



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA**  
**AT MOMBASA**  
**(BIMA TOWERS)**  
**CAUSE NO. 8 OF 2013**

**GIDEON NGAO FONDO.....CLAIMANT**

**v**

**MUNICIPAL COUNCIL OF MALINDI.....RESPONDENT**

**JUDGMENT**

1. Gideon Ngao Fondo (Claimant) was employed as a Clerical Officer, Office of the President on 10 July 1972 and later promoted to Higher Clerical Officer.
2. Through a letter dated 10 October 1983, the Municipal Council of Malindi (Respondent- the Municipality has since been dissolved and pursuant to section 59 of the Urban Areas and Cities Act, 2011, pending actions are to be continued against the County Government) appointed the Claimant as a Senior Market Master.
3. The Permanent Secretary, Office of the President through his letter dated 12 February 1985 wrote to the Claimant through the Respondent's Clerk informing him that the Director of Personnel Management had through his letter dated 11 October 1984 approved his transfer from the Central Government to the Respondent with effect from 1 November 1983. The letter also informed the Claimant that the Central Government would pay him upto and including 31 October 1984.
4. According the Statement of Claim, the Claimant took up the appointment with the Respondent from 1 November 1983.
5. Through a letter dated 14 June 2007, the Respondent gave the Claimant 6 months notice of retirement on account of age. The notice was to take effect on 31 December 2007. The notice advised the Claimant to take as terminal leave any accrued leave as per the terms of service in operation then.
6. On notification of the retirement, the Claimant filed form G.P 190 (statement on aggregate pensionable emoluments) but when he followed up with the Treasury he was informed it was the Respondent which was liable to pay his pension.
7. Attempts to have the Respondent pay the pension did not succeed and on 4 February 2013 the Claimant lodged a Statement of Claim against the Respondent seeking unremitted employers contribution towards Kenya Local Government Officers' Superannuation Fund and benefits he would have received, unpaid salaries from date of retirement upto date of judgment, leave days for 2008,2009,2010,2011 and 2012,

and leave allowance. The Claimant also sought interest.

8. The Respondent was served and on 11 March 2013 it filed a Statement of Response. After several appearances in Court, the Cause was heard on 5 November 2013 and 3 April 2014.

### **Claimant's case**

9. The Claimant contends that he was appointed by the Respondent on permanent and pensionable terms and that he was given and filled admission forms to the Kenya Local Government Officers' Superannuation Fund but when he followed up he was informed he should not worry, based on the strength of his transfer letter from central to local government that he had continuity of service and would benefit from a non-contributory pension scheme from the Exchequer.

10. Further, the Claimant contends that pursuant section 2 of the Pensions (Amendment) Act, 2003, the Respondent was obliged to keep him on the payroll pending payment of full gratuity.

11. The Claimant also contends that pursuant to the Local Government (Local Authorities Trust) Rules, 2007, the Respondent was obliged as a matter of law to be a sponsor of the Local Authorities Pensions Trust, an umbrella retirement (defined) benefit scheme for all local authorities and to register him for the Fund. The Respondent was one of the sponsors listed in the first schedule to the Rules.

12. Similarly, the Claimant contends that pursuant clause 21 of the Terms and Conditions of Service for Officers of Local Authorities entered into between the Association of Local Government Employers and the Kenya Local Government Workers Union, he could not be appointed into the Respondent's permanent staff unless/until he became accepted as a member of the Kenya Local Government Officers' Superannuation Fund or the Local Authorities Provident Fund.

13. The Court at this juncture notes that the Claimant only exhibited the cover and page 14 of a document titled Association of Local Government Employers and Local Government Workers Union National Joint Negotiating Council incorporating All Local Authorities in Kenya, Terms and Conditions of Service for Officers of Local Authorities.

14. The whole/complete document was not produced and the Court cannot confirm whether it was signed, when and whether it was registered as required of collective bargaining agreements (document 8 in Claimant's Supplementary List of Documents).

15. Another similar document purported to have been signed on 28 June 1983 in respect of employees on salaried grades was also exhibited (cover page and signature page)-(document 12 in Claimant's Supplementary List of Documents).

16. In submissions, the Claimant exhibited what appears to be extracts from a document providing for terms and conditions of service for officers of local authorities signed in 2010, long after his retirement.

17. The Claimant pleaded that in failing to remit contributions to the Superannuation Fund, the Respondent was negligent.

18. In testimony, the Claimant stated that prior to appointment by the Respondent on permanent and pensionable terms, he was employed in the Office of the President.

19. And sometime in 2007, the Claimant stated that he received a notification of retirement and later started following up on his pension by having a GP 190 filled up by the Respondent but when he presented the same to the Treasury, it was rejected on the basis that the Treasury paid pension for retired central government employees and not those of local authorities who had their own Superannuation Fund.

20. The Claimant further stated that he was not a member/contributor to the Superannuation Fund. He also stated that because he was appointed on permanent and pensionable terms, the Respondent was under

an obligation to register, sponsor and contribute to the Superannuation Fund for its employees. The Claimant stated that despite filling the application forms (exh 7) the Respondent failed to process the same.

21. Further, had he registered with the Fund he would have contributed 12% of his wages and the Respondent 15%. The Respondent did not deduct any contributions from him.

22. The Claimant also stated that in July 2002 he became a member of the Local Authority Provident Fund and thus contributed 9% of his salary while Respondent contributed 12% until 31 August 2007. On retirement he was paid Kshs 474,898/80. He was also a member of National Social Security Fund and was paid benefits on retirement.

### **Respondent's case**

23. The Respondent in its Response filed on 11 March 2013 denied that the Claimant was employed in the office of the President, was transferred to it as a permanent and pensionable officer, was served with a retirement notice; was given Superannuation Fund application forms to fill which he duly did and informed not to worry as he would benefit from a non contributory pension scheme; passed to Claimant transfer approval letter in 1985; that Respondent was liable for Claimant's pension; that Respondent is a sponsor under the Local Government Pension Regulations 1963; that Respondent could not appoint Claimant as permanent staff unless accepted as member of Superannuation Fund; that the Treasury rejected Claimant's pension claim; that Respondent was required to establish a pension/provident fund for its officers; to retain Claimant until payment of pension and that it is liable to pay the Claimant pension, and is entitled to the reliefs sought.

24. The Respondent also pleaded that the Claimant was paid all his dues and that a suit in which similar issues had been raised was pending, being Malindi CMCC No. 377 of 2012.

25. The Respondent called one witness, Johari Ali Karevu Gambo, a Senior Internal Auditor. The witness stated that he previously worked with the Municipality of Malindi before it was dissolved.

26. He confirmed that after an application, the Claimant was offered an appointment as a Senior Market Officer subject to a Collective Bargaining Agreement between the Association of Local Government Employers and Kenya Local Government Workers Union.

27. The witness also stated that there were 3 different funds, Superannuation Fund, Provident Fund and National Social Security Fund and that an employee could not be a member of both the Superannuation and Provident Fund, but had to opt for one and that the Claimant was not a member of either but the National Social Security Fund, though the Respondent's employees were exempt from National Social Security Fund.

28. In 2002, the Claimant opted to join the Provident Fund and was paid on retirement and, that the Respondent did not have any records the Claimant applied to join the Superannuation Fund. He further stated that the Claimant should have been aware he was not a member of the Superannuation Fund as he used to receive a monthly pay slip with details of deductions.

29. According to the witness, the Claimant was appointed by the Respondent afresh and was not transferred from the civil service with privileges and benefits.

30. The witness concluded by stating that on retirement the Claimant was not retained in service. The witness produced a bundle of documents. One of them was a Memorandum of Collective Agreement on Terms and Conditions of Employment for non-salaried Grades between the Association of Local Government Employers incorporating all Local Authorities and the Kenya Local Government Workers Union.

31. For unexplained reasons, the agreement did not have clauses 17-21 (pages 9 and 10). The Respondent

sought to rely on clause 13. The Clause provided that employees shall become members of the Local Authorities Provident Fund or Individual Council's Private Provident Fund Schemes and excess contributions to be made to the National Social Security Fund. The agreement was signed on 28 June 1983.

32. The Court is unable to comprehend why both parties were producing incomplete documents to support their respective contentions. Unlike statutory provisions which are universally available, these documents sought to be relied on should have been produced in their entirety. The approach adopted by the parties is undesirable and most regrettable.

### **Issues for determination**

33. The Statement of Claim exhibited some needless verbosity (it run into some 10 pages - 28 paragraphs). From a keen perusal of the Statement of Claim, Response, documents exhibited, testimony of witnesses and written submissions, the central issues are whether there are pending proceedings in another Court, whether the Claimant was appointed on permanent and pensionable terms, whether the Claimant applied for membership of the Superannuation Fund and whether by failing to register the Claimant with the Superannuation Fund, the Respondent should be liable to meet the pension the Claimant would have been entitled to.

34. There are several ancillary issues raised by the pleadings and the Court will consider them generally as may be necessary.

### **Pending suit between parties**

35. In the Response, it was contended that Malindi Chief Magistrate's Civil Case No. 377 of 2012 between the same parties and litigating over the same issues, was pending.

36. The Respondent did not produce any evidence or material to support this fact and the Court declines to consider the issue.

### **Whether Claimant was appointed on permanent and pensionable terms**

37. The Claimant's appointment letter dated 10 October 1983 did not expressly state that he was being appointed on permanent and pensionable terms. It only stated that the Claimant was being appointed to a position within the Respondent's *establishment, on terms and conditions of service applicable and amended from time to time* and that *the first six months would be probationary*.

38. On 25 October 1984 the Permanent Secretary, Office of the President wrote to the Respondent to inform him of the Department's agreement to the Claimant being transferred to the Respondent provided he was offered appointment on permanent and pensionable post and that the Claimant would qualify for *aggregate pensionable emoluments*.

39. In a letter dated 27 November 1984 the Respondent's then Clerk to replied to the Permanent Secretary, Office of the President (exh 3) and confirmed that the Claimant was employed on permanent and pensionable terms.

40. The letter further informed the Permanent Secretary that the Claimant was a contributor to the National Social Security Fund and upon retirement would earn retirement benefits according to the terms of the National Social Security Fund Act.

41. The Court is satisfied on the basis of the Respondent's letter of 27 November 1984 and finds that the Claimant was appointed by the Respondent on permanent and pensionable terms.

### **Whether Claimant applied for Superannuation Fund membership**

42. The Claimant produced a Superannuation Form 1 (exh 7) in which he was applying for membership of the Fund. The application indicated the Claimant's date of commencement of service was 1 November 1983. The Claimant signed the forms on 27 November 1984.

43. The form needed to be certified by the Respondent's Clerk/Treasurer but there is no indication it was certified.

44. The Court is again satisfied and finds on the basis of material presented that the Claimant did his part in an endeavour to be registered as a member of the Superannuation Fund.

### **Whether Respondent was under legal obligation to register Claimant with pension scheme**

#### **Superannuation Fund**

45. The Local Government Act, cap. 265 came into operation on 30 April 1963. The preamble stated that *it was an Act of Parliament to provide for the establishment of authorities for local government; to define their functions and to provide for matters connected therewith and incidental thereto.*

46. Section 151 of the Local Government Act gave a local authority the power to *establish, control, manage, maintain and contribute to any pension, provident or benevolent fund for the benefit of its officers and to grant pensions and gratuities from such fund to retiring officers or their dependents.*

47. Concurrent with the Act, the Kenya (Local Government)(Pensions) Regulations 1963 established through regulation 8 a new fund, (*the Kenya Local Government Officers' Superannuation Fund*) out of the Fund which had been established by the Nairobi Municipality (Superannuation Fund) Rules, 1950.

48. Rule 8 of the Superannuation Fund Rules provided for compulsory membership to the Fund of all employees of local authorities on a pensionable post unless the employee was a member of a Provident Fund at the operative date. Such employee could opt out of the Provident Fund and surrender accumulated funds to the Superannuation Fund.

49. The Kenya Local Government Officers' Superannuation Fund Rules, 1963 provided at rule 5 that the Minister may admit a local authority to the Fund (my research did not establish when the Respondent was admitted).

50. Regulation 5 of the Kenya (Local Government) (Pensions) Regulations, 1963 required every local authority to transmit monthly contributions in respect of selected officers to the new Fund (then under the public trustee).

51. However, in 2007 there was a change in the statutory framework. The Local Authorities Pensions Trust Rules, 2007 made pursuant to the Kenya (Local Government)(Pensions) Regulations, 1963 established the Local Authorities Pensions Trust.

52. The Pension Trust Rules revoked L.N. 313 of 1963, the Kenya Local Government Officers' Superannuation Fund Rules (These rules came into effect just on the horizon of the Claimant's retirement and therefore are not decisive to the determination of this Cause).

53. Rule 49 of the Pension Trust Rules deemed all local authorities including the Respondent as sponsors of the Trust. The Trust is the successor to the Kenya Local Government Officers' Superannuation Fund which had been established under the Kenya Local Government Officers Superannuation Fund Rules, 1963.

54. On the basis of the statutory regime applicable, the Court is satisfied and reaches the conclusion that the Respondent was under an obligation to register/process the registration of the Claimant as a member of the Superannuation Fund on appointment in 1983.

55. The Court however needs to very briefly make reference to another piece of legislation and the contractual terms agreed between the parties association and union which may have some relevance to the discussion.

### **Local Authorities Provident Fund**

56. The Local Authorities Provident Fund Act, cap 272 Laws of Kenya commenced on 5 July 1960. Its purpose was to *establish a provident fund for certain employees of local authorities; to provide for contributions to the fund by such employees and authorities, and for the administration of the fund by a Local Authorities Provident Fund Board; and for matters incidental thereto and connected therewith.*

57. The Act required local authorities to designate certain posts for the purposes of the Act. The parties did not lead any evidence as to whether the Claimant's post was a designated post for purposes of the Act.

58. Under section 8 of the Act, membership/contribution to the Fund could coexist with membership of the National Social Security Fund.

59. But because the Claimant was paid his benefits for the period 2002 to 2007 under the provisions of the Fund, the Court will assume that the Respondent had resolved to be bound by the Act with the approval of the Minister and further that it had designated the Claimant's post as an eligible post.

60. On the basis of contractual terms and more specifically clause 13 of the Collective Bargaining Agreement, the Claimant was required to become member of the Local Authorities Provident Fund or individual Council Private Provident Fund Schemes and excess contributions to be paid to the National Social Security Fund.

61. Evidence before the Court and admitted by the Claimant is that he was a member and contributor to the Local Authorities Provident Fund established through cap 272 and that on retirement he was paid Kshs 474,898/80. The Claimant joined this fund on 1 July 2002 and left on 31 December 2007.

### **Collective Bargaining Agreement**

62. The Association of Local Government Employers and the Kenya Local Government Workers Union had signed a Memorandum of Collective Agreement (Collective Bargaining Agreement) on 28 June 1983. The agreement related to non salaried grades whose designations were set out in Appendix A.

63. The agreement appears to have made it a requirement that no employee would be appointed on permanent and pensionable terms unless s/he was accepted as a member of the Superannuation Fund or Provident Fund. This clause created a positive obligation upon the Respondent to secure the pension rights of its employees.

64. Between 1983 and 30 June 2002 the Claimant was not a member or contributor to either the Provident Fund or the Superannuation Fund. The Respondent in this regard acted negligently when it did not process the Claimant's application to join the Superannuation Fund and it is liable to make good the benefit the Claimant would have been entitled to had he been accepted as a member of the Superannuation Fund, but between 1983 to 2002.

### **Appropriate relief**

#### ***Unremitted employers contribution to Superannuation Fund***

65. The Claimant under this head sought Kshs 669,564/- being what the Respondent should have contributed to the Superannuation Fund and benefits. The Claimant did not clarify whether these contributions/benefits was spread from 1983 to 2007. Between 2002 and 2007, the Claimant was a member of the Provident Fund/National Social Security Fund and was paid his benefits on retirement.

66. The Court is of the view that the Claimant has made a case for this head of relief but only for the period between 1983 and 2002 when he was not a member of either the Superannuation Fund or Provident Fund.

67. The parties should calculate and agree on what the unremitted contributions could have been and file a report with the Court for adoption because the Court is unable to compute the same on the basis of what is on record. This should not be a complicated task as the formula is known.

### ***Unpaid salaries from date of retirement***

68. Under this relief, the Claimant sought Kshs 1,982,925/0 being salaries from 1 January 2008 to May 2012.

69. The Court has agonized over this head of claim. At the time of retirement the Claimant was a member of the Provident Fund/National Social Security Fund and was paid the accrued benefits on retirement.

70. The Claimant has relied for this head of claim on the provisions of section 2 of the Pension (Amendment) Act, 2003 (the provision is actually section 16A of the Pensions Act).

71. Employees of local authorities had specific statutory framework governing their pensions. The parties did not address the Court on the nexus between the different statutes or whether the reach of the provision of section 16A of the Pensions Act should be applied or extended to cases such as this.

72. The Court is therefore unable to concede to this prayer and it is declined.

### ***Leave***

73. The Claimant did not testify at all in regard to the leave claim of Kshs 215,500/-. According to the pleadings, it was anticipated leave, had the Claimant been retained in service pending payment of gratuity.

74. On the basis of the finding on the applicability of section 16A of the Pensions Act, this head of claim is declined.

### ***Leave allowance***

75. Similarly, no evidence was led at all on the foundation of this relief and it is declined.

### ***Costs and Interests***

76. The Claimant has succeeded. The Respondent did not comply with the law and contractual obligations entered into with the Union. The Claimant will have costs and interest at Court rates from time of filing of Claim.

### ***Conclusion and Orders***

77. From the foregoing discussion, the Court reaches the conclusion, finds and holds that the Respondent was negligent and in breach of the law in failing to process/register the Claimant as a member/contributor to any pension scheme between 1983 to 2002 and that it is liable to the Claimant and it is ordered to pay the Claimant

- a. Unremitted contributions to Superannuation Fund between 1983 to 2002 to be calculated and filed in Court within 7 days from the date hereof.

78. The claims for leave, leave allowance and unpaid salaries to retirement are dismissed.

79. Claimant to have costs and interest.

**Delivered, dated and signed in open Court in Mombasa on this 13<sup>th</sup> day of June 2014.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimant Mrs. Chepkwony instructed by Chepkwony Gicharu & Associates

For Respondent Mr. Kibara instructed by Muturi Gakuo & Kibara Advocates