In the instant case, the Claimant faulted the 2nd Respondent for breach of fiduciary duty for among others, failure to ensure that the gratuity allegedly transferred to it by the 1st

Respondent on his behalf, was properly captured and annual statements issued to him as a member. I respectfully differ with the forgoing accusation.

11. In my view, the persons with the duty of verifying that the correct gratuity was forwarded to the scheme were the Claimant and the 1st Respondent. The 1st Respondent had that duty, and indeed it promised that it would notify the Claimant when it commenced the process of transfer. Therefore it ought to have computed the gratuity earned as at 1st February 2001 and served a statement to the Claimant for verification.
12. It never did so despite the letter dated 3rd April 2003 whereby it cited financial constrains as the reason for the delay. It follows that, the dispute of the correct amount of gratuity payable to the Claimant between 1992 and 2001 is a matter outside the Retirement Benefit Scheme and it does not concern the 2nd Respondent.
13. I must add that, if the amount payable after transfer of the gratuity in 2007 was to be disputed, then that would fall under section 46 of the Retirement Benefit Authority and the court would have no jurisdiction. Accordingly, I find that the objection by the 2nd Respondent is merited in as far as the Claimant faults its decisions as administrator of the scheme, and also in so far as the claim concerns the actual accruals of gratuity before transfer of the same to the scheme.

14. As regards the objection by the 1st Respondent, the dispute between it and the Claimant is about gratuity payment for the period 1992-2001 when there was no pension scheme. There is evidence that the gratuity was payable to the Claimant but the actual amount was not made known to the Claimant before it was transferred to the pension scheme.
15. A determination of that amount is within this court's jurisdiction by dint of Article 162 (2)(a) of the Constitution and section 12 of the Employment and Labour Relations Court Act. The court is mandated to determine the amount of gratuity earned between 1992 and 2001, and whether or not all of it was duly forwarded to the pension scheme. Consequently, I find no merits in the 1st Respondent's objection.

Conclusion

16. I have found merits in the objection by the 2nd Respondent dated 5th September 2025 and I allow it as urged. As such the claim against the 2nd Respondent is hereby struck out.
17. The objection by the 1st Respondent dated 25th August 2025 lacks merit and it is overruled. Each party shall bear own costs of the objections.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN OPEN
COURT AT NAIROBI THIS 6TH DAY OF NOVEMBER, 2025.**

**ONESMUS MAKAU
JUDGE**

Appearance:

Wanjiku for the Claimant

Lelu for the 1st Respondent

Ngethe for the 2nd Respondent

ORIGINAL