



**Local Authorities Provident Fund Board v County Government of Narok & another (Cause E008 of 2022) [2023] KEELRC 1977 (KLR) (31 July 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1977 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
CAUSE E008 OF 2022  
DN NDERITU, J  
JULY 31, 2023**

**BETWEEN**

**THE LOCAL AUTHORITIES PROVIDENT FUND BOARD ..... CLAIMANT**

**AND**

**THE COUNTY GOVERNMENT OF NAROK ..... 1<sup>ST</sup> RESPONDENT**

**THE COUNTY EXECUTIVE COMMITTEE MEMBER FINANCE COUNTY  
GOVERNMENT OF NAROK ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

**I. Introduction**

1. Vide a statement of claim dated March 4, 2022 drawn by Sheikh & Co Advocates the Claimants commenced this cause seeking the following orders against the Respondents –
  - a. An order compelling the Respondents to remit the outstanding statutory contributions deducted from its employees to the Claimant Lapfund, amounting to Kes 1,012,296,749.05 (Kenya Shillings One Billion, Twelve Million, Two Hundred Ninety-Six Thousand, Seven Hundred Forty-Nine Shillings, Five Cents) as at February 14, 2022.
  - b. An order compelling the Respondents to remit the future statutory contributions deducted from its employees to the Claimant Lapfund as prescribed by Section 8(3) of the *Local Authorities Provident Fund Act*, Chapter 272 Laws of Kenya.
  - c. Costs of the suit
  - d. Interest on (a), (b) and (c) above at Court Rates from the date of judgment until payment in full.
  - e. Any further relief that the Court deems fit to grant.



2. On May 20, 2022 the Respondents appointed Kemboy Law Advocates to act for them in this matter and on May 23, 2022 the said Advocates filed a notice of preliminary objection (PO) to the cause on the following grounds –

Take Notice that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents herein shall at the hearing of the Claimant's Statement of Claim dated 4<sup>th</sup> March, 2022 raise the following points of law as preliminary objections to be heard and determined on priority basis.

1. That this Honourable Court lacks the requisite jurisdiction to entertain the entire suit either as drawn or at all in view of Section 12 of the *Employment and Labour Relations Court Act*, Chapter 234B of the Laws of Kenya.
2. That this entire suit is an affront to the efficient use of this Honourable Court's precious judicial and administrative recourses and further is otherwise an abuse of this Court's process.

In the event, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents shall urge the Honourable Court to dismiss with costs this entire suit in limine.

3. On 6<sup>th</sup> June, 2022 the court directed that the PO be heard first and that the same be canvassed by way of written submissions. Counsel for the Respondents filed his submissions on 21<sup>st</sup> July, 2022 while counsel for the Claimant filed on 21<sup>st</sup> October, 2022. This ruling is thus in regard to the PO as raised by the Respondents.
4. The Respondents have neither entered appearance nor filed a response to the claim.

#### **ii. Submissions By The Respondents' Counsel**

5. Counsel for the Respondents identifies the single substantive issue for determination by this court in the PO to be whether this court is vested with the requisite jurisdiction to hear and determine the dispute between the parties herein. This court agrees that that is the main issue for determination, and then there is the issue of costs of the PO and the main cause.
6. Counsel has cited the Supreme Court in *Re: The Matter of Interim Independent Electoral Commission* (2011) eKLR and *Samuel Kamau Macharia & Another V Kenya Commercial Bank Limited & 2 Others* (2012) eKLR in laying emphasis that unless a court is expressly endowed with the necessary and requisite constitutional or statutory jurisdiction to hear and determine a matter the proceedings before such a court are mere nullities and of no legal consequence, ab initio.
7. Counsel submitted that the relationship between the Claimant and the 1<sup>st</sup> Respondent is purely commercial and contractual and that there exists no employer-employee relationship between the two as to bring the dispute within the jurisdiction and purview of this court. Counsel argues that the dispute between the parties is in the nature of breach of contract in that the 1<sup>st</sup> Respondent is alleged to have failed to submit monies collected from its employees to the Claimant as required by the law.
8. Further, counsel has cited Section 12 of the *Employment and Labour Relations Court Act* (ELRC Act) insisting that the alleged dispute between the Claimant and the Respondents is not within the ambit of the issues and matters that this court can hear and determine. Counsel submits that the Claimant has no locus in bringing this matter to this court as the Claimant is neither an employee, an employer, a trade union, nor an employer organization. In this regard, counsel asks this court to align itself with the reasoning of the Supreme Court in *Albert Chaurembo Mumba & Others V Maurice Munyao &*



*Others* (2019) eKLR wherein the Supreme Court stated that the jurisdiction of this court is and should be restricted to the provisions of Section 12 of the ELRC Act.

9. Counsel has at length attacked the decision of Majanja J. in *Local Authorities Provident Fund Board (LAPFUND) V Kisii County Government* (2018) eKLR terming the same bad law that should not bind on this court. Counsel urges this court to be guided by the *Chaurembo* (*Supra*) decision from the Supreme Court and disregard the decision and reasoning of Majanja J. in the above cited case.
10. On the basis of the foregoing, counsel for the Respondents urges this court to find in favour of his submissions and strike out this cause for want of jurisdiction.

### III. Submissions By Claimant's Counsel

11. In response, counsel for the Claimant submits that this cause is properly before the court. It is submitted that the subject matter arises from an employer-employee relationship as the same is on retirement dues and benefits arising from employment contracts. Counsel insists that the words disputes relating to and arising from as used in the ELRC Act grant this court jurisdiction to hear and determine matters and issues in the nature of the prayers in this cause. Counsel further submits that work benefits, remittance of provident fund contributions, gratuity, pension, and such other related issues are recognized by the *Employment Act* as forming part of the contracts of employment and hence are employer-employee matters or matters related or connected thereto. Counsel submits that in case of a dispute over the foregoing issues this court has both constitutional and statutory mandate to hear and determine the same.
12. Counsel argues that this being a matter relating to and arising from employer-employee relationship this court is properly seized of the same and as such the PO by the Respondents is not proper. Counsel has heavily relied on the decision of Majanja J. in *Lapfund V Kisii County Government* (*Supra*) in laying emphasis that this matter is properly before this court. Counsel has also cited *Amos O. Chuchu & Others V Retirement Benefits Authority & 2 Others* (2015) eKLR and *Samuel Oduar Okeyo V Postal Corporation of Kenya Staff Pension Scheme* (2017) eKLR insisting that pension and gratuity are terms and conditions of employment or matters arising therefrom or connected therewith.
13. Counsel argues that there is no clause or provisions in the *Constitution* or statutes that oust the jurisdiction of this court over the subject matter and cited *Kirigiti Thatbi-Ini Mugumo Water Co. Ltd V Kiambu Water & Sewerage Co. Ltd* (2013) eKLR to buttress the argument that ouster clauses must be express and unambiguous.
14. On the basis of the foregoing, counsel for the Claimant submits that the PO by the Respondent is not properly taken and that the same be dismissed with costs.

### IV. Issues For Determination

15. There is only one main issue for this court to determine – Does this court possess the requisite mandate and jurisdiction to hear and determine this cause? Put in another way – Is this cause properly before this court? And then, if this cause is improperly before this court – What orders should issue? And finally – Who should meet the costs as a consequence of the orders issued?
16. As far as this court understands the applicable law and principles, a PO is a point or points of law that if successfully argued may dispose of a cause or an issue in controversy between parties. Such a PO may relate to any legal issues and the same may relate to the main cause or even an interlocutory application or proceedings. The PO may be raised on legal grounds such as jurisdiction of the court, legal capacity



of a party, res judicata, bar or estoppel by law, incurably defective pleadings, or any other such grounds based on the Constitution, statute law, or precedents.

17. A most distinguishing feature of a PO from any other objection is that it should be based on law not on contested facts which may require a court to interrogate the pleadings and or call for evidence. The issue(s) should be so readily visible, prima facie, that the trial court should not require a legal microscope, a telescope, or a binocular to see, identify, and isolate the legal issues in contest in the PO. The PO becomes even clearer where the facts that would obscure the law are admitted and or agreed by and between the parties or where such facts are so bare and naked that the court can clearly and readily see through them – See *Mukbisa Biscuits Manufacturing Co. Ltd V East End Distributors Ltd* (1969) EA 696.
18. A court of law derives its jurisdiction either from the Constitution, a statute(s), or both, or in rare instances from judicial precedents – See Re: *In the matter of Interim Independent Electoral Commission* (2011) eKLR and *Samuel Kamau Macharia & Another V Kenya Commercial Bank Limited & Others* (2011) eKLR.
19. the Constitution in Article 162(2) gave the Parliament authority to pass a law creating a court to deal and handle Employment and Labour Relations matters. The Parliament passed the said law as such and this court (ELRC) is established under Section 3 of the ELRC Act with the jurisdiction of the court spelt out under Section 12 thereof in the following terms -

#### 12. Jurisdiction of the Court

- (1) The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including—
  - (a) disputes relating to or arising out of employment between an employer and an employee;
  - (b) disputes between an employer and a trade union;
  - (c) disputes between an employers' organization and a trade union's organization;
  - (d) disputes between trade unions;
  - (e) disputes between employer organizations;
  - (f) disputes between an employers' organization and a trade union;
  - (g) disputes between a trade union and a member thereof;
  - (h) disputes between an employer's organization or a federation and a member thereof;
  - (i) disputes concerning the registration and election of trade union officials; and
  - (j) disputes relating to the registration and enforcement of collective agreements.



- (2) An application, claim or complaint may be lodged with the Court by or against an employee, an employer, a trade union, an employer’s organization, a federation, the Registrar of Trade Unions, the Cabinet Secretary or any office established under any written law for such purpose.
- (3) In exercise of its jurisdiction under this Act, the Court shall have power to make any of the following orders—
  - (i) interim preservation orders including injunctions in cases of urgency;
  - (ii) a prohibitory order;
  - (iii) an order for specific performance;
  - (iv) a declaratory order;
  - (v) an award of compensation in any circumstances contemplated under this Act or any written law;
  - (vi) an award of damages in any circumstances contemplated under this Act or any written law;
  - (vii) an order for reinstatement of any employee within three years of dismissal, subject to such conditions as the Court thinks fit to impose under circumstances contemplated under any written law; or
  - (viii) any other appropriate relief as the Court may deem fit to grant.
- (4) In proceedings under this Act, the Court may, subject to the rules, make such orders as to costs as the Court considers just.
- (5) The Court shall have jurisdiction to hear and determine appeals arising from—
  - (a) decisions of the Registrar of Trade Unions; and
  - (b) decisions of any other local tribunal or commission as may be prescribed under any written law.

20. From the foregoing law, there would appear to be no contest or obscurity as to who can file a cause or action before this court and in regard to what subject matter(s). This year, this court is celebrating 11 years since its inception. In terms of settling and crystallization of the jurisprudence coming from this court and even from the Court of Appeal, there are many areas which are in contest. One such area is in regard to the jurisdiction of this court. The preamble to the ELRC Act states that it is “An Act of Parliament to establish the Employment and Labour Relations Court to hear and determine disputes relating to employment and labour relations and connected purposes”. [emphasis added]

21. Further, Section 12 of the *Act* as cited above states that the court has jurisdiction to hear and determine matters or disputes relating to employment and labour relations including those listed thereunder. Surprisingly, the jurisdiction of this court has in the recent past become one of the most contested issues. The jurisdiction of this court is so contested that several decisions coming from the Court of Appeal have not settled the issue. While most judges in ELRC have adopted a more liberal, purposive, and wider approach in interpreting what constitutes a matter falling under the jurisdiction of the court, the Court of Appeal has approached this issue in a rather limited and conservative view to the effect



- that parties who file matters before the court must demonstrate an employer-employee relationship between them and that the parties must fall in the categories listed under Section 12 of the *Act*. This approach by the Court of Appeal has to a large extent rendered the word including in Section 12 and the words relating to and for connected purposes in the preamble to the Act to be of no effect and or consequence and restricted the jurisdiction to what is specifically and expressly provided for in Section 12 of the *Act*.
22. For example, this court (Nderitu J) in Nakuru ELRC Petitions E016 of 2022 – *Kenneth Odongo V Nakuru County Public Service Board & Others* (2022) eKLR and Nakuru ELRC E17 of 2022 – *Stephen Michael Oduor Ogutu V The Speaker, Nakuru County & Others* (2022) eKLR made a ruling on the jurisdiction of this court and adopted the rather liberal and wider interpretation of the provisions in regard to the jurisdiction of this to include matters relating to and connected with employment and labour relations. However, on appeal the Court of Appeal in Civil Appeal E136 of 2022 as consolidated with E137 of 2022 held inter alia that the jurisdiction of this court (ELRC) is limited and restricted to the parties and matters specifically provided for under Section 12 of the Act alluded to above.
  23. For clarity, the Petitioners in the petitions alluded to above were seeking orders to stop the process of recruitment of chief officers in a process that the petitioners felt was tainted with irregularities, illegalities, and threats and violations of their constitutional rights. This court granted interim orders halting the recruitment process as I felt the process of recruitment, including shortlisting, interviewing, nomination, vetting, and appointment of employees are matters relating to and connected with creating an employer-employee relationship and that the matter was properly before this court. Further, this court held that notwithstanding that the petitioners were neither applicants nor interviewees for the said vacancies they had locus standi in filing the petitions under Articles 22 and 258 of the *Constitution* in pursuit of public interest.
  24. On appeal against the said interim orders the Court of Appeal in setting aside and striking out the petitions stated as follows –
 

“Having found that there was no employer/employee relationship between the Appellants and the 1<sup>st</sup> Respondent, nor an employment and labour relations dispute as contemplated by Article 162(2) of the *Constitution* or Section 12(1) of the E&LRC Act, it is our view that the court fell into error when it proceeded to assume and arrogate unto itself, a jurisdiction that it did not have”. Further, the Learned Judges of appeal stated as follows – “Further and with utmost respect to the learned judge, it is our view that he could not rely on the preamble to the E&LRC Act which provides that the court will hear and determine disputes relating to employment and labour relations and “for connected purposes”. He also erred by interpreting the word “including” in Section 12 of the E&LRC Act to arrogate himself a jurisdiction that he did not have to handle all and sundry matters before him as the preamble to and S. 12 thereof cannot be read in isolation to the other substantive sections of the E&LRC Act.”
  25. In arriving at the foregoing decision, the Court of Appeal followed the reasoning and holding in another recent decision from the same court in *National Social Security Fund Board of Trustees V Kenya Tea Growers Association & Others* (2023) eKLR wherein it was held that the jurisdiction of ELRC is restricted to the provisions of Section 12 of the *Act*.
  26. While the two foregoing decisions from the Court of Appeal may be subject of appeal to the Supreme Court the same are binding on this court. While the decision of Majanja J. in *LAPFUND V County Government of Kisii* (*Supra*) may be persuasive to this court, it is certainly not binding. In any event, the said decision which was delivered before the two decisions from the Court of Appeal cited above,



in my view, can no longer hold in view of the pronouncements from the Court of Appeal in the two decisions.

27. It is against the foregoing background that this court has to scale the issues for determination as raised in the PO.
28. The starting point is examining the parties in this cause and isolating the subject matter in dispute. The Claimant is a statutory body corporate body under the *Local Authorities Provident Fund Act* (Lapfund) with the authority to, inter alia, receive, invest, and manage savings from employees of local authorities (now county governments) for prompt payment to the members of retirement benefits once the members exit service. Under the fund both the employees and employers contribute to the fund at the rate of 12% and 15% of the member's monthly earnings respectively making a total of 27%.
29. The 1<sup>st</sup> Respondent is one such employer who is under statutory obligation to remit the monthly deductions to the Claimant while the 2<sup>nd</sup> Respondent is the officer of the 1<sup>st</sup> Respondent who is supposed to ensure that the monthly remittances are made. The Claimant alleges that while the deductions are made from the employees each month the Respondents have failed, refused, and or neglected to remit the same plus their contributions to the Claimant amounting to Kshs.1,012,296,749.05 as at the time of filing of the cause on 8<sup>th</sup> March, 2022. Due to non-remittance of the funds the Claimant alleges that it will not be in a position to pay retirement benefits to the employees of the 1<sup>st</sup> Respondent as and when they retire. Further, the Claimant alleges that the non-remittance is likely to cripple its operations. It is on this basis that the Claimant is seeking for the orders recited at the introductory part of this ruling.
30. As stated in another part of this ruling the Respondents have not filed a response to this claim. The court shall not speculate on the defence or reply to the claim that the Respondents may file. For now, the issue at hand is the merits or demerits of the PO.
31. There are some uncontested facts among them that - there exists no employer-employee relationship between the Claimant and the Respondents; the Claimant has not filed this cause for and on behalf of the alleged employees of the 1<sup>st</sup> Respondent; the Claimant is neither a trade union nor an employers organization and the same goes for the Respondent; and the employees whose deductions have been made from are not parties in this cause and there is no evidence this far that they are aware of this cause.
32. What I understand the Claimant to be saying in this cause and hence the subject matter of this cause is that the Respondents have breached their legal and statutory obligation in failing to remit the deductions made from the earnings of the employees and the percentage that the 1<sup>st</sup> Respondent is supposed to remit as an employer.
33. In my considered view, the subject matter as pleaded and filed is without the jurisdiction of this court. In a more direct language the Claimant is alleging that the Respondents have failed in their legal, statutory, and contractual obligation for not remitting the monies collected from the employees. Based on the jurisdictional boundaries delineated by the Court of Appeal in the two decisions cited above grounded on the jurisdiction of this court as outlined in Section 12 of the ELRC Act this court clearly has no jurisdiction to entertain this cause.
34. There is no employer-employee relationship between the Claimant and the Respondents. The employees whose monies have not been remitted are not party to this cause and certainly the Claimant has not filed this cause for and on behalf of the said employees as it has no legal capacity to do so. The Claimant is not a trade union for the said employees.



35. What the Claimant is seeking to do through this cause is to enforce a legal, statutory, and or contractual obligation between it and the 1<sup>st</sup> Respondent. That is not one of the matters that this court has jurisdiction over under the legal provisions cited above. While the Claimant may be having the locus standi to file the claim, in my opinion this court lacks the requisite legal jurisdiction to entertain the claim herein as presented and pleaded. In my view, this claim is for the filing in the High Court.
36. Having found that this court has no jurisdiction over the subject matter this cause shall be and is hereby struck out. To paraphrase Nyarangi J. in the celebrated case of *Owners of the Vessel "Lillian S" V Caltex (K) Limited* a court shall down its tools and take no more one step the moment it realizes that it has no jurisdiction over a matter before it. A court without jurisdiction labours in vain as any orders therefrom are mere nullities ab initio.
37. This cause is distinguishable from *Albert Chaurembo Mumba & Others V Maurice Munyao & Others (Supra)* and those others cited by counsel for the Claimant as the subject matter was different and the employees concerned were parties in those causes.
38. This court agrees with counsel for the Respondents that, prima facie, the issues raised in the PO are properly before this court as they are purely based on law – See *Mukhisa Biscuits Manufacturing Company Ltd (Supra)*.
39. This court is of the school of thought that once a court has no jurisdiction over a matter that court lacks jurisdiction in making an order for transfer of the cause to another court as that would amount to the court sanitizing an illegality. This court aligns itself with the decision of the Supreme Court in *Albert Chaurembo* case (*Supra*) and the Court of Appeal in *Phoenix of EA Assurance Company Limited V M. Thiga t/a Newspapers Service* (2019) eKLR to the effect that a court without jurisdiction cannot and should not make an order of transfer of the cause to another court as there is nothing before such a court capable of being transferred to the other court.

#### **V. Costs**

40. Ordinarily, costs follow event but the same is at the discretion of the court. However, this matter has been determined at an early stage through a PO hence greatly ameliorating the likelihood of the parties incurring further costs. In any event, the cause is not defended. In the circumstances, and in the interest of justice, this court orders each party to meet own costs.

#### **VI. Orders**

41. Flowing from the foregoing, in regard to the preliminary objection by the Respondents as contained in the notice dated 19<sup>th</sup> May, 2022 this court hereby issues orders that this cause is improperly before this court for lack of jurisdiction and the same is hereby struck out accordingly. Each party shall meet own costs.

**DATED, SIGNED, AND DELIVERED VIRTUALLY AT NAKURU THIS 31<sup>ST</sup> DAY OF JULY, 2023.**

.....  
**DAVID NDERITU**

**JUDGE**

