



Local Authorities Provident Fund Board v County Government of Migori & another (Cause E009 of 2021) [2023] KEELRC 1606 (KLR) (6 July 2023) (Ruling)

Neutral citation: [2023] KEELRC 1606 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E009 OF 2021
CN BAARI, J
JULY 6, 2023**

BETWEEN

LOCAL AUTHORITIES PROVIDENT FUND BOARD CLAIMANT

AND

COUNTY GOVERNMENT OF MIGORI 1ST RESPONDENT

**CHIEF FINANCE OFFICER, MIGORI COUNTY GOVERNMENT 2ND
RESPONDENT**

RULING

1. This ruling relates a Notice of Preliminary Objection dated 1st April, 2022, wherein, the Respondents seek the striking out of the Claimant's suit on the basis that it is incompetent, bad in law and an abuse of the court process for reason that the Court lacks jurisdiction to hear and determine the Claimant's claim.
2. The Respondents' contend that the subject matter in issue does not relate to or arise out of employment between an employer and an employee, but instead, ensues from a contractual or statutory obligation as between the Claimant and the Respondents.
3. In a replying affidavit sworn by David Koross on 30th August, 2022, the Claimant avers that the Respondents' objection is false and misleading on the premise that the Kshs. 1,006,098,350.09 is money collected by the 2nd Respondent from employees of the 1st Respondent, and which they have failed to remit to the Claimant since 13th April, 2013.
4. That by dint of Section 12 of the *Employment and Labour Relations Court Act*, the jurisdiction of this Court extends to matters relating to and concerning an employer/employee relationship.



5. It is the Claimant's assertion that the matter herein, is a matter relating to and arising out of the relationship between an employer and an employee as stipulated under Section 12(1)(a) of the *Employment and Labour Relations Court Act*.
6. The Claimant further avers that deductions from employees' salaries and contribution to the provident fund arise directly from an employer/employee relationship.
7. It is the Claimant's position that Section 19(1) of the *Employment Act*, provides for deductions from employees' salaries, which in itself is confirmation that this is an employment issue, and for which jurisdiction lies directly with this court.
8. Parties canvassed the objection by way of written submissions and which have been duly considered.

Analysis and Determination

9. I have carefully considered the Preliminary Objection, the reply by the Claimant and the submissions by both parties. The issue that crystalizes for determination is whether this Court is clothed with jurisdiction to hear and determine the Claimant's case.
10. The centrality of jurisdiction in matters before courts of law, was aptly encapsulated by Nyarangi J in *Owners of Motor Vessel Lilian "S" v Caltex Oil* [1989] eKLR in the following words:

“Jurisdiction is everything and without which, the Court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”
11. In *Samuel Kamau Macharia vs. KCB & 2 Others*, No. 2 of 2011 [2012] eKLR,, the Supreme Court opined: -

“A Court's jurisdiction flows from *the Constitution* or Legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law....”
12. Article 162(2) of *the Constitution* provides for the establishment of the Employment and Labour Relations Court as follows: -

“Parliament shall establish Courts with the status of the High Court to hear and determine disputes relating to:

 - (a) employment and labour relations;.....”
13. Pursuant to Article 162(3) of *the Constitution*, Parliament enacted the *Employment and Labour Relations Court Act*. Section 12(1) thereof, provides for the jurisdiction of the Court as follows:

“(1) The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of *the Constitution* and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including—

 - (a) disputes relating to or arising out of employment (emphasis mine) between an employer and an employee;



- (b) disputes between an employer and a trade union;
- (c) disputes between an employers' organisation and a trade union organisation;
- (d) disputes between trade unions;
- (e) disputes between employer organisations;
- (f) disputes between an employers' organisation and a trade union.....”

14. The Respondents' contention is that the Claimant is neither an employer nor an employee, and hence the relationship between it and themselves is not that of an employer and an employee, and hence the position that the Court is devoid of jurisdiction to entertain the Claimant's suit.
15. The Claimant is a pension scheme by which the 1st Respondent is to deduct and remit its employees pension contribution together with their contribution as the employer, to be administered/invested by the Claimant/scheme.
16. The Supreme Court in *Albert Chaurembo Mumba & 7 others (sued on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) v Maurice Munyao & 148 others (suing on their own behalf and on behalf of the Plaintiffs and other Members/Beneficiaries of the Kenya Ports Authority Pensions Scheme)* [2019] eKLR had this to say: -

“(139) The Law Dictionary defines a pension scheme as: A retirement plan offered by an employer. Funds come from both employee and employer. The employers' managers make sure the funds are in there upon retirement. They do this by investing in fixed income or equity securities. Miriam Webster Dictionary defines a pension scheme as: an arrangement made with an employer to pay money to an employee after retirement (140) The above comparative broad definitions leave no iota of doubt that at the core of a pension scheme is a relationship between an employer and an employee (emphasis mine). It is apparent in this case that the savings to the Scheme were from the deductions of proceeds of the employment relationship between the respondents and the Authority.”

17. The Claimant's claim is premised on Section 132 of the County Government Act, which provides that all members, officers and staff of a County Government shall subscribe to an existing pension scheme for officers and staff of local government.
18. Section 9 (1) of the Local Authority *Provident Fund Act*, states thus:

“A contribution required to be made under section 8(1) of this Act shall be deducted by the local authority from the salary of the contributor on each occasion on which his salary is paid and shall be paid into the Fund within such period as the Board may prescribe.”



19. Further Section 8(3) of the same Act, states: -

“Every local authority shall contribute to the Fund monthly, in addition to the sums deducted from its employees pursuant to Section 9 of this Act, a further sum equal to the total of such deductions.”

20. Section 19 (1) of the *employment Act* states thus in respect of deductions of wages:

“Notwithstanding section 17 (1), an employer may deduct from the wages of his employee”

(a) any amount due from the employee as a contribution to any provident fund or superannuation scheme or any other scheme approved by the Commissioner for Labour to which the employee has agreed to contribute;”

21. The issue in the suit is that the deductions envisaged under Sections 8 (3) and 9 (1) of the Local Authority *Provident Fund Act*, have not been remitted though deducted by the employer (Respondents) to the Claimant (the pension scheme).

22. The Court is in agreement that the Claimant is neither an employer nor an employee. I however also agree with the Supreme Court that indeed, at the core of a pension scheme is a relationship between an employer and an employee, and which leads me to the conclusion that the Claimant’s claim is a dispute arising out of employment between an employer and an employee.

23. In *Sarah Mang’oli v Kenya Medical Research Institute & Another* [2020] eKLR the court held that the claim of unremitted pension falls under breach of an employment contract and therefore the Employment Court is clothed with the requisite jurisdiction to hear the dispute.

24. Consequently, I find and hold that the claim herein is squarely and properly within the jurisdiction of this Court.

25. The Respondent’s Preliminary Objection is dismissed with costs.

26. Orders accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 6TH DAY OF JULY, 2023.

C. N. BAARI

JUDGE

Appearance:

Mr. Kimathi Present for the Claimant

Mr. Musembi h/b for Mr. Omiti for the Respondents

Christine Omolo- C/A

