



REPUBLIC OF KENYA



Mulu & 2 others (Suing for themselves and on behalf of 41 other former employees of Dubai Bank Kenya Limited - in Liquidation) v Kenya Deposit Insurance Corporation & 2 others (Cause 2512 of 2016) [2022] KEELRC 13480 (KLR) (9 December 2022) (Judgment)

Neutral citation: [2022] KEELRC 13480 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2512 OF 2016
MA ONYANGO, J
DECEMBER 9, 2022

BETWEEN

FRANCIS NZUKI MULU 1ST CLAIMANT

RAHIM ABDULMALIKI 2ND CLAIMANT

HASSAN KINUTHAI 3RD CLAIMANT

**SUING FOR THEMSELVES AND ON BEHALF OF 41 OTHER FORMER
EMPLOYEES OF DUBAI BANK KENYA LIMITED - IN LIQUIDATION**

AND

KENYA DEPOSIT INSURANCE CORPORATION 1ST RESPONDENT

**MR. ADAM BORU, LIQUIDATION AGENT, DUBAI BANK KENYA LIMITED
(IN LIQUIDATION) 2ND RESPONDENT**

**THE CABINET SECRETARY, MINISTRY OF LABOUR AND SOCIAL
SERVICES 3RD RESPONDENT**

JUDGMENT

1. The claimants are former employees of Dubai Bank, Kenya Limited (in liquidation).
2. The 1st respondent is a state corporation established under section 4 of the [Kenya Deposit Insurance Act](#), 2012 and is charged with the responsibility *inter alia* of providing a deposit insurance scheme for customers of member institutions and to receive, liquidate and wind up any bank, financial institution or mortgage finance company in respect of which the 1st respondent is appointed as receiver or liquidator in accordance with the [Act](#).



3. The 2nd respondent is the duly appointed liquidation agent of Dubai Bank Kenya Limited, (in liquidation) which is a bank previously licensed as a commercial bank under the [Banking Act](#), cap 488 laws of Kenya to carry out banking business in Kenya.
4. The 3rd respondent is the Cabinet Secretary in charge of the Ministry of Labour tasked with managing employment and labour issues in the country on behalf of the government.
5. The 3rd respondent is sued pursuant to the provisions of sections 66 to 73 of the [Employment Act](#) with regard to the insolvency of the 2nd respondent and his obligation towards payment of the employees' dues.
6. The issue in dispute in the claim is the failure by the respondents to pay the claimants their August 2014 salaries, unpaid leave days, salary in lieu of notice and terminal dues in accordance with the law and terms of employment upon receivership and liquidation of Dubai Bank Kenya Limited.
7. It is the averment of the claimants that at all material times to the suit they were former employees of the 2nd respondent which was put under receivership on August 14, 2015 by the Central Bank of Kenya following its inability to comply with mandatory statutory requirements for operating a bank under the [Banking Act](#), cap 488 and later put under liquidation on August 24, 2015 in accordance with the provisions of section 54 of the [Kenya Deposit Insurance Act](#), 2012.
8. The claimants avers that they were employed by the 2nd respondent on diverse dates until on or about the August 25, 2015 when they were, with no prior notice and or payment in lieu of termination as provided for under the [Employment Act](#), part VIII thereof and or as provided for under the [Kenya Deposit Insurance Act](#), 2012.
9. The claimants further aver that during the receivership period the 2nd respondent managed to recover and collect a substantial sum of Kshs 4 million which could have been applied to pay the employees their salaries before liquidation and termination of their employment.
10. It is the averment of the claimants that upon termination of their employment by the 2nd respondent, it undertook in the letters of termination dated August 25, 2015 to pay the claimants their salaries and terminal dues in accordance with their contracts of employment, but the respondents have since refused, failed and or neglected to pay them, hence the filing of the instant suit.
11. The claimants further aver that the failure of the respondents to pay them salaries and other benefits after arbitrarily terminating their employment is unlawful and pray that the same be declared unlawful, null and void.
12. The claimants pray that the respondents be jointly and severally held liable to pay the claimants unpaid salary, pay in lieu of notice, compensation and terminal dues as provided under their contracts of employment, the [Employment Act](#) and the [Kenya Deposit Insurance Act](#).
13. The claimants have tabulated their terminal dues under the heads basic salary for August 2015, unpaid leave, severance pay, damages for unlawful termination and pay in lieu of notice. The tabulation for each of the claimants including the former employees of Dubai Bank (in receivership) on whose behalf the claimants have filed suit is as follows –



No	Name of claimant	Salary for August 2015	Unpaid Leave	Paid in lieu of notice	Severance pay	12 months gross salary as damages	Total
1	Rahim Abdulmalik	111,483.87	124,800.00	111,483.87	1,003,354.83	3,337,806.44	4,688,929.01
2	Hassan Kinuthia	95,597.42	50,764.00	95,597.42	764,779.36	1,147,169.00	2,153,907.24
3	Kevin Kipkoech Keter	86,709.68	90,844.44	86,709.68	173,419.36	1,040,516.16	1,478,199.32
4	Saumu Ramadhan Juma	32,748.39	21,150.00	32,748.39	229,238.73	392,980.68	708,866.19
5	Muhamud Abdul	17,419.35	17,250.00	17,419.35	34,838.70	209,032.20	295,959.60
6	Hafswa Yahya	45,290.32	7,800.00	45,290.32	407,612.88	543,483.84	1,049,477.36
7	Francis Nzuku Mulu	49,575.48	22,056.50	49,575.48	396,603.84	594,905.76	1,112,717.06
8	Janeth Chelangat	17,419.35	9,000.00	17,419.35	34,838.70	209,032.20	287,709.60
9	Suleiman Goralwala	102,425.00	132,300.00	102,425.00	1,331,525.00	1,229,100.00	2,897,775.00
10	Vyonne Nduku Gerald	31,354.85	4,500.00	31,354.85	94,064.55	376,258.20	537,532.45
11	Muminah Dabaso	36,580.65	47,250.00	36,580.65	292,645.20	438,967.80	852,024.30
12	Kimwana Osman	32,748.39	21,150.00	32,748.39	229,238.73	392,980.68	708,866.19



13	Maureen Wanjiru Rung'u	41,806.45	48,600.00	41,806.45	250,838.70	501,677.40	884,729.00
14	Ali Adam	109,254.00	137,984.00	109,254.00	1,638,810.00	1,311,048.00	3,306,350.00
15	Karume Rajab	69,649.55	59,976.00	69,649.55	835,794.60	835,794.60	1,870,864.30
16	Athman Faridah Wangechi	35,674.84	-	35,674.84	321,073.56	428,098.08	820,521.32
17	Madatali Nazir	50,580.65	7,466.67	50,580.65	455,225.85	606,967.80	1,170,821.62
18	Chaudhry Rubina Rafiq	74,322.58	84,266.67	74,322.58	668,903.22	891,870.96	1,793,686.01
19	Suleiman Khadijah	45,290.32	31,200.00	45,290.32	362,322.56	543,483.84	1,027,587.04
20	Chao Agnes Mwashemu	59,225.81	34,000.00	59,225.81	-	710,709.72	863,161.34
21	Manhthi Patrick K	54,696.77	42,390.00	54,696.77	437,574.16	656,361.24	1,245,718.94
22	Omar Momar Ali	32,748.39	-	32,748.39	261,987.12	392,980.68	720,464.58
23	Wekulo leonard	65,032.26	53,200.00	65,032.26	585,290.34	780,387.12	1,548,941.98
24	Hussein Salma Suleiman	31,354.84	-	31,354.84	219,483.88	376,258.08	658,451.64
25	Hussein Hassob	30,309.68	20,880.00	30,309.68	151,548.40	363,716.16	596,763.92
26	Miraj Amina Abdalla	32,748.39	12,690.00	32,748.39	-	392,980.68	471,167.46



27	Alzabedi Abdallah Hassan	48,774.19	48,300.00	48,774.19	243,870.95	585,290.28	975,009.61
28	Gachuhi Salome Njeri	34,141.94	10,780.00	34,141.94	273,135.52	409,703.28	761,902.68
29	Mohammed Faiz Issa	27,870.00	-	27,870.00	-	334,440.00	390,180.00
30	Kyalo Erick	31,354.84	35,550.00	31,354.84	125,419.36	376,258.08	599,937.12
31	Siso Nick	143,070.97	254,613.33	143,070.97	429,212.91	1,716,851.64	2,486,819.82
32	Hassan Nasib Abdi	20,903.23	15,300.00	20,903.23	-	250,838.76	307,945.22
33	Mboshe Dinnah Moyi	17,419.35	18,750.00	17,419.35	34,838.70	209,032.20	297,459.60
34	Hassan Sofia Sheikh	45,290.32	90,580.64	45,290.32	90,580.64	543,483.84	815,225.76
35	Mugo James Mwai	17,419.35	19,500.00	17,419.35	34,838.70	209,032.20	298,209.60
36	Kimani David Njoroge	17,419.35	12,000.00	17,419.35	-	209,032.20	255,870.90
37	Mutai Gilbert Kibet	17,419.35	18,000.00	17,419.35	17,419.35	209,032.20	279,290.25
38	Mwanga Geoffery Ndambuki	247,741.94	302,222.22	247,741.94	-	2,972,903.28	3,870,609.38
39	Abdi Faisal Abdullah	13,935.48	13,935.48	-	167,225.76	195,096.72	



40	Omar Yunus Fatma Ali	20,903.23	10,800.00	20,903.23	20,903.23	250,838.76	324,348.45
41	Nteng'a Isaac Okeri	13,935.48	17,000.00	13,935.48	13,935.48	167,225.76	226,032.20
42	Asha Rashid	27,870.97	-	27,870.97	111,483.88	334,451.64	501,677.46
43	Mungwari Taurayi Ernest	13,935.48	84,266.67	13,935.48	13,935.48	167,225.76	293,298.87
Total							44,730,106.11

14. The claimants pray for the following orders
- a. Kshs 44,730,106.11 as particularized in the table herein above,
 - b. A certificate of service be issued to each claimant,
 - c. Costs of the suit and interest from the date of filing,
 - d. Any other relief the court may deem fit to so grant.
15. In their response to the memorandum of claim dated 21st and filed on February 22, 2017, the 1st and 2nd respondents deny that they failed to pay the claimants their August 2015 salaries, unpaid leave days, salary in lieu of notice and terminal dues as alleged in the memorandum of claim.
16. The 1st and 2nd respondents aver that the amounts payable to the claimants in accordance with section 57(1)(c) of the *Kenya Deposit Insurance Act*, 2012 are salaries only. That they are not under obligation and have no liability to pay leave days, salary in lieu of notice and terminal dues as these payments are not applicable when an institution is under receivership or in liquidation.
17. The 1st and 2nd respondents further aver that the *Kenya Deposit Insurance Act* has clear provisions on the recovery, collection and order of priority in paying out any monies by financial institutions under receivership. That the amount recovered by the 2nd respondent was applied in strict compliance with the law as set out in the 2nd respondent's statement of affairs as at August 25, 2015.
18. The 2nd respondent admits that it terminated the employment of the claimants and undertook to pay them as stated at paragraph 9 of the claim but states that the payments would be made in order of priority as set out in the *Kenya Deposit Insurance Act*.
19. The 1st and 2nd respondents deny that they acted arbitrarily or that the claimants are each entitled to the payments sought. They aver that the claim herein is premature and bad in law as the claimants as creditors have failed to follow the legal procedure stipulated under the *Kenya Deposit Insurance Act*.
20. In the witness statement of Adam Boru, the liquidation agent of Dubai Bank Kenya Limited (in liquidation) filed by the 1st and 2nd respondents together with their response to the memorandum of



- claim, Mr Boru states that the 2nd respondent was put under receivership by the Central Bank of Kenya on August 14, 2015. That the 2nd respondent was thereafter placed in liquidation by the Central Bank of Kenya on August 24, 2015 in accordance with the provisions of section 54 of the [Kenya Deposit Insurance Act, 2012](#).
21. That on August 24, 2015, Mr Boru lawfully terminated the services of the claimants since the 2nd respondent was insolvent and was no longer carrying out banking business. Upon issuing the claimants with the termination letters he undertook to pay their dues in terms of the criteria set out in the [Kenya Deposit Insurance Act, 2012](#).
 22. That when the claimants issued a demand letter, the 2nd respondent held a meeting with them together with their legal representative and explained to them the legal procedure he was required to comply with under the [Kenya Deposit Insurance Act](#) before payment of any claims. That he further explained to the claimants and their legal representative details of the priority of payments under section 33 and 57 of the [Act](#) and the statement of the affairs of the 2nd respondent as at August 25, 2015 which showed that the 2nd respondent was insolvent.
 23. The witness states that the termination of the employment of the claimants was not voluntary but was necessitated by the inability of the 2nd respondent to meet its financial obligations as a licenced banking institution.
 24. That the termination of the employment of the claimants was inevitable following the placement of the 2nd respondent in liquidation.
 25. The witness states that as at the date of liquidation the 2nd respondent was insolvent to the tune of Kshs 1,372,218,237.18 meaning its assets had a deficit and fell short of its liabilities by Kshs 1,372,218,237.18, which liabilities include those of the claimants.
 26. That as at August 24, 2015 the 2nd respondent had cash balances of Kshs 36,701,877.78 against insured deposits of Kshs 123,074,477.00.
 27. That the 2nd respondent was owed a total of sum Kshs 4,163,352,810.00 made up of loans of Kshs 161,624,202.25, overdrafts of Kshs 3,975,111,655.79 and staff loans of Kshs 26,616,952.00 as at August 24, 2015.
 28. That the 2nd respondent owed Kshs 143,702,863.04 to sundry debtors which includes staff salaries to the claimants of Kshs 1,766,134.17 and accrued leave of Kshs 2,019,179.86 as at the same date.
 29. That as at January 25, 2017 the witness had managed to pay Kshs 54,600,000.00 out of the insured deposits of Kshs 123,000,000.00 leaving a balance of about Kshs 68,400,000.00.
 30. That the 2nd respondent is owed Kshs 26,616,952.00 by some of the claimants herein as staff loans. The witness avers that he intends to collect this money from the claimants who owed the bank so that he could pay the creditors.
 31. The witness states that the 1st and 2nd respondents have acted in accordance with the relevant laws in dealing with claims herein especially regarding the priority of payments of claims as set out in the relevant Act.
 32. The witness avers that he advised the claimants and their legal representatives to be patient so as to give the 1st and 2nd respondents time to collect money from debtors to pay the insured depositors and thereafter the sundry creditors (which includes them) in the statutory order of priority



33. The 3rd respondent filed appearance through the Office of the Attorney General but did not file a defence to the claim. It did not participate in the suit at all.
34. By consent of parties, the suit was disposed of by way of written submissions. The claimants, 1st and 2nd respondents filed and exchanged written submissions.

Analysis Determination

35. It is not in dispute that the claimants were employees of Dubai Bank (in liquidation) engaged on different dates and in different capacities as specified in the memorandum of claim.
36. It is further not in dispute that the 2nd respondent terminated the employment of all the claimants by letters dated August 25, 2015.
37. The claimants submit that vide Employment and Labour Relations Court at Nairobi, Miscellaneous Application No 127 of 2016 they were on the November 14, 2016 granted leave by Mbaru, J to file this claim as required under section 56(2) of the [Kenya Deposit Insurance Act](#).
38. They further submit that they filed an authority mandating the 3 claimants to represent them in this claim which was filed together with the memorandum of claim dated December 5, 2016, annexed at page 30 after the verifying affidavit. It is on that basis that the claimants entirely rely on the witness statement/affidavit by Francis Nzuki Mulu, claimant No 7 in the claim's computation.
39. The claimants submit that the 3rd respondent is the Cabinet Secretary in charge of the Ministry of Labour tasked with managing employment and labour issues in the country on behalf of the government. Under section 66 and 70 of the [Employment Act](#) is actively involved in the liquidation process and is obligated to secure the employees debts and pay out what is due from the National Social Security Fund. Due notice was served upon the 3rd respondent and no action whatsoever was taken by the Cabinet Secretary who also did not file a defence to the suit.
40. For the 1st and 2nd respondents it is submitted that the claimants filed the instant suit prematurely, without exhausting other avenues available under the [Employment Act](#) and in violation of the doctrine of exhaustion. They rely on the decision in Kenya Chemical & Allied Workers Union v Ernst & Young Liquidators For Coates Brothers EA Limited [2015] eKLR where the court held that in the event of insolvency by the employer the applicable section is part VIII of the [Employment Act](#). Additionally, that section 66 and 69 set out the instances when payment can be made under the direction or order of the Cabinet Secretary. The payment should not exceed Kshs 10,000.00 except on advice of the National Labour Board and upon gazettelement.
41. The 1st and 2nd respondents submit that there is no evidence to demonstrate that the claimants made any application in writing to the 3rd respondent under sections 66-73 to enable him to exercise his powers regarding payment. That this is the only way the 3rd respondent will be aware of the dispute.
42. The respondents further submit that the claimants equally failed to comply with the mandatory requirements set out in the [Kenya Deposit Insurance Act](#), 2012. That the first port of call is the [Kenya Deposit Insurance Act](#), 2012 whose preamble states that it is:

“An act of Parliament to provide for the establishment of a deposit insurance system and for the receivership and liquidation of deposit taking institutions, to provide for the establishment of the Kenya Deposit Insurance Corporation and for connected purposes.



43. The 1st and 2nd respondents relied on the decision of the Court of Appeal in *Speaker of National Assembly v Karume* [2008] eKLR where the court stated –
- “Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.”
44. The 1st and 2nd respondents further rely on the decision in *Geoffrey Muthinja Kabiru & 2 others v Samuel Munga Henry & 1756 others*, [2015] eKLR where the court held –
- “It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews.... The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts...This accords with article 159 of the Constitution which commands courts to encourage alternative means of dispute resolution.”
45. The 1st and 2nd respondents submit that the claimants’ submission that they failed to comply with section 473 of the *Insolvency Act*, No 18 of 2015 is incorrect. They submitted that matters touching debts due (including employees’ salaries and wages) from a deposit taking institution are specifically addressed by the *Kenya Deposit Insurance Act*, 2012. The intention of Parliament is expressed in the short title. The provisions of the *Insolvency Act* and in particular section 473 generally provides for liquidation of incorporated and unincorporated bodies.
46. I have considered the pleadings and submissions on record. The issues arising from the pleadings and submissions are therefore the following:
- i. Whether the claimants claim offends the doctrine of exhaustion of available remedies;
 - ii. Whether the claimants are entitled to the orders sought in the memorandum of claim;
 - iii. Whether the claimants have fully complied with the requirements of sections 66- 73 of the *Employment Act*;
 - iv. Whether leave to file suit was granted;
 - v. Whether the 1st and 2nd respondents have failed to comply with sections 50(4)(f), 55 and 57 of the *Kenya Deposit Insurance Act* 2012;
 - vi. Whether the 2nd respondent complied with section 484 of the *Insolvency Act* No 18 of 2015 before commencement of liquidation;
 - vii. Whether any payments have been made by the respondents to the claimants, if so, how much;
 - viii. How much money/assets have been recovered by the 1st and 2nd respondents during the liquidation period;
 - ix. Are the claimants entitled to the dues as computed in their claim in lieu of notice when an institution is under liquidation;



- x. To what extent do sections 33 and 57 of the [Kenya Deposit Insurance Act](#), 2012 apply to the claimants herein;

Whether The Claim Offends The Doctrine Of Exhaustion

47. [Blacks' Law Dictionary](#) 10th Edition defines the doctrine of exhaustion as follows –

“exhaustion of remedies” The doctrine that, if an administrative remedy is provided by statute, a claimant must seek relief first from the administrative body before judicial relief is available. The doctrine’s purpose is to maintain comity between the courts and administrative agencies and to ensure that courts will not be burdened by cases in which juridical relief is unnecessary.

48. The doctrine was articulated by the Court of Appeal in [Geoffrey Muthinja Kabiru](#) case (*supra*) as cited by the 1st and 2nd respondents who insist that the claimants failed to exhaust the remedies provided under part VIII of the [Employment Act](#) at section 66 to 73.

49. Section 66 of the [Employment Act](#) provides –

66. Insolvency of employer

Where on an application made to him in writing by an employee or his representative the Minister is satisfied that—

- a. the employer of an employee has become insolvent;
- b. the employment of the employee has been terminated; and
- c. on the appropriate date the employee was entitled to be paid the whole or part of any debt to which this Part applies, the Minister shall, subject to section 69, pay the employee out of the National Social Security Fund, the amount to which, in the opinion of the Minister, the employee is entitled in respect of the debt.

50. The Act defines insolvency for purposes of the Act at section 67(b) as –

(b) if the employer is a company—

- i. a winding-up order or an administration order has been made, or a resolution for voluntary winding-up has been passed, with respect to the company; or
- ii. a receiver or a manager of the company’s undertaking has been duly appointed, or possession has been taken, by or on behalf of the holders of any debentures secured by a floating charge, of any property of the company comprised in or subject to the charge.

51. Section 68 defines the debts covered to include –

68. Debts to which this part applies

This part applies to the following debts—

- a. any arrears of wages in respect of one or more months, but not more than six months or part thereof;
- b. any amount which the employer is liable to pay the employee for the period of notice required by section 36 or for any failure of the employer to give the period of notice required by section 35 (1)(b), and (c);



- c. any pay in lieu of leave for annual leave days earned but not taken in accordance with section 28;
- d. any basic award of compensation for unfair dismissal; and
- e. any reasonable sum by way of reimbursement of the whole or part of any fee or premium paid by an apprentice.

52. Section 69 of the Act limits the amount payable under this section as follows –

69. Limitation on amount payable under section 68

- 1. The total amount payable to an employee in respect of any debt to which this Part applies, where the amount of the debt to which this part applies, where the amount of the debt is referable to a period of time, shall not exceed—
 - a. ten thousand shillings or one half of the monthly remuneration whichever is greater in respect of any one month payable; or
 - b. in respect of a shorter period an amount proportionate to the shorter period based on the amount payable under paragraph (a).
- 2. The Minister may, on the advice of the Board, by order in the Gazette, vary the limit specified in subsection (1).

53. Section 70 of the *Employment Act* provides for the role of the relevant officer and the Minister as follows:

70. Role of relevant officer

- 1. Where a relevant officer has been, or is required to be, appointed in connection with an employer’s insolvency, the Minister shall not make a payment under section 66 in respect of a debt until the Minister has received a statement from the relevant officer of the amount of that debt which appears to have been owed to the employee on the appropriate date and to remain unpaid.
- 2. A relevant officer shall, on the request of the Minister, provide the Minister with a statement for the purposes of subsection (1) as soon as is reasonably practicable.
- 3. If the Minister is satisfied that he does not require a statement under subsection (1) in order to determine the amount of a debt which was owed to the employee on the appropriate date and remains unpaid, he may make a payment in respect of the debt without having received the statement.
- 4. The following are relevant officers for the purposes of this section—
 - a. a trustee in bankruptcy or a permanent or interim trustee within the meaning of the Bankruptcy Act (cap 53);
 - b. a liquidator;
 - c. an administrator;
 - d. a receiver or manager;
 - e. a trustee under a composition or arrangement between the employer and his creditors; and



f. a trustee under a trust deed for his creditors executed by the employer.

54. Further, section 71 provides for the procedure for approaching the court as follows:

71. Complaint to Industrial Court

1. A person who has applied for a payment under section 66 may present a complaint to the Industrial Court—
 - a. that the Minister has failed to make the payment; or
 - b. that the payment made by the Minister is less than the amount which should have been paid.
2. The Industrial Court shall not consider a complaint under subsection (1) unless it is presented—
 - a. before the end of the period of three months beginning with the date which the decision of the Minister on the application was communicated to the applicant; or
 - b. within such further period as the Industrial Court considers reasonable in a case where it is not reasonably practicable for the complaint to be presented before the end of that period of three months.
3. Where the Industrial Court finds that the Minister should have made a payment under section 66, the Industrial Court shall—
 - a. make an award to that effect; and
 - b. declare the amount of any payment which it finds the Minister ought to make.

55. In this case the Minister for Labour did not take any action on the notice served upon him by the claimants. The claimants were therefore free to approach the court under section 71 of the *Employment Act*. Section 71 of the *Employment Act* does not require the claimants to exhaust the provisions under the *Kenya Deposit Insurance Act* before approaching this court. The claimants have however not supplied the request they made to the Minister to this court for the court to establish the particulars of the same.

56. I therefore find that the doctrine of exhaustion does not apply in the circumstances of this case.

57. Be that as it may, the second schedule to the *Insolvency Act* provides for priority of preferential debts as follows:

- i. First priority are the expenses of the bankruptcy or liquidation.
- ii. Second priority claims include wages salaries to employees together with any holiday pay, compensation for redundancy, statutory deductions, payments ordered under the *Employment Act*.
- iii. Third priority claims include tax deductions made by the bankrupt or company under the pay as you earn; non-resident withholding tax; resident withholding tax and duty payable.

58. The provisions of section 57 of the *Kenya Deposit Insurance Act* as read together with section 68 and 69 of the *Employment Act* and the second schedule to the *Insolvency Act* point to the fact that the salaries



of employees as set out under the sections would rank in second priority to insured depositors of Dubai Bank (in liquidation).

59. As stated by the 1st and 2nd respondents the insured deposits which ranked first in priority, stood at Kshs 123,074,477.00 as at the date of liquidation on August 24, 2015, against cash balances of Kshs 36,701,877.78. The bank was insolvent to the time of Kshs 1,372,218,237.18.
60. As at January 25, 2017 the liquidator had managed to pay Kshs 54,600,000.00 out of the insured deposits of Kshs 123,000,000.00 which took priority over the monies owned to the claimants. Even if the respondent collected Kshs 26,616,952.00 owed to the bank, it would not have been in a position to satisfy the balance of the insured deposits of Kshs 68,400,000.00.
61. From the foregoing, it is evident that the 1st and 2nd respondents were not in a position to pay the debts of the claimants which ranked second to the insured deposits. I therefore find that the 2nd respondent was insolvent and therefore there were no funds to be applied to payment of the monies owed to the claimants as at the time that they demanded payment or at the time they approached the court.
62. As at the time the parties filed submissions they did not inform the court of the position on recovery of debts or payment of insured deposits. The fact that there were no funds to pay the claimants at the time of coming to court does not mean that they are not entitled to payment should the liquidator be able to collect sufficient funds to pay off the insured debts. The claimants still rank second in priority after the insured deposits and are entitled to payment should there be any funds available after payment of insured deposits.
63. In the circumstances prayer no 1 of the claim, being the payment of Kshs 44,379,213.83 fails.
64. The claimants are entitled to certificates of service in terms of section 51 of the [Employment Act](#) which the 1st and 2nd respondents are directed to issue to the claimants.
65. Each party shall bear its costs to the suit.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 9TH DAY OF DECEMBER, 2022.

MAUREEN ONYANGO

JUDGE

