



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF**

**KENYA AT NAIROBI**

**CAUSE NO. 828 OF 2018 (FORMERLY HCCC NO. 1911 OF 2000)**

**JAMES WAWERU**

**REONARD N. KIMANI**

**MUCHOKI GITAU GICHIRA.....CLAIMANTS**

**VERSUS**

**KENYA RAILWAYS CORPORATION.....RESPONDENT**

**JUDGMENT**

1. The Plaintiffs, (now Claimants) are all former employees of the defendant (now respondents) and they all used to contribute to National Social Security Fund (NSSF) during the time of their employment. Under the NSSF Act the claimants were supposed to contribute one half of the required monthly contribution while the defendant was bound to contribute the other half on behalf of each employee. Under the contract of employments, the claimants were also entitled to full pension or gratuity upon retirement and/or retrenchment. However, when the claimants' contracts ended, the respondent paid their final dues but deducted therefrom the amount she had contributed on behalf of each claimant to the NSSF. The claimants were aggrieved and brought this suit on 27.4.2000 contending that the said deduction of their dues by the Defendant was inequitable, oppressive and contrary to the Law and prayed for the following:-

- a) A declaration that the purported deduction from the Plaintiff's pension and/or gratuity of the Defendant's contributions to the NSSF was ultra vires the provisions of the NSSF Act.*
- b) A refund of the NSSF Contributions deducted from the Plaintiff's pension and/or gratuity.*
- c) Interest on (b) above at court rates.*
- d) Costs of this suit.*
- e) Any other further relief that this Court may deem fit.*

2. The Plaintiffs also filed an application dated 19/04/2000 seeking authority to represent themselves and all other ex-employees of the defendant similarly aggrieved with the unlawful deductions of their terminal benefits. They filed a further supporting affidavit on 21/09/2000 annexing the names of all ex-employees it intended to represent and the amount that was due from the defendant for each person.

3. The Defendant filed its Statement of Defence dated 21/06/2000 averring that the then public policy authorised it to retain its share of contributions for employees leaving service to avoid payments of double benefits from public funds. She further averred that the Plaintiff's suit is incompetent for contravening Section 83 of the Railways Act and should be struck off with costs. It also filed its Grounds of opposition on 13/07/2000 opposing the Plaintiffs' application dated 19/04/2000 on the grounds that the

Plaintiffs should only represent themselves and if they represent any other persons, they should name the persons and not an amorphous group of ex-employees of the defendant. That the ex-employees have different claims against it and generalising their claims would have a devastating effect on the defendant. The grounds were supported by the affidavit of their advocate who avers that the Plaintiffs had not complied with Order 1 Rule 12(1) and (2) of the Civil Procedure Act. She further denied the claim for refund of the deducted dues contending that the deductions were done lawfully.

4. The parties filed a Statement of Agreed Facts on 19/11/2010 dated the same day averring that the Plaintiffs left the Defendant's employment under a retrenchment scheme and that at the time of calculating their gratuity, the Defendant retained the equivalent of its share of contributions to the NSSF during the period of the Plaintiffs' employment. On 28th May 2018, the High Court referred the suit to this court after the former lost jurisdiction over the matter under the 2010 Constitution.

5. The suit revolves around interpretation of the law and for that reason, the parties agreed to dispose it of by written submissions on the strength of the pleadings and the documentary evidence filed.

### **Claimants/Plaintiffs' submissions**

6. The Claimants submitted that the deduction of their final dues by the respondent to recover her contributions to the NSSF was unlawful and prayed for refund of the said deductions plus interest. They relied on their List of Documents dated 30/04/2003 to prove the said deductions. That the documents includes correspondences from the Respondent to each of them indicating their final dues and excluding the Respondent's share of contribution to NSSF. They also include a letter dated 13/04/1999 from the Managing Director of the NSSF questioning the Respondent's action of making the said deductions.

7. They further submitted that the Respondent's action was ultra vires the law particularly in **Sections 10(1) and 12 of the NSSF Act, Cap 258 Laws of Kenya** as read together with **Section 36 (b)** of the same Act. They also submitted that, the *Kenya Railways Personnel Regulations 1988* and *Clause 13 of the Kenya Railways Corporation (Gratuities) Regulations L.N. 111/198*, which were relied upon by the respondent to make the said deductions, are in conflict with **Section 11(1) of the NSSF Act** which exempts some employers from paying NSSF contributions and states as follows:

***"A contributing employer may deduct the employee's share of a standard contribution (being part of that contribution specified as such in the third schedule) from the wages payable by him to any employee in respect of the contribution period to which that contribution relates".***

8. Flowing from the foregoing provision, the claimants urged that the Respondent does not fall within the category of section 11 of the NSSF Act but by virtue of **Section 12** of the same Act, is mandated not to deduct their contributions and this supersedes any subsidiary legislation and/or regulation pursuant to the Respondent's internal management. They therefore prayed for refund of all the deductions made as enumerated in their list of documents mentioned hereinabove totalling Kshs.987,683/= plus the other prayers in the Plaint.

### **Respondent/ Defendant's submissions**

9. The Respondent submitted that the particular amounts the Claimants are praying for are not specifically pleaded in the Plaint and proved as is required for Special Damages and so the Claimants are therefore not entitled to the claims in prayers (b) and (c). It relied on ***Siree -vs- Lake Turkana El Molo Lodges [2000] 1 EA 521***, where this Court held that when damages are calculated to a cent, they cease to be general in nature and have to be claimed as special damages and as such, have to be specifically pleaded and proved.

10. The respondent submitted that according to ***Halsbury's Laws of England, vol. 20 para. 9***, a statutory corporation is the creature of, and derives its powers from, the statute creating it and as such, its funds are in effect, trust funds and cannot be applied without statutory authority to the making of gifts. It therefore submitted that, being a statutory corporation it cannot make gifts outside the provisions of the Kenya

Railways Corporation Act, Cap 397 read together with the Regulations made thereunder, otherwise it will be acting *ultra vires*.

11. The respondent further submitted that **Regulation 5** of the **Kenya Railways Corporation (Gratuities) Regulations L.N. 111/198** permits it pay gratuity from its funds on the terms and conditions specified in the gratuity Schedule. That the amount of gratuity it is permitted to grant is set out at **Regulation 8** while the rate of gratuity for each completed month of service shall be one-tenth of a month's salary less one half of the sum of any standard contributions made by the corporation in respect of the employee under the NSSF Act, during any period which has been counted as service for the purpose of his gratuity.

12. The respondent further submitted that payment of gratuity to employees by the Respondent is discretionary and not obligatory and as such, an ex-employee has no vested rights in the said gratuity and cannot make any claim thereunder. In addition, it submitted that the Claimants were contractually bound by the **Kenya Railways Personnel Regulations 1988 C17 (f)** which provides that:

*“Temporary, permanent and non-pensionable employees are required to contribute to the National Social Security Fund under the Act. To avoid payment of double benefits from public funds, the aggregate amount of the Corporation’s contribution is deducted from the gratuity payable to the employee”.*

13. The Respondent further submitted that the Claimants’ case is based solely on **Section 12 of the NSSF Act** but contended that the spirit of that provision is to prevent the employer from making deductions from the employees’ entitlements such as wages and the like but does not extend to voluntary gifts paid out by employers. It also submitted that, by dint of **Section 94 (4) of the Kenya Railways Corporation Act**, the provisions of the Act and the Regulations made thereunder override the provisions of Section 12 of the NSSF Act. That the said section 94(4) of the Kenya Railways Corporation Act provides that, the Act shall apply regardless of any written law.

14. It further submitted that this Honourable court lacks jurisdiction to deal with disputes relating to the interpretation and application of the abovementioned Regulations and that such dispute must be determined by the relevant Minister as per **Regulation 13 of the Kenya Railways Corporation (Gratuities) Regulations L.N. 111/198**. It relied on **Adero & ano vs. Ulinzi Sacco Society Limited [2002] 1 KLR 577** where Ringera J, as he then was, held that jurisdiction either exists or does not *ab initio* and cannot be conferred by the consent of the parties or be assumed on the grounds that parties have acquiesced in actions which presume the existence of such jurisdiction. The learned Judge also stated that jurisdiction is such an important matter that it can be raised at any stage of the proceedings, and even on appeal.

### **Analysis and determination**

15. After careful consideration of the pleadings, evidence and the submissions filed, the following issues arose for determination:

- a) Whether the court has jurisdiction to determine the dispute herein.
- b) Whether the Respondent was right in deducting the NSSF Contributions from the Claimants’ dues.
- c) Whether the Respondent should refund to the claimants the NSSF Contributions deducted from their employment terminal dues.

### **Whether the court has jurisdiction to determine the dispute herein.**

16. The jurisdiction of this court to hear and determine employment related disputes in Kenya is well settled. The said jurisdiction flows from Article 162(2) (a) of the constitution, section 12 of the

Employment and Labour relations Court Act and the various statutes of labour laws in Kenya. The dispute before the court is founded on a contracts of employment signed between the parties herein which, as submitted by the respondent were governed by the Kenya Railways Act and the regulations made thereunder. The said admission by the defence places the dispute herein within the jurisdiction of this court. The objection by the respondent that the court lacks jurisdiction to interpret the said regulations which govern the rights of the parties to the employment contract herein is rather contradictory and I dismiss it.

### **Whether deduction the NSSF Contributions from the Claimants' dues was justified.**

17. The claimants contended that the deduction of the SSSF contribution from their terminal dues was unlawful and relied on **Section 12 of the NSSF Act** which provides that an employer is not entitled to deduct from the wages of its employee or recover from the employee any contribution payable by it under the NSSF Act for that particular employee except as provided for in section 11 of the Act, which is in respect of the employee's share of a standard contribution. She further contended that under **Section 36(b) of the NSSF Act** anyone who knowingly deducts from the wages of their employees in respect of any contribution they are liable to pay under the NSSF Act other than the deductions they are authorised, shall be guilty of an offence and liable to a fine not exceeding Kshs.15,000/=.

18. On the other hand, the Respondent contended that the deduction of the NSSF contributions from the claimants terminal benefits was lawful and justified under the **Kenya Railways Corporation Act, Cap 397** and the Regulations made thereunder which provide that the Respondent shall deduct the aggregate amount it contributed to NSSF from their employees' gratuity to avoid payment of double benefits from public funds. It further submitted that even the current law, **Regulation 22 of the NSSF Regulations 2013** provides that, where a contract of service provides for gratuity, the employer shall deduct and remit contributions in accordance with the provisions of the Act provided that an employer may deduct its portion of contribution from the gratuity amount payable to the employee.

19. I have carefully considered the rival submissions from the two sides and more specifically the provisions of the NSSF Act and the Kenya Railway Corporation (gratuities) Regulations. There is no doubt that section 12 of the NSSF Act criminalises deduction of any money from employee's income as NSSF contributions beyond the authorised standard share. The said section provides:

***“Except as provided in section 11 in respect of the employee's share of a standard contribution, an employer shall not be entitled to deduct from the wages of his employee, or otherwise to recover from him, any part of any contribution payable by him under this Act in respect of that employee.”***

20. As correctly submitted by the respondent, the foregoing provision does not relate to the facts of this case. It concerns cases where some wicked employer may decide to evade the legal obligation to contribute towards his employee's NSSF and deduct both the employee's and the employer's standard shares from the employees income. In this case, however, the issue at hand relate to an employer who has contributed fully towards the employees' NSSF and who pays the employees gratuity upon termination. Hence the contention by the respondent that failure to deduct the share of the NSSF contributions she remitted in favour of the claimants would amount to double benefit to them.

21. I fully agree with the respondent that the said double benefits would be in breach of express statutory provisions and *ultra vires* **Regulation C17(f) of the Kenya Railways Personnel Regulations 1988** which provides that:

***“Temporary, permanent and non-pensionable employees are required to contribute to the Kenya National Social Security Fund under the Act. To avoid payment of double benefits from public funds, the aggregate amount of the Corporation's contribution is deducted from the gratuity payable to the employee”.***

22. Flowing from the forgoing analysis of the said express provisions of the statutes and regulations cited,

I return that the deduction of the respondent's share of NSSF contributions from the claimants' terminal dues was both lawful and justified.

**Reliefs**

23. In view of the foregoing finding that the deduction of the respondent's NSSF contributions from the claimants' terminal dues was lawful and justified, I decline to order refund thereof as prayed.

**Disposition**

24. For the reasons analysed herein above, I dismissed the suit with no order as to costs.

**Dated, Signed and Delivered in Open Court at Nairobi this 7th day of December, 2018**

**ONESMUS N. MAKAU**

**JUDGE**