

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
ELRC PETITION NO. E055 OF 2021

(Before Hon. Justice Dr. Jacob Gakeri)

KENYA AIRLINE PILOTS ASSOCIATION (KALPA).....

....PETITIONER

VERSUS

KENYA AIRWAYS PUBLIC LIMITED COMPANY.....

RESPONDENT

JUDGMENT

This suit has had along and chequered history dating 16th April, 2021 when the Petition was filed concurrently with a Notice of Motion dated 16th April 2021 under Certificate of Urgency seeking Injunctive relief to restrain the Respondent from discontinuing with contributions to the Provident Fund and although the suit was certified urgent on 19th April 2021, no interim orders were issued and the application was subsequently abandoned.

The Respondent, subsequently filed a Notice of Preliminary Objection challenging the jurisdiction of the court to hear and determine the suit in light of the Supreme Court decision in **Albert Chaurembo Mumba & 7 others v Maurice Munyao & 148 others (2016) eKLR** and compliance with the provisions of the Retirement Benefits Act.

The Court upheld the Petitioner Preliminary Objection and struck out the Petition vide a Ruling delivered on 20th December, 2021. Subsequently, the sought reinstatement of the Petition vide application dated 13th June, 2022, on the premises that the Petition was now mature because the Retirement Benefit Authority had declined to adjudicate the dispute for want of jurisdiction.

The Respondent file a Notice of Preliminary Objection on *res judicata, functus officio* and vexatious dated 28th September 2022. The court dismissed the Preliminary Objection vide its Ruling delivered on 10th November 2022 and vide a Ruling delivered on 7th April, 2025, the court reinstated the Petition for hearing and determination.

The Petitioner's case is that the Respondents unilateral decision to discontinue contributions to the Staff Provident Fund Scheme was unlawful, in contravention of the CBA and amounted to discrimination because the Government of Kenya held 48.9% shareholding, thus the Respondent qualified as a state-owned entity.

The Petitioner further contended that the Respondent had not remitted the Petitioner's portion for January to March 2020 and the Respondent's portion for the period April to June 2020.

According to the Petitioner, the Respondent violated Articles 27(1), 28, 41, 43(c) and 47 of the Constitution of Kenya.

The Petitioner prayed for:

- (a) Declaration that the Respondent breached the Petitioner's rights under Articles 27(1), 28, 41(1) 43(1) (e) and 47 of the Constitution of Kenya.
- (b) Permanent reinstatement of contributions to the Provident Fund.
- (c) Remedial plan on payment of non-remitted contributions.
- (d) An Order prohibiting the Respondent from discontinuing contributions to the Provident Fund in future in violation of the Petitioner's rights.
- (e) Damages for breach of fiduciary duty and violation of Petitioner's constitutional rights.
- (f) Interest on (e) above.
- (g) Costs of the suit.
- (h) Any other order the court may deem fit to grant.

Respondent's Case

In opposition to the Petition, the Respondent filed a Replying Affidavit sworn by Mr. Tom Shivo, the Chief People Officer of the Respondent who deponed that under the collective Bargaining Agreement (CBA) between the parties, the Respondent established a Staff Provident Fund Scheme membership of which was automatic and contributions were capped at 10% for of the employee's basic salary by both employer and employee.

That under the Trust Deed establishing the staff Provident Fund Scheme, the founder could discontinue the payment of contributions to the fund pursuant to a three (3) months notice to the Trustees.

The affiant deponed that although the Respondent was suffering losses owing to competition and financial challenges, the cessation of movement order on the onset of the COVID-19 in March 2020 Pandemic was the straw that broke the camels back primarily because the Respondent's business is air transport of passengers in the domestic, regional and international markets.

That the Respondent wrote to the Board of Trustees on 23rd March 2020 intimating its inability to meet its obligations in relation to employer and employee contributions to the scheme and as at that date there was a short fall of Kshs.241,062,037.26.

The effective date was 1st April, 2020, a waiver of the three (3) months' notice was made and the Retirement Benefits Authority (RBA) was notified of the cessation of contributions and consent sought and advice was given vide letter dated 9th April, 2020. Subsequently, the Board of Trustees notified the Petitioner vide letter dated 28th April, 2020.

That the Petitioner consented to the waiver of employee's contributions during the three (3) months' notice period but employees willing to contribute voluntarily could do so and contributions were to resume once the financial climate was deemed favourable and a consultative meeting between the Respondent and the Petitioner was held on 22nd July, 2020.

That the RBA had no objection to the decision of the Respondent which had in addition proposed a remedial plan for the payment of arrears from January to June 2020 of Kshs.322,543,857 in four (4) equal instalments and the same was fully paid to the fund.

The affiant deponed that employees were notified of the decision and the Respondent did not discriminate the employees on account of Government shareholding and in any case the Petitioner provided no comparators who were similarly circumstanced and the Petitioner was represented on the Board of Trustees of the fund.

The affiant further deponed that the Respondent acted in accordance with the terms of the Trust Deed and the decision was actuated by the economic impact of the COVID -19 Pandemic.

The affiant prayed for dismissal of the petition with costs.

Petitioner's submissions

As to whether the Respondent had power to vary the terms of the Provident Fund without consent of the Petitioner, it was argued that the Provident Fund was an integral part of the contract of employment between members of the Petitioner and the Respondent and required amendment of the CBA and the Respondent was barred from deciding whether or not to remit contributions unilaterally. Reliance was placed

As to whether the unilateral withdrawal of the Provident Fund was a violation of the Petitioner's Constitutional rights under Article 27, 28, 41 and 47, Counsel submitted that the Petitioner filed a Petition to obviate multiplicity of individual suits by members to urge that the unilateral alteration of provisions of the Provident Fund was a violation of Article 41 of the Constitution of Kenya.

Reliance was placed on the decisions in **Njue & 2 others v County Service Board Kirinyaga & another** on Procedural fairness and urge that members of the Petitioner had a legitimate expectation, that Provident Fund contributions would be remitted until their contracts of employment came to an end and the discontinuation violated their right to fair administrative action.

Counsel submitted that by acting in the manner it did, the Respondent violated the Petitioner's members right to personal dignity, citing the decision in **Francis Mulomba Nguyo v National Medial Group Ltd & 2 others (2024) eKLR** the urge that the Petitioner's members right to fair labour practices was violated by the Respondent.

As to whether the Petitioner was entitled to a remedial plan, reliance was placed on **Kenya Chemical Workers Union v Vector Pest Control and Supplies Ltd (2025)** to urge that the Respondent and the Petitioner were bound by the terms of the CBA between them to urge that failure by the court to declare the Petitioner's entitlement to non-remitted Provident Fund contributions would be tantamount to a variation of the terms of the CBA by the court.

Counsel urged that the Respondent be compelled to provide a remedial plan on how and when it will pay the non-remitted Provident Fund contributions from July 2020 to February, 2023.

Respondent's Submissions

As to whether the CBA, Trust Deed and Retirement Benefits Act governed the Fund as an integrated legal framework, and whether the Respondent had the right to discontinue contributions, counsel submitted the CBA though binding had to be read together with the scheme rules and Trust Fund and the CBA established the staff Provident Fund and both parties would make a contribution of 10% the basic salary of an employee. That the CBA did not displace the fund framework and the documents had to be read wholistically and harmoniously.

Counsel submitted that the general principle that an employer may not secretly or arbitrarily reduce remuneration of an employee was accepted but did not apply where action is taken pursuant to a pension instrument which defined how, when and on what terms contributions may be made suspended or discontinued and the Retirement Benefits Act governed pension schemes and reliefs.

Reliance was placed on the provisions of section 5, 32, 46, 48, 53 A and 53B of the Act on regulation of pension schemes scheme fund and dispute resolution.

Reliance was further placed on the Court of Appeal decision in **Staff Pension Fund & Kenya Commercial Bank Staff Retirement (DC) Scheme 2006 & another v Ann Wangui Ngugi & 524 other (2018) KECA 710 (KLR)** on the importance of the Trust Deed and the order of the Retirement Benefits Authority, to urge that the Trust Deed prescribed the structure of the Fund and clause 8 reserved the right of the Founder to discontinue payment of contributions to the Fund after a written notice of 3 months.

On whether the Respondent acted lawfully by discontinuing contributions, reliance was placed on **Gatuma v Kenya Breweries Ltd & 3 others (2024) KESC 52 (KLR)** and **Kenya Chemical Workers Union v Vector Pest Control and Supplied, Ltd (2025) KEELRC 947 (KLR)** to submit that a CBA is enforceable after registration and the latter decision was distinguishable in that the CBA was not being varied unilaterally.

Counsel submitted that owing to the COVID-19 Pandemic and its impact on the aviation sector, and the Respondent's operations the Respondent was unable to keep up with the contributions and issued a notice pursuant to the Trust Deed and thus did not act unilaterally. The Respondent involved the trustees of the Fund.

That the Retirement Benefits Act contained specific provisions on recovering deducted but unremitted contributions and reliefs. Specifically, sections 52A and 53B but no deductions had been made in this case because the Fund was lawfully closed to further contributions and none could be remitted.

Further reliance was made on the decision in **Communications Commission of Kenya v 5 others v Royal Media Services Ltd & others (2014) KESC 53 (KLR)** on the principle of constitutional avoidance to urge that the instant petition fell within the ambit of the principle and there was no need to invoke the Constitution of Kenya.

Counsel submitted that the instant Petition did not meet the threshold of a constitutional petition as envisaged in **Anarita**

Karimi Njeru v Republic and Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others (2013) KECA 445 (KLR) as regards precision as the Petitioner failed to prove discrimination and it had no comparator. That the 48.9% shareholding in the Respondent did not establish that the Respondent was a state organ or identify similarly circumstanced employees and the Respondent's decisions were actuated by the impact of the COVID-19 Pandemic and related financial conditions which affected on its operations generally. Counsel submitted that the Petitioner had not proved any violation of the right to human dignity and placed reliance on citing the decision **in Francis Mulomba Nguyo v Nation Media Group Ltd & 2 others (2021) KEHC 3888 (KLR)** and urge that no humiliation, degrading or arbitrary targeting or conduct against the Petitioner's members had been demonstrated.

Counsel, further submitted that the CBA was not varied unilaterally and Article 49 of the Constitution of Kenya was not violated and in any event the Respondent gave notice contacted the Retirement Benefit Authority and engaged the trustees.

Counsel submitted that the contention that members of the Petitioner had a legitimate expectation that contribution would continue until separation was legally and factual unsustainable and the elements of the expectation had not been demonstrated.

On relief, counsel submitted that none commended itself because declarations are discretionary, and no constitutional violation had been proved, the Fund was reinstated in February 2023, thus no

reinstatement was necessary, a permanent injunction was unavailable, as it is trite law that a court of law cannot rewrite a contract as held in **National Bank of Kenya Ltd v Pipe plastic Samkolit (K) Ltd & another (2001) KECA 362 (KLR)**, the period July 2020 to February 2023 was not before the court for a remedial plan, and any deducted but unremitted contributions are recoverable under the RB Act and the prayer seeking prohibition of future discontinuation of contributions was speculative and the claim for damages was untenable.

Counsel prayed for dismissal of the petition with costs.

Analysis and determination

It is common ground that the Petitioner and the Respondent had a CBA whose clause 38 provided for automatic membership to a Staff Provident Fund Scheme for all employees, after probation, with each party contributing 10% the employee's basic salary.

It is equally not in dispute that the Respondent's staff Provident Fund Scheme was managed in accordance with the Trustee Deed dated 22nd January 2018 under a Board of Trustee and the Petitioner was represented on the Board.

The facts of this case are largely uncontested. The Petitioner's case against the Respondent is that, it breached the Petitioner's members' right to equality and freedom from discrimination, human dignity, fair labour practices, social security and fair administration action. That it acted unilaterally in the discontinuation of contributions to the Provident Fund.

The Petitioner admitted that the Respondent's management notified the union vide letter dated 28th April, 2020 its intention to suspend contributions for 3 months effective 1st April 2020 owing to the travel restrictions occasioned by the COVID-19 pandemic and a meeting between the Petitioner and the Respondent took place on 20th March, 2020 and another on 22nd July, 2020.

By a letter dated 23rd March, 2020, the Respondent informed the Board of Trustees of the Provident Fund its intention to cease contributions owing to the COVID-19 Pandemic as per the Trust Deed, over and above the existing short fall of Kshs.241,062,037.26.

Similarly, by letter dated 30th March, 2020, the chair of the Funds Board of Trustees informed the Chief Executive Officer of the Retirement Benefits Authority and sought consent and guidance on:

- (i) Exercise of discretion by Trustees to postpone winding up of the fund and continue running it for the benefit existing members.
- (j) Exceptional circumstances had necessitated issuance of notice by the founder to terminate liability to contribute to the Fund from 1st April, 2020 and not over a three-months calendar notice period as specified in the Funds Trust instruments.

By letter dated 9th April, 2020 the Chief Executive Officer of the RBA guided the Board of Trustees as follows:

1. Under clause 34(b), the Trustees could exercise discretion to continue with the Fund as a closed fund for the benefit of existing members.
2. Under clause 8, the founder could exercise the right to cease contributions after issuing a three (3) months' notice to the Trustees. The notice may not be waived by the RBA because members had already accrued a right over the benefit for that period but;
3. In right of the circumstances, Trustees could exercise their power to compound liabilities and allow the employer to pay at a later date and in this case, liability would be until June 2020 and the founder had to provide a remedial plan to the RBA showing how the amounts would be paid within 3 years and
4. In the alternative, the employer could seek consensus of members or through their representatives to waive the notice period for the contributions accruing for that period to be considered as waived.

By letter dated 28th April, 2020 the Board of Trustees notified the Petitioner its intention to proceed as suggested by the RBA and vide its letter dated 11th May, 2020 and the Petitioner responded as follows;

“a) The consent sought to waive contributions during the three (3) months’ notice period is hereby granted. The sponsor must assume liability for the three (3) months’ notice period since they did not provide the notice as stipulated in the scheme rules.

b) Employees who are willing to continue making voluntary contributions should be allowed to do so.

Thank you for your co-operation and engagement on this matter”

However, vide letter dated 26th June, 2020, the Petitioner accused the Respondent of having terminated its liability to contribute to the Provident Fund indefinitely arguing that it only consented to suspension for a specified period and resumption when the financial climate became favourable. It accused the Respondent for having acted unilaterally.

By letter dated 17th July 2020, Evelyne Munyoki informed the Petitioner that the founder had exercised its right to discontinue contributions as per the Trust-Deed and Rules and RBA and approved the same the Petitioner consented and the Petitioner’s consent was not needed for the Founder to exercise the right under the Trust Deed and Rules.

Similarly, by letter dated 7th August 2020, the Respondent requested for authority to waive the accrued liability incurred on the employee pension contributions from 1st - April 2020 to 30th June 2020, being the notice period and the RBA had no objection to the liability being waived since the Petitioner had consented. However, the RBA was unequivocal that the employer’s portion of pension contribution was payable.

Vide letter dated 9th February 2021 the Respondent proposed to pay the outstanding pension contributions of Kshs.322,543,857 in four(4) instalments from February, 2021 to May 2021 and the RBA gave a conditional approval vide letter dated 12th February, 2021.

Strangely, despite its complaint to the Respondent vide letter dated 26th June, 2020, the Petitioner filed the instant suit 9 months after the Respondent's response dated 17th July, 2020. The Chief Human Resource of the Respondent explained to the Petitioner how the decision was arrived at including reminding the Petitioner that it consented to the suspension of member contributions effective 1st April, 2020.

Equally, the Petitioner had a representative on the Board of Trustees of the Provident Fund and neither alleged nor demonstrate that its representative was excluded from the Boards decision making process. Most importantly, the Respondent sought guidance and consent of the regulator before it proceeded was advised, proposed a way forward and the regulator gave a conditional approval.

Clearly, the Respondent, as Founder of the Staff Provident Fund Scheme invoked the provisions of clause 33 of the Trust Deed on "Partial Determination." which provides;

"(a) the participation of the Founder (or an employer who has executed a Deed of Adherence) on the Fund shall cease and determine upon the happening of one a more of the following events:

- (i) The Trustees receiving from the Founder (or an employer who has executed a Deed of Adherence) three (3) month's prior notice in writing of its intention to cease to contribute to the Fund."*

As noted by the Petitioner, vide its letter dated 11th May, 2020

“The sponsor and the association will review the financial situation thereafter and contributions will resume once the financial climate is deemed favourable.”

Clearly, the cessation of member contributions to the Provident Fund was for an indefinite period owing to the unforeseen COVID-19 Pandemic.

From the foregoing, it is discernible that the Respondent acted collaboratively or co-operatively and in good faith as evidenced by the communication via letters and meetings in March and July, 2020.

Clearly, the Respondent did not act unilaterally as alleged submitted by the Petitioner.

Nothing turns on this issue.

As whether the Respondent violated the Petitioner’s constitutional freedoms and rights under Articles 27(1), 28, 41, 43(1)(e) and 47 of the Constitution, it is clear that neither the relevant paragraphs of the Petition (paragraph 24, 25, 26, 27 and 28) nor the Supporting Affidavit set out the attendant particulars or details, for instance under paragraph 24 of the Petition, the Petitioner appears to be suggesting that its members were discriminated by the Respondent. However, the paragraph makes no reference as to how the alleged discrimination took place and in particular details of other similarly circumstanced employees whose pension contributions were being made.

On the definition of discrimination, in **Rose Wangui Mambo & 2 others v Limuru County Club & 15 other (2014) eKLR** citing **Peter K. Waweru v Republic (2006) eKLR** the court stated:

“...Discrimination means affording different treatment to different persons attributable wholly or mainly to their description... whereby persons of one such descriptions are subjected to ... restrictions to which persons of another description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description...

Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age, sex... a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured.”

For discrimination to arise, it must be proved that those favoured or not favoured were similarly circumstanced thus making the distinction unjustifiable.

In the instant case, the Petitioner’s allegation that no other Government owned body had their Fund or Pension Scheme discontinued as a result of the economic hardship occasioned by the COVID-19 Pandemic was not supported by any verifiable or any evidence.

The Supporting Affidavit replicated paragraph 24 of the Petition and no particulars or evidence was availed.

The allegation that the Respondent discriminated members of the Petitioner was not proved.

Similarly, the Petitioner provided no particulars to demonstrate that its members right to human dignity, fair labour practices and fair administrative action were violated by the Respondent.

It is trite law that he who alleges is required to adduce evidence to prove the allegations, as ordained by the provision of the Evidence Act.

In *Lockwood Girls Highschool v Wasike (2021) KECA 300 (KLR)* the Court of Appeal held:

“In order to appreciate the meaning of the provision, we turn to the Evidence Act. Sections 107 and 108 of the Evidence Act are to the effect that the burden of proof is always placed upon the party whose claim would fail if no evidence was adduced by either side and that he who alleges must prove so that a party desirous of establishing any legal right or liability must prove the facts upon which their assertion rests. This is what is referred to as evidentiary burden of proof...”

The Petitioner tendered no evidence to prove that the Respondent violated or infringed the rights and fundamental freedoms of its members.

Nothing turns on this issue.

A panoramic view of the Petition reveals that the Petition has failed to prove its case against the Respondent.

On the reliefs prayed for the court proceeds as follows:

- (a) Having found that the Petitioner failed to demonstrate that the Respondent breach the rights or fundamental freedoms of its members the declaration sought was unmerited and it is declined.
- (b) As regards an order to compel the Respondent to reinstate on a permanent basis contribution to the Provident Fund in favour of the Petitioner, evidence on record revealed that the partial cessation of contributions was until the financial climate was considered favourable. Bearing in mind that the Petition was filed almost 5 years ago and the effects of restrictions occasioned by the COVID-19 have progressively dissipated, there is no indication the suggest that the contributions were not reinstated. The relief has been overtaken by events and thus unavailable.
- (c) Concerning provision of a remedial plan on how unremitted contributions would be paid the, Respondent proposed a plan on 9th February, 2021 and the Retirement Benefit Authority gave a conditional approval on 12th February 2021 and the Petitioner adduced no evidence to show that the plan was not followed through. The prayer was overtaken by events.
- (d) An order prohibiting the Respondent from terminating contributions to the Provident Fund in future would be inappropriate at this stage because unforeseen circumstances could arise necessitating temporary cessation of contributions. Such an Order would fetter the

Respondent's discretion to deal with future occurrences effectively. The prayer is declined.

- (e) Having failed to prove breach of any fiduciary duty or violation of any right or fundamental freedom of its members, the Petitioner is not entitled to an award in damages.

The prayer is declined.

In conclusion, the Petitioner's case against the Respondent is unsustainable and it is accordingly dismissed.

Parties shall bear their own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 12TH DAY OF MAY, 2026.

**DR. JACOB GAKERI
JUDGE**

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 15th March 2020 and subsequent directions of 21st 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 has 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.

**DR. JACOB GAKERI
JUDGE**