



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. 499 OF 2017

IN THE MATTER OF AN APPLICATION BY THE

APPLICANTS FOR LEAVE TO APPLY FOR

JUDICIAL REVIEW ORDERS OF MANDAMUS

AND

IN THE MATTER OF ARTICLES 27, 43(1)E AND 47 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT

AND

IN THE MATTER OF THE RETIREMENT BENEFITS ACT, CAP 197 LAWS OF KENYA

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

RETIREMENT BENEFITS AUTHORITY.....RESPONDENT

AND

MOSES O. ONDINGO

WANJALA MARTIN KISOMBE

JACKSON KAYLA KENDUIYWO

NEHEMIAH ONYANGO ONYANGO

OLIVIA PENIAH OWUOR

PRISCA JERONO KAOKO (All suing as members of the)

POSTAL CORPORATION OF KENYA

JUDGEMENT

Introduction

1. By a Notice of Motion dated 17th October, 2017, the *ex parte* applicants herein seek the following orders:

1. Judicial Review order of Mandamus be issued to compel the respondent to determine the applicants complaint filed on 28th April 2014 in accordance with the Retirement Benefits Act.

2. That costs of this application be provided for.

Applicants' Case

2. According to the applicants, they were were employed by the Kenya Post and Telecommunication Corporation (hereinafter referred to as “the Corporation”) on diverse dates and were members of Kenya Post and Telecommunication Corporation Pension Scheme (hereinafter referred to as “the Scheme”) before the corporation was split into three and were subsequently assimilated into the Postal Corporation of Kenya and absorbed into the Postal Corporation of Kenya Pension Scheme where they worked before they retired on various dates (as indicated in their complaint forms).

3. It was averred that the applicants were dissatisfied with their pension benefits since they were entitled to their pension under the terms and conditions of their original employment with Kenya Post and Telecommunication Corporation Scheme or to improved terms under Rule 8 of the ***Communications of Kenya Act 1998***, Transitional provisions. Consequently, the *ex parte* applicants filed a complaint with the respondent on 28th April 2014 in accordance with section 46 of the ***Retirement Benefits Act*** but todate, over three (3) years from the date of filing the complaint, the respondent has declined to act on the same without any justifiable cause or reason.

4. It was averred that the respondent has made representation to the public that such complaints would be determined within a period of 1-6 months and yet the respondent has failed to act on the applicants' case for a period of over three years without and explanation. The applicants' case was that by so doing, the respondent has denied the applicants a chance to properly present their case and for the same to be heard to determination despite the fact that they have a just claim with a high probability of success.

5. It was the applicants' case that the adverse actions by the respondent are in total disregard of their own service charter which stipulates that such complaints ought to be determined within a period of six months. The applicants disclosed that as a result of the respondent's abdication of its duties to determine the applicants' complaint, the applicants filed RBAT Appeal No. 1 of 2015; Moses O. Ondingo & 5 Others –vs- Retirement Benefits Authority an appeal which is yet to be determined due to the fact that the respondent has not determined the complainant filed on 28th April 2014. The said appeal, it was averred was to compel the respondent to determine the applicants complaint but unfortunately, the tribunal is yet to be constituted.

6. It was the applicants' case that the respondent's conduct and actions violates their constitutional right to Fair Administrative Action and the Provisions of section 4 and 5 of the ***Fair Administrative Action Act***. Further, the actions of the respondent have been made irrationally, in bad faith, procedurally unfair and disproportionate to any interest sought to be protected and that the said undue delay is in gross breach of the applicants' right under Article 159(2)(b) of the Constitution which dictates that justice ought not to be delayed.

7. It was the applicants' case that the ***Fair Administrative Act*** requires the respondent to give reasons to the applicants on why they have taken inordinately longer period to act on their complaint.

8. It was the applicants' position that unless compelled by this Court as shown by their conduct the Respondents have no intention to comply with the provisions of the **Fair Administrative Actions Act** in respect to their maladministration and breaches.

9. The applicants reiterated that the respondent is in breach of Article 47(1) of the Constitution of Kenya on the applicants right to administrative action that is expeditious, efficient lawful and reasonable and Article 47(2) that the applicants have a right to be informed on the reason as to why the respondent has declined to determine their complaint to date.

10. The applicants asserted that they have fundamental rights to social and economic empowerment as per Article 43(1)(e) of the Constitution of Kenya which have been breached by the respondent who has declined to determine the complaint which purely is in regard to their pension benefits. They lamented that they are elderly and Article 57 of the Constitution protects their rights as older members of society with respect to pursuing their personal development and to live in dignity and respect which they cannot due to the adverse actions of the respondent.

11. It was therefore contended that the Respondents' actions are a violation of their fundamental rights and they urged this Court to intervene herein and grant the orders sought, since the respondent has misused and abused its powers to the prejudice to the applicants.

Respondent's Case

12. The application was however opposed by the Respondent, the **Retirement Benefits Authority** (hereinafter referred to as "the Authority").

13. According to the Authority, the Ex-Parte Applicants herein lodged a complaint dated the 28th of April 2014 with the Authority and in response thereto, the Authority sought more information and clarity regarding the various complaints filed through a letter dated the 15th of August 2014. To that request, the Ex- parte applicants' counsel responded to the Authority on the 27th of August 2014 but thereafter did not follow up on the matter and neither did they prompt the authority further on their complaint for 18 months save for filing a premature appeal in Tribunal Appeal No. 1 of 2016, which is yet to be heard and determined as the Appeals Tribunal is yet to be constituted.

14. According to the Respondent, the delay in dealing with the complaint herein has been occasioned by the complainants themselves.

15. It was averred that through a statement of Defence filed in response to Tribunal Appeal No. 1 of 2016, the Authority indicated that the letter dated the 15th of August 2014 did not constitute a decision of the authority under the **Retirement Benefits Act** and further indicated that the process of determining the complaint was and still is ongoing while still indicating that the Authority sought clarity and further information from the Ex-parte applicants. According to the Respondent, it sought from the Ex-parte applicants the workings of each member indicating specifically where there was departure from the procedure and/or formula provided in the scheme rules. Further, the Respondent indicated that they were keen to address the Ex parte Applicants' complaints to conclusion and sought that it be given the opportunity to do so. The Respondent further prayed the Appellants, the Ex parte Applicants herein, do cooperate in providing all information required to facilitate in the decision making of the matter herein.

16. According to the Respondent, each complaint received and handled by the Authority is unique and depending on its complexity, the investigations necessary and enquires pertaining thereto, it may take varying periods of time to make a determination on the complaint and the issues raised.

17. It was the Respondent's case that it is trite law that issue of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks judicial review of that action without pursuing available remedies before the agency itself. In this case it was averred that there is a clear dispute resolution mechanism and procedure provided for under the **Retirement Benefits Act** which has

yet to be followed and therefore the application before this Court is premature. To the Respondent, where a statute has provided a remedy to a party, this Court must exercise restraint and first give an opportunity to the relevant bodies or State organs to deal with the dispute as provided in the relevant statute and that it is a 'cardinal principle that, save in the most exceptional circumstances, the judicial review jurisdiction would not be exercised and the court must not exercise it where there already exists an alternative remedy.

18. The Respondent asserted that it continues to discharge its mandate under the Act and the Application herein is premature and an abuse of the Court process as it seeks to interfere with the complaint before the Authority before a determination is made thereon.

19. The Respondent submitted that the Retirement Benefits Authority (RBA), the Respondent herein is a regulatory body under the National Treasury, and a statutory body established under **Retirement Benefits Act** No. 3 of 1997 of the Laws of Kenya.

20. Similarly, the Retirement Benefits Authority (the RBA) has as one of its mandates under section 5 of the **Retirement Benefits Act** (the Act) the role to "protect the interests of members and sponsors of retirement benefits schemes". Towards this end, the Retirement Benefits Authority investigates and makes decisions on complaints or disputes between parties to a retirement benefits scheme and especially between trustees and members.

21. The Retirement Benefits Authority, it was submitted is vested with the power to make decisions on matters relating to retirement benefits, it investigates and decides complaints and disputes relating to the way retirement benefits schemes are run. The Authority's decision is by law final and binding on all the parties to the complaint and can be enforced in a court of law. Decisions of the Retirement Benefits Authority can only be challenged by appealing to the Retirement Benefits Appeal Tribunal as established under section 47 of the Act.

22. The Respondent, in its submissions relied on section 46 of the **Retirement Benefits Act** which provides that:

Any member of a scheme who is dissatisfied with the decision of the manager, custodian or trustees of a 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 established...

23. According to the Respondent, whether or not this Honourable court grants the orders of *mandamus* is a matter of the discretion of the court and a party seeking *mandamus* must demonstrate existence of a legal right to the performance of a legal duty; that the legal duty must be of a public nature; that the party against whom a *mandamus* is sought must have failed, despite the demand, to perform the legal duty to the detriment of the party who has a legal right to expect the performance. Further it is now settled that a *mandamus* will not issue as a matter of course. In this respect the Respondent relied on **Kenya National Examination Council vs. Republic Ex-parte Geoffrey Gathenji Njoroge & 9 Others [1997] eKLR**, and **Republic vs. Ministry of Interior and Coordination of National Government and Another ex parte ZTE Judicial Review Case No. 441 of 2013** and submitted that it is trite law that, save in the most exceptional circumstances, the judicial review jurisdiction would not be exercised and the court must not exercise it where there exist alternative remedy. The Respondent also relied on **Republic vs. Board of Directors, Kenya Police Sacco Ex-parte Charles Maigeni Memusi [2016] eKLR the court cited the case of Re Preston [1985] AC 835 at 825D** where Lord Scarman was of the view that a remedy by judicial review should not be made available where an alternative remedy existed and should only be made as a last resort.

24. Based on **Ex parte Waldron [1986] 1QB 824 at 825G-825H**, it was submitted that Glidewell LJ observed that the court should always interrogate relevant factors to be considered when deciding whether the alternative remedy would resolve the question at issue fully and directly. Therefore where there exists an alternative remedy through statutory law, then it is desirable that such a statutory remedy should be

pursued first.

25. In this case it was submitted that the Respondents herein have not refused to perform their statutory duty which is a requirement before the orders of *mandamus* can issue. In the circumstances of this case, the Respondent believed that this Court ought not to exercise its discretion to grant the Orders sought in the said application as the Applicants have not adduced cogent evidence to demonstrate to this Honourable Court that the said orders should be granted.

Determinations

26. Having considered the application, the affidavits both in support of and in opposition to the application and the submissions of the parties, this is the view I form of the matter.

27. In this case the Respondent does not dispute the fact that it has the power to entertain the applicants' complaint. Rather, its case is that the applicants moved this Court prematurely while it was still handling the complaint.

28. The scope of the judicial review remedies of *Certiorari*, *Mandamus* and Prohibition was the subject of the Court of Appeal decision in **Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge Civil Appeal No. 266 of 1996** in which the said Court held *inter alia* as follows:

“The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way... These principles mean that an order of *mandamus* compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done”.

29. Article 47 of the Constitution provides that:

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

(3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—

(a) provide for the review of administrative action by a court or, if appropriate, an independent

and impartial tribunal; and

(b) promote efficient administration.

30. Pursuant to the said Article, Parliament enacted the *Fair Administrative Action Act, 2015*. Section 2 thereof defines “administrative action” to include:

(i) the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or

(ii) any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates;

31. The same section defines “administrator” as “a person who takes administrative action or who makes an administrative decision.” Section 3 on the other hand provides:

(1) This Act applies to all state and non-state agencies, including any person

(a) exercising administrative authority;

(b) performing a judicial or quasi-judicial function under the Constitution or any written law; or

(c) whose action, omission or decision affects the legal rights or interests of any person to whom such action, omission or decision relates

32. That the actions or omissions of the Respondent, a state agency, affects the legal rights or interests of the applicants cannot be doubted. It is therefore my view and I so hold that pursuant to the provisions of Article 47 as read with the provisions of the *Fair Administrative Action Act, 2015*, judicial review orders may, where appropriate, issue against the decisions of the Respondent.

33. It is not denied that the Respondent has the power to hear and determine the applicants’ complaint the subject of these proceedings. It is also not controverted that the complaint has been pending determination for three years. What the Respondent contends is that each complaint received and handled by the Authority is unique and depending on its complexity, the investigations necessary and enquiries pertaining thereto, it may take varying periods of time to make a determination on the complaint and the issues raised. In this case the Respondent indicated that it was keen to address the *ex parte* Applicants’ complaints to conclusion and sought that it be given the opportunity to do so. It further requested that the Appellants, the *ex parte* Applicants herein, do cooperate in providing all information required to facilitate in the decision making of the matter herein.

34. It is not in doubt that a lapse of three years in determining a complaint arising from retirement benefits is without more, a *prima facie*, inordinate delay. While I agree that the complexity of the issues may well justify such a delay, it is upon the Respondent herein to place before this Court sufficient material on the basis of which this Court may make such a finding. In this case apart from a bare statement, the Respondent has not expounded on the nature of complexity that was involved in determining the applicants’ complaint that necessitated the delay in solving the same. Further the Respondent has not disclosed what steps if any it had taken in the matter and the stage at which it was in resolving the same.

35. In the foregoing circumstances, there is simply no material on the basis of which I can find that the obviously inordinate delay is justified. *Mandamus* is the appropriate remedy for compelling a person to perform a duty imposed on him by statute which duty he has refused to perform to the detriment of the applicant. Fortiori it should be an appropriate remedy to compel the performance of a constitutional duty. See **Jotham Mulati Welamondi vs. The Electoral Commission of Kenya Bungoma HC Misc. Appl. No. 81 of 2002 [2002] 1 KLR 486; [2008] 2 KLR (EP) 393.**

36. Under section 5 of the *Fair Administrative Action Act*, some of the grounds for seeking and granting

judicial review orders are that there was an abuse of discretion, unreasonable delay or failure to act in discharge of a duty imposed under any written law.

37. It was therefore held in **Republic vs. Kenya Vision 2030 Delivery Board & Another Ex-parte Eng Judah Abekah [2015] eKLR** that:

“As already pointed out, in matters of discretion mandamus can only compel the performance of a duty but it cannot direct the manner in which the mandate is to be executed. However, there is an exception to this rule as was pointed out by Panganiban, J in the Philippines case of First Phillippine Holdings Corporation versus Sandiganbayan, 253 Scra 30, February 1, 1996 that:

‘Ordinarily, mandamus will not prosper to compel a discretionary act. But where there is ‘gross abuse of discretion, manifest injustice or palpable excess of authority’ equivalent to a denial of a settled right which petitioner is entitled, and there is no other plain, speedy and adequate remedy, the writ shall issue.’”

38. In this case I am satisfied that the delay on the part of the Respondent to determine the applicants’ complaints amount to abdication of the constitutional and statutory obligation placed on the Respondent to resolve such disputes.

39. The Respondent has however contended that the applicant ought to have opted for the alternative mechanisms. The applicant’s case however is that at the time these proceedings were instituted, though the appellate Tribunal had been moved, the same Tribunal was not in place and could not therefore determine the matter. Therefore this is not a case where a party has not invoked the alternative dispute resolution mechanism but where the said mechanism is disabled from operating.

40. In my view, the applicants cannot be driven from the seat of justice on the basis of the existence of such alternative remedy, as was held **Republic vs. National Environment Management Authority [2011] eKLR**, where the Court of Appeal had this to say at page 15 and 16 of its judgment:

“ ...in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it.”

41. Similarly, this Court in **Republic vs. Ministry of Interior and Coordination of National Government and Another ex parte ZTE** Judicial Review Case No. 441 of 2013:

“...Therefore, unless due to the inherent nature of the remedy provided under the statute to resort thereto would be less convenient or otherwise less appropriate, parties ought to follow the procedure provided for under the statute.”

42. In my view, whereas the availability of an alternative remedy is a factor to be taken into consideration, the Court ought not, in its decision to sanitise a patently illegal action on the basis that there is a right of appeal provided by the statute where such a right is practically non-existent. In this case the circumstances of the dispute render such an option a mirage. To my mind, if there is no dispute resolution mechanism covering the circumstances of the case, to send the applicant away on a wild goose chase of a non-existent remedy would be absurd. Where the purported alternative remedy leaves an aggrieved party with no effective remedy, such remedy is no remedy at all. I reiterate that where a remedy provided under the Act is made illusory with the result that it is practically a mirage, the Court will not shirk from its Constitutional mandate to ensure that the provisions of Article 50(1) are attained with respect to ensuring that a person’s right to have any dispute that can be resolved by the application of law is decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body, is achieved.

43. In the premises I find this application merited.

44. Under the current Constitution, this Court is empowered to invoke its judicial review jurisdiction in the proceedings of this nature in order to grant appropriate orders including the orders sought herein. In other words judicial review jurisdiction has now been fused with the remedies under the Constitution and this is clearly discernible from the remedies crafted under section 11 of the ***Fair Administrative Action Act***.

45. Therefore the failure to adhere to the letter and spirit of the Constitution constitute a ground for the grant of orders of judicial review. In this case there is no evidence that the provisions of Article 47 of the Constitution were complied with by the Respondent.

Order

46. Accordingly the order which commends itself to me and which I hereby grant is an order of *mandamus* compelling the Respondent to determine the applicants complaint filed on 28th April 2014 in accordance with the ***Retirement Benefits Act*** in the next sixty (60) days.

47. In the circumstances of this case and in order to promote amicable settlement of the matter there will be no order as to costs provided that the orders of this Court are complied with by the Respondent.

48. It is so ordered.

Dated at Nairobi this 22nd day of February, 2018

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Maina for the ex parte applicants

Miss Olao for the Respondent

CA Ooko