



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**CAUSE NO.12 OF 2017**

**JOHN BIY.....CLAIMANT**

**VERSUS**

**SETH PANYAKO.....1<sup>ST</sup> RESPONDENT**

**REGISTAR OF TRADE UNION.....2<sup>ND</sup> RESPONDENT**

**KENYA NATIONAL UNION OF NURSES.....3<sup>RD</sup> RESPONDENT**

**AND**

**LOCAL AUTHORITIES PROVIDENT FUND (LAPFUND)....1<sup>ST</sup> INTERESTED PARTY**

**LAPTRUST (UMBRELLA) RETIREMENT**

**FUND BOARD OF TRUSTEES.....PROPOSED 2<sup>ND</sup> INTERESTED PARTY**

**RULING**

1. The ruling herein is with regard to the proposed 2<sup>nd</sup> interested party; LAPTRUST (Umbrella) Retirement Fund Board of Trustees (LAPTRUST) application dated 28<sup>th</sup> February, 2016 (2017) and filed on 1<sup>st</sup> March, 2017. The application is only opposed by the 1<sup>st</sup> interested party, LAPFUND who filed Grounds of Opposition.

2. The LAPTRUST application is premised on the provisions of section 3 of the Employment and Labour Relations Court Act and Rule 17 of the Employment and Labour Relations Court Act and seeking for orders that;

*1. The LAPTRUST (umbrella) Retirement Fund Board of Trustees be granted leave to join there proceedings as an interested party;*

*2. The issue of appropriate pension arrangements for members of the 3<sup>rd</sup> Respondent raised in paragraphs 32-33 of the claimant's Amended Memorandum of Claim is hereby;*

*(a) Deferred to Employment and Labour Relations Court Constitutional Petition No.53 of 2015 – Evans Wafula Makokha & Another versus Council of Governors & Others or Employment and Labour Relations Court (Nairobi) Cause No.107 of 2015 – Evans Wafula Makokha & Another versus Council of Governors; or*

*(b) Alternatively, struck out of these proceedings;*

*3. The costs of and incidental to this application be provided for; and*

*4. Such other, further, incidental and/or alternative orders as the court may deem just and expedient.*

3. The application is based on the grounds and affidavit of Timothy Wambui that sections 132 and 49 of the County Governments Act (CGA) and the Urban Areas and Cities Act (UACA) requires all employees of county governments to subscribe to an existing pension scheme. Most members of the 3<sup>rd</sup> Respondent are employees of county government and hence bound by section 132 and 49 of the CGA and UACA. LAPTRUST is the sole and only bona fide pension scheme for employees of county governments in view of the provisions under section 132 CGA; section 49 UACA; and government policy statements set out under circulars, letters, resolutions, deeds of adherence and legal opinion by the Attorney General dated 24<sup>th</sup> January, 2017.

4. The 1<sup>st</sup> Respondent and LAPFUND have purported to sign a Memorandum of Understanding having the object of enrolling members of the 3<sup>rd</sup> Respondent to the LAPFUND. This MOU is illegal and against section 132 and 49 of the CGA and UACA respectively. The LAPFUND is not a pension scheme but a provident fund. The LAPTRUST and members of 3<sup>rd</sup> Respondent will suffer irreparable harm should the 3<sup>rd</sup> Respondent members be allowed to join LAPFUND contrary to the law and policy embodied in section 132 and 49 of the CGA and UACA.

5. The question of the appropriate pension arrangements for employees of county governments has been the subject of multiple litigation which include HCCC Misc. Civil Application No.372 of 2015 – **Republic Versus Council of Governors & others ex parte Local Authorities Provident Fund; ELRC Petition No.53 of 2015; ELRC Cause No.107 of 2015** and the concurrence of multiple suits in different courts on the issue of appropriate pension arrangements for employee of county governments is not an efficient use of judicial time and unnecessarily creates risk of conflicting decisions and will result in embarrassing an undermining of judicial process and ultimately oppressive to the LAPTRUST.

6. Other grounds are that When LAPFUND filed their application it was concealed and or suppressed the matters set out by LAPTRUST and thus the non-joinder of LAPTRUST will be necessary as set out above on the matters set out hereinabove.

7. There grounds are given support by Timothy Wambui in his affidavit, the Manager with Natbank Trustees and Investment Services Limited, the Corporate Trustees charged with the overall responsibility of the day-to-day management of the LAPTRUST.

8. Wambui avers that sections 151 and 271 of the Local Government Act now repealed empowered local authorities to establish pension or provident schemes for its employees. To streamline operations of pension a statutory scheme for officers and staff was enacted – the Local Authorities Pensions Trust (LAPTRUST) as a defined benefits pension scheme and the Local Authorities Provident Fund (LAPFUND) as a provident fund.

9. Upon the passing of the constitution, 2010 there was a change to public sector retirement benefits schemes in circulars communicated by the government with the view to shift from defined benefits to defined contributions pension schemes and to shift from provident funds to pension schemes. The LAPTRUST was therefore established in 2011 as a defined contribution pension scheme to cater for employees if the then local authorities necessitated by changes introduced in Treasury Circular No.18 of 2010 and the need to provide for a smooth transition to the devolved system of government.

10. With devolved governments, the previous local authorities were to exist subject to any law enacted and premised on constitution, 2010. Parliament enacted CGA and UACA to ensure transition to devolved system of government and thus a shift from provident funds to pension schemes and the LAPTRUST was

recognised as the designated pension scheme for employees and officers of county governments.

11. Wambui also avers that the LAPFUND is not a pension scheme or an existing pension scheme as envisaged under section 132 and 49 of the GCA and UACA and the county governments have never been bound by the provisions of Local Authorities Provident Fund Act or signed any MOU with LAPFUND for a pension scheme. The MOU now entered between the 1<sup>st</sup> Respondent and LAPFUND is contrary to section 132 and 49 of the CGA and UACA respectively.

12. The LAPTRUST should thus be enjoined herein as an interested party as there will be irreparable harm should members of 3<sup>rd</sup> Respondent be allowed to join LAPFUND contrary to law and policy and also noting other on-going suits filed over a similar subject.

13. In reply, the LAPFUND filed Grounds of Opposition on the grounds that the LAPTRUST application is devoid of legal merits as the claim does not mention LAPTRUST and there is no privity of contract between the parties and LAPTRUST. There shall be no prejudice suffered if the LAPTRUST is not enjoined herein. There is no identifiable interest shown to exist and there are mere peripheral issues and assertions some being *sub judice* and pending before different courts where the LAPTRUST is at liberty to participate. The challenge to the function of LAPFUND herein is misplaced as this is a statutory body established in law under Local Authorities Fund Act a matter that can be addressed by filing a suit against such entity and not by joining the suit herein.

14. The averments that there are other suits pending with regard to the issue of pension arrangements for county government employees though true, such should be addressed in those other suits and not herein. There is no interest demonstrated herein for joinder of LAPTRUST.

15. Both parties made their oral submissions in court. I will put these into account in the analysis.

### **Determination**

16. Of interest if the fact that the issues of joinder are contested between the 1<sup>st</sup> interested party and the proposed 2<sup>nd</sup> interested party. The claimant, the mover of the suit herein and the respondents, all are not opposed to the joinder and opted out of these proceedings with regard to the question whether the proposed 2<sup>nd</sup> interested party should be enjoined herein.

17. In the court management of cases, Rule 18(1) of the Employment and Labour Relations Court (Procedure) Rules, 2016 the court may join or cause to be joined any interested party on being satisfied that there is an *interest* of such party in the matter before court. The Rule provides that;

*18. (1) The Court may, on its own motion and where it considers it fit, serve or order service of a pleading on any party whom it is satisfied may be interested in the matter being considered.*

18. It is therefore a best practice for the court on its own motion or upon being moved and where there is a demonstrated interest by any party or it is apparent to the court there exists and *interest* by any party on matters to be considered, such a party can be served with an order to attend.

19. Rule 18 of must however be read with caution so as to avoid mismanagement of matters before court as the joinder contemplated under this rule is for the purpose of effective case management.

20. The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, defines an interested party as;

***A person or an entity that has an identifiable stake or legal interest or duty in the proceedings and may not be directly involved in the litigation***

21. Legal Notice No 117 of 2013 further provides that, a person with leave of the Court may make an oral

or written application to be joined as an interested party or the Court, on its own motion, may also join an interested party to the proceedings before it.

22. Article 50 (1) of the Constitution provides that;

*Every person has the right to have any dispute that can be resolved by the application of the law decided in a fair public hearing before a court or if appropriate, another independent and impartial tribunal or body*

23. Is LAPTRUST then a necessary party herein?

24. The contest of the application for joinder is that under paragraphs 32 and 33 of the Amended Memorandum of Claim the questions as to the appropriate pension arrangements for members of the 3<sup>rd</sup> Respondent have been raised. That within this context, there exists other suits in ELRC Petition No.53 of 2015 and ELCR Cause No.107 of 2015 on a similar subject and which matters are between **Evans Wafula Makokha & Others versus Council of Governors**. With such submission, the LAPTRUST does not submit as to whether they have sought to be enjoined in these other suits and as such to ensure their *interest(s)* therein and herein are similar and ought to be protected by specific joinder herein.

25. What is clear to the court is that in the Amended Memorandum of Claim filed on 27<sup>th</sup> January, 2017 the claim relate to the question of alleged abuse of office by the 1<sup>st</sup> respondent; that the 1<sup>st</sup> Respondent should not hold the office of secretary general; the 2<sup>nd</sup> Respondent be ordered to call the National Governing Council of the 3<sup>rd</sup> Respondent to fill the position of secretary general; that the MOU entered into between the 1<sup>st</sup> Respondent and the Chief executive officer of LAPFUND on 5<sup>th</sup> December, 2016 be declared illegal, null and void; among others. As such, the court must make a finding into the matters of the MOU between the 1<sup>st</sup> Respondent and LAPFUND which is raised by the Claimant under paragraphs 32 and 33 of the Amended Memorandum of claim.

26. The questions raised by the LAPTRUST therefore come alive in that where LAPFUND sought to be enjoined herein noting their interests with regard to the mention of its mandate and the MOU between the 1<sup>st</sup> Respondent and LAPFUND dated 5<sup>th</sup> December, 2016 and now challenged by the Claimant on its legality, lawfulness and constitutionality were herein allowed and joined as an interested party.

27. The LAPTRUST being aware of the provisions of section 132 of the CGA and section 49 of UACA are also seeking to be enjoined herein. The provision that the Laptrust (umbrella) Retirement Fund scheme is the existing pension scheme for officers and staff of the defunct local governments as envisaged under section 132 of the CGA and the provisions of section 49 of UACA become relevant. The issues being asserted by the LAPFUND in view of the Claim filed by the Claimant and stand now introduced by LAPTRUST should be settled at the hearing.

29. For the court to therefore address the questions and issues raised in the Amended Memorandum of Claim as to the legality, lawfulness and constitutionality of the subject MOU between the 1<sup>st</sup> Respondent for and on behalf of 3<sup>rd</sup> Respondent members, and noting the interest and is identifiable and raised by the LAPTRUST in terms of the application of the law and in my reading of section 10(3)(a)(iii), section 10(4) and 35(6) of the Employment Act which requires an employer to registered its employees with a pension or provident fund scheme and bring such information to the attention of the employee upon employment; the matters thus raised by LAPTRUST become herein relevant and of direct application.

29. Without going into the merits of the matters set out in the Amended Memorandum of Claim and to ensure an effective arbitration of all matters set out by each party, I find the LAPTRUST has demonstrated an identifiable interest that warrant joinder as an interested party herein. Such will ensure all questions are addressed in an open and transparent manner for the meeting of the ends of justice.

**The application seeking and LAPTRUST to be joined herein as a party is allowed. LAPTRUST**

**shall be included in these proceedings as the 2<sup>nd</sup> interested party. Costs in the cause.**

Dated and delivered in open Court at Nairobi this 6<sup>th</sup> day of April, 2017

**M. MBARU**

**JUDGE**

In the presence of: .....