



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**FAMILY DIVISION**

**CIVIL CASE NO. 41 OF 2018 (OS)**

**IN THE MATTER OF THE ALEXANDER FORBES RETIREMENT FUND (PROVIDENT SECTION)**

**AND**

**THE ESTATE OF ELISHEBA NYAMBURA KIMANI (DECEASED)**

**BETWEEN**

**JOSEPH KIMANI KAMAU.....PLAINTIFF**

**VERSUS**

**SUNDEEP K. RAICHURA**

**JAMES I. OLUBAYI**

**JANE M. MBATI**

**LUCY KAMBUNI**

**JOHN OKONDO**

**PRATUL SHAH Sued as THE TRUSTEES OF ALEXANDER FORBES**

**RETIREMENT FUND (PROVIDENT SECTION).....DEFENDANT**

**RULING**

1. The **Retirement Benefits Authority Act, No. 3 of 1997** provides for the establishment of retirement benefits schemes, regulates their operations, and provides for the mechanisms of resolving disputes arising from the operations of such schemes (**Kenya Commercial Bank Staff Retirement (D.C.) Scheme 2006 & Another –v- Ann Wangui Ngugi and 524 Others [2018] eKLR**). Under **section 46** of the **Act** any member of a scheme who is dissatisfied with the decision of the manager, administrator, custodian or trustees of the scheme may request, in writing, that such decision be reviewed by the Chief Executive Officer with a view to ensuring that such decision is made in accordance with the provisions of the relevant scheme rules or the **Act** under which the scheme is made. **Section 47** sets up the Appeals Tribunal, and **section 48(1)** provides that any person aggrieved by the decision of the Authority or the Chief Executive Officer has the right to appeal to the Tribunal within 30 days of the decision. By **section 38(2)** of the **Act**, any dispute between any person and the Authority as to the exercise of the powers under the **Act** is also appealable to the Tribunal.

2. The deceased Elisheba Nyambura Kimani was an employee of Essar Telecom (K) Limited. She was a member of Alexander Forbes Retirement Fund. The respondents Sundeep K. Raichura, James Olubayi, Jane M. Mbat, Lucy Kambuni, John Okondo and Pratul Shah are Trustees of the Fund. In the Disposal of Death Benefits Workbook published by the Fund, the applicant Joseph Kimani Kamau (the deceased's widower) and their two children were nominated as the beneficiaries of the proceeds of the Fund.

3. The applicant's case is that the Fund has refused to pay the proceeds to him and the children. He therefore took out letters of administration on 31<sup>st</sup> October 2016 in High Court at Nairobi **Succession Cause No. 1189 of 2013** in respect of the estate of the deceased

and filed this originating summons seeking the determination of several questions, including whether or not the Fund is obliged to furnish him with the accounts and whether the Fund is under obligation to administer and distribute the provident funds held on account of the deceased as directed by the Trust Deed and Rules made thereafter.

4. The Fund entered appearance and filed a notice of preliminary objection whose grounds were that:-

- (a) the cause as filed was bad in law and fatally defective;
- (b) the cause was premature as the applicant had not followed the due process set out under the **Retirement Benefits Authority Act**;
- (c) the court does not have the jurisdiction to hear and determine the cause; and
- (d) the cause is frivolous and an abuse of the process of the court.

5. Mr. Kigera for the Fund addressed me on the objection. Mr. Amolo for the applicant responded that the objection had no merit. His case was that the applicant was not a member of the Scheme. His late wife was the one who was a member. The applicant could not therefore proceed under **section 46** of the **Act**. He cannot go to the Tribunal. He is a nominated beneficiary under the Scheme but that the Fund has refused to deal with him, hence his coming to this court which, according to him, has unlimited original jurisdiction in civil and criminal cases.

6. In answer, Mr Kigera referred to **section 2** of the **Act** which defines a member to include a person entitled to receive benefit under a scheme.

7. I have considered the originating summons and the oral submissions by counsel.

8. In the case of **Speaker of the National Assembly –v- James Njenga Karume [1992] eKLR**, the Court of Appeal held that:-

**“Where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.”**

9. The Court of Appeal sitting in the case of **Geoffrey Muthinja & Another –v- Emanuel Muguna Henry & 1756 Others [2015] eKLR** expressed itself as follows:

**“We see this as the crux of the matter in this and similar cases. It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews within churches as is bound to happen. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanism in place for resolution outside of courts. This accords with Article 159 of the constitution which commands Courts to encourage alternative means of dispute resolution”**

10. In the **Kenya Commercial Bank Staff Retirement (DC) Scheme 2006 & Another** (above), the respondents were former employees of the Kenya Commercial Bank. The Bank established the Kenya Commercial Bank Staff Pension Fund in 1982, which was amended in 2008. It was a defined benefits Scheme. In 2006 it established the Kenya Commercial Bank Staff Retirement (Defined Contribution) Scheme. The respondents were members of the 1982 scheme. They left service under different circumstances; including normal retirement, special voluntary retirement, early retirement and dismissal or ill-health. In 2009 the Chief Executive Officer of the Authority received a complaint from the respondents that their retirement benefits had been erroneously calculated. They alleged under-payment. He considered the complaint and made a decision. The respondents were not satisfied. They appealed to the Tribunal. The Tribunal made a decision. The respondents were again not satisfied. They appealed to the Employment and Labour Relations Court (ELRC). The Trustees of the Scheme filed a preliminary objection on the ground of jurisdiction. Their case was that the court lacked jurisdiction to hear and determine any dispute relating to retirement benefits; and that no right of appeal lied to the court as no such right had been conferred either by the **Act** or the Constitution. The court dismissed the objection. The Trustees appealed to the Court of Appeal. The Court of Appeal reiterated that the right of appeal must be expressly conferred by statute, and such right cannot be implied or inferred. (**Samuel Kamau Macharia & Another –vs- Kenya Commercial Bank Ltd & 2 Others [2012] eKLR**). It was found that under the mechanism of dispute resolution provided under the **Act**, there was no express provision for an appeal from the decision of the Tribunal, either to the ELRC or to the High Court.

11. Once again, this dispute is between a retirement benefits Fund set up under the **Act** and a beneficiary nominated under the Fund. **Section 2** of the **Act** defines a ‘**member**’ to mean –

**“a member of a retirement benefits scheme and includes a person entitled to or receiving a benefit under a retirement benefits scheme.”**

The deceased was a member of the Fund, and had nominated the applicant and their two children as beneficiaries of the Fund upon her death. Under **section 2** of the **Act**, therefore, the applicant is a member of the Fund. Any dispute between him and the Fund has to be, under **section 46(1)** of the **Act**, determined by the Fund. If the Fund refuses to pay, or underpays, etc, he has to complain in writing to the Chief Executive Officer of the Authority. If he is aggrieved at that stage, he has recourse to the Tribunal set up under **section 47** of the **Act**. The Tribunal’s decision can only be challenged by Judicial Review.

12. In short, this court does not have the jurisdiction to hear and determine this dispute involving retirement benefits between a member and a

Fund set up under the **Retirement Benefits Authority Act**. The objection taken out by the Fund is therefore sustained. The originating summons is dismissed with costs.

**DATED and DELIVERED at NAIROBI this 25<sup>TH</sup> day of JULY 2019**

**A.O. MUCHELULE**

**JUDGE**