



**The Local Authorities Provident Fund Board v County Government of Mombasa & another  
(Cause E047 of 2021) [2023] KEELRC 2303 (KLR) (28 September 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2303 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE E047 OF 2021  
M MBARÚ, J  
SEPTEMBER 28, 2023**

**BETWEEN**  
**THE LOCAL AUTHORITIES PROVIDENT FUND BOARD ..... CLAIMANT**  
**AND**  
**COUNTY GOVERNMENT OF MOMBASA ..... 1<sup>ST</sup> RESPONDENT**  
**MOMBASA COUNTY GOVERNMENT ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The claimant is seeking for orders that
  - a. An order compelling the respondents to remit the statutory deductions from its employees to the claimant, the outstanding contributions amounting to Kshs. 2,586,515,277.74 as at 16 April 2021;
  - b. Costs of the suit;
  - c. Interests on (a) and (b) at court rates;
  - d. Any other relief the court deems fit to grant.
2. The claim is that the claimant is a statutory body under the framework of the *Local Authorities Provident Fund Act*. The 1<sup>st</sup> respondent is a County Government established under Article 176 of *the Constitution* and the 2<sup>nd</sup> respondent is the County Executive Committee member in charge of finance in Mombasa appointed pursuant to Article 179(2)(b) of *the Constitution*.
3. The claimant is mandated under the Local Authorities Fund Act and part 7(1) of the Sixth Schedule to *the Constitution* to receive, invest and manage members' savings for prompt payment of retirement benefits when they exit service. The savings comprise of contributions from both the employer and the employee.



4. The employees of the 1<sup>st</sup> respondent subscribe to and contribute their retirement savings at the rate of 12% of their monthly salary to the Local Authority Provident Fund (LAPFUND) and the 1<sup>st</sup> respondent as the employer remits the equivalent of 15% of the gross monthly salary of the staff and employees to the LAPFUND.
5. The 1<sup>st</sup> respondent, through the 2<sup>nd</sup> respondent is mandated by law to remit the sums contributed to the claimant which amounts to 15% from the employer and 12% from the employee thus making a combined total of 27% of the monthly gross salary of the employee.
6. The 1<sup>st</sup> respondent as the employer is mandated to collect as part of statutory deductions the specified amount from its employees' salaries for remission to the claimant's account on a monthly basis. The 2<sup>nd</sup> respondent, despite deduction from the employees of the 1<sup>st</sup> respondent an amount equivalent to 27% of the gross salary has since May 2013 failed, refused and neglected to remit the same to the claimant. Despite the non-remittance of the contributions, the claimant is obliged to pay the employees their retirement dues upon leaving employment, whether the prescribed amount has been remitted by the respondents or not.
7. The claimant has continued to pay retirement benefits of the employees of the 1<sup>st</sup> respondent who have retired although the same is proving difficult as a result of non-remittance of contributions by the 2<sup>nd</sup> respondent.
8. From May 2013, the respondents failed to remit to the claimant monies amounting to Kshs. 2,586,515,227.74 which has been prejudicial to the claimant which has a statutory obligation to credit the member's accounts at the end of every month and pay the members their benefits when they retire irrespective of whether the 2<sup>nd</sup> respondent or other contributors have made their respective contributions. The non-remittance of contributions threatens the economic well-being of both current and former employees who have diligently served the 1<sup>st</sup> respondent for a significant period of their lives.
9. The claim is that the owing dues should be remitted at Kshs. 2,586,515,227.74 as at 16 April 2021.
9. In evidence, the claimant called Rhoda Chemashack the finance manager who testified that under Section 132 of the County Government Act (CGA), all members, officers and staff of a county government subscribe to an existing retirement scheme for officers and staff of local authority and by dint of these provisions, the respondents have a duty to make contributions on behalf of its employees to the claimant. Section 8(3) of the *Local Authorities Provident Fund Act* and Part 7(1) of the Sixth Schedule to *the Constitution* make it mandatory for County Governments to contribute to the Fund sums deducted from its employees and a further sum equal to the total of such deductions but the respondents have failed to remit the 27% of the salary for each employees resulting in a non-remittance of Ksh.2,586,515,227.74 as at the time of filing such and at the time of giving evidence of 30 June 2023 the non-remittance stood at Ksh.5,809,663,308.44.
10. Upon cross-examination, the witness testified that under the LAPFUND, a 'contributor' is defined as the employee of the 1<sup>st</sup> respondent and has not sued the employer for any non-remittances. Under the CGA, the 1<sup>st</sup> respondent is a body corporate capable of being sued in its own name and the 2<sup>nd</sup> respondent is sued as the officer. The statement of account produced is up to the time of filing suit and since May 2013 the respondents have not made any remittances. Prior to May 2013, there is no account rendered with regard to the contributions made. There are no audited accounts with regard to the owing non-remittances.



11. In response, the respondents denied the claims made and that there is no failure to deduct and remit the retirement savings of its employees as alleged. The retirement savings for a percentage of its employees' salaries, all statutory deductions are budgeted for an allocated for separately in the county's annual budget from the allocations of net salaries and other liabilities and payment of one is unaffected by the other and is only subject to budgetary allocations. The alleged non-remittance of Kshs. 2,586,515,227.74 is with regard to third parties being 1<sup>st</sup> respondent employees. The claim for Kshs. 2,586,515,227.74 is exorbitant and without justification.
12. The response is also that the respondents are not in breach of the statutory duties and the performance of its duties is upon receipt of funds from the national government and pleads the defence of frustration on its part. If at all there is non-remittance, this emanate from budget restrictions from shortfalls from the national government and delayed disbursements.
13. The jurisdiction of the court has prematurely been invoked and the matter ought to have gone for arbitration.
14. No witness was called by the respondent.
15. At the close of the hearing, both parties agreed to file written submissions.
16. The claimant submitted that the claimant has capacity to file these proceedings pursuant to Section 5(1)(a), Employment and Labour Relations Court (Procedure) Rules. The entity of the claimant has given authority to its officer to support the claim.
17. Upon service of the claim on the respondents, Section 120 of the *Evidence Act*, the respondents were estopped from challenging the facts and the authority given by the claimant to call its witness as held in 748 Air Services Limited v Theuri Munyi [2017] eKLR.
18. The respondents are in breach of their statutory obligation pursuant to Section 132 of the County Government act with regard to remittance of pension dues under the LAPFUND.
19. Section 8(3) of the *Local Authorities Provident Fund Act* requires that every county government should contribute to the Fund monthly a sum deducted from the employees and another equal sum from itself. The claimant caters for all employees of county governments with members contributing 12% while the employer as sponsor contributes 15%, a total of 27% of the member's gross salary and the 2<sup>nd</sup> respondent as the officer responsible to effect salaries within the 1<sup>st</sup> respondent should have remitted the pension dues to the claimant.
20. The respondents had been contributing to the Fund until May 2013, and since, a sum of Kshs. 5,809,308,44 remains unpaid at the time the claim was heard in court, 30 June 2013. Such non-remittance is unlawful and the orders sought should issue against the respondents to pay the same with accrued interests to date.
21. The respondents submitted that its Notice of Preliminary Objections on the grounds that the suit is incompetent for want of a resolution authorising the filing of the claim and the deponent of the Verifying Affidavit lacks authority to support the claim in the absence of a resolution hence the suit is defective. The claimant, as a body corporate under Section 5(8) of the Local Authority *Provident Fund Act* has a board which should have passed a resolution to support the claim herein.
22. The evidence by the claimant is based on the statement of accounts as at April 2021 and nothing more. Such material is not sufficient proof of the claim.



23. The claimant lacks standing to file this claim. The ‘contributor’ for purposes of the Fund is the employee and the employer should make remittances of contributions deducted to the scheme. Such an obligation should be enforced by the proper party as held in *Football Kenya Federation v Kenyan Premier League Limited & 4 others* [2015] eKLR that the question of proper parties to a suit goes to the root of standing. A party cannot file suit without proper standing, a party must have sufficient interest to sustain his standing as held in *Law Society of Kenya v Commissioner of lands & others*, HCCC No. 464 of 2000 (Nakuru).
24. In this case, the employees of the 1<sup>st</sup> respondent are the contributors to the scheme. The respondents have a duty to deduct and remit such contributions to the scheme. The duty to deduct and remit dues is owed to the employees and not to the claimant. Without being owed such duty, the claimant cannot file the claim herein for the benefit of the respondent’s employees. Such is a matter between an employer and employee and cannot be urged by a third party as held in *Okiya okeiti & 11 others v County Governments Retirement Scheme & 164 others; County pension Fund Financial Services Limited & 8 others (interested parties)* Petition No. 213, 222 and 230 of 2019 and 36 of 2022 (consolidated).
25. The orders sought cannot issue to a party outside the employment relationship and should be dismissed with costs.

### **Determination**

26. With regard to procedure adopted by the claimant in filing this claim, under Rule 4 of the Employment and Labour Relations Court (Procedure) Rules, 2016 (Court Rules) a claimant is allowed to file its pleadings inclusive of the policy, procedures and evidence to be relied upon at the hearing.
27. Upon service of the claim upon a respondent, under Rule 13 of the Court Rules is allowed a respondent to file responses together with records, policies and any evidence to be relied upon during the hearing.
28. Before close of pleading, parties are given the liberty to amend and exchange pleadings in accordance with Rule 14 of the Court Rules.
29. On the pleadings, before hearing directions can issue, Rule 14(5) of the Court Rules allow parties to object to any pleadings through notice and stating the reasons;
  - (5) A party may, by notice, object to a pleading stating grounds of objection except that no objection may be raised to any pleading on the ground of any want of form
30. the respondents were served by the claimant with its pleadings and no objection was raised until at the hearing stage. Such matter was already overtaken by events in terms of Rule 14 (5) of the Court Rules.
31. In any event, the respondents as the employer, the legal duty under Section 10(6) and (7) read together with Section 73, 74 and 75 of the *Employment Act*, 2007 rests on them to file work records upon the claim.
32. As the employer, whether as claimant or respondent the legal duty vests on the respondent. Where the claimant required any work records held by the respondents, this ought to have been addressed and application for production of such records pursuant to Rule 14 of the Court Rules.
33. No party addressed such matters.
34. The respondents did not urge its objections despite filing Notice of Preliminary Objections dated 3 June 2021. They sat back until the hearing date.



35. A claim filed before this in terms of Rule 4 and a response filed in terms of Rule 13 of the Court Rules is sufficient matter for the court to proceed and hear it and rely on the materials submitted in accordance with Rule 21 of the Court Rules;
21. The Court may, either by an agreement by all parties, or on its own motion, proceed to determine a suit before it on the basis of pleadings, affidavits, documents filed and submissions made by the parties.
36. Unlike commercial disputes before other courts, in employment and labour relations claims before this court, the employer has the duty to file work records. As addressed above, such shall suffice.
37. With regard to standing, the claimant is defined as a statutory body under the framework of the Local Authority Provident Fund. The respondents are defined as being established under Article 176 and 179(2)(b) of *the Constitution*.
38. The claim sought to be enforced is that the claimant is mandated under the Fund to receive, invest and manage members' savings for payment of retirement benefits which comprise contributions from both employers and employees.
39. The contributor being the employee.
40. That the employees of the respondents subscribe to and contribute their retirement savings at the rate of 12% of their salary and the 1<sup>st</sup> respondent as the employer matches with a contribution of 15% of the gross salary making total due to the claimant 27% of such salary.
41. Whereas matters of employee benefits, retirement of an employee and the subject benefits relates to an employment relationship, the employee subject of the contributions to the fund and the 'contributor' under the LAPFUND is not a party herein. Indeed, as submitted by the respondents, the claimant cannot urge a case for and on behalf of a third party employee, where such an employee is not demonstrated to have failed to urge its case. Such impede its standing before this court and renders the claim herein purely a commercial dispute outside the jurisdiction of this court pursuant to Article 162(2)(a) of *the Constitution* read together with the *Employment and Labour Relations Court Act, 2011*.
42. The relations between the parties bear a tripartite. Without the affected employee, the 'contributor', the claim before this court cannot hold. The basis it that a 'contributor' is defined under Section 2 of the Local Authorities Provident Fund that;
- "contributor" means a person— (a) who for the time being is the holder of a designated post; or (b) in respect of whom any amount is standing to his credit in the Fund;
43. Without the subject employee, whose benefit(s) are to be secured under LAPFUND as the 'contributor', the claimant's claim is general and without particulars of any beneficiary.
44. The basis is that within any pool of employees, there are major dynamics. For any employer, these dynamics refers to new recruitments, exits due to termination of employment, death or retirement. A general call to remit a given amount to the Fund from 'contributors' without recourse to these dynamics and the employee as the interested party whose rights are to be secured negates the claim in its entirety.
45. The claim that the respondents stopped making remittances from May 2013 to date but has been making retirement benefits to employees who have since retired is without evidence of the record of



the employees whose remittances were secured by May 2013 or those whose retirement dues from the Fund have since been paid.

46. Courts are not to issue general orders without any possible chance of enforcement. The basis being that court orders should not issue in vain as held in *Trusted Society of Human Rights Alliance v Cabinet Secretary for Devolution and Planning & 3 others* [2017] eKLR that;
47. The Court does not, and ought not to be seen to make orders in vain; otherwise the Court would be exposed to ridicule, and no agency of the constitutional order would then be left in place to serve as a guarantee for legality, and for the rights of all people the principle of law is that the whole essence of litigation as a process of judicial administration is lost if orders issued by court through the set judicial process in the normal functioning of courts are not enforceable against the parties cited as respondent. The claimant as a statutory body or person is legally and duty bound to give due compliance in this regard. Court orders cannot be issued in vain.
48. Accordingly, the claim that the respondents should be ordered to remit Kshs. 2,586,515,277.74 is without good foundation and is hereby struck out. Each party to bear own costs.

**DELIVERED IN OPEN COURT AT MOMBASA THIS 28<sup>TH</sup> DAY OF SEPTEMBER 2023.**

**M. MBARŪ**

**JUDGE**

In the presence of:

Court Assistant: Japhet Muthaine

..... and .....

