



**Mwonya v Egerton University (Cause E036 of 2022)  
[2025] KEELRC 307 (KLR) (6 February 2025) (Judgment)**

Neutral citation: [2025] KEELRC 307 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
CAUSE E036 OF 2022  
DN NDERITU, J  
FEBRUARY 6, 2025**

**BETWEEN**

**PROF. ROSE A MWONYA ..... CLAIMANT**

**AND**

**EGERTON UNIVERSITY ..... RESPONDENT**

**JUDGMENT**

**I. Introduction**

1. The claimant commenced this cause by way of a statement of claim dated 26th September, 2022 through Sheikh & Co. Advocates. As it is the procedure, the statement of claim is accompanied with a verifying affidavit sworn by the claimant, a list of witness, a written statement by the claimant, a list of documents, and a bundle of copies of the listed documents.
2. The claimant is seeking for the following reliefs –
  - a. KES. 12,248.626.54.
  - b. Costs of this suit.
  - c. Interest on (a) and (b) above at court rates of 12% p.a. from the date of filing this claim, until payment in full.
  - d. Any other relief this honourable court may deem fit in the circumstances.
3. The respondent through Wekesa & Simiyu Advocates filed a memorandum of response to the claim on 6th December, 2022. In the said response the respondent denies the claim and prays that the claimant's cause be dismissed with costs for want of merits.



4. The claimant filed a reply to the memorandum of response to the claim by the respondent wherein she reiterated the contents of the statement of claim and insisted that judgment be entered in her favour as prayed.
5. On 27th June, 2023, with the leave of the court, the respondent filed a list and bundle of copies of the listed documents. On the same date the respondent filed a list of witnesses and a statement by Prof. Richard S. Mulwa (RW1).
6. On 28th September, 2023 the respondent filed a notice of motion (the application) seeking for the following orders –
  - a. That the claim for gratuity and unremitted pension deductions of Kshs.10,168,766.00 and interest thereat be struck out.
  - b. That the entire claim herein against the Respondent be struck out; and
  - c. That the costs of and incidental to this application and the suit be borne by the claimant.
7. Further, on even date the respondent filed a notice of preliminary objection (PO) to the cause in the following terms –
  1. That this Honourable court does not have jurisdiction to hear and determine the suit herein as the claimant is non-suited as against the respondent.
  2. That the court does not have jurisdiction to hear and determine the claim for gratuity and unremitted pensions deductions of Kshs.10,168,766.00 and interest thereat and the entire suit pursuant to the provisions of Section 35 of the *Employment Act* and Egerton University Terms and Conditions of Service, 2008; and
  3. That the claims sought against the Respondent are ungrantable as against the Respondent as the claimant is non-suited and the court does not have jurisdiction to hear and determine those claims in the disclosed circumstances of this case.
8. Further, on 2nd September, 2023 counsel for the respondent filed written submissions, a list and bundle of the law and decisions in support of the PO.
9. This cause came up for hearing in open court on 2nd October, 2023 when the court ruled and directed that both the application and the PO raised matters of facts as opposed to matters of law and ordered and directed that the two be treated in opposition and or defence to the cause. The hearing then proceeded with the evidence from the claimant (CW1) and she closed her case.
10. The defence was heard in open court on 14th November and 12th December, 2023 when RW1 testified, was cross examined and re-examined and the respondent's case closed.
11. Counsel for both parties addressed the court by way of written submissions. Mr. Ochieng for the claimant filed his written submissions on 23rd September, 2024 while Mr. Wesonga for the respondent filed his submissions in opposition to the claim on 25th October, 2024. Further, on 28th October, 2024 counsel for the respondent filed a bundle of the law and authorities relied upon.

## II. The Claimant's Case

12. The claimant's case is expressed in the statement of claim, the oral and documentary evidence adduced by the claimant (CW1), and the written submissions by her counsel.



13. In the statement of claim, it is pleaded that the claimant was engaged by the respondent, a duly chartered public university, since 1987 serving in various incremental capacities in academics and administration. In academia she rose from senior lecturer to associate professor and full professor.
14. It is pleaded that purely on merit the claimant was appointed the vice-chancellor of the respondent and served in that capacity for five years from 13th January, 2016 to 13th January, 2021 when she retired honourably upon attaining the mandatory retirement age of 70yrs.
15. It is the claimant's case that despite her outstanding and dedicated service, the respondent has failed, refused, and or neglected to settle her terminal dues. The claim includes monies deducted but unremitted to two Saccos (Winam and Egerton), gratuity, and deducted but unremitted pension contributions. The said dues are tabulated as follows –

Head Of Claim	Amount (kes)
Gratuity & unremitted pension deductions	10,168,766.00
Interest at 12% p.a. on (1) above since retirement date on 13 January 2021, to 20/7/2022 when formal demand issued	1,932,065.54
Unremitted Egerton SACCO deductions	75,000.00
Unremitted WINAM SACCO deductions	13,500.00
Interest at 12% p.a. on (c) and (d) above since due date in January 2017	59,295.00
Total claim	12,248,626.64

16. It is pleaded that in failing to settle the above dues the respondent is in breach of Sections 18(5) of the *Employment Act* and Articles 41, 47, & 57 of *the Constitution*.
17. In her testimony in court, the claimant reiterated her pleadings and adopted her filed statement as her evidence-in-chief. She stated that after her lawyer made a formal demand the respondent admitted to the claim in its response but sought for time to settle the same. However, the claimant stated that the respondent did not settle the claim rendering it necessary for her to file this cause in court. She produced her filed documents as exhibits 1 to 6.
18. In cross-examination the claimant stated that when she joined the respondent as a lecturer in 1987 she automatically became a member of the pension scheme and deductions to the scheme were made by the respondent, the employer, from her monthly salary. She stated that those deductions made, alongside those that were to be paid to the Saccos, were not remitted as agreed.
19. The claimant admitted that as at the time of her retirement on 12th January, 2021 the respondent was in a dire financial crisis with huge debts to Kenya Revenue Authority (KRA) and others including Saccos and pension schemes. She stated that she had first-hand information as the accounting officer of the respondent of the respondent's financial status caused mainly by poor and irregular capitation from the Government of Kenya (GOK).



20. On re-examination by her counsel, the claimant reiterated that the items claimed in her cause are provided for in the contract of service that she produced in court as an exhibit. She stated that she was neither terminated nor dismissed and hence she is entitled to all her terminal dues including gratuity as claimed. She reiterated that the respondent tabulated her dues and promised to settle the same but failed to do so.
21. She stated that while it is true that she served as the accounting officer of the respondent as alluded to above, it was not her personal responsibility to pay salaries and other dues as the respondent is a legal and juridical person managed by a board, senate, and a council, organs over which she had no control. She denied that she mismanaged the respondent as the vice-chancellor.

### III. The Respondent's Case

22. The respondent's case is expressed in the filed memorandum of response to the claim, the preliminary objection to the claim, the oral and documentary evidence adduced through RW1, and the submissions by its counsel.
23. In the response to the claim it is pleaded that the claimant was appointed the vice-chancellor of the respondent on 13th January, 2016 for a period of five years. The claimant's tenure ended on 12th January, 2021 when the term contract ended.
24. It is pleaded that during her tenure the claimant was a member of Egerton University Retirement Benefits Scheme a separate legal entity from the respondent that is duly registered under the [Retirement Benefits Act](#). It is pleaded that the claimant contributed 10% and the respondent made 20% of the claimant's basic salary as per the agreement and contract between the parties. It is pleaded that in the circumstances, any retirement benefits and or pension that is payable to the claimant should be claimed from the said scheme and not from the respondent. It is pleaded that the respondent is not privy to the contract between the claimant and the said retirement benefits scheme.
25. Further, it is pleaded that having been a member of the retirement benefits scheme as pleaded above the claimant is not entitled to the claim of service pay or gratuity from the respondent under Section 35 of the [Employment Act](#).
26. It is further pleaded that the claimant was the vice-chancellor and the accounting officer of the respondent during the period that she claims that her contributions were not remitted to the retirement scheme and as such she should not be allowed to benefit from her malfeasance, inefficiency, and mismanagement. It is pleaded that all the claims made by the claimant are as a result of her mismanagement and she should not be allowed to benefit from her acute inefficiency and mismanagement.
27. In the notice of preliminary objection and the notice of motion both dated 27th September, 2023 the jurisdiction of this court is denied and challenged notwithstanding that the same is admitted in the response to the memorandum of claim. However, the two pleadings reiterate the factual contents of the defence as summarized above and on that basis the court ordered and directed that the same be treated as part of the response and defence to the claim.
28. In his testimony in court RW1 adopted his filed statement as his evidence-in-chief and produced the respondent's filed documents as exhibits 1 to 27.
29. He stated that for the period from 2017 to 2021 when the claimant was the vice-chancellor the respondent failed to remit deductions made from employees to the pension fund in the sum of over KShs2 billion. He stated that besides this debt to the pension scheme the claimant's mismanagement



rendered the respondent to incur huge debts that remain pending to this day. He stated that the failure to remit the pension funds has made it impossible for other employees besides the claimant to access and be paid their terminal dues.

30. In cross-examination RW1 stated that he is the acting registrar administration & planning and that human resources management falls within his docket. He stated that the claimant was not terminated but retired upon reaching the mandatory age of retirement of 70yrs.
31. He stated that while the claimant demanded payment of her retirement benefits he was not aware of any admission or undertaking by the respondent to pay the benefits as demanded. However, he admitted that the respondent owed to the claimant her retirement benefits as tabulated and claimed and that none had been paid. He also conceded that the respondent admitted and acknowledged the debt in a letter to the claimant by its legal officer. He further admitted that the respondent undertook to settle the claimed amount but requested for time to settle the same in the said letter. He also admitted that gratuity is payable to the claimant as per the letter of appointment which formed the basis of the employment relationship between the parties herein.
32. He stated that at some point during her tenure as the vice-chancellor, due to alleged mismanagement and incompetence, the claimant was suspended from duty but the intimated disciplinary proceedings were quashed by the court (Mbaru J) in Nakuru ELRC JR No. 2 of 2018.
33. He admitted that prior to and during the tenure of the claimant as the vice-chancellor the respondent faced chronic and massive financial challenges. However, he conceded that the poor financial status of the respondent was not attributable to the claimant and at no point was the claimant surcharged and or charged with mismanagement or misappropriation of the respondent's funds. He further stated that at no point did the respondent explain to the claimant why her retirement benefits had not been paid.
34. In re-examination RW1 alleged, without substantiation, that it was the claimant's mismanagement and inefficiency that led to the respondent being in a dire financial situation.

#### **IV. Submissions**

35. The claimant's counsel submitted on two aspects of the cause - the claim as expressed in the claimant's pleadings and evidence placed on record and the response to the preliminary objection and the notice of motion alluded to in the introductory part of this judgment.
36. It is reiterated that the claimant served her contract as the vice-chancellor of the respondent and that the employment relationship came to an end by effluxion of time upon the claimant attaining the mandatory age of retirement of 70yrs as alluded to elsewhere in the summary of the pleadings and evidence in this judgment. It is submitted that in the circumstances the claimant is entitled to retirement benefits as claimed.
37. It is further submitted that upon successful completion of her contract the claimant was entitled to gratuity as claimed under clause 13 of the contract of employment calculated at the rate of 13% of her annual basic salary. Further, it is submitted that the respondent formally admitted that the unremitted pension deductions are refundable and payable to the claimant and also the unremitted Saccos deductions. It is submitted that the respondent already admitted liability for the claimed sum of Kshs12,248,626.54 and as such the defence mounted by the respondent is a sham, boon, without merit, and only intended to buy time. The court is urged to find and hold that the respondent is estopped from disputing or denying the claim having admitted the same in emails dated 4th and 15th September, 2021 which were produced in court by the claimant and contents thereof admitted by the respondent.



38. It is submitted that there is no evidence of remittance of the claimed amounts either to the pension scheme or the two SACCOs or payment of any of them to the claimant. The court is urged to apply Section 19(6) of the *Employment Act* and find that such unremitted deductions are due and refundable to the employee, the claimant.
39. Counsel urged the court to be persuaded by the holdings in *Nelson Keshei V Narok County Government & Another* (2019) eKLR, *Bamburi Cement Limited V William Kilonzi* (2016) eKLR, & *Bamburi Cement Limited V Farid Aboud Mohammed* (2016) eKLR to the effect that gratuity is payable either at the discretion of an employer or based on a term of the contract where an employee has met the conditions for payment of the same. It is submitted that in this cause the payment of gratuity to the claimant is based on a term in the contract and that the claimant has met the conditions for payment of the same and that the respondent has admitted to the same as alluded to above.
40. On the unremitted deductions to the pension scheme and to the two SACCOs it is submitted that such non-remittance constituted fundamental breach of the employment contract between the parties and that this court has jurisdiction to order for the refund and payment of the same to the claimant as the same were deductions made from her monthly salary over a period of time. It is submitted that the monies so deducted if not remitted to the afore-stated institutions lawfully and rightfully belong to the claimant. The court is urged to dismiss the jurisdictional objection raised in this regard and adopt the reasoning in *Sarah Mang'oli V Kenya Medical Research Institute & Another* (2020) eKLR.
41. Further, it is submitted that failure to remit pension deductions is not a dispute under Section 46 of the *Retirement Benefits Act*. It is submitted that this is a dispute between an employer and an employer which does not in any way involve the manager, administrator, custodian, or trustee of the pension scheme. It is submitted that the dispute herein is between the parties to this cause and as such the Retirement Benefits Authority has no jurisdiction over the subject matter. Further, the court is urged to be persuaded by the reasoning and holding in *Ramogi V Great Lakes University of Kisumu* (2022) eKLR.
42. The court is again reminded that all the claims as tabulated and claimed by the claimant were formally admitted by the respondent as alluded to above. It is emphasized that this claim is for monies deducted from the claimant's salary but not remitted as per the contractual relationship between the parties. The court is reminded that this claim is different and distinct from a claim for pension monies deducted and properly remitted to the scheme. It is submitted that if the court denies the claimant this relief she stands to lose as she cannot recover the money from the scheme. It is submitted that it would have been a misjoinder if the scheme was included in the cause as the monies claimed were not remitted to it.
43. On the contested issue of interest on the claimed amount, pre and post judgment, it is submitted that the claimed monies became due and payable upon the retirement of the claimant on 13th January, 2021 by operation of Section 18(5) of the *Employment Act*. It is submitted that had the respondent paid and remitted the monies as and when they were deducted the same should have earned interest. Counsel cited *Amondi & Co Advocates V County Government of Kisumu* (2021) eKLR in support of award of interest pre and post judgment.
44. In response to the notice of preliminary objection and the notice of motion both dated 27th September, 2023 it is submitted that the allegation that this court lacks jurisdiction is factually and legally flawed. It is reiterated that the evidence on record is that the claimant left the employment of the respondent upon attaining the mandatory retirement age of 70 and not through termination or dismissal. Further, it is reiterated that the claim herein was admitted and acknowledged by the respondent through its legal officer as alluded to elsewhere in this judgment. It is submitted that



- payment of gratuity to the claimant was part of the agreed terms of contract between the parties and as such there should be no contest over the same.
45. On payment of the unremitted pension deductions it is reiterated that what the claimant is seeking is a refund of monies deducted from her salary but not paid and or remitted to the pension scheme. It is submitted that the respondent as the employer and hence the custodian of employment records failed to adduce evidence to prove that indeed the deducted monies were paid out and remitted to the pension scheme. It is reiterated that the holdings in the Mang'oli and Ramogi decisions cited above is that this court has jurisdiction to order refund of such monies deducted but not remitted.
  46. In the foregoing circumstances, it is submitted that the Egerton Pension Scheme, an independent and separate legal entity, had absolutely nothing to do with the monies deducted from the claimant's salary as the said deductions were neither remitted nor paid to the scheme. It is submitted that no claim lies with the scheme as it owes the claimant no monies in that regard. It is therefore submitted that there is no misjoinder or non-joinder of parties in this cause.
  47. It is further submitted that the provisions in the *Employment Act* are the bare minimums in regard to terms and conditions of employment. Hence, where a contract provides for terms that are more favourable than those in the Act those better terms of employment shall prevail over the minimums provided for in the Act. The court is urged to apply the provisions of Section 26(2) of the Act.
  48. In response to the allegations that it is the claimant who failed to properly act and manage the respondent during her tenure as the vice-chancellor, it is submitted that the financial woes afflicting the respondent preceded the claimant's tenure and continued long after she had retired. It is submitted that the claimant was only a member of the team of management and managerial decisions were collective based on recommendations by the respondent's council and senate. It is submitted that no evidence has been availed to demonstrate personal or professional failure on the part of the claimant in her role as the vice-chancellor. The court is reminded to note that no evidence of disciplinary or legal action was adduced so as to hold the claimant personally or criminally responsible for the financial woes of the respondent. It is pointed out that the financial difficulties faced by the respondent were caused by lack of adequate funding from the National Treasury.
  49. It is further submitted that attempts by the respondent to unlawfully and un-procedurally remove the claimant from office were thwarted by court in Nakuru ELRC JR No. 2 of 2018 wherein the suspension of the claimant from duty by the respondent was quashed and that issue is hence res judicata and the respondent is thus estopped from raising it. The court is urged to avoid adjudicating on the same based on the doctrine of res judicata as enunciated in *John Florence Maritime Service Limited & Another V Cabinet Secretary for Transport & Infrastructure & 3 Others (2015) eKLR* amongst many other decisions.
  50. The court is thus urged to enter judgment for the claimant as prayed based on the formal admission of liability by the respondent and for lack of any lawful justification by the respondent on why it should not pay and settle the claim.
  51. On the other hand, counsel for the respondent identified two issues for determination – that this court lacks jurisdiction to hear and determine this claim; and, that the claim is unmerited and the claimant is not entitled to the reliefs sought.
  52. On the first issue it is submitted that this court lacks jurisdiction over the subject matter based on Article 162(2)(a) of *the Constitution* and Section 12 of the *Employment and Labour Relations Court Act*.



53. Citing the Supreme Court in *Samuel Kamau Macharia & Another V Kenya Commercial Bank Limited & 2 Others* (2012) eKLR it is submitted that the claim for pension lies within the provisions of the *Retirement Benefits Act*. It is submitted that based on *Kenya Ports Authority V Industrial Court of Kenya & 2 Others* (2014) eKLR; *Staff Pension Fund & KCB Staff Retirement Scheme & Another V Anne Ngugi & 524 Others* (2018) eKLR; and *Albert Chaurembo Mumba & 7 Others* (2019) eKLR, this court lacks jurisdiction over matters pension.
54. It is submitted that there was no established contractual relationship between the claimant and the respondent over the unremitted monies to the pension scheme and that it is the Egerton University Retirement Benefits Scheme that should have sued the respondent for non-remittance of the deducted funds. It is submitted that the claimant having retired there is no employment relationship between the parties herein and as such the claimant should not have filed this claim against the respondent as it is non-suited and hence a fatal misjoinder of parties. It is submitted that the claimant ought to have filed her claim against the pension scheme under the provisions of the *Retirement Benefits Act*. It is submitted that there exists no privity of contract between the claimant and the respondent in regard to the monies deducted and payable to the scheme.
55. On gratuity, it is submitted that by virtue of Section 35 of the *Employment Act* the claimant is not entitled to payment of the same as she was a member of a pension scheme. Further, it is submitted that Clause 18(b) of the respondent's terms and conditions of service, 2008, barred the claimant from benefiting from gratuity for having been a member of the Egerton University Benefits Scheme established under the *Retirement Benefits Act*. The court is urged to be bound by the decision and the holding of the Court of Appeal in *Kenya Railways Corporation V Gideon K. Mutindi & 2 Others* (2008) eKLR that affirmed the foregoing arguments, that an employee who is a member of a pension fund, or a pension scheme, or any other arrangement under the *Retirement Benefits Act* and as contemplated under Section 35 of the *Employment Act* is not entitled to gratuity.
56. It is submitted that the claimant should not benefit from both pension and gratuity. It is submitted that the above provisions of the law override the terms and conditions of the contract between the parties which were unlawful to the extent of allowing the claimant to benefit from both pension and gratuity.
57. It is submitted that allowing the claim on gratuity shall amount to double payment and or unjust enrichment on the part of the claimant. Further, counsel argued that the claimant accumulated a pension of Kshs10,502,790.40 during her five-year tenure as a vice-chancellor. The court is urged to be bound by the decision of the Court of Appeal in *Chase International Investment Corporation & Another V Laxman Keshra & Others* (1978) eKLR on unlawfulness of unjust enrichment or benefit. It is further submitted that even if the contract between the parties provided that the claimant was to earn both gratuity and pension, such a clause in the contract was clearly illegal and unlawful. It is submitted that the respondent could not have consented or admitted to an illegality as freedom of contract does not extend to parties consenting to and or agreeing to break the law or to commit an illegality. In that regard the court is referred to the holding of the Court of Appeal in *Kenya Ports Authority V Fadhil Kisuwa* (2017) eKLR.
58. It is further submitted that if the court finds and holds that the claimant is entitled to gratuity, then the court should not grant her the claim on pension beyond the deductions that were made from her salary and unremitted. It is submitted that any award beyond the foregoing shall amount to double payment and unjust enrichment to the claimant.
59. Further, it is submitted that the combined claim of Kshs10,168,766/= is ambiguous and lacking in particulars. It is submitted that it is not clarified which part thereof comprises of pension and what



portion comprises of gratuity. It is submitted that this is a claim for special damages that should not only be specifically pleaded but also specifically proved.

60. On the alleged lack of jurisdiction of the court to hear and determine the issue of the deducted but not remitted SACCOs contributions it is submitted that such a claim is a civil debt under Section 35(2) of the Cooperative *Societies Act* which is recoverable by way of a civil action in the High Court or a magistrate's court as was held in *Egerton University Sacco Society Ltd V Egerton University & Another* (2020) eKLR. It is submitted that in the circumstances this court lacks jurisdiction under Article 162(2)(a) of *the Constitution* and Section 12 of the *Employment and Labour Relations Court Act*. It is further submitted that the claimant lacks loci standi to file the claim as the monies became due and payable to the SACCOs once the deductions were made. It is further submitted that other than the SACCOs it is the Commissioner of Cooperatives who may file the claim. The court is urged to follow the reasoning in *Republic V Commissioner of Co-operative Development Ex-parte Telkom Kenya Ltd* (2012) eKLR and *Egerton University Sacco Society Ltd V Egerton University & Another* (supra).
61. It is further submitted that the claim for unremitted SACCOs deductions is the subject matter in *Egerton University Sacco Society Ltd V Egerton University & Another* (supra) and as such this claim is sub-judice as this civil claim is pending before the High Court at Nakuru. The court is urged to strike out the claim in line with the holding in *Kenya National Commission on Human Rights V Attorney General & Others* (2020) eKLR.
62. It is submitted that for the period of five years that the claimant served as the vice-chancellor of the respondent she was the chief executive officer and accounting officer, the chair of the senate, chair of the management board, and secretary to the council. It is submitted that it was under the watch of the claimant in the afore-stated capacities that the wrongs and mismanagement from which she now wants to benefit occurred. It is submitted that the SACCOs deductions and pension contributions made during her tenure were not remitted causing the respondent to be indebted to the tune of over Kshs2 billion in retirement benefits. The court is urged not to allow the claimant to benefit from her own misconduct, malfeasance, mismanagement, and maladministration.
63. In view of the foregoing, the court is urged to be persuaded by the holdings in *Abu Chiaba Mohamed V Mohamed Bwana Bakari & Others* (2005) eKLR and *Kamau Mucuha V Ripples Ltd* (1993) KLR to the effect that no litigant should be allowed to benefit from his/her blatantly illegal or unlawful acts. It is submitted that he/she who comes to equity must do so with clean hands. It is submitted that the claimant had all the powers at her disposal to ensure that all deductions made from the salaries and emoluments of all employees of the respondent, including hers, were remitted to the relevant bodies and institutions. It is submitted that the claimant now wants through this cause to benefit from her own failures and inactions and the court is urged not to grant the reliefs sought. It is submitted that the claimant cannot and should not found an action based on her own inaction.
64. The court is urged not to grant the reliefs sought by the claimant and dismiss the entire claim for lack of merits. The court is further urged not to grant the interest on the principal sum as claimed. It is argued that the sum of Kshs12,248,626.54 as claimed by the claimant already includes interest as calculated in paragraph 13 of the memorandum of claim. The court is urged to award the costs of the cause to the respondent.

## V. Issues For Determination

65. The court has carefully and dutifully gone through the pleadings filed, the oral and documentary evidence tendered from both sides, and the written submissions by counsel for both parties, as



summarized in the foregoing part of this judgment. The following issues commend themselves to the court for determination -

- a. Whether this cause is properly before this court, or put differently, whether this court has jurisdiction to hear and determine the issues raised in the cause.
- b. Whether the claimant is entitled to the reliefs sought.
- c. Who should bear the costs of the cause?

## VI. Jurisdiction

66. The facts and evidence on the employment of the claimant by the respondent are not contested. The claimant joined the respondent in 1987 and rose through the ranks to be appointed the vice-chancellor on 13th January, 2016 wherein she served until her retirement on 13th January, 2021 upon attainment of the mandatory age of retirement of 70yrs.
67. The employment relationship between the claimant and the respondent, as the vice-chancellor, was governed by a letter of appointment dated 12th January, 2016. Although there is evidence on record that there were attempts to suspend and or remove the claimant from the said position, the attempts were thwarted by an order from the court and the claimant served the full-term until her retirement. Obviously, the claimant was not terminated or dismissed but she retired on attainment of the mandatory age of retirement.
68. As it shall be discussed in the succeeding parts of this judgment, the above-mentioned contract provided for various terms and conditions amongst them that the period of service was five years running from 13th January, 2016. In clause 13 the contract provided for gratuity in the following terms –

Upon successful completion of each contract term, you will qualify for a one – off Gratuity calculated at the rate of 31% of your annual basic salary. This gratuity is taxable. The gratuity shall not to be paid if your separation from the university is due to misconduct as provided for in the *Employment Act*. If you are on secondment or a member of some other retirement benefit scheme, you may opt to continue with the retirement benefit scheme which you are already a member. Please note that for the purpose of pension your substantive post is that of a full professor, and your pensionable benefits would be based on the above post.

69. In a response to a demand letter dated August 4th, 2022 via email, the respondent through its legal officer acknowledged that the claimant was indeed one of the many retirees who had pending claims against the respondent concerning unremitted pension scheme dues, gratuity, as well as unremitted SACCOs dues. It was stated in the said email that the claimant had been appraised on the same and that the respondent was to revert “as soon as we get the workings of the dues from the relevant offices.”
70. In a further email dated September, 2022 the respondent’s legal officer tabulated the amounts due and payable to the claimant as follows –

PR NO. 21104

Name: Rose A. Prof. Mwonya



Start Date	End Date	Basic Salary (kshs.)	No. Of Months	Total (kshs.)	Gratuity At 31% (kshs.)	Less 20% Remitted to Pension Scheme	Payable Gratuity (kshs.)
13/01/2016	30/06/2016	521,147.00	6	2,923,634.67	906,326.75	625,376.40	280,950.35
01/07/2016	30/06/2017	554,674.00	12	6,656,088.00	2,063,387.28	1,331,217.60	732,169.68
01/07/2017	30/06/2018	600,736.00	12	7,208,832.00	2,234,737.92	1,470,561.60	1,764,176.32
01/07/2018	30/06/2019	601,971.00	12	7,223,652.00	2,239,332.12	-	2,239,332.12
01/07/2019	20/06/2020	603,207.00	12	7,039,425.62	2,182,221.96	-	2,182,221.96
21/06/2020	30/06/2020	603,207.00	0	199,058.31	61,708.08	-	61,708.08
01/07/2020	31/12/2020	588,202.00	6	3,529,212.00	1,094,055.72	-	1,094,055.72
01/01/2021	12/01/2021	588,202.00	0	229,398.78	71,113.62	-	71,113.62
60	35,009301	4,852,883.45	45	427,155.68	425,727.85		
Total Gratuity Payable 8,425,727.85							
Add:10% Pension (Employee) deducted from VC's salary not yet remitted to the scheme (now refundable to her) 1,743,038.55							
Grand total 10,168,766.40							

71. The evidence on record is that the admitted dues were not paid to the claimant and no payment plan was offered by the respondent culminating in the claimant filing this cause in court.
72. The above background is important in consideration of the jurisdictional objection raised by the respondent in the PO and the application alluded to elsewhere in this judgment. As far as the court understands the respondent's case and the submissions by its counsel, the respondent objects to payment of gratuity because the respondent was a member of a pension scheme, the Egerton University Retirement Benefits Scheme, to which both parties contributed to at agreed ratios of 10% for the claimant and 20% for the respondent. It is submitted that the claimant should not benefit from the pension pay-out and at the same time receive gratuity as that shall amount to double-payment and unjust enrichment. It is argued by the respondent that such payment flies in the face of Section 35 of the *Employment Act*.
73. On the claim for pension, the respondent's position is that the same is a civil debt that may only be recovered as provided for under the *Retirement Benefits Act* such that if the matter was to be filed in court it should be so filed in the High Court or a Magistrate's court of competent jurisdiction. On the claim for unremitted but deducted dues payable to the two SACCOs, it is argued by the respondent that the same may only be recovered as a civil debt through the Commissioner of Co-operatives and in accordance with the provisions of the *Co-operative Societies Act*.



74. The court shall now deal with each of those objections, nay defence, as follows. Upfront, the court acknowledges and appreciates its jurisdiction as delineated in Article 162(2)(a) of *the Constitution* and Section 12 of the *Employment and Labour Relations Court Act*. For ease of reference Article 162(2)(a) of *the Constitution* provides as follows –
1. The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts referred to in clause (2)
  2. Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to –
    - a. employment and labour relations; and
    - b. the environment and the use and occupation of, and title to, land.
  3. Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).
75. Section 12 of the *Employment and Labour Relations Court Act* provides as follows –
1. The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of *the Constitution* and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including —
    - a. disputes relating to or arising out of employment between an employer and an employee;
    - b. disputes between an employer and a trade union;
    - c. disputes between an employers' organisation and a trade unions organisation;
    - d. disputes between trade unions;
    - e. disputes between employer organizations;
    - f. disputes between an employers' organisation and a trade union;
    - g. disputes between a trade union and a member thereof;
    - h. disputes between an employer's organisation or a federation and a member thereof;
    - i. disputes concerning the registration and election of trade union officials; and
    - j. disputes relating to the registration and enforcement of collective agreements.
  2. An application, claim or complaint may be lodged with the Court by or against an employee, an employer, a trade union, an employer's organisation, a federation, the Registrar of Trade Unions, the Cabinet Secretary or any office established under any written law for such purpose.
  3. In exercise of its jurisdiction under this Act, the Court shall have power to make any of the following orders –
    - i. interim preservation orders including injunctions in cases of urgency;
    - ii. a prohibitory order;
    - iii. an order for specific performance;



- iv. a declaratory order;
  - v. an award of compensation in any circumstances contemplated under this Act or any written law;
  - vi. an award of damages in any circumstances contemplated under this Act or any written law;
  - vii. an order for reinstatement of any employee within three years of dismissal, subject to such conditions as the Court thinks fit to impose under circumstances contemplated under any written law; or
  - viii. any other appropriate relief as the Court may deem fit to grant.
4. In proceedings under this Act, the Court may, subject to the rules, make such orders as to costs as the Court considers just.
5. The Court shall have jurisdiction to hear and determine appeals arising from –
- (a) decisions of the Registrar of Trade Unions; and
  - (b) decisions of any other local tribunal or commission as may be prescribed under any written law.
75. The evidence on record is that the relationship between the claimant and the respondent was that of an employer and an employee from 1987 when the claimant joined until January, 2021 when she retired. To that extent any claim relating to or arising from that relationship is essentially an employment and labour relations matter and thus prima facie falling within the jurisdiction of this court. The terms and conditions of that relationship were contained in the letter of appointment/contract alluded to in preceding part of this judgment.
76. Without beating about the bush, the court finds and holds that the cause of action and the remedies sought by the claimant arose by virtue of the employment contract and relationship arising therefrom between the claimant and the respondent and hence the same are justiciable and properly before this court.
77. The monies that were deducted from the claimant's salary for remittance to either the pension scheme or the two SACCOs were so deducted based on the employment relationship. If, as it turned out, the respondent/employer failed, refused, and or neglected to remit the same, it becomes monies unlawfully deducted and withheld from the salary and emoluments to which the claimant was lawfully entitled. Whether, as the respondent's counsel submitted, it amounts to a civil debt or, as the court views it, unlawfully withheld salary and emolument, the fact of the matter is that the same are refundable and payable to the claimant, the employee, by the respondent, the employer, based on the contract of employment. Otherwise, the same amount to unlawful deductions under Section 19 of the *Employment Act*.
78. Further, Section 17 of the *Employment Act* is clear that all monies due to an employee, salary and other emoluments, shall all be paid to the employee, except for any lawful and agreed deductions. In my considered view, when statutory and or other agreed deductions are made and not paid or remitted to the intended institutions or as per the instructions of the employee, such withheld deductions are unlawfully so withheld and are due and payable and refundable to the employee upon demand or upon termination of the employment relationship.



79. The claimant herein is simply seeking for refund of deductions made from her salary and emoluments that were intended to be remitted to a pension scheme and the two SACCOs that the respondent failed and or refused to remit as agreed. Counsel for the respondent is legally and factually wrong in his submission that the claimant ought to have joined the pension scheme and the impugned SACCOs and or the Commissioner of Co-operatives in this cause.
80. Sections 10 & 74 of the *Employment Act* obligate the respondent as an employer to keep and maintain records of employment. The respondent did not avail any evidence that the monies so deducted were remitted to the intended institutions. Such withheld deductions, the court finds and holds, amount to unlawfully withheld salary and emolument that the claimant is entitled to and now claiming through this cause.
81. It should have amounted to misjoinder had the claimant joined the two SACCOs or the pension scheme who were neither paid nor received the monies deducted from the claimant as was expected.
82. Likewise, the claim for gratuity is purely based on the employment relationship between the parties and this court is properly seized of the claim based on the unambiguous constitutional and statutory provisions cited above.
83. In the circumstances, based on all that is stated above, this court is properly seized of the subject matter of this cause and has the requisite jurisdiction to adjudicate over the same. The preliminary objections mounted by the respondent as expressed in the notice of PO and the application are hereby dismissed for lack of merits.

## **VII. Reliefs**

75. Flowing from the finding and holding in the foregoing part of this judgment, the court shall proceed to consider the reliefs sought as hereunder.
76. It is important to note that the respondent admitted the claimant's claim for gratuity before the cause was filed in court and sought for time to settle the same only to later negate on that promise. As alluded to elsewhere in this judgment, the admission was made by none other than the legal officer of the respondent in the sum of Kshs10,168,766.40. The clearly and well tabulated admission was produced as an exhibit by the claimant and no challenge or objection was raised to the same.
77. The court has studied the tabulation and noted that the same takes care of payable gratuity for each specified year and period and also considers the pension remitted to the scheme for each such year or period. The tabulation and admission emanated from the respondent's legal officer. The same has not been disowned by the respondent and or an alternative tabulation availed in evidence.
78. The court takes the considered view that once the admission was made and a promise to settle the same made, the same became binding and may only be set aside on the well known and established principles that apply in setting aside a contract such as mistake, deceit, misrepresentation, fraud, duress, coercion, etc. In any event, as stated above, no alternative tabulation or calculation was availed by the respondent challenging the admission.
79. While the respondent's counsel is right in the argument that gratuity and pension should not be paid to an employee concurrently, the respondent shot itself in the foot once it failed to remit monies for the pension scheme as and when it fell due and payable as agreed between the parties. This is so because such failure exposed the claimant to not being eligible for payment of pension and her only fall-back is the contract that provided for gratuity.



80. However, a contract cannot override the law and that presents the court with an opportunity to set aside a contract, or an admission for that matter, that was entered into based on a mistaken understanding or appreciation of the law. Section 35 of the Employment Act is clear that an employee who is on a pension scheme cannot at the same time benefit from gratuity. In such a scenario the court, as I hereby do, shall apply the more favourable option to the employee. That is exactly what the claimant has asked the court to do in this claim for gratuity, which was in any event payable under the contract.
81. Further, the claimant is not seeking to be paid pension and gratuity concurrently. In regard to pension, the claimant is seeking for refund of monies that were deducted from her salary but were not remitted to the pension scheme. The court takes the view that such a claim is legitimate as it does not amount to pension which would collide with the payment of gratuity if the court was to order payment of pension.
82. The court has said enough in demonstrating that the claim for gratuity and 10% pension (employee) deducted and not remitted to the pension scheme in the admitted sum of Kshs10,168,766.40 has merits and the same is hereby allowed.
83. The unremitted deductions that were payable to Egerton University Sacco and Winam Sacco has been claimed at Kshs75,000/= and Kshs13,500/= respectively. These two claims have not been denied and no evidence has been availed by the respondent for payment of the same to the two SACCOs or refund of the same to the claimant. Consequently, the two amounts are awarded to the claimant as prayed.
84. Counsel for both parties submitted at length on the rate and period of interest awardable to the claimant on any award made. The claimant is seeking a sum of Kshs1,932,065.54 as interest on the gratuity awarded above from the date of retirement 13th January, 2021 till 20th July, 2022 when a formal demand was issued. The claimant is seeking a sum of Kshs59,295/= being interest on the two amounts deducted but not remitted to the two SACCOs from January, 2017.
85. The respondent is opposed to the claim for interest and more so prior to the filing of the cause in court. The court is urged to keep in mind that the respondent is a public institution that is funded by the taxpayer and as such be cautious in awarding the claimed interest. The respondent has not spared time in reminding the court that it is as a result of mismanagement or inaction on the part of the claimant that the respondent failed to remit the claimed sums. It is also alleged that the said mismanagement and or inaction by the claimant put the respondent in such dire financial stress that it was unable to settle the admitted terminal benefits to the claimant.
86. No evidence was availed of the alleged inaction or mismanagement on the part of the claimant. In any event, the claimant served as the vice-chancellor for a full-term of five years and retired on attainment of the mandatory age of retirement of 70yrs. Many other not so pleasant allegations have been made against the claimant. However, such allegations are merely that, allegations. The respondent is free to follow up the same with the appropriate authorities and institutions. This court has no jurisdiction over such and in any event that is not the subject matter of this cause. Furthermore, no counter-claim was made by the respondent against the claimant. I say no more in that regard.
87. Rule 70(5) of the Employment and Labour Relations Court (Procedure) Rules 2024 provides as follows –  
Where a suit involves a liquidated amount that is claimed and specified at the time of filing a statement of claim and the court orders that the amount claimed or part of the amount paid to the



claimant, it may, in addition to that order, direct that interest be paid on the liquidated amount awarded at court rates.

75. The import of the foregoing is that an award of interest on a liquidated claim is at the discretion of the court based on the unique circumstances of each cause. It is a fact that the non-remittance of the claimed amounts occurred during the tenure of the claimant as the vice-chancellor of the respondent. It is also a matter of common notoriety that the respondent and many other public universities have suffered serious financial stress in the recent past. It is also a fact that the respondent being a publicly funded university runs on funds from the taxpayer.
76. In the circumstances, the court has to be cautious in awarding interest as at the end of the day it is the taxpayer who shall shoulder the same. It is for the foregoing reasons that the court shall only award interest on the awarded amount at court rates chargeable from the date of this judgment till payment in full.

#### **IX.Costs**

75. The claimant is awarded costs of the cause.

#### **X.Orders**

75. For all the foregoing reasons the claimant's cause succeeds and the court issues the following orders –
- a. The claimant is awarded the following –
- i. Gratuity & unremitted pension ...Kshs10,168,766/=
  - ii. Unremitted deductions to Egerton University Sacco ..... Kshs75,000/=
  - iii. Unremitted deductions to Winam Sacco.....Kshs13,500/=
- Total ..... Kshs10,257,266/=
- b. Costs of the cause to the claimant.
- c. Interest to the claimant at court rates from the date of this judgment till payment in full.

The award is NOT subject to any deductions.

**DELIVERED VIRTUALLY, DATED, AND SIGNED AT NAKURU THIS 6<sup>TH</sup> DAY OF FEBRUARY, 2025.**

.....

**DAVID NDERITU**

**JUDGE**

