



Sapayia & another (Both suing as personal representatives of the Estate of Daniel Munei Sapayia - Deceased) v Registered Trustees of Africa Inland Church Kenya & another (Cause E952 of 2021) [2023] KEELRC 875 (KLR) (14 April 2023) (Judgment)

Neutral citation: [2023] KEELRC 875 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E952 OF 2021**

**SC RUTTO, J
APRIL 14, 2023**

BETWEEN

**MARY SHAMAMA SAPAYIA 1ST CLAIMANT
NICHOLAS MAPENAE SAPAYIA 2ND CLAIMANT
BOTH SUING AS PERSONAL REPRESENTATIVES OF THE ESTATE OF
DANIEL MUNEI SAPAYIA - DECEASED**

AND

**THE REGISTERED TRUSTEES OF AFRICA INLAND CHURCH
KENYA 1ST RESPONDENT
THE BOARD OF MANAGEMENT, AIC KAJIADO CHILD CARE
CENTRE 2ND RESPONDENT**

JUDGMENT

1. The claimants have brought the instant claim in their capacity as personal representatives of the estate of Daniel Munei Sapayia (deceased). The claimants aver that the deceased was employed by the 2nd respondent on or about January 1, 1981 as a superintendent and later promoted to the position of Project Director. It is averred that the deceased worked diligently for the respondents until sometimes in July, 2020 when they started delaying his salary and harassing him despite his advanced age and the hard economic times caused by the Covid 19 global pandemic. That due to the said harsh conditions which the claimants aver amounted to constructive dismissal, the deceased tendered his resignation on November 9, 2020. It is against this background that the claimants seek against the respondents the following reliefs: -

- a. A declaration that the respondent constructively dismissed Daniel Sapayia-deceased from employment;



- b. A declaration that the respondents failed to pay Daniel Sapayia his terminal dues;
 - c. A declaration that the respondents failed to pay Daniel Sapayia his rightful pension;
 - d. Payment of all lawful terminal dues owed to the claimant (sic) as set out in paragraph 17 of the Memorandum of Claim at a sum of Kshs 19,574,077/=.
 - e. Costs of the suit.
 - f. Interest at court rates 12% pa from October, 2020.
 - g. Any other relief the Court may deem fit to grant.
2. The 1st respondent opposed the claim through its Statement of Defence dated January 20, 2022, through which it averred that the 2nd respondent is independently run by its own Board of Management and is in charge of its own decisions and operations. That the claimants have not demonstrated any way in which the 1st respondent influences, guides or interfered with the management of the 2nd respondent. That further, it is not involved with the employment of staff at the Centre. That the deceased was employed on terms offered by the 2nd respondent devoid of the input of the 1st respondent. Consequently, the 1st respondent has asked the Court to dismiss the suit with costs.
3. On its part, the 2nd respondent filed a Statement of Defence and Counterclaim. It averred that the deceased was first employed as an orthopedic technician on or around 1981. That it was around 1996 that he was employed as a superintendent and/or project Director of the 2nd respondent until his exit in December, 2020. That from August, 2020, all its employees including the deceased who appended his assent to the attendant reduction, took a salary reduction of 20% in recognition of the hard economic times occasioned by the Covid 19 pandemic. That the 2nd respondent unearthed irregular misappropriation of the center's funds by the deceased to the tune of Kshs 828,510.00 hence his salary from September, to December, 2020, was withheld to recover the monies he had illegally misappropriated. That after the deceased's suspension on October 30, 2020, he issued a notice of retirement on November 9, 2020 hence he did not resign but elected to voluntarily retire from the organization. To this end, the 2nd respondent has asked the Court to dismiss the suit and enter judgment against the claimants as follows: -
- a. A declaration that Daniel Munei Sapayia voluntarily retired from AIC Kajiado Child Care Centre.
 - b. A declaration that Daniel Munei Sapayia was paid his full benefits from his service to the institution.
 - c. A declaration that Daniel Munei Sapayia admitted to the loss of funds and organizational assets linked to him.
 - d. General damages arising from filing this suit.
 - e. Costs of the suit.
4. The claimants filed a Reply to the 2nd respondent's Statement of Defence and Defence to Counterclaim. Putting the 2nd respondent to strict proof, the claimants denied the averments contained in the Statement of Defence and reiterated the averments in the Claim. They averred that the allegation that the deceased misappropriated funds was not based on any audit reports. That the deceased only admitted liability due to the harassment he was being subjected to. The claimants further averred that



the counterclaim does not disclose any cause of action hence prayed that the same be dismissed with costs.

5. The matter proceeded for hearing on October 27, 2022, with each side calling oral evidence.

Claimant's case

6. The 1st claimant testified on her own behalf and on behalf of the 2nd claimant. At the outset, she adopted her witness statement to constitute her evidence in chief. She proceeded to produce the bundle of documents filed together with the claim as exhibits before Court.
7. It was her evidence that the 2nd respondent failed to pay the deceased his salary from October, 2020 until January, 2021 hence he had no alternative than to elect early retirement due to harsh working conditions. That the 2nd respondent accepted the deceased's resignation vide a letter dated December 19, 2020 with effect from 21st December, 2020. That due to his diligence, the deceased continued working for the 2nd respondent until his last day being 31st January, 2021 when he officially left its employment. That despite his resignation citing difficult working conditions, the 2nd respondent failed to pay the deceased salary arrears for the months of October, 2020 until January, 2021.
8. That further, upon his retirement, the deceased was not paid his retirement benefits as contributed by both him and the 2nd respondent to various pension schemes. That he also discovered that the 2nd respondent had failed to remit all his benefits to the right scheme despite deducting the same from his salary. That the 2nd respondent also failed to pay the deceased any or the pension benefits for the years 1989 and 2006. That unfortunately, the deceased passed away on April 26, 2021 before claiming his terminal benefits.
9. It was her evidence that the 2nd respondent's actions amounted to constructive dismissal which offends the rule of law, natural justice and the best labour practices.

Respondents' case

10. The respondents called oral evidence through Mr. Duncan Mutiru Sakampa who testified as RW1. He identified himself as the Director of the 2nd respondent and Administrative Secretary of the 1st respondent. Similarly, he adopted his witness statements and the bundle of documents filed on behalf of both respondents to constitute his evidence in chief.
11. It was RW1's evidence that the Centre largely depends on donor funding to sustain its recurrent expenditure and its operations at large. That upon the onset of the Covid-19 pandemic in 2020, the Centre faced a substantial financial challenge in meeting its obligations due to the adverse impact of the pandemic on the donors' financial capacity.
12. That in August 2020, the staff of the Centre, inclusive of the deceased, accepted a 20% salary reduction in recognition of the biting economic hardship.
13. That in or around October 2020, the Board of the 2nd respondent received and adopted audit reports of wanton financial mismanagement, misappropriation of funds and fraud at the Centre. That the Centre's Board noted that the reports pointed to the deceased's involvement in the financial impropriety.
14. That upon being directed to send the Finance Manager on administrative leave, the deceased frustrated the Board's decision and continued to work with the censured Finance Manager.



15. That the 2nd respondent's Board also recognised that the deceased continued to transact business with a view to defrauding the Centre and diverting donor funds meant for the Center's programmes. That the deceased also violated accepted procurement rules and guidelines by issuing tenders to relatives.
16. That subsequently, the Board resolved to suspend the deceased hence he was served with a notice of suspension on October 30, 2020.
17. That the deceased thereafter issued a Notice of Retirement on November 9, 2020 which was effective from January 1, 2021 to the Board. That the Board accepted his request for early retirement through its letter dated December 29, 2020. That even after issuing the notice of retirement, the deceased thereafter proceeded to write emails to various donors disparaging the board members, mischaracterizing the nature of his exit and confirming the misuse of donor funds.
18. That the officials of the Centre reviewed the audit reports and subsequently collated the amounts owed to it by the deceased, as being Kshs 828,510/=. That with the Centre withholding his salary from the months of September to December 2020, and taking into account a salary advance issued to him, the deceased was required to pay a balance of Kshs 365,316/=.
19. That on November 13, 2020, the deceased wrote to the Board apologizing for the loss of funds and organizational assets directly linked to him through the audit reports.
20. That on November 30, 2020, a show cause letter was issued to the deceased asking him to explain why disciplinary action should not be taken against him for various acts of misconduct including misdirection of donor funds and loss of the Centre's assets.
21. That in or around December 2020, the deceased subsequently activated a dispute resolution mechanism to try to remedy the situation and subsequently engaged with officials of the claimant in the Counterclaim.
22. That acknowledging the deceased's advanced age and period of service, the officials of the Centre deliberated with him on the funds owed to the Centre.
23. That adding to the withholding of his salary from September to December 2020, and a salary advance credited to him, the deceased deposited money to the tune of Kshs 365,316/= being the balance of the money owed to the Centre.
24. That from the early stages of the deceased's employment up to the year 2006, the Centre only remitted the statutorily required pension funds to the National Social Security Fund (NSSF) of not only Mr. Sapayia but all employees of the Centre. That it is only in or around the year 2007, that the Centre started an external provident fund.
25. That upon the deceased's registration with NSSF on June 1, 1988, the Centre duly remitted all his NSSF benefits.
26. That from the year 2006, the Centre contracted external organizations to run its provident fund and thereby receive pension contributions from its employees and itself, as an added benefit to its employees. That save for the 2 months in which the deceased was suspended after its communication on October 30, 2020, the Centre comprehensively processed the benefits owed to him.
27. That in or around 2018, the Centre transferred its provident fund from Liberty Life Assurance to Britam Life Assurance Company (Kenya) Limited at which point the deceased chose to unilaterally collect a refund and claim his retirement benefits while the Centre was transferring its scheme.



Submissions

28. It was submitted on behalf of the claimants that the 2nd respondent constructively dismissed the deceased. That the action of suspending the deceased in itself is a pointer and ingredient of intention to unfairly and constructively terminate him. That the only reasonable conclusion is that the 2nd respondent's intention was to put the deceased in a situation where he could not wait but retire or resign from work. That it is after submission of the retirement notice that the 2nd respondent decided to sanitize the process by conducting a disciplinary process. In support of the claimants' submissions, the cases of *Fredrick Saundu Amolo vs Principal Namanga Mixed Secondary School & 2 others* (2014) eKLR, *Kenneth Kimani Mburu vs Kibe Muigai Holdings Limited* (2014) eKLR and *Coca Cola East & Central Africa Limited vs Maria Kagai Ligaga* (2015) eKLR were cited.
29. It was further submitted on behalf of the claimants that the 2nd respondent did not pay all the pension dues for the deceased since his employment. That the 2nd respondent kept skipping remission of pension dues for the deceased. That further, the 2nd respondent did not pay any form of pensions for the deceased since his employment in 1981 to 1988. Placing reliance on the case of *Board of Trustees, Kenya Broadcasting Corporation (KBC) Staff Retirement Benefits Scheme (Suing on Behalf of the Scheme) vs Kenya Broadcasting Corporation*, the Court was urged to award interest on the unpaid and unremitted pension to the deceased.
30. On the part of the respondents, it was submitted that the evidence tendered by the 1st claimant is hearsay and inadmissible. That this is unlike RW2 who sat in the board meetings where the audit process found the deceased responsible for misappropriation. That the entire claim should fall on that particular point of hearsay.
31. That it was ironic that the deceased who was a senior executive serving as director would state that his salary was being delayed and yet he was part of both the Board and management who would be tasked with sourcing for funds.
32. It was the respondents' further submission that the deceased's own apology letter proves the existence of the audit that was carried out. That the claimant's assertions that the audit reports do not exist falls by the wayside. That the claimants' assertions that the deceased had not seen the audit report and was also forced to sign the apology letter are novel concepts that are not pleaded by the claimants and are not supported by evidence.
33. It was further submitted that the 2nd respondent fully remitted all pensionable dues owed to the deceased. That the claimants have not attached any document refuting the clear contents of the Britam statements, withdrawal notification form and withdrawal certificate. That no demand letter, internal board memo or any of the documents was annexed showing the deceased had complained that the Center had not remitted his dues to the pension scheme. That further, the claimants had not challenged the probative value of the P9 reports as evidence. That the claim that the deceased did not receive his pension or that the same was not remitted is an invention of the claimants. That further, the claimants did not attach the deceased's pay slips or his NSSF statement. In support of its submissions, the 2nd respondent placed reliance on the cases of *Abednego Ndolo Mulinge vs Kenya Institute of Management* (2022) eKLR and *Mwende Nzabu vs Trustees and Office Bearers of Anglican Church of Kenya* (2018) eKLR.

Analysis and Determination

34. In view of the claim before Court, the evidence on record and the rival submissions, I find the issues falling for the Court's determination as being: -



- i. Whether the deceased was constructively dismissed by the 2nd respondent.
- ii. Whether the 2nd respondent paid all the pension dues to the deceased.
- iii. What reliefs if any, are available to the claimants?

Constructive dismissal?

35. The term constructive dismissal is defined by the *Black's Law Dictionary* (10th Edition) as follows: -

“An employer’s creation of working conditions that leave a particular employee or group of employees little or no choice but to resign, as by fundamentally changing the working conditions or terms of employment; an employer’s course of action that, being detrimental to an employee, leaves the employee almost no option but to quit.”

36. It is common ground that the deceased retired on November 9, 2020 and that his salary was withheld by the 2nd respondent from the month of September upto December, 2020.

37. I will reproduce the deceased’s notice of retirement thus: -

“To the Board of Management

AIC Kajiado Child Care Center

Box 4116-01100,

Kajiado-Kenya,

Dear Sir

RE: Notice Of Retirement

The above subject matter refers.

Greetings in the name of Jesus Christ our Lord. I would humbly wish to submit to you my notice of retirement effective from 1st of January, 2021. Thus the period in between serves as notice period. During the notice period, I will be available for any help that the Board might need to facilitate smooth transition.

Kindly arrange to avail my retirement benefits for the 39 years of service from 1st January 1981 until December 31st 2020. Kindly do also issue me a formal acceptance of this notice of retirement.

I remain very grateful for the opportunity the organization accorded me to serve in the office of the director. I wish you well with (sic) future endeavours.

Yours sincerely,

Daniel Ole Sapayia”

38. The deceased’s request for early retirement was accepted on December 19, 2020 by RW1, the 2nd respondent’s Acting Director as follows: -

“We are pleased to acknowledge receipt of your notice retirement dated November 9, 2020. Pursuant to your request the Board of Management (BOM) of the Child Care Centre in their general meeting of December 18, 2020 accepted your notice of retirement w.e.f December 31, 2020.



We thank you for the many years of service to the work of the Child Care Center since 1981.
We are indeed very grateful to you.

The Board of Management wishes you a blessed retirement.

Your sincerely

Duncan Sakimpa”

39. The claimants aver that the deceased’s early retirement was involuntary and have proceeded to cite the following incidences, which they term as amounting to constructive dismissal: -
- a. Failure to pay the deceased his salary for October, November and December 2020;
 - b. Failure to pay the deceased his salary for January, 2021;
 - c. Subjecting the deceased to harsh working conditions without a salary for over four months;
 - d. Failing to be mindful of the employee’s means of survival during Covid 19 period by failing to pay his salary;
 - e. Making it extremely difficult for the deceased to continue working leading to his retirement; and
 - f. Failing to pay the deceased his terminal dues.
40. On the other hand, the respondents deny the assertion of constructive dismissal and aver that the deceased’s salary was withheld from September to December, 2020 after the Board unearthed misappropriation of funds of the 2nd respondent.
41. The question that must now be resolved is whether given the circumstances presenting herein, the deceased was constructively dismissed from employment.
42. The Court of Appeal in the case of *Coca Cola East & Central Africa Limited vs Maria Kagai Lugaga* [2015] eKLR cited with approval the case of *Western Excavating (ECC) Ltd. -v- Sharp* [1978] ICR 222 or [1978] QB 761, in which Lord Denning MR expressed himself as follows: -
- “If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer’s conduct.
- He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or alternatively, he may give notice and say that he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once (emphasis ours). (See also Nottingham County Council -v- Meikle (2005) ICR 1).”
43. The Learned Judges of the Court of Appeal thus went ahead and pronounced the following guiding principles in respect of claims of constructive dismissal, thus:-
- a. What are the fundamental or essential terms of the contract of employment?
 - b. Is there a repudiatory breach of the fundamental terms of the contract through conduct of the employer?



- c. The conduct of the employer must be a fundamental or significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract.
 - d. An objective test is to be applied in evaluating the employer's conduct.
 - e. There must be a causal link between the employer's conduct and the reason for employee terminating the contract i.e causation must be proved.
 - f. An employee may leave with or without notice so long as the employer's conduct is the effective reason for termination.
 - g. The employee must not have accepted, waived, acquiesced or conducted himself to be estopped from asserting repudiatory breach; the employee must within a reasonable time terminate the employment relationship pursuant to the breach.
44. The Court further determined that the burden of proof lies with the employee.
45. From the principles established in the Coca Cola case(supra), and in light of the definition of the term constructive dismissal, it is apparent that a claimant ought to demonstrate that there is a fundamental breach of the employment contract in order to sustain a claim for constructive dismissal. This could be a breach of either an express or implied contractual term but, in any event, must be sufficiently serious so as to justify termination of the employment contract.
46. Such a fundamental breach can either be demonstrated by a single incident or a continuing pattern of behaviour which might be serious enough to entitle the employee to consider himself or herself dismissed from employment.
47. The onus is on the employee to demonstrate that the actions of the employer resulted in his or her resignation. Some of the instances of contractual breach may include; reduction or failure to pay salary; withdrawal of a contractual benefit; demotion or reduction in rank; where an employer creates and/or perpetuates a hostile or toxic work environment; unreasonable altering of an employee's reporting structure, job description, hours of work, or working conditions; or failing to provide an employee with adequate support to do their job.
48. In the instant case, it is instructive to note that the deceased did not state the reasons behind his early retirement. The letter was very cordial and he thanked the 2nd respondent for the years of service and gave his best regards. He even offered to serve during the notice period. He did not cite the unpaid salary as being the reason behind his early retirement. If indeed, the reason for the deceased's early retirement was the salary reduction, then it is rather odd that he did not mention the same in his letter seeing that by the time he tendered his notice of early retirement, the 2nd respondent had already withheld his salary for close to two months.
49. According to the holding in the *Coca Cola* case (*supra*),
- “There must be a causal link between the employer's conduct and the reason for employee terminating the contract i.e causation must be proved.”
50. In this case, the deceased did not establish causation by drawing a nexus between the 2nd respondent actions and his early retirement.



51. With regards to the 2nd respondent action of withholding the deceased's salary, for the month of September upto December, 2020, the 2nd respondent attributed this to the deceased's alleged misappropriation of funds belonging to the Centre.
52. On record, is a letter dated November 13, 2020 through which the deceased tendered his written apology for the loss of funds. The letter is couched as follows:-

“RE: Apology Letter To The Bom

Greetings in the name of Jesus Christ our Lord. I would like to sincerely appreciate the opportunity granted to me by the Board of Management to serve for 39 years. In this period, I have witnessed thousands of lives being transformed for better and this has been truly fulfilling for me.

I apologize for the fund loss that was directly linked to me while I was serving as the Director cum Accounting Officer for AIC Kajiado Child Care Centre.

This also includes mistakes of loss of other funds as unearthed by the investigative audit report from Mazars Certified Public Accountants Kenya by CBM one of our main donors and the investigation by the BOM finance committee as well as loss of organization's assets that have happened in the course of my service.

This is very sad and regrettable and I therefore very sincerely apologize for that.

Yours truly

Daniel Ole Sapayia”

53. In addition to the written apology, the deceased deposited Kshs 364,000.00 into the 2nd respondent's Bank account on January 26, 2021.
54. The claimants submitted without prejudice that the audit undertaken by CBM auditors revealed that there was no loss of funds within the 2nd respondent Centre. That with regards to the loss of Kshs 828,510/=, allegedly misappropriated by the deceased, the 2nd respondent had been funded to sink a borehole at its premises which was done but the borehole dried up within 3 months. That subsequently, the deceased was allowed to use piping and other materials to supply water to the community within his village. That the deceased was then accused of stealing the funds and he had no option but to apologize. It was further submitted that the deceased was forced to write the apology letter before the 2nd respondent could accept his retirement notice and so that he could leave honourably.
55. It is noteworthy that the claimants did not plead these issues in the Claim and only brought up the same in their submissions. It is trite that submissions are not evidence. Such was the determination by the Court of Appeal in *Daniel Toroitich Arap Moi vs Mwangi Stephen Muriithi & another* [2014] eKLR where it was held that: -

“We have already found that the 1st respondent failed to discharge his burden of proof of the existence of facts claimed of the companies, what they owned and whether property sales indeed took place, followed by transfers. So what we conclude is that the learned trial judge simply lifted the figure of sh.80,161,720/= from the 1st respondent's submissions and awarded it against the appellant. This was wholly in error. Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and



we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented." Underlined for emphasis

56. Back to the loss of funds, the claimants did not tell the Court, why the deceased paid Kshs 364,000.00 into the 2nd respondent's bank account. It is also noteworthy that he deposited the money and tendered the written apology after his notice of early retirement. By this time, he had nothing to lose as he had already retired. There is therefore no plausible reason why he would pay the 2nd respondent money if at all he was blameless for the loss of its money.
57. Quite the contrary, it is notable that by the time the deceased deposited the sum of Kshs 364,000.00 into the 2nd respondent's bank account, his early retirement had been accepted close to a month before then. Hence the question, what did he have to lose by not depositing the money? In light of the foregoing, I am led to conclude that by the deceased depositing the money into the 2nd respondent's bank account, he was in essence accepting responsibility for the loss of the money allegedly misappropriated.
58. Therefore, in as much as the claimants aver that the 2nd respondent's actions of withholding the deceased's salary for about three months was unlawful, his payment of the money and his letter of apology indicate otherwise.
59. It is also worth noting that the deceased opted to proceed on early retirement during his suspension on account of the alleged misappropriation of funds. On this issue, I wish to echo the sentiments expressed by the Court in the case *Stella W. Muraguri vs Edward Kamau Muriu & 4 others* Cause 2027 of 2015, thus: -
- “44. To my mind, not every involuntary resignation amounts to constructive dismissal. The threshold for constructive dismissal is achieved where the involuntary resignation has a direct causal link with the employer's conduct, which may reasonably be described as intolerable. It cannot be said to be constructive dismissal, when an employee resigns to get out of a tight spot.” Underlined for emphasis
60. The total sum of my consideration is that the claimants have not proved on a balance of probabilities that the deceased was constructively dismissed from employment.

Pension dues?

61. The claimants aver that the deceased was not paid his retirement benefits despite the same being deducted by the 2nd respondent. In its defense, the 2nd respondent stated that prior to 2007, it did not have any private pension scheme. Indeed, there is no evidence of deductions from the deceased's salary with regards to any pension scheme prior to 2007. Further, the record bears that the deceased signed the individual pension plan in 2007 and his statements with regards to his contributions indicate that he joined the pension scheme with effect from 1st January, 2007.
62. With regards to the claim that the 2nd respondent made deductions from the deceased's salary and failed to remit the same, it is notable that the 2nd respondent transferred the pension scheme from Liberty to Britam around 2017 and the deceased claimed his benefits at a 100%. If indeed, the 2nd respondent had failed to make full remittances as appropriate, then the deceased would have noticed as much and he would have claimed any non-remittance.



63. The claimants further exhibited the deceased's statement from Liberty which indicates "0" remittances in some months. Be that as it may, it is evident that where remittances read "0", the subsequent months doubles up or triples the remittances. In this regard, I am led to conclude that in some months, the remittances were paid in arrears. I will sample a few, in the month of April, 2013, the balance reads "0" however in the month of June, 2013, the remittance is Kshs 12,296/= which is double the amount of the monthly remittance. The same is replicated in the month of October, 2013 and November, 2013, January, 2014 and February, 2014.
64. Further to the foregoing, the 2nd respondent exhibited the deceased's P9 form which indicates that it made full remittances with regards to his pension. This discounts the claimants' assertions that the deceased monthly pension remittances were not consistent.
65. In respect of the NSSF remittances, the 2nd respondent has admitted that it only started making contributions from 1987 when the deceased was duly registered with the Fund. Therefore, from 1981 upto 1987, there were no remittances in his favour. In this regard, the 2nd respondent is required to make the remittances in favour of the deceased from 1981 to 1987 to the NSSF.

Orders

66. The upshot of the foregoing is that the claim partially succeeds and the 2nd respondent is ordered to make the NSSF remittances in favour of the deceased from 1981 to 1987 to the NSSF. The rest of the claims are dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14TH DAY OF APRIL 2023.

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STELLA RUTTO

JUDGE

Appearance:

For the Claimants Ms. Kyalo

For the Respondents Mr. Cheptumo

Court assistant Abdimalik Hussein

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE

