



Bwana v Kenya Ports Authority & 2 others (Judicial Review Application E036 of 2023) [2023] KEHC 25734 (KLR) (24 November 2023) (Ruling)

Neutral citation: [2023] KEHC 25734 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
JUDICIAL REVIEW APPLICATION E036 OF 2023**

A. ONG'INJO, J

NOVEMBER 24, 2023

**IN THE MATTER OF THE KENYA PORTS AUTHORITY
RETIREMENT BENEFITS SCHEME TRUSTEE ELECTIONS**

BETWEEN

BWANA MOHAMED BWANA APPLICANT

AND

KENYA PORTS AUTHORITY 1ST RESPONDENT

KENYA PORTS AUTHORITY ELECTION COMMITTEE 2ND RESPONDENT

KENYA PORTS AUTHORITY PENSION SCHEME 3RD RESPONDENT

RULING

1. By a Notice of Motion application dated 30th October 2023, the applicant Bwana Mohamed Bwana sought leave for an order of certiorari to remove the decision of the Election Committee made on 3rd October 2023 disqualifying the applicant from participating in the election for member trustees of the Kenya Ports Authority Retirement Benefit Scheme 2012 scheduled for 30.11.2023 and bring it before this court for purposes of being quashed.
2. That this court do grant the applicant leave to apply for an order of mandamus to compel the Election Committee to nominate the applicant to participate in the election for member trustee of the Kenya Ports Authority Retirement Benefits Scheme 2012 scheduled for 30th November 2023.
3. That the court grant leave to the applicant to apply for an order of prohibition to prevent election of member trustee of the Kenya Ports Authority Retirement Benefits Scheme 2012 scheduled for 30.11.2023.



4. The applicant also sought that grant of leave for an order of certiorari, mandamus and prohibition do operate as stay of the election of member trustee of the Kenya Ports Authority Retirement Benefit Scheme 2012 scheduled for 30th Nov. 2023 until the determination of the application or until the court orders otherwise.
5. This application is supported by grounds on its face and affidavit of Bwana Mohamed Bwana, the applicant, sworn on 30th October 2023.
6. The grounds and supporting affidavit are to the effect that the 1st Respondent through the 2nd Respondent on 3rd October 2023 informed the applicant that he was disqualified from participating as a candidate in the elections as he had allegedly failed to submit a fit and proper test form, a decision that was outrageous and irrational as he had complied with all the requirements of the election rules including submitting the fit and proper test form.
7. That on 4th October 2023, he appealed to the Chairperson of the Election Committee Kenya Ports Authority Pension Scheme Administrator as per annexure BMB4.
8. That the Election Committee rejected the applicant's appeal on 11th October 2023 on the ground that his application did not include a duly filed fit and proper test form and yet none of the candidates were invited to witness the opening of the sealed envelopes submitted by them to witness the vetting as is required by law. The applicant argued that the 1st and 2nd Respondents' decision disqualifying him from participating in the election of 30.11.2023 was irrational as it was not supported by facts and thus illegal and should be quashed.
9. Annexed to the application are: -
 - a. Annexure BMBI – Invitation for nominations containing eligibility guidelines;
 - b. Kenya Ports Authority Pension Scheme – Notice of Trustees Election of Defined Benefits (old & new) Scheme;
 - c. Kenya Ports Authority Pension Scheme – Election Rules & Regulations;
 - d. Trustees Nomination Form with particulars of candidates and list of proposers;
 - e. Copy of applicant's ID cards;
 - f. Fit and proper test form duly filled;
 - g. Police Clearance Certificate;
 - h. CRB Clearance; and
 - i. Letter dated 3.10.2023 in which he was informed he was disqualified for failing to submit fit and proper test form.
10. Appeal to the Chairperson Elections Committee dated 4.10.2023 in which the applicant contended that he had submitted the fit and proper test form together with his nomination papers and that his nomination be revisited and his eligibility be re-evaluated so he can participate as a candidate in the election.
11. A response to his appeal dated 11th October 2023 indicating that he failed to meet the mandatory requirement of regulation 8 (a) (iv) of the [Kenya Ports Authority Pension Scheme Election Rules and Regulations 2017](#) and his appeal was therefore dismissed.



12. The application was filed alongside the applicant's statement outlining reliefs sought and a verifying affidavit. The application was certified urgent and orders issued that the same be served for directions on 14.11.2023.
13. On 14.11.2023, the 2nd and 3rd Respondents had filed a Replying Affidavit and also a Preliminary Objection which they sought to be heard. The applicant was granted leave to respond to the preliminary objection which directions was taken that it would be heard by way of written submissions.
14. The Preliminary Objection is to the effect that this court lacks jurisdiction to hear and determine the application dated 30.10.2023 and/or entertain Judicial Review proceedings in view of the doctrine of exhaustion of Internal and Statutory Dispute Resolution Mechanisms provided for under Regulation 24 (a), (b), (d), and (e), 25, and 27 of the *Kenya Ports Authority Pension Scheme (Elections Rules and Regulations)* April, 2017 as read together with Section 48 of the *Retirement Benefits Authority Act* no 3 of 1997.
15. That the Notice of Motion application and the entire proceedings offend and contravene the provisions of Section 9 (2) of the *Fair Administrative Action Act* 2015, the mandatory provisions of Order 53 Rule 1(2) of the *Civil Procedure Rules 2010*; it is unprocedural, foreign and unknown to Judicial Review proceedings; that the verifying affidavit was devoid of facts and therefore incompetent and renders the proceedings fatally flawed.
16. That the 3rd Respondent sought that the application be struck out and dismissed.
17. The 3rd Respondent also opposed the application and the Judicial Review Proceedings via Replying Affidavit sworn on 13th November 2023 reiterating the grounds in the preliminary objection.
18. The applicant filed a further affidavit dated 17th November 2023 concurrently with submissions in opposition to the preliminary objection.

Analysis and Determination

19. Having considered the Notice of Motion application dated 30th October 2023, the Replying Affidavit, the Preliminary Objection, the Further Affidavit of the applicant and the submissions by the applicant and the 3rd Respondent, the issue for determination is whether the preliminary objection should be upheld.
20. Preliminary objection was addressed in the case of *Mukisa Biscuits Manufacturing Ltd v West End Distributors* (1969) EA 696 as follows: -

“----a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration”.

In the same case Sir Charles Newbold, P. stated:

““a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising



of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop”.

21. The applicant submitted his Trustee Nomination Form on 24th September 2023 and on 3rd October 2023 upon evaluation of his nomination by the Election Committee, he was disqualified from participating as a candidate because he had not submitted a Fit and Proper Test Form. The applicant appealed to the Chairman of Elections Committee of the 3rd Respondent and requested that his nomination be revisited and he be evaluated for eligibility alleging that he did submit his evaluation form as part of the package. The appeal was disallowed for reason that he failed to meet the mandatory requirement of Regulation 8 (4).
22. The applicant’s application and Judicial Review proceedings to this court have been objected pursuant to provisions of Regulation 23 and 24 (e) of the [Kenya Ports Authority Pensions Scheme Election Rules and Regulations](#) April 2012 which provides for a Dispute Resolution Board to hear and resolve disputes arising from the elections before or after the elections.
23. The Rules and Regulations also provide that the decision of the Dispute Resolution Board may be challenged by filing a reference with the Regulator Retirement Benefits Authority Appeals Board whose decision shall be final.
24. Section 48 of the [Retirement Benefits Act](#) provides: -
 1. Any person aggrieved by a decision of the Authority or of the Chief Executive Officer under the provisions of this Act or any regulations made thereunder may appeal to the Tribunal within thirty days of the receipt of the decision.
 2. Where any dispute arises between any person and the Authority as to the exercise of the powers conferred upon the Authority by this Act, either party may appeal to the Tribunal in such manner as may be prescribed.
25. The applicant acknowledges the provision of the internal dispute mechanism in the rules and regulations of the pension scheme but he alleged that he was instructed by the 2nd Respondent’s Chairperson to submit any protests or challenge of the decision disqualifying him to the 2nd Respondent and not to the Dispute Resolution Board and not as proof that the board existed. He also claimed that he appealed to the retirement benefits authority by a letter annexed to the further affidavit and he is yet to receive a decision thereof. He said that there is another requirement of an appeal to the tribunal while time is running out.
26. The applicant argued that the jurisdiction of the High Court is unlimited and it has jurisdiction to hear and determine this application as provided under Section 9 (4) of the [Fair Administrative Actions Act](#).
27. In [Bethwell Allan Omondi Okal v Telkom \(K\) Ltd \(Founder\) & 9 others](#) (2017) eKLR the Court of Appeal held: -

The Appellant might want to argue that he has a constitutional right of access to justice, and we agree that he does, but the High Court and this Court have pronounced themselves many times to the effect that a party must first exhaust the other processes availed by other statutory dispute resolution organs, which are by law established, before moving to the High court by way of constitutional petitions. See *International Centre for Policy and Conflict & 4 others v The Hon. Uhuru Kenyatta and others*, Petition no 552 of 2012, and *Speaker of National Assembly v Njenga Karume* (2008) 1KLR 425.



28. The applicant's complaints are against the 3rd Respondent whose operations are governed by Election Rules and Regulations of April 2017. Those rules and regulations provide for internal dispute resolution mechanisms where a party aggrieved by decisions of the 3rd Respondents would seek remedy. It also provides that where the decision of the Dispute Resolution Board of the 3rd Respondent are disputed, then the same may be challenged by filing a reference with the regulator. The letter that is annexed to the applicant's further affidavit cannot be ascertained whether it was truly filed by RBA or not and therefore it is not possible to verify that the applicant made reference to file a reference to the regulator challenging the decision of the Elections Committee or the Dispute Resolutions Board.
29. It is apparent that the applicant did not follow the route prescribed by the Regulations of the 3rd Respondent and therefore cannot be given an audience before this court. The proceedings herein are therefore removed and referred to the Retirement Benefits Authority Appeals Tribunal for hearing and determination expeditiously before the date of the elections called on 30th November 2023. Each party to bear their own costs.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS,
THIS 24TH DAY OF NOVEMBER 2023**

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of: -

Ogwel- Court Assistant

Mr. Ngiri for the State

Mr. Aboubakar Advocate for Applicant

Mr. Omondi Advocate for the 2nd and 3rd Respondents

No appearance for 1st Respondent

Accused person present in person

HON. LADY JUSTICE A. ONG'INJO

JUDGE

