



**Local Authorities Provident Fund Board v County Government of Kisii & another  
(Cause E068 of 2021) [2022] KEELRC 13168 (KLR) (10 November 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13168 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
CAUSE E068 OF 2021  
CN BAARI, J  
NOVEMBER 10, 2022**

**BETWEEN**

**LOCAL AUTHORITIES PROVIDENT FUND BOARD ..... CLAIMANT**

**AND**

**COUNTY GOVERNMENT OF KISII ..... 1<sup>ST</sup> RESPONDENT**

**CHIEF FINANCE OFFICER, KISII COUNTY GOVERNMENT .... 2<sup>ND</sup>  
RESPONDENT**

**JUDGMENT**

1. The Claimant lodged this suit through a Statement of Claim dated September 28, 2021, and filed on September 30, 2021. The Claimant seeks an order compelling the Respondents to remit statutory deductions from its employees to the Claimant, which currently stands at Kenya Shillings Nine Hundred and Twenty Three Million, Eight Hundred and Nineteen Thousand, Seven Hundred and Eighty-Six and forty Two Cents Only (923, 819,786.42) as at May 31, 2022. The Claimant further prays that she be awarded costs of the suit and interest thereon.
2. The Respondents entered appearance on December 17, 2021, through Kennedy Chweya Onsembe, Advocate, their County Attorney, but did not file a response to the Claimant's claim.
3. On March 28, 2022, the Claimant's Counsel told the Court that the Counsel for the Respondents had reached out to him with a proposal for an out of court settlement, and sought time to settle the matter. The court allowed the adjournment to allow parties a chance at an out of court settlement.
4. On June 2, 2022, Counsel for the Claimant requested for a hearing date on the basis that parties' negotiations did not bear fruits. The matter was listed for hearing on July 4, 2022.



5. The Claimant presented one Ms. Rhoda Chemashack, their Finance Manager to testify in support of her case. Ms. Rhoda adopted her witness statement and produced a bundle of documents filed in the matter in support of the Claimant's case.
6. The Respondents did not participate in the case despite service.
7. The Claimant filed submissions in the matter. The Respondents did not.

### **The Claimant's Case**

8. The Claimant's case is that her mandate is that of a Retirement Scheme for employees of County Governments, who include the 1<sup>st</sup> Respondent herein. The Claimant further states that she is mandated under the Local Authorities Fund Act, CAP 272, and part 7(1) of the Sixth Schedule to the Constitution of Kenya 2010, to receive, invest and manage member's savings for prompt payment of retirement benefits when County employees exit service.
9. The Claimant states that the savings held by her, comprise of contributions from both the employers and employees of County Governments.
10. The Claimant states that the employees of the County Government of Kisii subscribed to, and contribute their retirement savings at a rate of 12% of their monthly salary to the Local Authorities Provident Fund (LAPFUND).
11. It is the Claimant's case that the 1<sup>st</sup> Respondent as an employer, equally remits the equivalent of 15% of the gross monthly salary of each employee of the County Government of Kisii to LAPFUND.
12. The Claimant states that 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 being a combined total of 27% of the gross monthly salary for the employees in their service.
13. It is the Claimant's position that the 1<sup>st</sup> Respondent, being the employer of the employees of the County Government of Kisii, is mandated to collect, as part statutory deductions, the specified amount from its employees' salaries for remission to the Claimant's accounts on a monthly basis.
14. The Claimant states that the 2<sup>nd</sup> Respondent despite deducting from the employees of the County Government of Kisii an amount equivalent to 27% of each employee's gross monthly salary and the employer's contribution, has since April 30, 2013, failed, refused, and/or neglected to remit the money on behalf of the employees of the County Government of Kisii to the Claimant.
15. The Claimant states that despite non-remittance of the contributions by the 2<sup>nd</sup> Respondent, the Claimant is obligated to pay the employees their retirement dues upon leaving the service, whether the prescribed amount has been remitted by the Respondents or not.
16. The Claimant states that she continues to pay the retirement benefits of the employees of the 1<sup>st</sup> Respondent as they retire, and the payment is proving difficult as a result of non-remittance of the contributions by the 2<sup>nd</sup> Respondent.
17. It is the Claimant's case that as of April 30, 2013, the Respondents have failed to remit to the Claimant monies amounting to Kenya Shillings Six Hundred and Seventy-Nine Million, Eight Hundred and Ninety-One Thousand, Six Hundred and Seventy-Eight and Seven Cents Only (679,891,678.70), and which amount has since grown to Kenya Shillings Nine Hundred and Twenty Three Million, Eight Hundred and Nineteen Thousand, Seven Hundred and Eighty-Six and forty Two Cents Only (923, 819,786.42) as at May 31, 2022



18. The Claimant states that the non-remittance of the contributions, is greatly prejudicial to the Claimant as it has a statutory obligation to credit the member's accounts at the end of every month, and pay the members their retirement benefits irrespective of whether the 1<sup>st</sup> Respondent or other contributors have made their respective contributions.
19. It is the Claimant's case that the 1<sup>st</sup> Respondent's non-remittance of contributions threatens the economic well-being of both current and former employees who have diligently served the County Government of Kisii for a significant period of their lives.
20. The Claimant further states that the continued non-remittance and/or contribution of monies by the Respondents to the Claimant if not addressed, may greatly undermine the Claimant's operations as contributing members may stand to lose benefits they are legally entitled to.
21. The Claimant's prayer to this court is for an order compelling the Respondents to remit the statutory deductions from its employees to the Claimant, amounting to Kenya Shillings Nine Hundred and Twenty Three Million, Eight Hundred and Nineteen Thousand, Seven Hundred and Eighty-Six and forty Two Cents Only (923, 819,786.42).

### **The Claimant's Submissions**

22. It is submitted for the Claimant that the 2<sup>nd</sup> Respondent had diligently contributed towards the Provident Fund up until April, 2013. It is further submitted that the 2<sup>nd</sup> Respondent has since failed to make remittances despite having deducted the amounts from their employees salaries.
23. The Claimant submits that the provisions of Sections 8(3) and 9 of the *Local Authorities Provident Fund Act* and Section 132 of the *County Government Act*, are plain, precise and unambiguous, therefore the Respondents were and are at all times under a statutory duty to strictly comply with the provisions of the law. The Claimant had reliance in the holding of Justice Mativo in *Law Society of Kenya v Kenya Revenue Authority & Another (2017) eKLR* where he stated thus:

“ All that the Court has to see at the very outset is, what does the provision say? The Courts are bound by the mandate of the Legislature and once it has expressed its intention in words which have a clear and significance meaning, the Court is precluded from speculating.”

24. It is the Claimant's submission that the Respondents have undermined the principles of good governance by failing to comply with statutory obligations as provided for under Article 10 of *the Constitution* of Kenya
25. The Claimant submits that by virtue of Section 33 of the *Retirements Benefits Act*, an employer pays statutory contributions in respect of such employees into any scheme fund prescribed, and that the unremitted contributions stood at Kenya Shillings One Billion, Sixteen Million, Two Hundred and Twenty-eight Thousand, One Hundred and Twenty-one and Thirty-five Cents (Kshs.1,016,228,121.35) as the date of filing these submissions and which continues to accrue both in terms of unremitted contributions and interest.

### **Analysis and Determination**

26. I have considered the pleadings, the witness' oral testimony and the Claimant's submissions. The issues for determination are: -
  - i. Whether the Respondents are in breach of their statutory obligation on statutory deductions; and



- ii. Whether the Claimant is entitled to the relief sought.

### **Whether the Respondents are in breach of their statutory obligation**

27. 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.
28. The establishment of the Local Authorities Provident Fund (LAPFUND), under the [Local Authorities Provident Fund Act](#) of 1984, put into place the Fund as a body corporate to administer the Provident Fund.
29. In 2012, the [Local Authorities Provident Fund Act](#), Cap 272, was repealed to align with the County Government Act, 2012. It is upon this alignment that LAPFUND is recognized as an existing pension scheme for officers and staff of local government; now County Governments.
30. Section 9 (1) of the Local Authority [Provident Fund Act](#), provides:
- “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.”
31. 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.”
32. The Claimant's assertion is that the 2<sup>nd</sup> Respondent had diligently made contributions towards the Provident Fund until April, 2013, when they stopped contributing in respect of their staff pension despite deducting the contributions from the staff salaries, and which now stands at an alarming figure of close to a Billion shillings.
33. The Claimant's further contend that the non-remittance by the Respondents is prejudicial to the Claimant and the employees of the Respondents, and threatens the economic well-being of both their current and former employees, who have diligently served the County Government for a significant period of their lives by losing the benefits they are entitled to by law.
34. The Claimant asserts that the non-remittance by the Respondents is prejudicial to the other counties since the Claimant has to pay the employees of the counties that are compliant as well as those that are not.
35. 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;”



36. Further, Section 19 (4) of the Act goes on to state:

“An employer who deducts an amount from an employee’s remuneration in accordance with subsection (1)(a), (f), (g) and (h) shall pay the amount so deducted in accordance with the time period and other requirements specified in the law, agreement court order or arbitration as the case may be.”

37. These provisions place the responsibility and duty to make deductions on the employer and further obligates the employer to remit any amount deducted, in accordance with the law under which the amount is so deducted. In *Bernard & Shaw Ltd v Shaw (Rubin Third Party) [1951] 2 All E.R 267 K.B.D, at p.268*, the Judge found inter alia: “In respect of the collection of tax a statutory duty is, therefore, imposed on the employer, and if he fails to deduct tax, he is in breach of that duty and is liable to pay the tax to the revenue authorities whether he has deducted it or not.”

38. Further, in [Co-Operative Bank of Kenya Ltd v Erastus Kibara Mureithi \[2013\] eKLR](#), the Court stated thus: -

“According to the [Income Tax Act](#) and the [Employment Act](#), it is the sole responsibility of the employer to make any deductions, statutory or otherwise, and remit the same on behalf of the employee. Failure by the employer to exercise its statutory mandate is not excusable.” Where proceedings are brought in respect of failure by the employer to remit deductions from employee’s remuneration, the law empowers the court to order that the employer refunds the employee the amount deducted from the employee’s wages, and pay the intended beneficiary on behalf of the employee with the employer’s own funds.

39. The non-remission of pension deductions offends the principles of good governance through failure by the employer/Respondents to comply with statutory obligations provided for under Article 10 of [the Constitution](#)

40. Pensions is a form of social security which the employees of the Respondents have worked for all their lives. It is a right that has accrued to the employees, and which is constitutionally protected. The employees of the 1<sup>st</sup> Respondent will stand prejudiced if this court does not order the remission of their contribution to their pension scheme.

41. I find and hold that the Respondents have failed their statutory obligation by failing to remit their employees’ pension contributions to LAPFUND as required by law.

#### **Whether the Claimant is entitled to the relief sought.**

42. On the questions of whether the Claimant is entitled to the relief sought, it is true when they say, there is no wrong without a remedy.

43. The Respondents have made deductions from their employees’ salaries, and they have no choice but to remit the deductions to the rightful body. This is what is right and just.

44. In sum, I make orders as follows: -

- a. An order compelling the Respondents to remit the statutory deductions, to wit pension contributions, from its employees to the Claimant, in the sum of Kenya Shillings Nine Hundred and Twenty Three Million, Eight Hundred and Nineteen Thousand, Seven Hundred and Eighty-Six and forty Two Cents Only (923, 819,786.42).



- b. For reason that the Respondents did not defend the suit, the Claimant is awarded half the cost of the suit and interest thereon.

45. Judgment accordingly.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 10TH DAY OF NOVEMBER, 2022.**

**CHRISTINE N. BAARI**

**JUDGE**

**Appearance:**

Mr. Kimathi Present for the Claimant

N/A for the Respondents

Christine Omollo- C/A

