



Kenya National Union of Nurses v Local Authorities Provident Fund Board & 4 others; Kiuluku & 8 others (Interested Parties) (Petition E005 of 2023) [2023] KEELRC 2278 (KLR) (29 September 2023) (Ruling)

Neutral citation: [2023] KEELRC 2278 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E005 OF 2023**

BOM MANANI, J

SEPTEMBER 29, 2023

**IN THE MATTER OF ACTUAL BREACH AND OR
CONTRAVENTION OF FUNDAMENTAL RIGHTS AND
FREEDOMS UNDER ARTICLES 19, 20, 21, 22, 23, 27, 41,
43 AND 47 OF THE CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF ARTICLES 2, 3, 10, 73, 201
& 232 OF THE CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF REGULATION 8(C) (II) OF THE RETIREMENT
BENEFITS (OCCUPATIONAL BENEFITS SCHEMES) REGULATIONS, 2000**

AND

**IN THE MATTER OF THE CONSTITUTION OF KENYA
(PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS)
PRACTICE AND PROCEDURE RULES UNDER RULES, 2013**

BETWEEN

KENYA NATIONAL UNION OF NURSES PETITIONER

AND

LOCAL AUTHORITIES PROVIDENT FUND BOARD 1ST RESPONDENT

**CABINET SECRETARY, MINISTRY OF NATIONAL TREASURY AND
PLANNING 2ND RESPONDENT**

RETIREMENT BENEFITS AUTHORITY 3RD RESPONDENT



CHIEF EXECUTIVE OFFICER, RETIREMENT BENEFITS AUTHORITY 4TH
RESPONDENT

ATTORNEY GENERAL 5TH RESPONDENT

AND

SELLESTINA KIULUKU INTERESTED PARTY

KIRAGHA MWANYASI INTERESTED PARTY

PATRICK MUIRURI INTERESTED PARTY

NANCY INGATO ANYANDA INTERESTED PARTY

ODONGO M OKEYO INTERESTED PARTY

HORO GUYO OKOLA INTERESTED PARTY

ELYAS SHEIKH ABDINOOR INTERESTED PARTY

JANE WAMBUGU INTERESTED PARTY

MOLU JILLO MAMO INTERESTED PARTY

RULING

Background

1. The Petitioner is a Trade Union that represents the interests of nurses in Kenya. By virtue of schedule 4 to the *Constitution* of Kenya 2010, health services were devolved to County Governments with the National Government only retaining the policy aspects of this function. Therefore, matters that relate to human resource in the health sector including those of nurses fall in the realm of County Governments.
2. The 1st Respondent was established under section 5 of the *Local Authorities Provident Fund Act*, 1960 to manage pension matters for members of staff of Local Authorities. By virtue of section 51 of the *County Governments' Retirement Scheme Act*, 2019, the *Local Authorities Provident Fund Act* was repealed. However, in the judgment delivered in *Okoti & 11 others v County Governments Retirement Scheme & 164 others; County Pension Fund Financial Services Limited & 8 others (Interested Parties)* (Petition 213, 222 & 230 of 2019 & 36 of 2022 (Consolidated)) [2022] KEELRC 13584 (KLR), the County Governments' Retirement Scheme Act, 2019 was declared unconstitutional, null and void. As a result, the *Local Authorities Provident Fund Act* under which the 1st Respondent was established remains in force.
3. By virtue of section 132 of the *County Government Act*, all members, officers and staff of a County Government are obligated to subscribe to an existing pension scheme for officers and staff of local government. Consequently, and by virtue of being employees of County Governments on account of the devolved function of medical services, nurses are obligated to join a pension scheme for staff of local government. It is for this reason that nurses are members of the Pension Fund that is managed by the 1st Respondent.
4. By Gazette Notice No. 10642, the 2nd Respondent appointed ten persons to sit on the Board of the 1st Respondent. The record shows that some of the appointees resigned but were replaced by subsequent



appointments by the 2nd Respondent. It is also suggested that the initial appointments were revoked and fresh ones made thereby rendering the dispute moot.

5. The Petitioner was aggrieved by the aforesaid appointments. The gist of the Petitioner's grievance is that it was not consulted on the appointments. It's the Petitioner's case that since it represents nurses who are contributors to the Pension Fund that is managed by the 1st Respondent, its input on the aforesaid appointments ought to have been sought.

Preliminary Objection

6. The Respondents have objected to the court's jurisdiction to adjudicate on the dispute. It is the Respondents' position that the issue that is raised by the Petitioner does not fall within the jurisdiction of the Employment and Labour Relations Court (ELRC).
7. The Respondents correctly argue that the jurisdiction of the ELRC is provided for under section 12 of the *Employment and Labour Relations Act* (ELRC Act) as read together with article 162(2) of the *Constitution*. In their view, the ELRC can only handle disputes as defined under section 12 of the *ELRC Act*.
8. The Respondents contend that the question of representation of workers on the Board of the 1st Respondent is not an employment and labour relations dispute within the meaning of section 12 of the *ELRC Act*. It is not one of the matters contemplated under section 12 of the *ELRC Act*. On the contrary, it is a dispute that relates to the *Constitution* of the Board of a Trust Fund which ought to be handled by a court other than the ELRC.
9. In response, the Petitioner takes the view that the question whether the Board of the 1st Respondent is legally constituted is a matter that falls within the jurisdictional realm of the ELRC. According to the Petitioner, because workers (in this case nurses) are major contributors to the Fund that is managed by the 1st Respondent, they have a right to be represented on the 1st Respondent's Board. Therefore, non inclusion of their representatives on this Board is bound to affect their interests, a matter that the ELRC has legitimate powers to interrogate.
10. The Petitioner has also argued that section 12 of the *ELRC Act* should not be narrowly interpreted in order to oust the court's jurisdiction to determine disputes which impact on employee rights. In the Petitioner's view, the use of the word "including" in the aforesaid section is evidence that the list of matters that the ELRC can deal with under the *Act* is not closed. Therefore, the current dispute falls within the court's powers to determine. In support of this position, the Petitioner relies on the decision in *Local Authorities Provident Fund Board (Lapfund) v Kisii County Government* [2018] eKLR where the court appeared to express a similar view.
11. The question of the ELRC's jurisdiction is a vexed one. It has been the subject of discussion in a plethora of decisions. Whilst judges of the courts of record have sometimes liberally demarcated the court's jurisdictional boundaries, the general indication that flows from the decisions by the Court of Appeal is that the ELRC's jurisdiction is strictly confined to disputes that have their underpinning in an employment relation. Anything that has not arisen from an employment relation is considered as falling outside the purview of the court to handle even if the matter has a bearing and an impact on an employee's welfare.
12. In the recent decision of *National Social Security Fund Board of Trustees v Kenya Tea Growers Association & 14 others* (Civil Appeal 656 of 2022) [2023] KECA 80 (KLR), the Court of Appeal reiterated this position when it indicated that the ELRC's mandate to adjudicate on disputes must be



- founded on an employment relation. Whatever the dispute, it must be ancillary or incidental to the matters contemplated under section 12(1) of the ELRC Act.
13. The Court of Appeal rejected the argument that questions relating to the constitutionality of the National Social Security Fund Act (NSSF Act) fell within the jurisdiction of the ELRC merely because workers are the largest contributors to the Fund established under the Act. In the court's view, the central question in the Petition was the constitutionality of the NSSF Act, a matter that did not fall under section 12 of the ELRC Act. The fact that workers were the greatest contributors to the Fund could not be the basis for invoking the jurisdiction of the ELRC to adjudicate on the dispute. By virtue of article 165(3) of the Constitution, the High Court was the only court that was seized of jurisdiction to entertain the matter.
 14. The court also rejected the suggestion that the use of the word "including" in section 12 of the ELRC Act can be relied on to unduly stretch the ELRC's jurisdiction. According to the court, the word can only be invoked to bring on board matters which arise from an employment relation and which are related to the matters set out under section 12 of the ELRC Act.
 15. By parity of reasoning, the central question in the Petition before me is whether the Board of the 1st Respondent was properly constituted when the 2nd Respondent made unilateral appointments to it. This singular question does not have its foundation in an employment relation. Neither is it ancillary or incidental to the matters contemplated under section 12(1) of the ELRC Act. Indeed, there is no employment relation between the disputants in the action. If I understand the Court of Appeal's position on the ELRC's jurisdiction well, the failure by the 2nd Respondent to include a workers' representative on the Board of the 1st Respondent does not render the dispute an employment and labour relations dispute within the meaning of section 12 of the ELRC Act merely because the impugned decision may impact negatively on the interest of workers.
 16. The fact that disputes that come to the court must be founded on an employment relation or relate to matters contemplated under section 12 of the ELRC Act was reiterated by the Court of Appeal in the case of Attorney General & 2 others v Okiya Omtata Okoiti & 14 others [2020] eKLR. The court observed on the matter as follows:-

"We have no doubt that the ELRC and the ELC have jurisdiction to interpret and apply the Constitution as held by the High Court in United States International University (USIU) v. The Attorney General & Others [2012] eKLR and this Court in Daniel N. Mugendi v. Kenyatta University & 3 Others [2013] eKLR. However, the jurisdiction of those specialized courts to interpret and apply the Constitution is not original or unlimited like that of the High Court. It is limited to constitutional issues that arise in the context of disputes on employment and labour relations or environment and land matters."

17. Having regard to the foregoing, it is doubtful that this court has the mandate to question the legality of membership of the Board of the 1st Respondent unless the issue is raised in the context of a dispute arising from an employment relation. Consequently, it is my considered view that the objection raised by the Respondents on the court's jurisdiction is merited.

Determination

18. The upshot is that the court finds that the ELRC lacks the requisite jurisdiction to determine the legality of the Constitution of the Board of the 1st Respondent outside of an employment dispute or outside the scope that has been set under section 12 of the ELRC Act.
19. Accordingly, the Petition is struck out with costs to the Respondents.



DATED, SIGNED AND DELIVERED ON THE 29TH DAY OF SEPTEMBER, 2023

B. O. M. MANANI

JUDGE

In the presence of:

..... for the Applicant

.....for the Respondent

ORDER

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M. MANANI

