



**THE REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 1352 OF 2018**

(Before Hon. Lady Justice Maureen Onyango)

**BOARD OF TRUSTEES, KENYA BROADCASTING CORPORATION (KBC)STAFF**

**RETIREMENT BENEFITS SCHEME (Suing On Behalf Of The Scheme)..CLAIMANT**

**VERSUS**

**KENYA BROADCASTING CORPORATION (KBC).....RESPONDENT**

**RULING**

The application before me for determination is a notice of motion dated 3<sup>rd</sup> September, 2018 (**the Application**) filed by the Claimant/Applicant under certificate of urgency on 4<sup>th</sup> September, 2018. The application is expressed to be made under Rule 17 of the Employment and Labour Relations Court Rules, Section 53A of the Retirement Benefits Authority Act, Regulation 4 of the Retirement Benefits (Minimum Funding Level and Winding-Up of Schemes) Regulations 2000 as well as Section 1A, 1B and 3A of the Civil Procedure Act.

The application seeks the following orders:-

1. Spent.
2. Pending the hearing and determination of the main suit, the Court be pleased to grant orders against the Respondent requiring it to submit to the KBC Staff Retirement Benefits Scheme (Scheme) all deductions made from its employees' emoluments/salaries for purposes of remittance to the Scheme; the Respondent's contributions towards the Scheme; and property rent collections (staff tenants check-offs) from the date of this order henceforth.
3. Costs of this application be awarded to the Claimant.

The Application is premised on the grounds (1-20) on the face of the Application. It is supported by a supporting affidavit sworn by Daniel Okoth, on 3<sup>rd</sup> September, 2018 (the **Supporting Affidavit**) and a supplementary affidavit (the **Supplementary Affidavit**) sworn by Jane Kiambi on 21<sup>st</sup> August, 2019.

Briefly the Claimant/Applicant has collectively pleaded in the grounds of the Application and the Supporting Affidavit that:-

- i. The Claimant's suit is for recovery from the Respondent of all unremitted contributions and property rent collections owed to the Scheme which amount to over KES 820,242, 211 as at the time of filing of the suit and the Application.
- ii. The Respondent, who is the employer of the members of the KBC Staff Retirement Benefits Scheme (**The Scheme**), is responsible by law and under by a Trust Deed entered into with the Claimant, for making deductions on the members' emoluments/salaries together with the Respondent's own contributions and remitting them to the Claimant.
- iii. The Applicant and the members of the Scheme are concerned and aggrieved on account of non-remittance of all the pension benefits due for nearly a decade which have pushed the funding of the Scheme below the level set by **Regulation 4 of the Retirement Benefits (Minimum Funding Level and Winding-Up of Schemes) Regulations 2000**.
- iv. As a result of the Respondent's failure to remit all the deducted employee' contributions together with the Respondent's

contributions to the Scheme, there has been a deteriorating funding level which has exposed the Scheme to massive actuarial risks and regulatory action by the Retirement Benefits Authority (**RBA**) including the threat of winding up.

v. The decline in the funding of the Scheme led the RBA to write to the Chairperson of the Claimant inquiring on the failure to remit and later demanding for a Remedial Plan for the Respondent.

vi. Consequently, the trustees of the Claimant were required to prepare a Remedial Plan showing how the Scheme will be restored to financial balance. The Respondent as the Sponsor, filed Remedial Plans with the RBA, which it reneged on on several occasions and in return has aggravated the deteriorating funding position of the Scheme.

vii. An actuarial valuation of the Scheme conducted in 2016 revealed a deficit of over KES 2.1 billion as at 30<sup>th</sup> June, 2016, a figure that has escalated to over KES 2.8 billion as at the date of the filing of the claim herein. According to the actuarial valuation, the Scheme Actuarial deficit has deteriorated from KES 1,441,431,000 as at 30<sup>th</sup> June 2013 to KES 2,137,495,000 as at 30<sup>th</sup> June, 2016.

viii. The valuation also established that the Scheme's funding level (ratio of Scheme assets to total liabilities) has plummeted to 29.6% effectively falling below the minimum funding requirement of 100% prescribed by the Retirement Benefits Regulations, 2000.

ix. The deficit is a direct consequence of the Respondent's non-remittance of deductions made from its employees' emoluments/salaries for purposes of remittance to the Scheme; the Respondent's contributions towards the Scheme and property collections (staff tenants check-offs).

x. Despite severally admitting its indebtedness to the Claimant and the deteriorating funding level, the Respondent continues to be in breach of its statutory obligations and under the trust deed by deducting the employees' contributions and failing to remit them to the Scheme to date.

xi. Even currently, the Respondent continues to deduct contributions from the members without remitting to the Scheme.

xii. The Respondent's actions have put the Scheme in great financial jeopardy that the Respondent's former employees who worked hoping they would receive payments to sustain them while in retirement may be rendered destitute.

xiii. Given that the retired members of staff are not receiving their pension and the average age of at least 70% of the Respondent's employees being 48 years, the Scheme's immediate need for cash cannot be overemphasized.

xiv. Moreover, if the Scheme is dissolved, members would walk away with only a 20% pay off.

In response, the Respondent filed a Replying Affidavit sworn by Jeremiah M Marakia on 15<sup>th</sup> July, 2019 and filed on 16<sup>th</sup> July, 2019 (the **Replying Affidavit**).

In its reply, the Respondent pleaded that:-

i. The application is pre-emptive of the main suit as the prayers sought by the Claimant have the effect of granting same orders sought in the Statement of Claim without hearing the matter on merit where the Applicant would need to prove the amounts claimed are indeed owed and have not been paid.

ii. It has been remitting through its management the employees' portion of pension contributions as required contrary to the allegations by the Applicant.

iii. It has in fact remitted employee contributions amounting to KES 66, 314, 173 between March 2018 and July, 2019 and has also remitted substantial sums as relates to the employer contributions.

iv. It has also during the same period, remitted over KES 85, 379, 462 being 70% monthly lump sums for pensioners.

v. It is fully intent to clear any balances owed to the Scheme and has made several contributions towards the same even during the subsistence of the suit and continues to do so.

vi. Following the liberalization of the electronic media industry and the withdrawal of the Respondent's Television and Radio license permit rights, the Respondent has been exposed to massive levels of competition resulting in a negative impact on its cash flows. As a result of this, the Respondent had to heavily rely on the Treasury to meet its financial obligations.

vii. Despite its financial distress, the Respondent confirms that through a special board paper, a remedial action plan was created to address the settlement of the monies owed to the scheme, however, the Respondent has been unable to secure the entire amount required to offset balances owed to all its creditors including the Claimant.

viii. It has made fervent attempts at remedying the settlement and remitted the contributions despite its strained financial capability whose status has been in the public knowledge for a protracted period of time.

ix. Owing to its financial position and if this application were to be allowed compelling the Respondent to pay the entire sum at once without having determined the case on merit it would be crippled as the Respondent would be unable to maintain even the payment of salaries to its current staff and would effectively jeopardize the livelihoods of all its employees.

In further support of its application and in response to the Respondent's Replying Affidavit, the Claimant/Applicant filed a Supplementary Affidavit on 27<sup>th</sup> August, 2019, sworn by Jane Kiambi on 21<sup>st</sup> August, 2019 (the **Supplementary Affidavit**) where it briefly stated that:-

i. The total amounts owed by the Respondent to the Claimant arising out of all deductions made from its employees' salaries together with the Respondent's contributions as well as property rent collections (staff tenants check-off) for purposes of remittance to the Scheme amount to an unremitted pension grand total of KES 909,945,089.19 as 30<sup>th</sup> June 2019.

ii. In response to failure by the Respondent to comply with the RBA's directions on payment of the total outstanding contributions together with the accrued interest within 30 days of the said directions, the RBA has previously threatened to issue a Notice under Section 53B of the Retirement Benefits Act (the **RBA Act**) which requires the RBA to recover unremitted contributions from the Claimant to protect the interests of members of the Scheme.

iii. The RBA has however not enforced its threats leaving the Scheme with no option but to seek the intervention of this Court.

iv. The Respondent has claimed its inability to fully remit the owed monies to the Scheme but has in no way laid before the Court sufficient material demonstrating its alleged financial troubles and showing that the government or line ministry is unable to provide the funds required.

v. The material exhibited in the Replying Affidavit to support the alleged financial difficulties is based on unauthenticated reports in the media and ought to have instead contained if at all, audited financial statements and reports to enable the Court assess the Respondent's (in) solvency.

vi. Non-remittance of the dues owed to the Claimant by the Respondent has led to continuing damage to the Scheme's financial state and the result is irreparable and will continue to cause far reaching consequences if not curbed as summarized below:-

a. A majority of the Respondent's employees (at least 70%) are aged over 48 years and are living in great fear of retirement given that upon retirement given that upon retirement, they will neither receive pension lump sum nor be eligible for pension income given the financial damage directly cause by the Respondent. Many of these employees will therefore have no access healthcare and will be without a livelihood putting them in great danger of disease, stress and financial depression.

b. The actual deficit of the pension scheme has further escalated from KES 2.1 Billion to KES 2.7 Billion which continues to accumulate at a dangerous rate.

c. Since the Respondent is paying pensioners directly as ordered by RBA, these payments or the rest of the payments made by the Respondent up to KES 85, 379,462.25 as at 24<sup>th</sup> June, 2019 have not improved the funding levels of the Scheme which continue to plummet.

vii. The legal position on the operation of pension schemes is that an employer is obligated to make its contributions to a scheme upon entering into a legal relationship creating the scheme.

The Parties appeared before me on 16<sup>th</sup> July 2019 where I issued directions for the filing of written submissions.

The Claimant/Applicant in its Submissions dated 21<sup>st</sup> August 2019 and filed on 27<sup>th</sup> August, 2019 and submitted on the depositions on the Supporting Affidavit and the Supplementary Affidavit.

It identified the main issue in the application for the determination of this court as whether the Respondent is required to submit to the Scheme all deductions made from its employees' emoluments/salaries for purposes of remittance to the Scheme, the Respondent's contributions and Schemed property rent collections (staff tenants check-offs).

The Claimant/Applicant further made submissions that:-

i. It is not in contention that the Claimant is a retirements benefit scheme for employees of the Respondent and by dint of **Section 33 of the RBA Act**, the Respondent bears the responsibility of paying the prescribed statutory contributions into the scheme as well as remitting any deductions or collections it has made on behalf of the Respondent to the Respondent.

ii. Prayer 2 of the application is framed in the form of a mandatory injunction and it relied on the **Kenya Airports Authority v Paul Njogu Mungai & Others [1997] eKLR, Giella v Cassman Brown & Company Limited [1973] EA 358** to persuade this court to grant the prayer and further submitted as follows:-

iii. That by the admissions in paragraphs 4-8 of the Respondent's dated 15 July, 2019, the Respondent has stated its full intention to clear any balances owed to the Claimant and had further admitted in its Replying Affidavit that it had remitted over KES 66,314,173 in employee contributions between March 2018 and July 2019 and over KES 85,379,462.25 being the 70% monthly lump sums for pensioners and undisclosed sums in employer contributions.

iv. That as a result of the Respondent's admission, the Application should be allowed. The Claimant relied on **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]** which cited the case the case of **Choitram v Nazari [1984] KLR 327** which citation was reproduced in the Applicant's submissions in full.

v. The Respondent's promises to the RBA to remit the outstanding dues and comply with the directives on the remedial plans presented to the RBA also qualified as admissions of the Respondent's liability.

vi. The Respondent's inability to pay the Claimant the entire amount owed to it based on its financial distress has not been demonstrated and that further the Respondent has not exhausted all avenues to available to it for purposes of obtaining funds to settle the amounts owed to the Claimant.

vii. The Respondent is dishonest in its allegation that is unable to make the remittances claimed by the Claimant and seeks to invite the Court's protection on the basis of insolvency which can only be sought through the requisite procedures within insolvency proceedings which are not within the purview of this court's jurisdiction.

viii. The Claimant/Applicant is not asking for that was never available to the Respondent but money whose whereabouts are only known to the Respondent considering the issue before the court is non-remittance of employee contributions and property rent collected.

**ix. Section 19(6) of the Employment Act** provides that where proceedings are brought under **Section 19(5)** in respect of failure by the employer to remit deductions from and employee's remuneration, the court may in addition to fining the employer, order the employer to refund to the employee the amount deducted from the employees' wages and pay the intended beneficiary on behalf of the employee with the employer's own funds.

x. By failing to make various remittances, the Respondent is also in breach of trust deed founding the Scheme and guilty of the offence set out in **Section 53A (4) of the Retirement Benefits Act** by refusing to remit to the Claimant deductions made on the Respondent's employees' emolument despite being in receipt of a notice requiring it to remit the said deductions.

xi. The continuing damage to the Scheme's financial state caused by non-remittance by the Respondent is irreparable and will result in far reaching consequences which call for urgent measures and interventions by this Court in form of a mandatory injunction.

xii. On a balance of convenience, there is sufficient reason to allow the application as it would help to slow down the growth rate of the debt owed in the claim by allowing the court to deal with a static figure as opposed to the ever changing figures that would confront the court at the trial of the main suit of this application is not allowed.

xiii. It would also ensure that the Applicant does not go into liquidation which situation would cause untold suffering to those employees of the Respondent who are about to retire or former employees who have already retired and ensure compliance with the mandatory provisions of the **Section 53A of the Retirement Benefits Act**.

On the other hand, the Respondent filed its submissions on 4<sup>th</sup> December, 2019, the same being undated and unsigned. Therein, the Respondent reiterated the contents of its Replying Affidavit. It identified the singular issue as to whether the Application disclosed any substantive issues to warrant this court's intervention.

The Respondent further submitted that:-

i. While it was experiencing financial difficulties with its financial position not improving, it has stretched its meagre resources and has made efforts to wholly remit the employee contributions through payments to the Claimant which ought to show that the Respondent is committed to clearing any balances owed to the Claimant.

ii. It was aware of the decline of the funding position; however, the same was attributable to factors such as payment of full benefits to members exiting from employment.

iii. The best way to serve the interests of all stakeholders in a business is to restore viability.

iv. It is only fair and just that the sponsor be granted more time to enable it stabilize its financial status and address the case of the Claimant among several other creditors and this can only viably materialize if the instant matter is dismissed and the main suit be heard on merit.

v. The suit might be deprived of any significance as a Judgment of the Court cannot operate to grant any practical relief to the Plaintiff due to the factual developments on the Respondent's financial position. In support of this submission, the Respondent relied on the case of **Eric J. Makokha & Others v Lawrence Sagini & Others Civil Application No. 20 of 1994**.

vi. As the Claimant did not compute the amount of deductions/contributions not remitted and simply alleges that the Respondent is liable to make pension contributions, the court would be unable to make a conclusive determination of the issues. The court would only be able to do so if the Claimant specifically provided evidence or records from the Respondent that thought deductions were made, the Respondent failed to remit the deductions to the Claimant and were thus liable for the same.

vii. The application raises no issue distinctive from those sought in the main suit and an early involvement of the court would lead to premature comments on the merits on issues yet to be adjudged.

The Respondent thus urges this court not to make definitive or final findings of either fact or law at this stage as doing so may ultimately embarrass the court at the hearing of the main suit and as such ought to dismiss the Application.

### **Determination**

I have considered the Application herein, the Supporting Affidavit, the Supplementary affidavit as well as the Replying Affidavit filed by the parties. I have also considered the written submissions filed in support and in opposition to the application.

It is apparent from the affidavits and submissions filed by both parties that it is not in contention that the Claimant is a pension's scheme that was formed for the benefit of the Respondent's employees and to which the Respondent is required to deduct from its employees' salaries/emoluments for purposes of remittance to the Claimant as well as remit to the Claimant its own contributions as the employer/sponsor of the Scheme.

The issue arising for consideration is whether the Application is merited and if so, whether the Applicant is entitled to the orders sought.

The wording and import of Prayer 2 of the application clearly seeks this court to issue a mandatory injunction. In the case of **Kenya Breweries Ltd v Washington Okeyo (2002) EA 109** the Court of Appeal had occasion to discuss and consider the principles that govern the grant of mandatory injunctions. It held that the test for grant of a mandatory injunction was as correctly stated in VOL 24 of **Halsbury's Laws of England 4<sup>th</sup> Edition paragraph 948** that:-

“A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally, be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is simple and summary one which can be easily remedied, or if the defendant attempts to steal a march on the plaintiff, a mandatory injunction will be granted on an interlocutory application.”

In the English case of **Locabail International Finance Limited v Agro Export & Another (1986), ALI ER 901** which the Court of Appeal in Kenya has followed with approval in many decisions, the court held that:-

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could easily be remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory injunction, the court has to feel a high sense of assurance that at the end of the trial it would appear that the injunction had been rightly granted, that being a different and higher standard than required for a prohibitory injunction.”

In the case of **Nation Media Group & 2 others v John Harun Mwau [2014] eKLR** the Court of Appeal said:-

“It is trite law that for an interlocutory mandatory injunction to issue, an applicant must demonstrate existence of special circumstances ... A different standard higher than that in prohibitory injunction is required before an interlocutory mandatory injunction is granted. Besides existence of exceptional and special circumstances must be demonstrated as we have stated a mandatory injunction can only be granted in exceptional and in the clearest of cases.”

The principles of law arising from the above decisions is that a court considering an application for an interlocutory mandatory injunction must be satisfied that there are not only special and exceptional circumstances, but also that the case is clear.

In an application like the one before me, where the Applicant seeks a mandatory interlocutory injunction, the court will act sparingly and only accede to the request and grant such an order in the clearest of cases.

In the present case it is not contested that the Applicant is a retirement benefits pension scheme established for Respondent's employees to which the Respondent is required by law, contract and by its own admission, to deduct from its employees emoluments/salaries as well as make its set contributions and collectively remit the same to the Claimant.

It is also not in dispute that there has been a progressive decline in the funding position of the Respondent occasioned by the failure of the Claimant to remit all the deductions made from its employees' emoluments/salaries as well the Respondent's contributions.

The Respondent has admitted its indebtedness to the Claimant and has intended to settle the payments in full and confirmed that it has made reference to previous proposals for settlement of that indebtedness a strategy which while submitted to the Applicant and adopted by the RBA has not been fulfilled.

It is noted by this court that the only oppositions to the Claimant's application that the Respondent has fronted are that the Claimant has not computed the amount of deductions/contributions not remitted and that the Respondent is undergoing great financial difficulties particulars of which have not been disclosed to this court.

It is also not contested that the continued decline of the funding position of the Applicant exposes the Applicant to the threat of being placed under administration or dissolved on the basis of non-compliance with the provisions of the **Retirement Benefits (Minimum Funding**

**Level and Winding-Up of Schemes) Regulations 2000.** The net effect of this would be that the Respondent's employees will not be able to receive their pension lump sum or a pension income which clearly exhibits the irreparable harm that would be occasioned to the Claimant and its members.

I find that the case is clear and the orders sought to be granted at the interlocutory stage can be granted.

Having said that much, I allow Claimant/Applicant's application in terms of prayer 2 and proceed to make the following orders:-

**i. Pending the hearing and determination of the main suit, the Respondent is hereby required to submit to the KBC Staff Retirement Benefits Scheme, the Claimant/Applicant, all deductions made from its employees' emoluments/salaries for purposes of remittance to the Scheme; the Respondent's contributions towards the Scheme; and property rent collections (staff tenants check-offs) from the date of this order henceforth.**

**ii. Costs of this application shall abide the outcome of this Suit.**

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 15<sup>TH</sup> DAY OF MAY 2020**

**MAUREEN ONYANGO**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court of operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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, this 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 this 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**