



REPUBLIC OF KENYA



KENYA LAW
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**Mbogo & 111 others v Kenya Planters Co-operative Union (Petition
125 of 2016) [2025] KEELRC 427 (KLR) (14 February 2025) (Judgment)**

Neutral citation: [2025] KEELRC 427 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION 125 OF 2016**

JW KELL, J

FEBRUARY 14, 2025

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF FUNDAMENTAL
RIGHTS AND FREEDOMS UNDER ARTICLES 22, 23, 41(1), 41(2)
(A), 43 (1)(E), 47,48,57, AND 159 OF THE CONSTITUTION OF KENYA**

AND

**SECTION 12 OF THE EMPLOYMENT AND LABOUR RELATIONS COURT
ACT; RULE 11(C) & 12 PROTECTION OF FUNDAMENTAL RIGHTS AND
FREEDOMS OF THE INDIVIDUAL PRACTICE AND PROCEDURE RULES
AND ALL OTHER ENABLING POWERS AND PROVISIONS OF THE LAW**

BETWEEN

SALESIO NJERU MBOGO & 111 OTHERS & 111 OTHERS PETITIONER

AND

THE KENYA PLANTERS CO-OPERATIVE UNION RESPONDENT

JUDGMENT

1. The 112 petitioners brought a dispute claiming they were at all material times employees of the respondent as per their respective letters of appointment. They were members of and made contributions to the Kenya Planters Co-Operative Union Limited Staff Retirement Benefits and Life Scheme (Retirement Scheme) through the respondent. They alleged breach of right to pension benefits by the respondent. Vide a petition dated 16th September 2016 received in court on the 19th September 2016 the petitioners sought for relief against the Respondent, their former employer, as follows: -
 - a. A Declaration that the Respondent has breached the Petitioners fundamental rights under Articles 41(1),43(1) (e) and 57 of *the Constitution*.
 - b. Ksh. 149,825,531/= being all the amounts unlawfully held by the Respondent together with interest.



- c. General damages for breach of fiduciary duty and violation of the Petitioners Constitutional Rights at Ksh. 100,000,000/=.
 - d. Interest on (b) and (c) above at Court Rates from the date of filing suit.
 - e. Any other or further order this Honourable court may deem fit to grant in the circumstances.
 - f. Cost of the suit.
2. The petition was verified by all the petitioners and supported by the witness statement dated 16th September 2016 of Salesio Njeru Mbogo , the 1st Petitioner, who stated he had authority of all petitioners.(pages 157-186 of the petitioners’ bundle of documents). The 36th Petitioner did not sign the petition and she was withdrawn from the petition leaving 112 petitioners.
 3. The respondent entered appearance and filed a notice of preliminary objection on the 16th November 2016 which was upheld under ruling dated 19th April 2017 but on review the ruling was set aside vide another ruling of 13th of November 2017.

Facts of the Petition

4. On or about the 19th of October 2009, the Respondent went into receivership under the Kenya Commercial Bank. As a result of this, the Kenya Planters Co-operative Union Staff Retirement Benefits & Life Assurance Scheme (hereinafter “the Scheme”) was forced to wind up as the Respondent could no longer fund it. All 112 of the Petitioners herein were employees of the Respondent under their respective letters of appointment and contracts and had thus anticipated receiving retirement benefits from the said scheme. The Scheme went into liquidation in January of 2011 when a Liquidator was appointed by the Retirement Benefits Authority to oversee the process. The petitioners stated that at the time of winding up of the scheme and in accordance with the law the liquidator issued a comprehensive report on unremitted contributions by the respondent to the scheme indicating the monies the petitioners were entitled to in the report dated 30th April 2010 amounting to Kshs. 77,938,737 which sum the respondent in breach of fiduciary duties and trust misappropriated.
5. The petitioners stated that , on the 4th of July 2014, the Respondent’s receivership status was lifted restoring them to their corporate status and normal operations. The Petitioners herein then proceeded to institute these proceedings against the Respondent through their Petition dated 16th September 2016 for unremitted contributions, withdrawal benefits, and actuarial deficit. The Petitioners stated that the Respondent made deductions from their salaries which it held in trust for the Petitioners and was supposed to forward as contributions to the Scheme. However, the Petitioners allege that the Respondent failed/declined to remit the funds it held in trust to the Scheme as was due. The Petitioners further alleged that the Respondent misappropriated withdrawn benefits that it received but failed/declined to pay out to the beneficiaries, and that the Respondent failed to pay dues owed to them under the provisions of the Retirement Benefits Authority Act and the Trust Deed and Rules which add up to the actuarial deficit. The Petitioners thus claim the following particulars of the debt owed to them by the Respondent:
 - i. Unremitted KPCU contributions to the scheme amounting to Kshs 14,436,779
 - ii. Withdrawn benefits not paid to beneficiaries amounting to Kshs 11,173,958
 - iii. ctuarial Deficit amounting to Kshs 52,328,000Totalling up to Kshs 77,938,737



Finally, the Petitioners claim that these alleged actions on the part of the Respondent are contraventions of their rights under Articles 41, 43, and 57 of *the Constitution* of Kenya, 2010.

Response

6. The court on perusal of the file only found a response in the form of a notice of preliminary objection dated 15th November 2016. The germane of the preliminary objection was that the petition was defective on account of the verifying affidavits offending the provisions of sections 5 of the Oath and Statutory Declarations Act, the claim for pension being brought contrary to procedures, defective authority to represent, improper joinder of petitioners and for failure to disclose any infringement of the fundamental rights of the petitioners by the Respondent.

Hearing and evidence

7. The Claimant's case heard with one witness the 1st petitioner on behalf of the other 111. He testified on oath and was cross-examined by counsel for the respondent. The Respondent closed their case without calling a witness and stated it relied on filed pleadings. The only pleading the court found on record was their Notice of Preliminary Objection 15th November 2016. Both parties filed written submissions after the hearing.

Determination

Issues for determination

8. The petitioners' issues for determination in the petition were-Whether the petitioners have proved their respective claims on a balance of probabilities. Whether the petitioners are entitled to the reliefs sought.
9. The respondent addressed the following issues:-
 - i. Whether the Petitioners exhausted all legal remedies available to them prior to instituting these proceedings.
 - ii. Whether the Petitioners have proven their allegations against the Respondent.
 - iii. Whether the Petitioners are entitled to the reliefs they seek.
10. The court having perused the pleadings by the petitioner, having not seen a response in writing by the respondent save for the notice of preliminary objection, and having heard the petitioners' witness, found the issues for determination in the Petition to be :-
 - a. Whether the petitioners exhausted alternative legal remedies on the issue of pension dispute before instituting the petition and if so;
 - b. Whether the petition was merited.
 - c. Remedies.

Whether the petitioners exhausted alternative legal remedies on the issue of pension dispute before instituting the petition

11. The dispute under the petition, in summary, was that the Respondent misappropriated withdrawn pension benefits that it received from ICEA (the administrator of the liquidated pension scheme) but failed/declined to pay out to the beneficiaries and that the Respondent failed to pay dues owed to them



under the provisions of the Retirement Benefits Authority Act and the Trust Deed and Rules which add up to the actuarial deficit. The Petitioners thus claim the following particulars of the debt owed to them by the Respondent:

- i. Unremitted KPCU pension contributions to the scheme amounting to Kshs 14,436,779
 - ii. Withdrawn pension benefits which the Respondent received from ICEA (the administrator of the pension scheme) not paid to beneficiaries amounting to Kshs 11,173,958
 - iii. Actuarial Deficit amounting to Kshs 52,328,000
- Totalling up to Kshs 77,938,737

12. The pension scheme was placed under liquidation by the Retirement Benefits Authority. According to PW1, the liquidator commenced winding it up in January 2010. The scheme was a trust registered under Trustees Act and subject of [Retirement benefits Act](#) and the relevant Trust Deed and Rules of the Scheme.
13. The respondent submitted that the petitioner had not exhausted the legal mechanisms under the Retirement Benefits Authority Act. The respondent submitted that the grievance finds avenues for redress through Sections 53A and 53B of the Retirement Benefits Authority Act. Section 53A states that, should an employer deduct money from an employee's pay for a retirement benefits scheme and then fail to forward the funds to the scheme within 15 days, the scheme may institute legal proceedings against the employer after giving them not less than seven days' notice of their intent to do so. Section 53B of the Act empowers the Retirement Benefits Authority to take action against an employer that fails to remit retirement contributions including delineating procedure on notifying the employer, involving the Kenya Revenue Authority to enforce collection of the contributions, and meting out penalties for non-compliance.
14. The Petitioners did not submit on this issue.
15. Section 53 B of the Retirement Benefits Authority Act provides for recovery of unremitted pension contributions as follows:-

“53B. Powers to recover unremitted contributions

- (1) Notwithstanding the provisions stated under section 53A, where there is non-remittance of the contribution by the employer, the Authority shall—(a)require the employer to—
 - (i) pay the contributions and interest accrued to the scheme in full within the period specified in the notice and a penalty of five per cent of unremitted contributions or twenty thousand shillings whichever is higher, payable to the Authority within seven days of receipt of the notice;
 - (ii) pay the penalty specified in paragraph (a)(i) and submit to the Authority for approval a remedial plan providing the period within which the accumulated contributions and interest thereon shall be offset; or
 - (iii) immediately cease further deductions from employees' emoluments and notify all the members of the scheme of the cessation: Provided that—
 - (a) the Authority may lift the cessation order where it is satisfied that the employer is able to remit the employee emoluments as and when they fall due;



(b) where there is a failure by an employer to comply with a direction to cease deductions from employees' emoluments under this provision, the Authority shall take the necessary action or issue such other directions as it may deem necessary and expedient in protecting the interests of the members, including instituting summary proceedings to recover the amounts due to the scheme; and (b) initiate the process of winding up the scheme and facilitate members to join individual schemes where their contributions shall be remitted.

- (2) Where an employer has failed to remit contributions, the Trustees may with the approval of the Authority, appoint the Kenya Revenue Authority, as an agent, to collect unremitted contributions, interests, and penalties.
- (3) Subject to subsection (2), the Trustees shall in writing request the Authority for approval and shall demonstrate that they have taken all reasonable effort to recover unremitted contributions from a defaulting employer without any success.
- (4) The Authority shall either approve or reject the request in writing within twenty-one days from the date of receipt of the request. (5) Despite subsection (2), where the Authority is of the opinion that the Trustees have failed or have not made reasonable effort to recover the unremitted contributions, interests and penalties, the Authority shall give notice to the Trustees instructing them to appoint the Kenya Revenue Authority as an agent to recover the unremitted contributions, interests and penalties.
- (6) Upon appointment under subsection (2) or (5), the Kenya Revenue Authority shall issue a twenty-one-day notice in writing to the defaulting employer requiring it to remit the unremitted contributions, interests, penalties and recovery costs.
- (7) Where an employer fails to comply with the notice, the Kenya Revenue Authority shall —
 - (a) serve such employer and the employers bank with an agency notice;
 - (b) attach the bank accounts of the defaulting employer; and
 - (c) remit the attached funds to the Scheme, within thirty days.
- (8) The cost of the recovery of unremitted contributions shall be borne by the defaulting employer.”

16. The court asked itself who were the parties in dispute. The petitioners described themselves as former employees of the Respondent and members of The Kenya Planters Co-Operative Union Limited Staff Retirement Benefits and Life Scheme (Retirement Scheme). The respondent was stated to have been the sponsor of the scheme and the former employer. The court then held the petitioners to be pensioners.

17. The Supreme Court in *Petition No. E004 Of 2023 As Consolidated With Petition No. E002 Of 2023- Kenya Tea Growers Association & 14 others v National Social Security Fund Board of Trustees* (Koome; CJ & P, Mwilu; DCJ & V-P, Ibrahim, Wanjala, Njoki, Lenaola & Ouko, SCJJ) revisited the issue of jurisdiction of the court in pension matters according to their decision in *Albert Chaurembo Mumba & 7 Others v Maurice M. Munyao & 148 Others* [2016] KECA 160 (KLR) as follows: “[84] It has been submitted by the respondents herein, that by dint of our decision in the *Albert Chaurembo Case*, the ELRC has no jurisdiction over disputes arising from the implementation



of the NSSF Act 2013, as the same deals with “Pensions”. But what was the decision in Chaurembo? At Paragraph 145, the Court pronounced itself as follows: “On the other hand, section 2 of the Employment and Labour Relations Court Act defines the term an “an employee” to mean a person employed for wages or salary and includes an apprentice and indentured learner. The provision further defines “employer” to mean any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation, or company. Thus, whereas a dispute may well fall within an employment dispute, the meaning of a pensioner is nowhere near the meaning of an employee, neither can the scheme of organization fit in the meaning of an employer.” [Emphasis added] [85]

18. Again, at paragraph 146(Chaurembo), the Supreme Court stated: “In our view, once a member leaves the employment of a Sponsor, by becoming a pensioner, there is no longer a relationship of employer-employee that exists between such a pensioner and the sponsor. The relationship that exists in that case becomes that of trustee and beneficiaries (members) of a trust and that relationship is governed by the Retirement Benefits Act, Trustees Act, Cap 167 of the Laws of Kenya and the general common law on trusts. It is important to note that nowhere in the Employment and Labour Relations Court Act is there jurisdiction conferred on the Employment and Labour Relations Court to resolve issues between trustees of a pension scheme and members of the scheme (pensioners).” In Kenya Tea Growers Association & 14 others v National Social Security Fund Board of Trustees the Supreme Court having revisited Chaurembo case at paragraph 146, stated:- “[86] It is clear that our decision in Chaurembo, does not oust the jurisdiction of the ELRC to determine disputes, arising out of the application of the provisions of the NSSF Act 2013, to employees who are yet to become pensioners. What the ELRC lacks, is jurisdiction over disputes between pensioners and trustees of a specific pension scheme as the latter is governed by dedicated statutes and applicable common law.”(emphasis given)
19. The instant case the petitioners only sued the sponsor of the Scheme. The court held that the petitioners being pensioners, the respondent the sponsor, and the parties having a dispute on the affairs of the pension scheme, the dispute fell squarely under the jurisdiction of the Retirement Benefits Authority. The Supreme Court decisions are binding on this court. The petitioners are pensioners and this court lacks jurisdiction as per the Chaurembo decision revisited by the Supreme Court in the NSSF Act case. The issues raised under the constitutional petition are all about pension dues. The court held that the petition was a case of constitutional avoidance. The dispute could have been resolved under the jurisdiction of the Retirement Benefits Authority Act. The Court found the pleaded constitutional violations were all about the pension dispute. The pension dispute case can still be presented to the Retirement Benefits Authority for resolution of the dispute. The court lacks jurisdiction over disputes by pensioners arising from a pension scheme as held in Albert Chaurembo Mumba(supra). The court must down its pen as held by Nyarangi JA in Owners Of The Motor Vessel “Lillian S v Caltex Oil (Kenya) Ltd [1989] KECA 48 (KLR) that: ‘ Jurisdiction was everything. Without it, a court had no power to make one more step. Where a court had no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downed tools in respect of the matter before it the moment it held the opinion that it was without jurisdiction. ’”
20. This being constitutional petition it cannot be referred to Retirement Benefits Authority by the court. The petitioners ought to have filed the dispute with the Authority which has the requisite mandate under the Retirement Benefits Authority Act. Indeed there is even an appeal mechanism to the Tribunal under the Act. The procedure is complete and ought to be exhausted before coming to court. The relevant court would then be the High Court which has unlimited jurisdiction.



21. Consequently, the court held it had no jurisdiction over the cause of action (dispute arising from a pension scheme) and downed its pen. The petition was struck out for want of jurisdiction.
22. This being a constitutional petition the court made no order as to costs.
23. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 14TH DAY OF FEBRUARY, 2025.

**J.W. KELI,
JUDGE.**

In the Presence of:

Court Assistant: Otieno

Petitioners:- Njeri

Respondent:- Absent

