



Board of Trustees, Kenya Broadcasting Corporation (KBC) Staff Retirement Benefits Scheme (Suing on behalf of the Scheme) v Kenya Broadcasting Corporation (Cause 1352 of 2018) [2022] KEELRC 4 (KLR) (27 April 2022) (Judgment)

Neutral citation: [2022] KEELRC 4 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1352 OF 2018
MA ONYANGO, J
APRIL 27, 2022

BETWEEN

BOARD OF TRUSTEES, KENYA BROADCASTING CORPORATION (KBC) STAFF RETIREMENT BENEFITS SCHEME (SUING ON BEHALF OF THE SCHEME) CLAIMANT

AND

KENYA BROADCASTING CORPORATION RESPONDENT

JUDGMENT

1. The Claimant is a Staff Retirement Benefits Scheme for employees of Kenya Broadcasting Corporations, a state corporation established under the *State Corporations Act*, and the Respondent herein.
2. The Respondent being the sponsor of the scheme, is required by law to collect all sums contributed by its staff who are members of the scheme together with its own contributions, and remit the same to the Trustees of the Scheme:
3. In its claim the Claimant avers that the Respondent has failed to remit deductions made from the employee's emoluments/salaries to the scheme as well as property rent collections made through staff check-offs which has led to the deterioration of funding levels of the scheme from 48.6% as at June 30, 2011 to 29.6% as at June 30, 2016.
4. The Claimant avers that due to the decline in funding of the scheme the Retirement Benefits Authority wrote to its chairperson inquiring on the failure to remit the funds and demanding a remedial plan.
5. It further avers that the Respondent's actions are illegal and in gross breach of the provisions of Article 41 (2) of the *Constitution* of Kenya as read with the *Trust deed, The Retirement Benefits Regulations*, the *Employment Act* and the *Retirement Benefits Act*.



6. The Claimant avers that the amount of remittances owed to it are accumulating and escalating at a fast pace thus necessitating intervention from this Court as the Respondent has on several occasions made promises to settle the same to no avail.

7. In its claim the Claimant is seeks the following reliefs:

- i. Pursuant to Section 53A of the Retirement Benefits Act, No. 3 of 1997, a judgment for summary recovery of unremitted employees' pension contributions that the Respondent has failed to remit to the scheme which as at March 31, 2018 stood at Kshs. 53,117,348.13/-
- ii. Compound Interest on (i) above at statutory rate of three per cent per month pursuant to the provisions of Section 53A of the Retirement Benefits Act No. 3 of 1997 from the date of default till payment in full.
- iii. In the alternative, an order that the Respondent remits to the scheme all outstanding remittances which as at the indicated dates are as follows:

No.	PENDING REMITTANCES	PERIOD	AMOUNT (KSHS)
1.	Employer's pension contributions	As at March 31, 2018	683,406,014.72
2.	Employees' Pension Contribution	As at March 31, 2018	53,117,348.13
3.	Interest on outstanding contributions	As at June 30 2017	72,986,990.00
4.	CBA Pension arrears	JULY 1 2016 – June 30 2017	4,525,858.72
5.	Property rent collections (Staff tenants check offs)	September 1 2014 – March 31 2018	6,206,000.00
TOTAL	820,242,211.57		

- iv. An order be issued against the Respondent to henceforth remit the contributions deducted from the employees.
- v. The Respondent be ordered to pay out to the scheme sums of money equivalent to the deficit (which is over Kshs. 2.1 billion as at the date of this Claim) occasioned by the Respondent's failure to make remittances to the scheme.
- vi. Damages for exposing the scheme to deficits; regulatory risks such as the threat of winding up by the Retirement Benefits Authority; and actuarial risks
- vii. Interest at the prevailing commercial rates on all unremitted sums as particularized in (iii) above from the respective dates of default till payment in full.



- viii. Pursuant to Section 53A of the *Retirement Benefits Act*, No. 3 of 1997, a compound interest at the statutory rate of three per cent per month on all unremitted employees' pension contributions that the Respondent has failed to remit to the scheme which as at March 31, 2018 stood at Kshs. 53,117,348.13 from the dates of default until payment in full.
 - ix. Costs of this Claim
 - x. Any other relief that this Court may deem fit to grant.
8. In support of its claim the Claimant relied on the following documents:
- i. Claimant's List and Bundle of documents dated 3rd September, 2018 and filed in Court on September 4, 2018
 - ii. The Claimant's Supplementary List & Bundle of Documents dated 21st August, 2019 and filed in Court on 27th August, 2019
 - iii. Claimant's Supplementary Affidavit, Claimant's Written Submissions all in support of its Application dated 21st August, 2019
 - iv. The Claimant's Replying Affidavit (in response to the Application dated November 11, 2019) dated October 25, 2018 and filed on 26th October, 2018
 - v. The written submissions (in opposition to the Respondent's Application dated 11th October, 2018)
 - vi. The Respondent's Replying Affidavit (in response to the Claimant's Application dated 3rd September 2018) dated 15th July, 2019 and the Respondent's Response to the Statement of Claim.
 - vii. Claimant's Witness Statement by Daniel Okoth dated 3rd September, 2018, the Witness Affidavit sworn by Florence Migunde on 31st October, 2021 and the Witness Affidavit sworn by Daniel Okoth on 31st October, 2021.
9. In all the above documents the Claimant reiterates the averments made in its Statement of Claim and maintains that the Respondent remains indebted to it for the unremitted deductions and rent property collections to the scheme.
10. The Claimant further stated that the amount continues to accrue interest on a daily basis until the same is settled in full. It contends that the outstanding amount as at 31st October, 2021 is Kshs. 1,047,579,070.85/-.
11. The Claimant averred that the Respondent herein ought to be compelled to pay compound interest at the rate of 3% per month on the amount of unremitted employee deductions by dint of the provisions of Section 53A (3) of the *Retirement Benefits Act* bringing the total as at 31st October, 2019 to Kshs. 5,769,516,893.18/-.
12. The Claimant maintained that despite obtaining orders from this Court on 15th May, 2020 in the nature of a mandatory injunction compelling the Respondent to ensure that it remits the amounts due to the Claimant monthly, it has failed and/or ignored to obey the orders thus threatening the very existence of the Claimant.
13. The Claimant further contends that the Respondent owes it Kshs.7,721,031,000/- being actuarial deficit of the pension scheme as at 30th June, 2018 and urged this Court to award the same.



14. In conclusion the Claimant urged this Court to find merit in its claim and allow it in terms of the reliefs sought therein.
15. In response to the Claim the Respondent filed its Response dated 14th October, 2021 in which it admits its indebtedness to the Claimant herein. It however maintains that it has been facing financial difficulties over time and that condemning it to pay the sums owed at once would cause total crippling of its functions.
16. The Respondent further avers that even with the looming financial difficulties it has made fervent attempts at settling the debt and remittance of contributions to the scheme though its efforts are yet to be fruitful.
17. It is on this basis that the Respondent urged this Court to dismiss the Claim with costs to the Respondent.
18. In support of the Respondent's case, the Respondent relies on the following documents:
 - i. The Respondent's Witness Statement by Moraa Ongosi, its Finance and Administration Manager sworn on 14th October, 2021
 - ii. The Respondent's Affidavit sworn by Moraa Ongosi sworn on 14th October, 2021
 - iii. The Replying Affidavit sworn by Jeremiah M. Marakia on 15th July, 2019.
19. In the documents the Respondent reiterates the averments made in its response to the statement of claim. The Respondent further avers that it has been making remittance towards the satisfaction of its employees' contributions and in particular it has between March 2017 to July 2018 remitted over Kshs. 66,314,173.00/- as employee contributions as well as substantial amounts with regards to employer contributions.
20. The Respondent argues that the claim for any deficits by the Claimant ought therefore to be substantiated and demonstrated.
21. The Respondent further maintains that it has in recent times been going through financial difficulties and has heavily been dependant on funding from the National Treasury for its day to day running including the staff emoluments.
22. The Respondent deals that despite the remedial actions it has taken it has been unable to secure the entire sums required to offset the balance required as well as pay off its other creditors.
23. The Respondent argues that should this Court issue an Order directing it to pay off the balance at once, it shall halt its operations and it shall be unable to meet its financial obligations including payment of salaries.
24. In conclusion the Respondent urged this Court to dismiss the Claim in its entirety with costs to the Respondent.

Claimant's submissions

25. The Claimant submitted that judgment on admission ought to be entered in its favour as against the Respondent herein, the Respondent having admitted its indebtedness to the Claimant. To buttress this argument the Claimant relied on the provisions of Order 13 Rule 2 of the *Civil Procedure Rules, 2010* and the cases of *Telkom Kenya Limited v Kenya Railways Corporation* [2018] eKLR; *Peeraj General Trading & Contracting Company Limited, Kenya & Another v Mumias Sugar Company Limited*



- [2016] eKLR; *Endebess Development Company Limited v Coast Development Authority* [2018] eKLR and *Choitram v Nazari* [1984] KLR 327. In all these decisions the Court made reference to judgment on admission as provided under Order 13 Rule 2 of the Civil Procedure Rules, 2010.
26. The Claimant further submitted that in addition to the Respondent's admission of the debt, it has through its conduct indicated that it is in fact indebted to the Claimant by making promises on various occasions to settle the amount owed to it. This has led to the communication from the Retirement Benefits Authority to the Respondent's Managing Director directing it to pay the amounts owed to the Claimant.
 27. The Claimant further submitted that the Respondent has refused and/or failed and/or ignored to settle the outstanding debt to the Claimant despite having received several reminders from the Retirement benefits Authority directing it to remit the sums owed.
 28. The Claimant further submitted that the amount owed continues to accrue interest on a daily basis and that should this Court fail to order the immediate payment thereof the sums will continue accruing to its prejudice and its members stand to suffer irreparable loss.
 29. The Claimant further submitted that as a result of the continued failure on the part of the Respondent to honour its financial obligations its funding levels have continued to dwindle and its beneficiaries stand to suffer grave financial losses.
 30. The Claimant further submitted that this Court ought to order the Respondent to pay compound interest on the outstanding debt from the date of default until settlement in full by dint of the provisions under Section 53A (3) of the *Retirement Benefits Act* which amount as at 31st October 2021 totals to Kshs.5,769,516,893.18/-.
 31. It is further the Claimant's submission that the Respondent's alleged financial constraints should not be used as a ground to release it from meeting its obligations to the Claimant. Further that the Respondent has failed to avail any evidence to support the alleged financial difficulties.
 32. It is on this basis that the Claimant urged this Court to dismiss the Respondent's contention that it is facing financial hardships and instead find merit in its Claim and allow it as prayed.
 33. On the issue of costs, the Claimant submitted that it is entitled to the same having laid a basis for the grant of the orders sought. For emphasis the Claimant cited the case of *Jasbir Singh Rai and others v Tarlocham Singh Rai & 4 others* [2014] eKLR.

Respondent's submissions

34. The Respondent on the other hand submitted that it has been facing financial constraints and as a result has been unable to wholly remit employee contribution. The Respondent further contended that it has made some payments as a sign of its commitment in clearing all the sums owed to the Claimant.
35. The Respondent further submitted that as at 15th July 2019 it had settled the sum of Kshs. 66,314,173/- part of the employee contribution to the Claimant in line with this Court's ruling delivered on 15th May, 2020.
36. The Respondent further submitted that it has shown goodwill in meeting its obligations with the Claimant and therefore urged this Court to allow it more time to enable it stabilize its financial status and address the Claimant's Claims together with several other of its creditors.



37. The Respondent submitted that should this Court proceed to allow the claim as prayed, the judgment shall not be capable of being enforced given its current financial status, as it shall be difficult for it to honour the award. For emphasis the Respondent cited and relied on the case of *Eric v J Makokha & others v Lawrence Sagini & others* Civ. Application No. 20 of 1994 where the Court held that the Courts will decline to grant orders where the fulfilment will be impossible.
38. The Respondent further submitted that the Claimant in its Claim failed to compute the amount of deductions and/or contributions not remitted to allow this Court make a conclusive determination on the issue.
39. In conclusion the Respondent urged this Court to find the claim devoid of merit and dismiss it with costs to the Respondent.

Analysis and determination

40. I have considered the claim, affidavits, evidence adduced, Submissions by the parties and authorities relied upon and note that there is no dispute as to the Respondent's indebtedness to the Claimant as it has admitted in its pleadings and even made proposals on settlement, clearly indicating its intention to settle the payments. It is further not in dispute that the Respondent has failed to honour previous proposals for settlement despite presenting the same before the Retirement Benefits Authority for adoption.
41. The continued failure by the Respondent to remit the deductions made from its members of staff emoluments/salaries as well as other deductions due to the Claimant scheme greatly prejudices members of the Claimant scheme as they will not be able to receive their pension or pension income due to the dwindled finances occasioned by the Respondent's failure to settle the outstanding dues.
42. The Respondent does not dispute its indebtedness to the Claimant, but argues that should this Court direct the full payment at once, it shall be brought to its knees given its current financial woes.
43. The Retirement Benefits Authority on 13th February, 2017 approved the Remedial Plan by the Respondent on settlement of part of the actuarial deficit which proposal entailed transfer of 4 properties belonging to the Respondent valued then at an estimated value of Kshs.1.1 billion; subject to the provision of:
 - a. Current valuation reports for the subject properties
 - b. The approval for transfer by the parent ministry
44. To date none of the above requirements have been met. In my considered view this is a clear indicator that the Respondent is guilty of dragging its feet as there is already in place a proposal of settling the sums owed to the Claimant.
45. The Respondent contends that it has since remitted Kshs. 66,314,173.33/- towards employee contributions with the Claimant as well as substantial amounts towards employer contribution. It however, did not file any statement of account to verify this position to this Court to prove the extent of its indebtedness.
46. In light of the admission by the Respondent of its indebtedness and the evidence before me, I find that the Respondent is indeed indebted to the Claimant in the manner alleged.
47. Section 53 of the *Retirement Benefits Act* No. 3 of 1997 provides as follows:
 53. Proceedings for recovery of deductions from employers



1. Where an employer, having with the agreement of an employee who is a member of a scheme, made a deduction from the employee's emoluments for remittance to the scheme, fails to remit the deduction within fifteen days of the deduction, the scheme may, after giving such employer not less than seven days' notice, institute proceedings for the recovery of the deduction.
2. A notice under subsection (1) shall be in writing and copied to the Authority, and shall:
 - (a) require the employer to pay the sum deducted to the scheme within seven days of the notice; and
 - (b) inform the employer that if he fails to pay such sum before the expiration of the notice, proceedings for the summary recovery of the sum shall be filed in court without further reference to him.
3. Any sum which is the subject of proceedings for summary recovery under this section shall attract a compound interest at the rate of three percent per month.
4. Without prejudice to any proceedings instituted under the provisions of this section, a person who refuses or fails to comply with a notice given to him under subsection (1) commits an offence and shall be liable to a fine not exceeding five hundred thousand shillings, or in the case of a natural person, to imprisonment for a term not exceeding three years, or to both.
5. Where an offence under subsection (4) is a continuing offence, the person convicted shall, in addition to the penalty prescribed in that subsection be liable to a further fine of one thousand shillings for every day or part thereof during which the offence continues.

[Emphasis added]

48. Based on the foregoing, I find that the Respondent having made the requisite deductions from its employees' salaries, it had a duty to remit such funds to the Claimant scheme within 15 days.
49. The Respondent has continuously failed and/or ignored and/or refused to make the requisite remittances despite the agreements with the Retirement Benefits Authority as well as the Court Ruling delivered on 15th May, 2020.
50. This Court therefore makes the following orders: -
 - i. Judgment be and is hereby entered in favour of the Claimant as against the Respondent for the recovery of unremitted employees' pension contributions and rental income that the Respondent has failed to remit.
 - ii. The Respondent is directed to remit to the scheme all outstanding remittances as at the date of judgment.
 - iii. The Respondent is hereby directed to henceforth remit all deductions made from its employees' salaries on account of the scheme.**
 - iv. The Respondent shall pay compound interest at 3% per month on the unremitted deductions pursuant to the provisions of Section 53 of the *Retirement Benefits Act*.
 - v. The Claimant is awarded costs of this suit with interest at Court rates from the date of this Judgment until settlement in full.



- vi Parties are directed to file computations of amounts owed to the Claimant by the Respondent as at of the date of judgment including daily accruals of interest, setting out what has been paid, for final orders of this Court.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 27TH DAY OF APRIL 2022

MAUREEN ONYANGO

JUDGE

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, the court has 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 the 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.

MAUREEN ONYANGO

JUDGE

