



**Okallo v Kenya Medical Research Institute & another (Cause 558 of 2019) [2025] KEELRC 2343 (KLR) (30 July 2025) (Judgment)**

Neutral citation: [2025] KEELRC 2343 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 558 OF 2019**

**JW KELI, J  
JULY 30, 2025**

**BETWEEN**

**ALICE OKALLO ..... CLAIMANT**

**AND**

**KENYA MEDICAL RESEARCH INSTITUTE ..... 1<sup>ST</sup> RESPONDENT**

**KENYA MEDICAL RESEARCH INSTITUTE STAFF RETIREMENT BENEFIT  
SCHEME ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. Vide an amended statement of claim dated 16<sup>th</sup> August 2019 and amended on the 20<sup>th</sup> of March 2023, the claimant sued the respondent and sought the following Orders:-
  - a. An order that the Respondents Pay Pension dues of Kshs. 3,748,754.13 as at 30<sup>th</sup> June 2018 to the Claimant;
  - b. An order compelling the 2<sup>nd</sup> Respondent to conduct a current actuarial valuation of the Claimant's pension dues and subsequently, produce and make available to Court, an updated Member Benefit Statement as at the date of Judgment within 14 days from the date of Judgment.
  - c. An order that the Respondents pay to the Claimant any additional updated outstanding pension dues, being the difference in the total sum as per the afore-requested Updated Member Benefit Statement furnished to Court and the total sum awarded as special damages in prayer (a) above.
  - d. A Permanent injunction as against the 1<sup>st</sup> Respondent prohibiting them from forcefully evicting the Claimant from the staff quarters (being House No. M04 situated on Mbagathi Way, Nairobi) until full and final payment of pension dues;



- e. General damages for breach of the Claimant's rights under Article 25(a), 27(1), 28, 29(d) and (f), and 57(c) of the Constitution of Kenya.
  - f. General damages for psychological distress and torture
  - g. Costs of this suit
  - h. Interest on (a), (c), (e), (f) and (g) above at court rates (14%) from the date of judgment until payment in full.
  - i. Any other relief that this Honourable Court may deem fit to grant.
2. The claimant in support of the claim filed her list of witnesses dated 7<sup>th</sup> January 2025, undated witness statement, supplementary witness statement dated 20<sup>th</sup> March 2023, and list and bundle of documents with the bundle of documents attached dated the 7<sup>th</sup> of January 2025.
  3. The Respondents entered appearance through the law firm of Muriu, Mungai & Company Advocates and filed an amended statement of response, counterclaim and set-off dated 5<sup>th</sup> June 2024. In their counter-claim, the Respondents sought the following orders:
    - a. An order directing that the claimant vacates House No. M04 situated within the 1<sup>st</sup> Respondent's staff quarters immediately and unconditionally and to also surrender the keys to the 1<sup>st</sup> Respondent's Housing Officer.
    - b. An order directing the Claimant to pay the 1<sup>st</sup> Respondents the sum of Kshs. 1,775,000.00 being the rent outstanding as at April 2024, and a further sum of Kshs. 25,000.00 per month from the said date until the date she vacates the subject property.
    - c. Costs of the suit herein and the counter-claim.
    - d. Interests on (b) and (c) above at 12% per annum until payment in full.
    - e. In the alternative and without prejudice to (b) above, the Honourable Court be pleased to order that the rent outstanding as at the date the Claimant vacates the subject property be set off against any amount that this Court may find to be due and/or payable to the Claimant by the Respondents.
    - f. Such further or other reliefs as this Court may deem fit and just to grant.
  4. In support of the response, the respondent filed a list of witnesses dated 13<sup>th</sup> January 2023, witness statement of Anthony Wachira dated 13<sup>th</sup> January 2023, supplementary list of witnesses dated 5<sup>th</sup> June 2024, witness statement of John Musau dated 5<sup>th</sup> June 2024, a list of documents dated 13<sup>th</sup> January 2023, and a supplementary list and bundle of documents dated 5<sup>th</sup> June 2024.
  5. To counter the Respondent's amended statement of response as aforesaid, the claimant filed a reply dated 29<sup>th</sup> August 2024.

### **Hearing and evidence**

6. The parties, by consent dated 18th March 2025, settled on the issue of pension claim and the terms of the claimant to vacate the house. The parties left to the court to determine the claim for general damages and the respondent's counterclaim for rent and costs by way of documentation and written submissions.



## The Claimant's case in summary

7. The Claimant's case is that she was employed by the Respondent from the year 1986 until 1<sup>st</sup> April 2018, when she retired from employment. She served as the Chief Administrative Officer of the 1<sup>st</sup> Respondent at the time of her retirement. The Claimant joined the 2<sup>nd</sup> Respondent scheme, the Staff Pension & Life Assurance Scheme (Defined Benefits). The 1<sup>st</sup> Respondent was required to remit a specified sum of money monthly towards the Claimant's pension account in the Staff Pension & Life Assurance Scheme (Defined Benefits), which is then managed by the 2<sup>nd</sup> Respondent.
8. The claimant complains that the 1<sup>st</sup> Respondent as the employer of the Claimant, failed and/or refused to remit the said amounts to the Claimant's pension account with the 2<sup>nd</sup> Respondent monthly. As a result, an accumulated and unpaid pension amount of Kshs. 3,748,754.13 remains unpaid to the Claimant. This amount is the Claimant's actuarial reserve as at 30<sup>th</sup> June 2018, and the amount increases every year with interest until payment to the Claimant. The Claimant states that she made several attempts to obtain her updated Member Benefit Statement as at the date of filing the Amended Statement of Claim to no avail, thus necessitating a claim for production of an updated Member Benefit Statement as at the date of this court's judgment, and a consequential order for settlement of the additional sums thereon, over and above the special damages claim for Kshs.3,748,754.13 pleaded herein. The Claimant takes the position that the Respondents should be compelled to produce an updated statement of the Claimant's dues pursuant to Article 27(1) of the *Constitution* of Kenya, 2010 which guarantees the Claimant equal protection and equal benefit of the law.
9. The 1<sup>st</sup> Respondent's failure to remit the Claimant's pension is an apparent failure of their obligation to legally terminate their employment relationship with the Claimant, and this has contributed towards the Claimant's occupancy of the 1<sup>st</sup> Respondent's staff quarters and in particular KEMRI House M04. This is why the Claimant has remained and still resides in the 1<sup>st</sup> Respondent's staff quarters and in particular KEMRI House M04 while awaiting to be paid her pension dues so as to be in a position to organize herself including arranging for alternative housing.
10. The claimant admits that on 8<sup>th</sup> August 2019, she received letters from the 1<sup>st</sup> Respondent dated 31<sup>st</sup> July 2019 and 8<sup>th</sup> August 2019. The letter dated 31<sup>st</sup> July 2019 from the 1<sup>st</sup> Respondent, on the hand informed the claimant of the intended reallocation of the staff quarter house number M04 to one Mr. Philip Melly and gave the Claimant had 7 (seven) days to vacate the said house which was alleged by the 1<sup>st</sup> Respondent to have accumulated unpaid rent of Kshs 350,000/=. On the other hand, the letter dated 8<sup>th</sup> August 2019 invited the claimant to a meeting scheduled for 9<sup>th</sup> August 2019 to discuss the status of the staff quarter house. During the said meeting, the 1<sup>st</sup> Respondent reiterated that the claimant was required to vacate the subject house immediately despite her protestations that she was yet to receive her pension.
11. It is averred that the Respondents are liable for any loss occasioned to them over the Claimant's occupancy of the house as a consequence of their own breach of the law. The Claimant's occupancy of the house to-date is on the strength of the injunction issued by the Court which was meant to preserve the Claimant's right of immediate payment of all the Claimant's unassignable pensions upon retirement without extensive delays. The Claimant has severally requested that her pension dues be paid before she can vacate the said staff quarters but the 1<sup>st</sup> Respondent has refused. The Claimant states that she is afraid that she may be evicted anytime from the said house in the staff quarters without her pension dues being settled, due to the failure of the 1<sup>st</sup> Respondent to remit the required contributions to the retirement scheme managed by the 2<sup>nd</sup> Respondent. She has on several occasions been harassed by the 1<sup>st</sup> Respondent, despite being an older member of the society who has a right



under Article 57 (c) of the Constitution of Kenya, 2010 to live in dignity and respect and be free from abuse.

12. The Claimant is aggrieved by the breach of her constitutional rights and states that she has also suffered psychological torture and distress at the hands of the Respondent due to their harassment which has caused her to be embarrassed/humiliated in the presence of her colleagues, and hence her rights under Article 25(a), 27(1), 28, 29(d) and (f), and 57(c) of the Constitution of Kenya have been violated. The Respondent's failure to meet her legitimate expectation of remitting her pension dues as and when they fall due; daily debts incurred by the Claimant since she is financially constrained after retirement and the various reminders by the creditors to pay the debts; and the loss of the Claimant's friends and social circle who are currently belittling her since she is not in a position to maintain her former lifestyle, have all exacerbated the Claimant's psychological torture and distress. The Claimant states that she has suffered a loss of monthly earnings, which were to be remitted from January 2019 to January 2023 (49 months), causing her to suffer financial distress as well. The Respondents should adequately compensate the claimant for the harm caused.

### **Respondent's case in brief**

13. The Respondent's case is that it indeed employed the Claimant on 2<sup>nd</sup> September, 1985 and she retired from the 1<sup>st</sup> Respondent's service on 1<sup>st</sup> April, 2018. Upon the Claimant's employment, she was allocated, on her application, a house, namely House No. M04, within the 1<sup>st</sup> Respondent's staff quarters situated near its Head Office. They state that the 1<sup>st</sup> Respondent's Housing Policy, which is well known by all staff residing with the staff quarters, gives a member of staff a period of sixty (60) days grace period after retirement or for staff who cease employment, to vacate the premises. This period is intended to allow the outgoing staff time to organize themselves after retirement, vacate the house within the staff quarters and hand over the keys to the 1<sup>st</sup> Respondent's Housing Officer for re-allocation to another staff member. There is a huge demand for houses or units within the 1<sup>st</sup> Respondent's staff quarters and once a unit is vacant, there are many other staff members who apply for allocation as the rent paid by staff-members is lower than market price and due to its close proximity to the Institute's Head Office. The Claimant has continued to reside in the 1<sup>st</sup> Respondent's staff quarters since her tenure expired on 1<sup>st</sup> June 2018 and she was expected to hand over the subject property and its keys to the 1<sup>st</sup> Respondent's representative, despite not paying any rent, which is usually deducted from employees, since she ceased working for the 1<sup>st</sup> Respondent. The Respondent avers that it has been greatly prejudiced/suffered loss as it has lost the monthly rent of Kshs. 25,000/- payable for the subject property, namely House No. M04, as per the Institute's Policy. Many staff of the 1<sup>st</sup> Respondent who have applied to be allocated the said unit have also been prejudiced. As at April 2024, according to the Respondent, the outstanding rent is Kshs. 1,775,000.00. Despite demand and reminders sent to the Claimant to vacate the house and surrender the keys, she has continued to stay in the house without rent payment.
14. The Respondents state that there is no nexus between the Claimant's claim for unpaid pension and the subject property. They add that the injunction issued by the court did not bar the 1<sup>st</sup> Respondent from demanding rent for the subject property for the duration of the Claimant's occupancy of the same. They challenge the jurisdiction of the court to handle the dispute relating to the subject property since it is now a landlord/tenant dispute as the Claimant is no longer an employee of the 1<sup>st</sup> Respondent. It takes the position that this claim should have been filed in the High Court.
15. On the issue of the Claimant's pension, the Respondents deny the jurisdiction of the court on the premise that the claim for pension benefits is regulated by the Retirement Benefits Act which provides a mechanism for settling disputes in relation to staff pension and/or pension benefits.



16. However, it states that if any part of the Claimant's claim is allowed, it should be set off against the Respondent's claim in the counter-claim. It cites Section 13 of the Pensions Act which provides that pensions are assignable or transferable to settle a debt owing to the Government, hence the Claimant's claim is assignable to the 1<sup>st</sup> Respondent for the unpaid rent.

## **Determination**

### **Issues for determination**

17. The claimant in submissions addressed the following issues –
- a) Whether the Claimant is entitled to damages and compensation for the Respondent's failure to remit the Claimant's dues as required hence leading to psychological stress and violation of Constitutional rights?
  - b) Whether the Respondent's claim for rent is merited?
  - c) Whether the orders for compensation and damages as sought in the Amended statement of claim should be granted?
18. The respondent addressed the following issues:-
- i. Whether the Claimant has proved her claim for general damages violation of her Constitutional Rights;
  - ii. Whether the Respondents have proved their claim for rent; and
  - iii. Who should pay the costs of the suit and the Counterclaim?
19. The court finds that the parties are in agreement on the issues for determination to be –
- a) Whether the Claimant is entitled to general damages for psychological stress and violation of Constitutional rights as per the amended claim ?
  - b) Whether the Respondent's claim for rent is merited?
  - c) costs.

### **Whether the Claimant is entitled to general damages for psychological stress and violation of Constitutional rights as per the amended claim ?**

20. The claimant in amended claim sought for the following orders:-
- e. General damages for breach of the Claimant's rights under Article 25(a), 27(1), 28, 29(d) and (f), and 57(c) of the Constitution of Kenya.
  - f. General damages for psychological distress and torture.

### **The claimant's submissions**

21. Whether the Claimant is entitled to damages and compensation for the Respondent's failure to remit the Claimant's dues as required hence leading to psychological stress and violation of Constitutional rights? The claimant submitted that it is a fact that once an employee joins a pension scheme, the employer is tasked with the obligation of deducting the monthly contributions and rightfully submitting them to the scheme as was expected in this case. Further, it is a well-known fact that an employee who joins a pension scheme intends to utilize the pension funds upon retirement given



- that there will be no other source of income after retirement. This is also noting that at the point of retirement, it is likely that the said employee will be an older member of the society hence necessitating more care and attention.
22. That this is similarly the case in this matter because, at the point of retirement, the Claimant had already attained the age of seniority hence deeming her an older member of society. To this end, noting that she still continues to advance in her years, she continues to enjoy the rights enshrined in the Constitution of Kenya, 2010 in respect to the older members of society and key among them being the right to live in dignity and respect and be free from abuse. Further and above that, the Claimant's rights as enshrined in Article 25(a), 27(1), 28, 29 (d) and (f) solidifies her right to live in dignity, respect and not to be subjected to any form of torture; whether physical or psychological. Despite the aforementioned rights being applicable to the Claimant, it is our submission that the same have been blatantly infringed by the Respondent for the reasons that upon the deduction of the monthly contributions during the claimant's employment, the Respondents failed and or refused to remit these funds to the pension scheme as required and consequently leading to failure to remit the accumulated pension dues to the claimant upon retirement.
  23. Further, after the Claimant's retirement from employment, the Respondents, instead of fulfilling their obligations and remitting the pension dues to the claimant as required by law, they started sending the Claimant threats of eviction and demanding the Claimant to vacate the staff quarters without remitting the pension dues that were to facilitate the vacation. The Court was invited to study page 28 and 29 of the Claimant's Trial bundle, which entails the Respondent's letters threatening to evict the Claimant anytime without further notice.
  24. In addition, the Respondents would on several occasions harass the Claimant, physically, in a bid to have her vacate the Respondent's staff quarters before payment of her dues.
  25. The claimant invited the Court to take Judicial notice that the Respondent's staff quarters hosts the Claimant's former colleagues and hence the Respondent's actions of physical harassment to the Claimant, have without a doubt, caused shame and embarrassment on the Claimant as she has since been perceived as someone who does not want to leave the Respondent's staff quarters. The Claimant has been subjected to psychological stress and torture since retirement, as her pension dues were not remitted as expected, and has always lived in fear that she may become destitute if the Respondent decides to act on their threat and evict her without payment of her dues. This is also bearing in mind that she has since been financially constrained as she does not have any other source of income hence leading her to seek loans which have in essence, adversely affected her dignity and respect as she is not in a position to pay the debts. The claimant invited the Court to study the Claimant's witness statement and the Supplementary witness on page 10-15 of the Claimant's trial bundle, to ascertain the veracity of the constitutional violation.
  26. The claimant submitted that in light of the blatant constitutional violations, we submit that the Claimant is entitled to compensation and damages from the Respondent. This is in reliance to the case of Irene Wangari Gacheru & 6 others v Attorney General [2017] eKLR where the Court held that:- "An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach, and deter further breaches. All these elements have a place in helping the court arrive at a reasonable award. The court must consider and have regard to all the circumstances of the case." This was also buttressed in the case of Gichuhi v County Government of Kirinyaga & 2 others where the Court held that:- I have however held and



found that the Petitioner's Constitutional Rights were violated and I dare say in a high handed and callous manner and hence deserving compensation.....Respondent decides to act on their threat and evict her without payment of her dues. This is also bearing in mind that she has since been financially constrained as she does not have any other source of income hence leading her to seek loans which have in essence, adversely affected her dignity and respect as she is not in a position to pay the debts.”

27. This Honourable Court has the requisite jurisdiction to award compensation for constitutional violations of this nature as it was held in *Jenny Luesby the case of Standard Group Limited* [2018] KECA 353 (KLR) where the Court of Appeal, in dealing with similar issues before this Court held that: "The trial court also awarded general damages for emotional distress, as claimed, in the sum of Ksh. 8,250,000. It hinged its jurisdiction to award such damages on Article 162 (2) of the Constitution as read with section 12 of the Employment and Labour Relations Court Act (ELRCA) which donates exclusive powers to the ELRC to handle matters relating to employment. Among the orders that the court may make under section 12 (3) are:

- (vi) an award of damages in any circumstances contemplated under this Act or any written law;
- (vii) any other appropriate relief as the court may deem fit.

We have considered the issue and the authorities relied on. We think for ourselves that in view of the express jurisdiction granted to the ELRC under Article 162 (2) of the Constitution as read with section 12 of the Act, the *Sonye* case (supra) is of doubtful authority. It was decided 11 years before the new Constitution, 8 years before the Employment Act, and relied on the House of Lords decision in the *Addis* case (supra) made more than 100 years ago. So long as an employee can plead and prove breach of a constitutional right within the context of the employee's contract of employment or demonstrate that he is entitled to damages in circumstances as contemplated under the Employment and Labour Relations Court Act (ELRCA), over and above those awardable for unlawful termination, we see no impediment for the trial court granting such relief.

28. Similarly, in awarding damages to the claimant for violation of a constitutional right based on contractual obligations of an employer, the Court in the case of *Irene v Naserian Karbolo Consortium Kenya Aids NGOS* [2012] KEELRC 111 (KLR) held that: "The Court has also considered the jurisdiction as conferred upon it under Sub Article 162(2) (a) of the Constitution to hear and determine disputes relating to employment and labour relations and finds that the jurisdiction confers power to grant remedies with respect to contracts of employment and remedies for injuries related or incidental to such contracts." That the Claimant is entitled to compensation for the late remittance of the pension dues and violation of her hereinabove stated constitutional rights and we thus implore this Honourable Court to assess the gravity of the violation and award the appropriate damages.

### **Respondent's submissions**

29. The Claimant is seeking general damages for breach of her rights under Article 24(a), 27(1), 28, 29(d) and (f) and 57(c) of the Constitution of Kenya. It is the Claimant's case that by failing to pay her pension benefits upon retirement, the Respondents have caused her psychological torture and distress contrary to her constitutional rights under articles 25, 29 and 57 of the Constitution. She further alleges that the Respondents demanded that she pay rent and threatened to evict her from the staff quarters thereby violating her right to dignity under Article 28 of the Constitution. It is an undisputed fact that the Claimant ceased being an employee of the 1st Respondent through retirement on 1st April 2018, as admitted in paragraph 2 of the witness statement. As at the time of her retirement she was residing in the 1st Respondent's staff quarters paying rent of Kshs. 25,000/= per month which was being deducted from her salary on a monthly basis. However, she continued to reside in the 1st Respondent's house



after her retirement by virtue of orders of this Honourable Court whilst refusing to make payment of rent. She has thus been residing in the 1st Respondent's house since her retirement, without any justifiable reasons, to-date without paying rent whilst knowing that the rent payable is Kshs. 25,000/= per month.

30. The Claimant was legally and contractually required to vacate and or/hand over the subject property after retirement in line with the provisions of the Housing Policy, as it is a benefit for staff, but to-date she has failed and or refused to vacate or hand over the said property. The Claimant has admitted in the claim and witness statement that she was issued with demands and the letter dated 30th July 2019 wherein she was given notice and requested to vacate the subject property as she was no longer an employee of the 1st Respondent but she failed to comply and/or heed to the demands. That the continued stay by the Claimant in the 1st Respondent's staff quarters even after her retirement without payment of rent is unjustified and as such, the 1st Respondent was within its right to demand payment of the rent and/or evict the Claimant from the staff quarters. The 1st Respondent is a state corporation and loss of Kshs. 25,000/= on account of unpaid rent is loss of public funds as the subject property would have been allocated to another staff member for the rental sum of Kshs. 25,000/=. However, the Claimant's actions has caused loss of the said sum of Kshs. 25,000/= each month from 1st June 2018 to-date, which excluded 90 days period allowed under the Housing Policy for exiting staff to hand over keys.
31. The respondent submitted that the circumstances of this case clearly shows that the Claimant's claim for pension, which is regulated by the Retirement Benefits Act, was settled amicably whereas the claim for unpaid rent is pending and it arises from the Claimant's breach of the 1st Respondent's Housing Policy. That the Claimant has not proved violation of any of her rights as alleged to entitle her to general damages as claimed or at all more so as it is a fact that she has breached the above-stated Housing Policy thus causing loss to the 1st Respondent. In this respect, we do further submit that a party cannot claim damages whereas she has breached an existing Policy and her claim for pension has a statutory provision under the RBA Act on the applicable remedies for delayed payments. That the Claimant's claims do not meet the competence threshold set out by the High Court in Anarita Karimi Njeru v Republic [1979] eKLR when held that: "We would, however, stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed." The foregoing principles were affirmed by the Court of Appeal in the case of Mumo Matemu -vs- Trusted Society of human Rights Alliance & Others [2013] eKLR. 20.Your Ladyship, we do further submit that the Claimant has cited other provisions of the Constitution which she alleged to have been violated, but she has failed to demonstrated with sufficient clarity the manner the said provisions were violated.
32. The Claimant has relied on the letters dated 29th May 2019 and 31st July 2019 at pages 23 and 24 respectively of the Claimant's Trial Bundle, to allege that the Respondents threatened to evict her from the staff quarters thereby violating her right to dignity and subjecting her to distress and psychological torture. It is noteworthy that the said letters are requests by the Respondents that the Claimant vacates the subject property or be evicted from the quarters. The letters do not contain any threats as alleged or at all. The letter dated 29th May, 2019 reads: "This to kindly request you to clear the amount and vacate the above house with immediate effect failure to which the Institute will evict you from the quarters without further notice." The letter dated 31st July, 2019 reads: "Consequently, as per the date of this letter and as final reminder, you have seven (7) days to vacate the said house and hand over the keys for occupation by the new tenant so that the Institute, and by extension the Government, stops losing rent payable to this house." Clearly, the above-stated letters were written with decorum and in polite tone



in recognition and consideration of the Claimant's dignity and the undisputed fact that the Claimant is a former employee of the 1st Respondent. The letters were also very accommodating and gave the Claimant sufficient notice to vacate the premises before she could be evicted by the Respondents. It is a fact that the subject property is for as asset for the 1st Respondent and it is allocated to staff members who pay rent of Kshs. 25,000/= per month in return. However, it is also a fact that the Claimant was residing in the subject property but was not paying rent. In the premises, the 1st Respondent's action to write demand letters cannot be faulted and it is justified. It is also noteworthy that even though the Claimant failed to comply with the said demands and she failed to pay rent over a long period of time while still staying in the 1st Respondent's property, she was never evicted from the premises by the Respondents. The Claimant is yet to vacate the premises as at the date of these submissions. The allegations that the Claimant was physically harassed are completely fabricated and unsubstantiated and there is no evidence to support those allegations. In any event, the 1st Respondent was within its right under the Housing Policy to demand that the Claimant vacates the subject property as the Claimant had retired and therefore her entitlement to the staff quarters had ceased. Further, she was residing in the premises without paying rent thus causing loss to the 1st Respondent.. Clause 4(vii) (c) of the 1st Respondent's Staff Housing Policy provides that employee leaving the service for the purpose of retirement shall be required to vacate the house not later than Sixty (60) days from the date he ceases duty. Under Clause 5 of the Policy: "Any breach of the housing rules shall lead to sanctions from the office of Deputy Director, Administration which include but not limited to the following: i. Verbal warning ii. Written warning iii. iv. Disciplinary action as per institute HR Policy & Procedural Manual and Housing Policy Eviction from institute residential house." On the appropriate finding of the Claimant's conduct under the circumstances of this case we seek to rely on the case of East African Railways Corporation –vs Karangi [1988] KECA 113 (KLR), wherein the Court of Appeal held that an employee who has retired but refuses to vacate the staff quarters is a trespasser and the employer has a right to evict such former employee from its premises. The court stated: "The position therefore was that the respondent having reached the regulated age, was retired by the corporation. He was in occupation of Corporation premises. He was given notice, as the Judge found, to quit. He refused to quit when the notice expired. What was his legal status vis-a-vis the Corporation? It does not require a great deal of learning in the law, to say he was a trespasser. If that is right, what remedies did the Corporation have to enable it regain possession of its premises? The Act, by subsection 2 of section 83, provides one such remedy. It says, the Corporation may apply to a magistrate for an order empowering a police officer, among other things, to evict him from the premises. That is not the only legal remedy available to the Corporation. This is only an enabling power but the Act leaves intact any other legal remedies that may be to the Corporation to obtain the respondent's eviction. Thus, the Act says, "the Director General may, without prejudice to any other means of recovery apply etc". The question to be determined on this part of the case, is what legal remedy is available to an owner of a house in occupation of a trespasser and who refuses to quit? I think that is the right of re-entry, a species of self-help but nevertheless still good law. That is the right the corporation exercised both in July 1975 and January 1976. And the evidence is that it did not use any force or unreasonable force in securing the respondent's eviction. Its servants merely entered the premises, put away there respondent's personal belongings, locked the doors and obtained peaceably the possession of the keys. Is the Corporation liable in damages to the trespassing respondent for this? Unless my appreciation of the law on this subject is faulty, my opinion is that it is not....."

33. Similarly the respondent urged this Honourable Court to adopt the above-stated finding by the Court of Appeal, and submit that the employment relationship between the Claimant herein and the 1st Respondent was terminated upon her retirement, and thereafter her continued stay in the staff quarters without the 1st Respondent's consent and without paying rent as required by the Housing Policy amounts to trespass. In this respect we do further submit that the 1st Respondent's demands seeking



that she vacates the premises cannot entitle the Claimant to damages for violation of her rights, as alleged or at all. The English Court of Appeal held in *Hemmings and Wife v The Stoke Poges Golf Club* [1920] 1 KB 720 that: "But I see no reason to add to the existing privileges of trespassers on property which does not belong to them by allowing them to recover damages against the true owner entitled to possession who uses a reasonable amount of force to turn them out." In the case of *David Ngugi Elijah v County Government of Embu & another* [2016] eKLR the Court held that-"18. The applicant has not demonstrated that he has a right over the house. In view of the fact that the 1st respondent is the rightful owner of the house in dispute and the applicant is not a civil servant or an employee of the 1st respondent, the applicant has not demonstrated that there exists a right which has been apparently infringed by the respondents. In absence of this proof, the applicant has not demonstrated a prima facie case to justify granting the orders sought."

34. The respondent submits that the Claimant's claim that her rights were violated by the Respondent's delay to pay her pension benefits is misconceived and should be disregarded by this Honourable Court. This is because the alleged delay is a purely contractual issue and not a constitutional violation as alleged and its an issue between the 1st Respondent, as the employer, and the Claimant, as the employee, which had remedies provided by statute by virtue of the provisions of the RBA Act. Therefore, even if the allegations for delayed payment were proved, the same cannot entitle the Claimant to general damages as it is trite that general damages do not issue in cases of breach of contract especially where, as here, the same has not been pleaded. Furthermore, the dispute between the parties on the issue of pension was resolved by consent. In the case of *James Mukuha Gichane v National Hospital Insurance Fund & 3 others* [2017] eKLR, the Court of Appeal held that: "The circumstances of this appeal show that the appellant's claim, based, under the Constitution (now repealed) was misplaced. The alleged breach of fundamental constitutional right was not proved. The grievance of the appellant related to termination of employment and the only issue for determination was whether he was lawfully terminated. No matter how broadly the scope of fundamental rights is interpreted, it cannot encompass ordinary tortious and contractual rights between individuals that do not bear on human or fundamental rights. Thus, the rights of an employee vis a vis the employer in ordinary circumstances do not connote breach of fundamental rights. In this appeal, the relationship between the appellant and the 1st respondent being that of an employee and employer relationship, was pegged on contract. The issue of right to life which the appellant alleged was not discernible and could not arise under the contract." [Underlining ours]
35. The respondent further submitted that a critical aspect on the claim for pension is that it was settled amicably by a partial judgment and thereafter the Claimant has been paid her full pension benefits, including the interest for the period of the delay. Consequently, the Claimant has therefore been fully compensated for the delay. In *Highway Furniture Mart Ltd -vs- Permanent Secretary office of the President and another* (2006) eKLR, the Court of Appeal held: "The justification for an award of interest on principal sum is to compensate a plaintiff for the deprivation of any money, or specific goods though the wrongful act of a defendant." Similarly, in *Insurance Experts (K) Limited v National Bank of Kenya Limited* [2017] eKLR, the court held that: "9) It is therefore clear that an award of interest is a form of reimbursement or compensation to a person who has been deprived of the use of goods or money by reason of a wrongful act on the part of the other party, by the party who has basically wrongfully deprived him of the use of goods or money." That the Claimant has failed to prove the claim for damages and hence it should fail. Further, she has also failed to prove violation of her constitutional rights to the required threshold and hence the claim for damages in that respect is unfounded and incompetent.



## Decision

36. The threshold for violation of constitutional rights was set in *Anarita Karimi Anarita Karimi Njeru v Republic* [1979] eKLR when held that: “We would, however, stress that if a person is seeking redress from the High Court on a matter which involves a reference to the *Constitution*, (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.” The foregoing principles were affirmed by the Court of Appeal in the case of *Mumo Matemu -vs- Trusted Society of human Rights Alliance & Others* [2013] e KLR. The claimant invited the court to consider the evidence at pages 28 to 29 of the claim which she stated entailed the respondent threatening to evict the claimant anytime without notice and paragraphs 10-15 of the claimant’s witness statement on the constitutional violations. The court perused the said statement and in summary the claimant’s case was to the effect that there was delay in payment of her pension dues immediately after retirement necessitating her occupancy of the 1<sup>st</sup> respondent’s house to preserve her rights as asserted in the preliminary injunction granted by court. That she had undergone shame, embarrassment and her integrity ruined as former colleagues think that she was residing at the staff quarters illegally and had since belittled her. The Court finds that the said letters were all on notifying the claimant to vacate the staff house having retired.
37. It was not in dispute that the claimant had been allocated the KEMRI House No. M04 by virtue of employment and consistent with the policies of the employer. Housing is a basic right of employment under section 31 of the *Employment Act* to wit- ‘(1) An employer shall at all times, at his own expense, provide reasonable housing accommodation for each of his employees either at or near to the place of employment, or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.’ The claimant was thus enjoying the right to housing as an employment benefit. It was not in dispute that the claimant had retired on 1<sup>st</sup> April 2018. It was not in dispute that the 1<sup>st</sup> respondent’s housing policy gives staff 60 days being a grace period for retiree or staff who cease employment to vacate the staff houses. (policy at pages 1-22 of the respondent’s bundle). The grace period of 60 days with respect to the claimant expired on the 1<sup>st</sup> June 2018, she refused to vacate on basis of non- payment of the pension dues. In the matter in casu the 1<sup>st</sup> respondent had in place a pension fund under the trusteeship of the 2<sup>nd</sup> respondent. The pension was not payable by the employer. Retirement benefits schemes like the 2<sup>nd</sup> respondent are registered under the Retirement Benefits Authority Act and regulated by the authority. The pension schemes are independent from the employer. The role of the scheme is as stated under the section 40 of RBA act to be – ‘40. General obligations of trustees and managers The trustee, manager, custodian or administrator of a scheme shall— (a) ensure that the scheme fund is at all times managed in accordance with this Act, any regulations made thereunder, the scheme rules and any directions given by the Chief Executive Officer; (b) take reasonable care to ensure that the management of the scheme is carried out in the best interests of the members and sponsors of the scheme; (c) report to the Chief Executive Officer, as soon as reasonably practicable, any unusual occurrence which in his view could jeopardise the rights of the members or sponsors of the scheme; and (d) report to the Chief Executive Officer, as soon as reasonably practicable, if any contributions into a scheme fund remain due for a period of more than thirty days’. The court then finds that the claimant illegally stayed in the house of the employer, as the reasons for failure to vacate the house had no basis in the law. The house did not belong to the pension scheme(2<sup>nd</sup> Respondent) which had obligation to pay her pension. The court finds that the continued stay in the house post 60 days of retirement was in breach of the contractual relationship with the employer and amounted to trespass. The court agreed with decision in *East African Railways Corporation -vs Karangi* [1988] KECA 113 (KLR), wherein the Court of



Appeal held that :-"The position therefore was that the respondent having reached the regulated age, was retired by the corporation. He was in occupation of Corporation premises. He was given notice, as the Judge found, to quit. He refused to quit when the notice expired. What was his legal status vis-a-vis the Corporation? It does not require a great deal of learning in the law, to say he was a trespasser. If that is right, what remedies did the Corporation have to enable it regain possession of its premises? The Act, by subsection 2 of section 83, provides one such remedy. It says, the Corporation may apply to a magistrate for an order empowering a police officer, among other things, to evict him from the premises. That is not the only legal remedy available to the Corporation. This is only an enabling power but the Act leaves intact any other legal remedies that may be to the Corporation to obtain the respondent's eviction. Thus, the Act says, "the Director General may, without prejudice to any other means of recovery apply etc". The question to be determined on this part of the case, is what legal remedy is available to an owner of a house in occupation of a trespasser and who refuses to quit? I think that is the right of re-entry, a species of self-help but nevertheless still good law. That is the right the corporation exercised both in July 1975 and January 1976. And the evidence is that it did not use any force or unreasonable force in securing the respondent's eviction. Its servants merely entered the premises, put away there respondent's personal belongings, locked the doors and obtained peaceably the possession of the keys. Is the Corporation liable in damages to the trespassing respondent for this? Unless my appreciation of the law on this subject is faulty, my opinion is that it is not....." In the upshot the court finds that on separation post retirement there was no employee employer relationship to justify claim of housing of the claimant by the respondent. She was a trespasser and the court finds the respondent was entitled to issue the notices for vacation of the house including eviction.

38. Having held that the claimant was in breach of the contract of employment by refusing to vacate the house on retirement and further that the obligation to pay pension was not on the owner of the house by the pension scheme, can the claim for general damages as sought be sustained? I would return in the negative. The court finds that this case does not meet the threshold of constitutional violation as stated in *Anarita Karimi Anarita Karimi Njeru v Republic* [1979] eKLR to attract any compensation under the *Constitution*. The claimant was paid the pension with interest which is adequate compensation for breach of contract by the 2<sup>nd</sup> respondent. The claim for general damages is held to be without merit.

### **Whether the Respondent's claim for rent is merited?**

#### **The respondent's submissions on their counterclaim**

39. The Respondents' claim as pleaded in the counterclaim is for Kshs. 25,000/= per month, being rent due and payable by the Claimant to the 1st Respondent, with effect from 1st June 2018 until the date the Claimant vacates and/or hands over the suit property to the 1st Respondent. The Claimant has opposed the claim on grounds that: This court does not have jurisdiction to handle the claim as the claim ought to have been filed at the Rent Restriction Tribunal; This court does not have jurisdiction to handle the claim as the claim ought to have been referred to arbitration pursuant to Clause 15 of the 1st Respondent's Staff Housing Policy; The claim is unmerited as payment of the rent is attributable to Respondents' delay in releasing the Claimant's pension dues; and d) The Set-Off is unmerited because the pension dues are not assignable.
40. Jurisdiction of this Court vis-a-vis Rent Restriction Tribunal. It is the Claimant's contention that the Respondents' Counterclaim, being a claim for rent, ought to have been filed in the Rent Restriction Tribunal pursuant to Section 5(1)(f)(ii) of the *Rent Restriction Act*, CAP 296 of the Laws of Kenya. It is common ground that upon the Claimant's employment, she was given and/or allocated a house within the 1st Respondents Premises, on her application, at the 1st Respondents Staff Quarters, being House No. M04, wherein she has been residing as a benefit that accrue after her employment with the 1st



Respondent. The Claimant's stay in the suit property arose from an employee/employer relationship and it is a benefit based from that relationship and regulated by the 1st Respondent's Housing Policy. The Claimant, as is the case for other employees residing in similar houses, was paying the agreed rent of Kshs. 25,000/=, payable monthly, through salary deductions. It is also an undisputed fact that the Claimant retired from the service of the 1st Respondent and or/ceased to be an employee on 1st April 2018 and from the said date she ceased being a staff and/or employee of the 1st Respondent. In that respect there could be no set off or deduction of the monthly rent after the Claimant retired as she was not getting any salary. Further, it is also a fact that the Claimant was legally and contractually supposed to vacate and hand over the subject property to the 1st Respondent immediately she ceased to be an employee of the 1st Respondent and in any event no later than sixty (60) days from the 1st of April 2018. This is expressly provided in the 1st Respondent's Housing Policy. It is also a fact from the documents placed before this Honourable Court that the Claimant's entitlement to staff housing was as a consequence of her employment with the 1st Respondent herein, which terminated on 1st April, 2018. Thereafter the Claimant continued to stay in the suit property, despite her retirement, and it was pursuant to orders that were issued by this Honourable Court. In that respect we do submit that this Honourable Court confirmed and assumed jurisdiction when it issued injunctive orders that have made the Claimant to continue residing in the suit property. In that respect the respondent submits that the same Court has jurisdiction to determine the effect of the Claimant's continued stay to date.

41. That Counterclaim, as pleaded, therefore emanates from the contract of employment between the Claimant and the 1st Respondent and is therefore subject to this Court's jurisdiction. This Honourable Court's jurisdiction is governed by section 12 of the [Employment and Labour Relations Court Act](#) which provides that this court will have jurisdiction to handle: .... disputes relating to or arising out of employment between an employer and an employee" The respondent urged this Honourable Court to adopt the finding in the case of Patrick Sau Mutemi -vs- Kenya Meat Commission [2019] eKLR, Justice Maureen Onyango, wherein it held that Section 12 of the [Employment and Labour Relations Court Act](#) gives this Court jurisdiction to determine disputes arising out of an employment relationship, which include rent arrears for premises related to the claimant's employment. The Courts held, inter alia, that; "Further, this Court under Section 12 of the [Employment and Labour Relations Court Act](#) has jurisdiction to determine disputes arising out of an employment relationship which include fraudulent activities or rent arrears for premises related to the claimant's employment." A similar finding was made in the case of David R Adanje v Nakuru Water and Sanitation Services Limited [2021] KEHC 6755 (KLR) thus:- '1. The Applicant vide an application dated 19th August 2019 brought under Section 3 and 3A of the [Civil Procedure Act](#) Cap 21, order 51 rule 1 of the Civil Procedure rules, 2010 and all other enabling provisions of the law sought for the following orders; 1) Spent 2) That leave be granted to the Applicant David R. Adaje to file his suit afresh arising from the unlawful seizure of his house hold goods detained by the respondent and unlawful levying and deduction of rent from his salary even after eviction from the respondent's premises whilst he was an employee of theirs. When it comes to matters employment the [Constitution](#) of Kenya 2010 states at Article 162(2) that; Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to (a) employment and labour relations; Parliament went ahead and enacted the [Employment and Labour Relations Court Act](#) no 20 Of 2011. The jurisdiction of the court is set out at Section 12 which provides inter alia .... It is clear from these legal provisions that jurisdiction over the applicant's issues lies with the Employment and Labour Relations Court, which court is the one empowered to exercise its inherent jurisdiction over the said matter." [Emphasis supplied]
42. That there is no dispute that the Respondents' Counterclaim for rent arises out of the employment relationship between the Claimant and the 1st Respondent. The sum claimed as rent was being



deducted from the Claimant's salary before her retirement and thereafter she continued to reside in the subject property by virtue of orders issued by this Honourable Court. In the premises we submit that pursuant to Section 12 of the *Employment and Labour Relations Court Act*, this Honourable Court has jurisdiction to determine the issue and the dispute is not for the Rent Restriction Tribunal as alleged by the Claimant.

43. Jurisdiction of this Honourable Court vis-a-vis Arbitral Tribunal - the Claimant contends that the Respondents' claim for rent ought to have been referred to mediation and arbitration pursuant to Clause 15 of the 1st Respondent's Staff Housing Policy which provides that disputes arising out of the policy should be referred to mediation and subsequently to arbitration if mediation fails. That the above-stated submissions are in bad faith and intended to mislead this Honourable Court as the Claimant is seeking to invoke the arbitration clause of the Respondent's Staff Housing Policy at a belated stage after jurisdiction has been assumed by all parties. It is noteworthy that at an early stage the Respondents raised the issue of jurisdiction for clarity by the Court, and at that stage the Claimant opposed the application, and she argued that this Honourable Court has jurisdiction to determine the issues before Court. The invocation of the arbitration clause has come late at submissions stage when the Claimant already filed a Response to the Counterclaim thereby acknowledging this Court's jurisdiction to handle the Counterclaim. Section 6 (1) of the *Arbitration Act*, 1995 states that: "A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds..... In the case of Eunice Soko Mlagui -vs- Suresh Parmar & 4 others [2017] eKLR, the Court of Appeal held that, the filing of a defence constitutes acknowledgment of a claim, within the meaning of the provisions of section 6(1) of the *Arbitration Act*. The Court further stated that: "Section 6 (1) of the *Arbitration Act* obliges the party desiring referral of the dispute to arbitration to make the application promptly and at the earliest stage of the proceedings. Similarly, in Adrec Limited v Nation Media Group Limited [2017] eKLR, the Court of Appeal held that: "It should be emphasized that the right to seek and obtain stay of proceedings under section 6(1) of the *Arbitration Act* is lost the moment a defence is filed in the proceedings. By dint of the defence, the party filing it subjects itself to jurisdiction of the court and cannot thereafter resile from that position." That by filing the Response to the Counterclaim, the Claimant subject herself to jurisdiction of this Honourable Court and should not therefore be allowed to resile from that position. The Respondents' Claim for Rent is merited. As at April, 2024, the outstanding sum was Kshs. 1,775,000.00 which sum and/or rental sum continues to accrue. (See pages 50-52 of the Respondents' Trial Bundle) The 1st Respondent has been losing and/or unable to get monthly rental income of Kshs. 25,000/=, since 1st June, 2018 to-date, as attempts to re-allocate the subject property to the 1st Respondent's staff and/or employees for going monthly rental sum of Kshs. 25,000/= has failed as it is occupied by the Claimant, who has refused and/or failed to pay rent. The Claimant admits in her pleadings and witness statements that she was served with demands to vacate the subject property. However, she has admitted that despite the said demands and reminders for her to vacate the subject property and surrender all the keys, she has continued to stay and/or reside in the subject property whilst not paying any rent. (See pages 27-29 of the Claimant's Trial Bundle) The Respondents' claim against the Claimant is for Kshs. 25,000/= per month being rent due and payable to the 1<sup>st</sup> Respondent, with effect from 1st June 2018 until the date the Claimant vacates and/or hands over the suit property to the 1st Respondent.
44. The Claimant contends that she refused to vacate the premises because the Respondents had not released her pension benefits to enable her secure alternative accommodation. The Claimant has, however, failed to point to any provision of the Staff and Housing Policy or any law for that matter to anchor her argument that she was entitled to stay in the staff quarters until her pension dues



are paid. If anything, this argument flies in the face of established principle that any right or fringe benefit enjoyed by the employee by virtue of his employment determines upon termination of the contract of employment from which the right or benefit ensued. That position was settled by the Court of Appeal in *Erick VJ Makhokha & 4 others -vs- Lawrence Sagini & 2 others* [1994] eKLR when it held that: "The contract of employment having gone, the fringe benefits of subsidized housing went with it." It was stated as follows in *Fadhil Juma Kisua & Another -vs- Kenya Ports Authority* [2015] eKLR: "13 ....the right to housing of an employee under Section 31 of *Employment Act* is only available as long as the employment relationship between the parties exist. Such right is either enjoyed in form of physical shelter or paid monthly allowance. It cannot therefore continue after termination of the employment contract unless the employer permits the former employee to continue using the house in humanitarian consideration. That position was settled by the Court of Appeal in *Erick Vj Makhokha & 4 others -vs- Lawrence Sagini & 2 others* [1994] eKLR when it held that: "The contract of employment having gone, the fringe benefits of subsidized housing went with it." 14. The foregoing decision is binding on this Court and this Court will obviously follow it to find and hold that the claimant's right of housing went with their employment after they were dismissed. For that reason, just as an employee who receives housing allowance cannot continue holding his former employer liable to pay the same after separation, the employee who is housed by the employer cannot demand to continue being housed after separation." The Court in *Dock Workers Union v Kenya Ports Authority (Miscellaneous Application E057 of 2021)* [2023] KEELRC 1247 (KLR) relied on the above authorities to hold that: "The relationship that exists between an employer and employee is purely contractual, and the same terminates upon termination of the contract of employment. Any right or fringe benefit enjoyed by the employee by virtue of his employment determines upon termination of the contract of employment from which the right or benefit ensued." Similarly, in *Benard Mukolwe & 122 others v Karuturi Limited (In receivership) &4 others* [2015] KEELRC 1462 (KLR), the court held that: "I have considered the documents referred to and the submissions and come to the following conclusions in regard to prayer 3 of the motion. 17. Firstly, under section 31 of the *Employment Act*, 2007, an employer has the primary responsibility to provide an employee with reasonable housing accommodation failing which the employer must pay to the employee a sufficient sum as house allowance. 18. Secondly, the provision of housing accommodation and or pay of housing allowance in lieu is confined to where an employment relationship exists or survive. The corollary to this is that where an employer has terminated and or purported to terminate the services of an employee, the obligation to provide housing or pay in lieu ceases unless there is some other contractual provision to the contrary. 19. Third, that the right to housing under section 31 of the *Employment Act* is not tied to and does not survive termination, whether unfair or wrongful." In *Kimeu Kieti & 184 Others v Kenya Meat Commission* [2015] eKLR, the High Court held that: "I agree with the learned magistrate's finding that the orders granted on 15th November 1995 did not injunct the Respondent from demanding rent. This position was confirmed in the ruling by Lenaola J delivered in *Machakos High Court Misc. Application No. 143 of 2009* on 26th November 2009 that demand for rent by the Respondent's agent was not being in contempt of the said orders. The said demand is not disputed and the Appellants did attach copies of the demand letters to their replying affidavit to the Respondent's Notice of Motion of 21st May 2009. In addition the Appellants did not provide any evidence in the lower court of the alleged consent allowing them to stay in the Respondent's houses. The fact that there was a demand made for rent by the Respondent was in my view a material change of circumstance that merited the trial Court to review the injunction orders it had granted. In addition, it is not in dispute that the Appellants are no longer employees of the Respondent. At the time of the issue of the injunction orders on 15th November 1995 it was alleged that there was some terminal benefits due to them from the Respondent. However, 14 years down the line in May 2009, their dues had not been determined and they were still in possession of the Respondent's houses. It must always be



remembered that an injunction is an equitable remedy, and he who comes to equity must also do equity. In addition, delay defeats equity. The delay in prosecuting the suit in the trial court by the Appellants while still enjoying the benefits of the injunction orders for 14 years is in my view inequitable" In the case of *Stella Wambui Muhoro v Kenya Meat Commission* [2020] KEELRC 887 (KLR), the Court held that the claimant is duty bound to pay the rent from the date of separation. The Court stated: in "The claimants' right of housing having ceased with the termination of her employment, she cannot demand to continue being housed by the respondent. I thus find that the claimant is duty bound to pay the rent demanded by the respondent from the date of separation." An attempt to stay execution of this decision was rejected by the Court of Appeal *Stella Wambui Muhoro v Kenya Meat Commission* [2020] KECA 127 (KLR) on grounds that the intended appeal was not arguable and that it would not be rendered nugatory. The Court held: "Taking into account the parameters of our discretion in the application before us as well as being careful not to make final determination on the merit of the intended appeal, we are not convinced that the intended appeal is arguable given that the applicant's entitlement to staff housing was subject to here employment which according to the applicant's admission, terminated on 12th October 2014. What's more, we are not satisfied that the applicant has demonstrated that the intended appeal would be rendered nugatory unless the orders sought are granted. We say so because despite being terminated in 2014, it appears that the applicant still continues to be a tenant on the suit premises." Guided by the above authorities, the 1<sup>st</sup> respondent submitted that the Claimants' right of housing having ceased with her retirement, she cannot demand to continue being housed by the 1st Respondent more so after she ceased being an employee of the 1st Respondent and her claim for pension having been compromised. She is therefore duty bound to pay the rent claimed by the Respondent from June, 2018. That the Counterclaim is merited.

45. The Set-Off -.It is the Respondents' case that in the event the Claimant's claim or any part thereof, is found by the Court to be due and/or payable, then the same and/or award for the Claimant should and/or ought to be set off as against the Respondents claim in the counterclaim. Under Order 7 Rule 3 of the Civil Procedure Rules, a defendant in a suit may setoff, or set-up by way of counterclaim against the claims of the plaintiff. Further, Section 13 of the *Pensions Act* provides that pension dues are assignable or transferable for the purposes of satisfying a debt due to the Government and thus the Claimants' claim, as pleaded in the Claim are assignable to the 1st Respondent. The Claimant contends that she does not owe the Government any debt and therefore the Set-Off is unmerited. There is no dispute that the 1st Respondent is a Government Institution. The Respondent urged for order that the rent outstanding as at the date the Claimant vacates the subject property, be set off against any amount that this Court may find to be due and/or payable to the Claimant by the Respondents.

#### **Claimant's submission to the counterclaim**

46. The claimant submitted that from the outset that the Respondent's claim is bad in law and warrants to be struck out with costs because there are various avenues have been provided by law in which this claim could be adjudicated upon and a determination rendered on the same. This is informed by the fact that the *Rent Restriction Act*, CAP 296 Laws of Kenya, establishes a Rent Tribunal to deal and adjudicate on various issues of rent as stipulated in Section 5(1) (f)(i) and (1) which states that:-(1)The tribunal shall have power to do all things which it is required or empowered to do by or under the provisions of this Act, and in particular shall have power-
- (1)(i) subject to the provisions of section 14, to make either or both of the following orders an order for the recovery of amears of rent, mesne profits and service charges,
  - (1) to permit the levy of distress for rent



47. That without prejudice to the foregoing, the Staff Housing Policy issued on October 2021 and which the Respondent relies on, provides a Dispute resolution mechanism which states and in particular Clause 15, that in the event parties are unable to settle a dispute arising out of the policy amicably, they should refer the matter to mediation and subsequently to Arbitration if mediation fails. That it is evident that there are laid out mechanisms for settlement of this claim before the parties approach this Honourable Court. However, the Respondent has failed and or ignored to exploit the aforementioned mechanisms before approaching this Court. It is therefore the claimant's submission that the Respondents have offended the Doctrine of exhaustion of dispute resolution mechanisms and consequently, this Court lacks the jurisdiction to hear and determine this Counter-claim as the same has been prematurely invoked. This is in reliance to the case of Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others [2015] KECA 304 (KLR) where the Court of Appeal held that: "It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked". This was buttressed in the case of Mohammed v Rent Restriction Tribunal, Nairobi & 2 others where the Court held that:- The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts. In the instant case, the petitioner seeks reliefs which can be adequately addressed by the Rent Restriction Tribunal. The tribunal has powers to hear and determine the dispute at hand. On the basis of the foregoing, this court finds that the court's jurisdiction has been prematurely invoked. The petitioner ought to pursue his claim fully through the tribunal and in compliance with the law." Similarly, the Court of Appeal in the case of Speaker of the National Assembly v Karume [1992] KECA 42 (KLR) held that:- "In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed." In the foregoing, the claimant submitted that this Court should down its tools for want of Jurisdiction and subsequently dismiss the Respondent's Counter-claim for rent with costs.
48. Without prejudice to the foregoing and should this Honourable Court find that it is vested with the requisite Jurisdiction to deal with the Counter-claim, the claimant submits that this claim is unmerited because it was the Claimant's legitimate expectation that upon retirement, the Respondent would remit to her the pension dues that had already become due to enable her to move out of House M04 and source for alternative housing. That noting that the Claimant had no other source of income, it was thus required of the Respondent to remit the pension dues to the Claimant and thereafter seek for her to move out. This would also signify the end of the contractual relationship between the Claimant, the employee and her employer, the Respondent.. However, the Respondent chose to refuse and or ignore to remit the claimant's dues upon retirement, hence necessitating her to stay in the house until the dues are paid given that she had no financial support to move out. It is without a doubt that the Respondent wishes to benefit from its own wrong doings by punishing the Claimant who has not been at fault since the beginning. That it is also clear that the Respondent has approached this Court with unclean hands as it seeks for payment of rent, which is fully attributed to their own wrong doings. To that end, the claimant implored this Honourable Court to dismiss this Claim as the same goes against the rules of Justice and equity, which this Court should aim to advance and safeguard. In respect to the set-off, the pension dues are not assignable. This is in reliance to Section 13 of the Pensions Act, CAP 189 Laws of Kenya, which states that: "A pension, gratuity or other allowance granted under this Act shall not be assignable or transferable except for the purposes of satisfying-(a) a debt due to the Government; or(b) an order of any court for the payment of periodical sums of money towards the maintenance of the wife, or former wife, or minor child, of the officer to whom the pension, gratuity or other allowance has been granted, and shall not be liable to be attached, sequestered or levied upon



for or in respect of any debt or claim whatever except a debt due to the Government.". Noting that there is no debt that the Claimant owes the Government, that this Honourable Court should decline the Respondent's invite of setting off the alleged and irregular debt against the Claimant's debt and dismiss the said prayer, as the same is vexatious and bad in law. That the Respondent's counter-claim and set-off lacks in merit and the same should be dismissed forthwith.

### **Decision.**

49. The court finds that the claim for the unpaid rent arose from the employee-employee relationship whereby, as a benefit of employment, the claimant occupied KEMRI HOUSE NO. M04, owned by the 1<sup>st</sup> respondent. On retirement on 1<sup>st</sup> April 2018 the claimant was issued notice of 60 days as per the housing policy of the 1<sup>st</sup> respondent but despite notice, she did not vacate the house on basis of non-payment of the pension. The court already held that the benefit of housing was under section 31 of the *Employment Act* and ceased 60 days post retirement as per the housing policy the 1<sup>st</sup> respondent. Indeed it ought to have ceased on 1<sup>st</sup> April 2018 hence the 60 days was a grace period extended by employer as per the policy. The court noted that dispute resolution of arbitration was waived by the claimant when it filed response to the counterclaim applying Section 6 of the arbitration reads- '6. Stay of legal proceedings (1) A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds— (a) that the arbitration agreement is null and void, inoperative or incapable of being performed; or (b) that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration. (2) Proceedings before the court shall not be continued after an application under subsection (1) has been made and the matter remains undetermined.'" There was no application for stay of proceedings and hence the claimant waived the right to plead the arbitration. I was persuaded and guided by decisions in *Stella Wambui Muhoro v Kenya Meat Commission* [2020] KEELRC 887 (KLR), where the Court held that the claimant is duty-bound to pay the rent from the date of separation. The Court stated: "The claimants' right of housing having ceased with the termination of her employment, she cannot demand to continue being housed by the respondent. I thus find that the claimant is duty bound to pay the rent demanded by the respondent from the date of separation." An attempt to stay execution of this decision was rejected by the Court of Appeal *Stella Wambui Muhoro v Kenya Meat Commission* [2020] KECA 127 (KLR) on grounds that the intended appeal was not arguable and that it would not be rendered nugatory. The Court held: "Taking into account the parameters of our discretion in the application before us as well as being careful not to make final determination on the merit of the intended appeal, we are not convinced that the intended appeal is arguable given that the applicant's entitlement to staff housing was subject to employment which according to the applicant's admission, terminated on 12th October 2014. What's more, we are not satisfied that the applicant has demonstrated that the intended appeal would be rendered nugatory unless the orders sought are granted. We say so because despite being terminated in 2014, it appears that the applicant still continues to be a tenant on the suit premises." The dispute for rent arose from employment contract hence the court has original jurisdiction. There was no dispute on payable rent amount being Kshs. 25000 per month. That was the price paid by other employees for occupation of the houses, vide deduction of salary. The claimant, having retired, could not have their salary deducted. The rent thus accumulated. The counter claim is merited and allowed.



## **In conclusion**

50. The outstanding prayers for general damages and compensation under the amended claim dated 20<sup>th</sup> March 2023 are dismissed for lack of merit. The counterclaim is allowed. Judgment is entered for the respondent in the counterclaim against the claimant as follows –
- a. An order directing that the Claimant vacates House No. M07 situated within the 1<sup>a</sup> Respondent's Staff Quarters immediately and unconditionally and to also surrender the keys to the 1<sup>st</sup> Respondent's Housing Officer.
  - b. An order directing the Claimant to pay the 1<sup>st</sup> Respondent the sum of Kshs. 1,775,000/=, being the rent outstanding as at April, 2024, and a further sum of Kshs. 25,000/= per month from the said date until the date she vacates the subject property.
  - c. Interest from date of judgment at court rates until payment in full.
  - d. On costs- the court took into account that the parties settlement by consent some part of the claim and fact that the claimant was now retired. To temper justice with mercy the court ordered each party to bear own costs in the claim and the counterclaim.
51. 30 days of execution is granted.
52. It is so ordered.

**DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 30<sup>TH</sup> DAY OF JULY, 2025.**

**J.W. KELI,**

**JUDGE.**

In the presence of:

Court Assistant: Otieno

Claimant: Mugambi h/b for Nungo

Respondent: Opolo h/b Muge

