



Local Authorities Provident Fund Board v County Government of Laikipia (Cause E047 of 2021) [2022] KEELRC 13559 (KLR) (15 December 2022) (Judgment)

Neutral citation: [2022] KEELRC 13559 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
CAUSE E047 OF 2021
ON MAKAU, J
DECEMBER 15, 2022**

**BETWEEN
LOCAL AUTHORITIES PROVIDENT FUND BOARD CLAIMANT
AND
COUNTY GOVERNMENT OF LAIKIPIA RESPONDENT**

JUDGMENT

Introduction

1. The claimant brought this suit on 18th September, 2021 seeking the following reliefs;
 - a. An order compelling the Respondent to remit the statutory deductions inclusive of interest made from its employees to the Claimant amounting to Kshs.397,224,761.28.
 - b. Cost of the suit.
 - c. Interest on (a) and (b) at Court Rates.
2. The respondent filed defence on 5th November, 2021 denying the said claim but admitted that only Kshs.23,537,315.00 was owing to the claimant. It further sought declaration that the suit is premature and no interest is payable because no notice was served as required under section 53A of the [Retirement Benefits Act](#).
3. The suit never went to hearing as the parties told the court that the issue of the principal claim had been settled. However, the court record is not clear on what amount was paid in the said settlement.
4. The issue for determination herein is whether the claimant is entitled to interest on the principal claim paid under Section 53A of the Act.
5. The claimant submitted that the respondent owed it money by dint of section 33 of the said Act which requires that an employer may with approval of his employees, pay any statutory contributions



- in respect of such employees into any scheme fund prescribed for that purpose. It further submitted that section 8 of the [Local Authority Provident Fund Act](#) (LAP Fund Act) makes it mandatory for the respondent to contribute to the fund, sums deducted from the employees plus employees contribution.
6. It further submitted that the respondent in its defence admitted receipt of the demand letter dated January 12, 2021 seeking payment of Kshs.311,114,450.50 being the principal amount plus interest. While admitting that the notice required under Section 53A of the Retirement Benefit Act was not served on the respondent, the claimant contended that such notice is not mandatory. It was therefore submitted that the various demand letters served and acknowledged by the respondent in its defence warrants the payment of the compound interest under section 53A of the Act.
 7. For emphasis the claimant cited the case of [Republic vs Attorney General & 2 others exparte Patrick Ochwa, Samuel Ouma & Job Weloba t/a Cootow & Associates](#) (2021) KEHC 144 (KLR) and [Republic vs The Non-Governmental Organizations and others](#) (2020) eKLR where the court was of the view that the court has a duty to try and get the real intention of the Constitution or statute by carefully attending to the whole scope of a statute, and that the word shall refers to mandatory command while may is directory or permissive.
 8. Accordingly in this case, the claimant submitted that the use of the word ‘May’ in section 53A above means that the issuance of a notice before filing a suit under the said section is merely directive and not a mandatory requirement.
 9. The Respondent has however submitted that the notice required under section 53A of the Act was not issued before filing of the suit and therefore the claim for interest must fail. It was argued that the said provision deals with the proceedings for recovery of deductions from employees and it requires in mandatory terms that a notice shall be issued to the defaulter. It was submitted that subsection (2) uses the word “Shall” to make the requirement of notice mandatory.
 10. For emphasis, the respondent relied on the case of [Equity Group Holdings Ltd vs Commissioner of Domestic Taxes](#) (2021) eKLR where the court held that the word ‘Shall’ when used in a statutory provision imports a form of command and not an option.
 11. The respondent further submitted that the claimant never served any notice that met the requirements of section 53A of the Act and therefore no interest is payable on the principal sum paid. According to the respondent the parties negotiated a settlement as per the minutes filed, which did not include the payment of interest on the principal.

Analysis

12. The relevant provision of the law in this dispute is section 53A of the [Retirement Benefits Act](#) which states that;
 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.”
13. The above provisions gives a pension scheme the option to file suit to recover unremitted pensions deductions. However before filing the suit, the Pension Scheme has the following obligation to fulfil:-
 - a. Shall give a written notice to the defaulter.
 - b. The notice shall be copied to the Retirement Benefits Authority.
 - c. The notice shall require the defaulter to pay the sum deducted within 7 days of the notice.
 - d. The notice shall inform the employer that if he fails to pay before the expiry of the notice, summary recovery proceedings of the sum shall be filed in court without further reference to him.
 14. The claimant has admitted in its submissions that it did not serve the respondent with the notice contemplated in section 53A and insisted that the said notice is not mandatory. However my reading of section 53A set out above does not give a scheme fund any option whether to issue or not to issue the statutory notice before filing summary recovery proceedings. The only option given is whether or not to file recovery suit.
 15. The law is vivid that after serving the notice contemplated under section 53A (2) of the Act, then the Fund Scheme may file suit. The notice must meet certain thresholds as set out above before the fund scheme can file the suit. The purposive interpretation of subsection (1) and (2) is that if the notice does not meet the said statutory thresholds, the suit is incompetent, and the benefits that accrue in a suit brought under section 53A of the Act including compound interest at 3% per month does not arise.
 16. Since there is admission by the claimant that it did not comply with section 53A (1) and (2) of the Act before filing the instant suit, the claim for compound interest under that section must fail. A party cannot benefit from an express provision of law when he has failed to comply with the same, like in this case.
 17. However, the claimant is entitled, and is hereby awarded interest at court rate, on the principal sum paid, from the date of filing the suit to the date when the payment was made. Since both parties have succeeded in their respective cases, each party will bear its own costs of the suit.



DATED, SIGNED AND DELIVERED AT NYERI THIS 15TH DAY OF DECEMBER, 2022.

ONESMUS N. MAKAU

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 April 2020, this judgment 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.

ONESMUS N. MAKAU

JUDGE

