



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

JUDICIAL REVIEW APPLICATION NO. 34 OF 2020

IN THE MATTER OF: AN APPLICATION FOR LEAVE TO APPLY

FOR JUDICIAL REVIEW ORDERS OF MANDAMUS 2015

AND

IN THE MATTER OF: VIOLATION OF CONSTITUTIONAL RIGHTS PROTECTED

UNDER ARTICLES 21, 22, 23(1), 23(F), 25©, 27, 40(1), 47(1), 47 (1) & (2),

48 & 50(1) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: SECTIONS 3, 4(3), 7(1) & 11(1) (a) OF THE

FAIR ADMINISTRATIVE ACTION ACT, NO. 4 OF 2015

AND

IN THE MATTER OF: SECTION 9 OF THE LAW REFORM

ACT (CAP 26 OF THE LAWS OF KENYA)

AND

IN THE MATTER OF: THE COMMISSION ON ADMINISTRATIVE

JUSTICE ACT, NO. 23 OF 2011

AND

IN THE MATTER OF: REGULATION 32(2) OF THE COMMISSION

ON ADMINISTRATIVE JUSTICE REGULATIONS

AND

IN THE MATTER OF: THE DETERMINATION BY THE COMMISSION ON

ADMINISTRATIVE JUSTICE MADE ON 8TH JULY 2017 ON A COMPLAINT OF

DISCRIMINATION AND UNFAIR TREATMENT BY JACON ODHIAMBO

ON CONDONEMENT OF HIS GRATUITY AND BACKDATING OF

HIS PENSIONABLE SERVICE

BETWEEN

REPUBLIC.....APPLICANT

-VERSUS-

KENYA PORTS AUTHORITY.....RESPONDENT

JACOB ODHIAMBO.....EX-PARTE APPLICANT

RULING

1. Pursuant to leave granted on 21/9/2020, the ex-parte Applicant herein filed the Notice of motion 22/9/2020 and seeks the following orders:

a) An Order of Mandamus to compel the Respondent to forthwith implement the determination of the Commission on Administrative Justice made on 8 July 2017 on a complaint of discrimination and unfair treatment by the ex-parte Applicant on Condonement of his Gratuity and Backdating of his Pensionable Service (the "Determination").

b) A Declaration Be Issued that absent appeal, review, or setting aside by the Respondent through an appropriate court process, the CAJ Determination is final and binding on the Respondent.

c) A declaration be issued that by refusing to implement the determination, the Respondent has breached and continues to breach the ex-parte Applicant's right of equality and freedom from discrimination protected under Articles 27 (1),(2), (4) and (5) of the Constitution of Kenya.

d) A Declaration Be Issued that by refusing to implement the determination, the Respondent has breached and continues to breach the ex-parte Applicant's right to property in terms of his pension benefits protected under Article 40(1) of the Constitution of Kenya.

e) A Declaration Be Issued that by refusing to implement the determination, the Respondent has breached and continues to breach the ex-parte Applicant's right of access to justice protected under Article 48 of the Constitution of Kenya.

f) An order compelling the Respondents to pay damages to the ex-parte Applicant for violation of his fundamental rights set out above.

g) This honourable court do grant any such other and further reliefs as it may deem just and necessary in the circumstances of this case.

h) The Respondent meets the ex-parte Applicant's costs for these proceedings.

Applicants' Case

2. The ex-parte Applicant's case may be gathered from the verifying Affidavit sworn in support of the Application sworn by **Jacob Odhiambo** who is the ex-parte Applicant. He avers that the now defunct Kenya Cargo Handling Service (KCHS) employed him on 25/07/1966, and he was later on admitted on permanent and pensionable terms on 1/1/1967. Therefore, he joined KCHS staff provident fund in January 1981. KCHS was later on merged with the Kenya Ports Authority and following the said merger, KCHS staff provident fund was frozen and the former employees of KCHS were given two option: Receive the dues payable to them from KCHS staff provident fund as at the time of the merger; or to transfer the member's dues under KCHS staff provident fund to Kenya Ports Authority Pension Scheme (KPAPS). The ex-parte Applicant opted to receive the dues payable to him. He was paid an amount equal to Kshs. 52,039.00 as at 31/12/1980, and he began his pensionable service under new KPAPS effective 01/01/1981.

3. The ex-parte Applicant avers that on 24/11/2000, which was a month before his retirement date, he unsuccessfully requested the Respondent to consider including his service under the defunct KCHSSPF as part of his total service in return of the amounts paid to him in the year 1981. However, the ex-parte Applicant later learnt that some of his colleagues who were members of the defunct KCHSSPF had been allowed to buy back their gratuity and had their pension benefits recalculated to include service under the defunct KCHS. Therefore, the said actions by the Respondent were discriminatory.

4. The ex-parte Applicant avers that he raised the issue of discrimination and unfair treatment with the Respondent. However, his several letters did not elicit any response from the Respondent. Undeterred, on 28/7/2014, the ex-parte Applicant lodged a complaint with the Commission on Administrative Justice (CAJ). On 8/9/2014, an inquiry was initiated by the CAJ and the Respondent participated in the inquiry. On 8/7/2017, the CAJ in its determination communicated vide letter dated 27/6/2017 held that the ex-parte Applicant had been discriminated against by the Respondent by being denied an opportunity to convert his pension years to pension earning years; that the Respondent ought to have treated the ex-parte Applicant fairly and justly; and that allowing the ex-parte Applicant's colleagues to pay back their gratuities and have their pensions enhanced and denying a similar request from the ex-parte Applicant was unfair.

5. It is the ex-parte Applicant's case that CAJ in exercise of its powers under Article 59 (2) (j) of the Constitution and Section 8(g) of the

CAJ Act ordered the Respondent to reconsider the ex-parte Applicant's case with a view of granting him his request to pay back his gratuity and have his pension enhanced.

6. The ex-parte Applicant avers that the decision by the CAJ was communicated vide letter dated 27/6/2017 and the Respondent was ordered to act on the CAJ's determination within 90 days. However, the Respondent retreated to its lackadaisical attitude and refused and or neglected to implement the determination by the CAJ, and neither did the Respondent appeal against the determination nor apply to have the said decision quashed through the court process.

7. It is the ex-parte Applicant's case that determinations by the CAJ are binding in absence of any appeal against it and the failure to comply with the determination violates the ex-parte Applicant's right to a fair administrative action and fair hearing guaranteed under Article 47 (1) and 50(1) of the Constitution.

The Respondent's Case

8. Respondent opposed the motion vide Notice of Preliminary objection and Grounds of Opposition and a Replying affidavit sworn on 27/10/2020 by **Fatma Shafi** who is the Respondent's Human Resource Officer(Discipline). The grounds in support of the Notice of Preliminary Objection are that:

a) The matter is in respect of quantum of pension benefits of the ex-parte Applicant and therefore, this court is divested of jurisdiction by virtue of the provisions of Section 46 of the Retirement Benefits Act No. 3 of 1997.

b) The orders sought are incapable of being enforced against the Respondent because pension benefits of the Respondent's former employees are paid by a separate and independent legal entity established and regulated under the Retirement Benefits Act.

c) An order of mandamus cannot issue to direct the retraction and reversal of the action already taken by the ex-parte Applicant in his own volition.

d) The determination by the CAJ required the Respondent to exercise a discretion in respect of the Applicant's case, therefore an order of mandamus cannot issue to compel the performance of a discretionary action in a specific and particular manner, and neither can it issue where the Respondent is not obligated under law to perform a duty.

e) That the determination by the CAJ was in accordance with Section 42 (1) and (2) of the Commission on Administrative Justice Act. Therefore, failure or refusal to implement the decision by the Respondent would trigger redress mechanism under Section 42(4).

9. The Respondent reiterated the content of the ex-parte Applicant's verifying affidavit save for the fact that the ex-parte Applicant's appeal was made on humanitarian grounds, vide his letter dated 24/11/2000. The ex-parte Applicant's intention was to buy back the gratuity already paid to him, in exchange of him being considered as having been on the Respondent's pensionable service with effect from the date of his initial employment by KCHS on 1/1/1967.

10. The deponent avers that the Respondent considered the ex-parte Applicant's appeal and declined the same for reasons that the ex-parte applicant had been paid his entire benefits payable to him as at 31/12/1980 pursuant to his own voluntary and discretionary choice; that there was no lawful obligation requiring the Respondent to allow the ex-parte Applicant's appeal; that if the Applicant appeal was allowed by the Respondent, the same would have a substantial implication against the KPAPS and it would lead to deregistration of the pension scheme; that pension benefits are contributory and payable strictly in accordance with the law and Trust Deed and Rules of the **KPAPS** which is a separate legal entity.

11. The deponent avers that the correspondence between the Respondent and three of its former employees, relied upon by the ex-parte Applicant to justify his present claim are all confidential documents and the ex-parte Applicant is not an addressee in them. Therefore, the same might have been illegally obtained. Nevertheless, the subject of the said letters can be distinguished from the ex-parte Applicant's case, because the said former employees had been employed on permanent and pensionable terms but did not belong to any pension scheme; therefore, their pensionable period was backdated. However, the ex-parte Applicant was an actual member of **KCHSSPS** and he elected to take his entire gratuity payable to him as at the end of the year 1980.

12. It is the Respondent's case the attempt to compel the alteration of the ex-parte Applicant's pension benefits, having previously made a voluntary decision to cash out is tantamount to reaping where he never sowed at the peril of a pension scheme that serves the interest of former employees of the Respondent.

Submissions

13. The ex-parte Applicant filed his submissions on 20/01/2021 and 4/05/2021, while the Respondent submissions were filed on 16/12/2020 and 16/06/2021. The submissions were highlighted on 17/06/2021.

Determination

14. From the pleadings and submissions filed before this Court by the parties, in my view, the issues for the determination are:

1. Whether the court has jurisdiction to hear and determine the suit pursuant to the doctrine of exhaustion.

2. Whether the ex-parte Applicant's grievance can only be redressed through the mechanism under Section 42(4) of the Commission on Administrative Justice Act

3. Whether an order of mandamus can issue to compel the Respondent to act on the recommendations of the Commission on Administrative Justice.

4. Whether the ex-parte Applicant proved gross abuse of discretion and manifest injustice to warrant the intervention by this court.

15. Since the Court directed that the **Notice of Preliminary Objection** and the instant **Notice of Motion** be canvassed together, this Court will now endeavour to determine the two. However, the Court will deal with the **Notice of Preliminary Objection** first before embarking on the instant **Notice of Motion**.

1. Whether the court has jurisdiction to hear and determine the suit pursuant to the doctrine of exhaustion.

16. The Respondent has raised various grounds in support of its **Notice of Preliminary Objection**. The main one is that the ex-parte Applicant has not exhausted the statutory remedies available to him under Section 46 of the Retirement Benefits Act before approaching this court; hence, this Court is divested of jurisdiction to hear the instant application. On the flip side, the ex-parte Applicant's position is that Section 46 of the Retirement Benefits Act is inapplicable as the dispute in the suit is between a member and the sponsor and the cause of action arose from the failure to implement a decision of the CAJ, and it would be absurd to subject the failure to comply with the decision of the CAJ to the CEO of the RBA for review.

17. This Court is guided by the decision in **Owners of Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd [1989] KLR 1** when dealing with the issue raised about this Court's jurisdiction. Nyarangi JA (as he then was) held as follows in this regard:

"I think it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence.

24. **Mr. Cheruiyot** learned counsel for the Respondent argues that upon completion of an investigation or inquiry, Section 41 and 42 of the Commission on Administrative Justice requires the CAJ to make a report to a public entity, which report should contain a recommendation. In this instance, it was recommended that the Respondent reconsiders the ex-parte Applicant's case. The Respondent considered the recommendation and in the exercise of its discretion, did not enforce the same.

25. Counsel also submitted that if at all there was refusal and/or failure to implement the recommendations of the CAJ within a specified period of time, then Section 42 (4) of the CAJ Act is instructive that the commission may prepare a report and submit to the National Assembly a report detailing the failure or refusal to implement its recommendation and the national assembly will take the appropriate action. To buttress his submission counsel cited the Supreme Court in **Kenya Vision 2030 Delivery Board v Commission on Administrative Justice & 2 others [2021]** where the court held that not even a Court of law can dictate the manner in which a recommendation should be implemented. The only exception, as pointed by the trial Court, is where **"there is gross abuse of discretion, manifest injustice or palpable excess of authority"**

26. **Mr. Mbarak** learned counsel for the ex-parte Applicant was in consonance with the Respondents submissions and appreciated that the Supreme Court finding in **Kenya Vision 2030 Delivery Board v Commission on Administrative Justice & 2 others (supra)** is binding upon this court. However, counsel distinguished the ex-parte Applicant's case by submitting that there exists exception which in the ex-parte Applicant's case were gross abuse of discretion and manifest injustice by the Respondent in allowing the ex-parte Applicant's fellow employees to buy back their gratuity and calculating the pensions of the said employees to include service under the defunct KCHS, and disallowing a similar request made by the ex-parte Applicant. Therefore, the Respondent's decision was contrary to Article 27(1) and (4) of the Constitution and Section 7 (2) (j), (k), (m), (n), and (o) of the Fair Administrative Action Act.

27. This Court needs not reinvent the wheel on the subject. By virtue of Article 163(7) of the Constitution, it is bound by the decisions of the Supreme Court. The Supreme Court has already in **Kenya Vision 2030 Delivery Board v Commission on Administrative Justice & 2 others (Supra)** articulated itself on the dispute at hand as follows:

"[40] From the foregoing Constitutional provisions, the statutory provisions and authorities highlighted, it is our finding that whereas CAJ has the requisite mandate to make recommendations to a public officer or a public body, the same is not binding. A recommendation can only be binding when the same is specifically provided for in the Constitution or in law. Neither the Constitution nor the CAJA states that CAJ's recommendations are binding. Consequently, the Board had the discretion to determine the manner in which they were to implement CAJ's recommendations. Towards that end, we find and affirm that the CAJ's recommendations to inter alia: pay the 3rd Respondent an equivalent of twelve months salary and allowances in compensation for a one-year period of the reviewed contract; facilitate the 3rd Respondent to access his personal effects from his former office; and offer him an unconditional apology for the treatment meted out to him, were not binding upon the Board. We therefore fault the appellate court's conclusion that CAJ's recommendations were binding on the Board.

*[41] We agree with the Board's submission and the High Court's finding that under Section 42(4) of the CAJA, the remedy where there has been non-compliance with the recommendations of the CAJ, is for the CAJ to prepare a report of the Board's failure to implement the recommendations to the National Assembly for appropriate action. CAJ ought to have explored the options set out in Section 41 of CAJA. Ultimately, we agree with the trial Court's finding that not even a Court of law can dictate the manner in which a recommendation should be implemented. The only exception, as pointed by the trial Court, is where **"there is gross abuse of discretion, manifest injustice or palpable excess of authority"** equivalent to denial of a settled right which the aggrieved party is entitled, and there is no other plain, speedy and accurate remedy." It is our finding that the circumstances of the appellants' case do not fit the said exception.*

[42] Even where such exceptional circumstances are pleaded, who then bears the burden of proving abuse of discretion? It is our opinion that where a party is so aggrieved by the exercise of discretion or lack of it thereof, by a public office of officer or institution, it is for that party to prove that their case fits within the four corners of the exception set above. In the instant appeal, we agree with the trial Court that the 3rd Respondent did not discharge this burden of proof. Mere allegation that the Board declined to comply with the CAJ's recommendation is not enough to prove gross abuse of discretion, manifest injustice, or palpable excess authority."

28. From the foregoing, this Court finds and holds that under Section 42(4) of the CAJA, the remedy where there has been non-compliance with the recommendations of the CAJ is for the CAJ to prepare a report of the Respondent's failure to implement the recommendations to the National Assembly for appropriate action. This Court cannot dictate the manner in which recommendations by the CAJ should be implemented. However, all hope is not lost for the ex-parte Applicant since this Court can in exceptional circumstances intervene in the implementation of the CAJ recommendation when an applicant/aggrieved party demonstrates on a balance of probabilities that there has been **gross abuse of discretion, manifest injustice or palpable excess of authority** equivalent to denial of a settled right to which the aggrieved party is entitled, and there is no other plain, speedy and accurate remedy. Has the ex-parte Applicant discharged its burden of proof in order for this court to intervene and provide a speedy and accurate remedy?

3. Whether the ex-parte Applicant proved gross abuse of discretion and manifest injustice to warrant the intervention by this court.

29. The Claim herein is against the sponsor (the Respondent), rather than the trustees of KPA Pension Scheme. The claim by the ex-parte Applicant was presented well after the statutory limitation set under Section 66 of the KPA Act, which provides:

66. Limitation

Where any action or other legal proceeding is commenced against the Authority for any act done in pursuance or execution, or intended execution, of this Act or of any public duty or authority, or in respect of any alleged neglect or default in the execution of this Act or of any such duty or authority, the following provisions shall have effect—

(a) the action or legal proceeding shall not be commenced against the Authority until at least one month after written notice containing the particulars of the claim, and of intention to commence the action or legal proceeding, has been served upon the Managing Director by the plaintiff or his agent;

(b) the action or legal proceeding shall not lie or be instituted unless it is commenced within twelve months next after the act, neglect or default complained of or, in the case of continuing injury or damage, within six months next after the cessation thereof.

30. It is therefore clear that the instant action against the Respondent is statute barred having been instituted after the lapse of twelve months from when the duration to implement the recommendations by the CAJ lapsed. Consequently, the action by the ex-parte Applicant is incapable of sustenance and the only remedy available to the ex-parte Applicant is to pursue the aforementioned remedy available under Section **42(4) of the CA J Act**.

31. For the reasons outlined herein above, the Notice of Motion herein dated 22/09/2020 is dismissed. Parties to bear own costs.

DATED, SIGNED & DELIVERED AT MOMBASA THIS 30TH DAY OF SEPTEMBER, 2021.

E. K. OGOLA

JUDGE

Ruling delivered via MS Teams in the presence of:

Mr. Mwanguya holding brief Mbarak for Ex parte Applicant

Ms. Ikegu for Respondent

Ms. Peris Court Assistant