



Local Authorities Fund Board v County Government of Kilifi & another (Employment and Labour Relations Claim 2 of 2022) [2022] KEELRC 3962 (KLR) (22 September 2022) (Ruling)

Neutral citation: [2022] KEELRC 3962 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI
EMPLOYMENT AND LABOUR RELATIONS CLAIM 2 OF 2022
BOM MANANI, J
SEPTEMBER 22, 2022**

BETWEEN

LOCAL AUTHORITIES FUND BOARD CLAIMANT

AND

COUNTY GOVERNMENT OF KILIFI 1ST RESPONDENT

**COUNTY EXECUTIVE COMMITTEE MEMBER, FINANCE, COUNTY
GOVERNMENT OF KILIFI 2ND RESPONDENT**

RULING

1. Through a Statement of Claim filed on March 30, 2022, the Claimant has sued the Respondents seeking that they be compelled to remit to the Claimant Ksh. 476,400,085.21 being the sum allegedly due on account of staff pension remissions by the 1st Respondent to the Claimant for the benefit of employees of the 1st Respondent.
2. The Respondents entered appearance in the matter but have yet to file their defense. However, they filed a Notice of Preliminary Objection to the competence of the suit on principally four grounds as follows: -
 - a) That the court lacks jurisdiction to hear the dispute in view of the fact that the agreement giving rise to the dispute contains an arbitration clause and the parties are bound to submit to arbitration in line with section 6 of the *Arbitration Act*.
 - b) That the Claim has been filed in disregard of the principle of exhaustion of alternative remedies inferred under sections 46 and 48 of the *Retirement Benefits Act*.
 - c) That the court lacks jurisdiction to hear and determine disputes relating to a retirement benefits or pensions scheme.
 - d) That the Claim is otherwise an abuse of the court process and should be struck out.



3. The court gave directions that the preliminary objection be heard first. Further, it was agreed by the parties that the objection be canvassed through written submissions.
4. The submissions have since been filed. In this ruling, I have considered the submissions and authorities as set out by the parties and the law on the matter.
5. Although the Respondents pleaded six (6) grounds in support of their objection, in their written submissions, they appear to have focused on grounds numbers a), b) and c) above. I will therefore pay considerable attention to the three grounds as urged by counsel.
6. On the 1st ground, it is the position of counsel for the Respondents that because the facts giving rise to the case stem from an agreement with an arbitration clause, the court should not assume jurisdiction over the matter in total disregard of the dispute resolution procedures agreed upon under the said arbitration clause. In his view, the court should respect the arbitration clause by declining jurisdiction.
7. On its part, the Claimant urges that the objection premised on section 6 of the Arbitration Act is misconceived and bad in law. That since the Respondents took a step in the proceedings by filing a Notice of Preliminary Objection they lost the right to invoke the plea for stay of proceedings donated under section 6 of the Arbitration Act. That further, section 6 of the Arbitration Act only provides for stay of proceedings upon an application in that regard. That contrary to this express requirement of statute, the Respondents have not filed any application before the court for stay of proceedings.
8. Section 6 of the Arbitration Act as amended provides as follows:-
 - i) A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds: -
 - a) that the arbitration agreement is null and void, inoperative or incapable of being performed; or
 - b) that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.
 - ii) Proceedings before the court shall not be continued after an application under subsection (1) has been made and the matter remains undetermined.
 - iii) If the court declines to stay legal proceedings, any provision of the arbitration agreement to the effect that an award is a condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings.
9. In the Respondents' view, the fact that the parties have an agreement providing for arbitration is of itself evidence of their desire to resolve any disputes arising from the agreement through alternative dispute resolution mechanisms. Consequently, they urge the court to respect this arrangement by striking out the suit. In the Respondents' view, if the court were to adopt a contra position this will be tantamount to rewriting the clause on dispute resolution in the agreement.
10. In the Respondents' view, the very fact of providing for arbitration in the contract affirms the establishment of an alternative forum for dispute resolution between the parties. Consequently, and in recognition of the principle of exhaustion of alternative remedies, the court should decline jurisdiction and require the parties to go back to arbitration as initially agreed. The parties should only come back to court after exhausting this self imposed method for dispute resolution. According to the Respondents,



this approach is in line with article 159 of *the Constitution* which promotes the use of alternative methods of dispute resolution.

11. While I agree with the submission by the Respondents that a court must not re-write a contract between parties, it is not lost to me that section 6 of the *Arbitration Act* provides the procedure to be followed where a party to a contract with an arbitration clause desires to exhaust the alternative dispute resolution mechanisms provided for under such clause. Such party ought to apply for stay of the proceedings and must do so immediately upon entering appearance in the cause or otherwise acknowledging the claim. There is no provision for moving the court to strike out the proceedings in deference to arbitration.
12. Although the Respondents are entitled to pursue arbitration, they cannot do so outside the purview of section 6 of the *Arbitration Act*. The only avenue open to them is to seek for stay of proceedings pending referral of the matter to arbitration. Therefore, to the extent that the preliminary objection seeks to strike out and not stay the proceedings, it is misconceived.
13. I should perhaps mention here that the requirement that the application for stay of proceedings be filed before the filing of any pleadings other than the Memorandum of Appearance appears to have been dropped through an amendment made to the *Arbitration Act* in 2009. As a result, the position taken by the Claimant that the filing of the Notice of Preliminary Objection took away the right of the Respondents to apply for stay of proceedings appears contestable.
14. The other point of law raised by the Respondents relates to whether the court should hear the case in view of sections 46 and 48 of the *Retirement Benefits Act*. Essentially, these provisions of law contemplate the processing of certain disputes arising under the Act by first lodging a complaint before the Chief Executive Officer, Retirement Benefits Authority (the CEO). Thereafter, appeals from the decision of the CEO may be lodged with the Retirement Benefits Appeals Tribunal.
15. Although the Claimant's counsel suggests that the *Retirement Benefits Act* does not apply to the Claimant, the Claimant's website points to a contra position. It describes the scheme established under the *Local Authorities Provident Fund Act* as "a Defined Contribution Scheme registered and regulated by the *Retirement Benefits Act* of 1997 and subsequent Regulations." Therefore, unless the contrary is demonstrated, I am convinced that the Claimant is subject to the regulatory framework established under the *Retirement Benefits Act*.
16. I have carefully considered the objection by the Respondents premised on sections 46 and 48 of the *Retirement Benefits Act*. In my view, section 46 of the *Act* contemplates disputes between "a member of a scheme" and "the manager, administrator, custodian or trustees of the scheme" arising from the latter's decisions in relations to the scheme. It appears to me that the section may not have been intended to cover all disputes connected to a pension scheme. For instance, I doubt that a dispute between a sponsor of the scheme and the scheme's manager can be construed as a dispute between a member of the scheme and its manager. Indeed, the definition of the term member under the definition clause of the Act appears to exclude sponsors of the scheme. It states thus: -

"member" means a member of a retirement benefits scheme and includes a person entitled to or receiving a benefit under a retirement benefits scheme."
17. That being the case, it is doubtful that the dispute between the parties to this action, being a dispute between a sponsor of a scheme and the manager of the scheme falls within the purview of sections 46 as read with section 48 of the *Retirement Benefits Act*.



18. Finally, I think that the Supreme Court has already expressed itself on the question whether the Employment and Labour Relations Court (ELRC) has jurisdiction to hear disputes relating to pension funds not just from the view point of the principle of exhaustion as contemplated under sections 46 and 48 of the *RBA* but also generally (see *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).
19. After considering the entities against which an action may lie to the ELRC under section 12(2) of the *Employment and Labour Relations Act*, the court expressed its reservations whether the list extended to cover claims by retired pensioners in the following terms: -

“We do not see how a pensioner falls within the listed category of persons and parties that can make an application or institute proceedings before the court. From the foregoing it is thus clear that the Employment and Labour Relations Court had no jurisdiction to hear and determine a dispute that relates to trustees of a pension scheme and members of the scheme particularly where the said members are no longer employees of the Sponsor.”
20. The position taken by the Supreme Court in my view is that for the ELRC to assume jurisdiction over a matter, such matter must be directly related to the employer-employee relation within the parameters set out under section 12 of the *ELRC Act*. And disputes over the management of pension funds (including remission of funds to such schemes) arise from settlor-trustee-beneficiary relations which fall outside employment disputes within the meaning of section 12 of the *ELRC Act* notwithstanding that the trust funds may have come into place as a result of an employment relation.
21. The dispute before me is between a sponsor and manager of a scheme. Neither of the two falls in the bracket of what would be considered an employer or employee with reference to the subject matter at hand. Under a trust, the two stand in the position of a settlor and trustee. Similarly, the employees who are contributors to the scheme are deemed as settlors for purposes of the law on trusts.
22. Further the subject matter of the dispute is whether the sum in dispute, which comprises the trust fund, is payable by the sponsor to the scheme manager. If the limits of jurisdictional reach prescribed by the Supreme Court above are an appropriate guide to me, I doubt that I can validly assume jurisdiction over the cause as it is not, at least directly, between an employer and an employee or by or against an employer and or employee by or against any of the several entities mentioned under section 12(2) of the *ELRC*.
23. And as the Supreme Court expressed itself at paragraph 110 of its judgment in the aforesaid case, its decisions bind all courts except the Supreme Court itself. As a result, I am bound to find that my jurisdictional reach does not extent to cover the current dispute.
24. I am of course aware that various courts have pronounced themselves differently on this matter. For instance, in *Local Authorities Provident Fund Board (Lapfund) v Kisii County Government* [2018] eKLR, Majanja J was of the view that since the funds in an employee pension scheme are raised pursuant to an employer-employee relationship, the ELRC should assume jurisdiction over disputes arising from management of such scheme. Even though this reasoning is compelling, the position taken by the Supreme Court appears to state otherwise. As a result, if the dispute is to be construed as one between a settlor and trustee over remittance of trust funds, it appears to me that the right forum to adjudicate on the matter would be the High Court.



25. I therefore decline the invitation to assume jurisdiction over dispute. Accordingly, I am left with only one option which is to strike out the claim. As the matter concerns public bodies acting in the interest of public servants, I will make no order as to costs.

DATED, SIGNED AND DELIVERED ON THE 22ND DAY OF SEPTEMBER 2022

B. O. M. MANANI

JUDGE

In the presence of:

.....for the Appellant

.....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

JUDGE

