



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

HIGH COURT CIVIL CASE NO 251 OF 2013

TITUS KIMONDO NDIRANGU.....1ST PLAINTIFF
CHARLES MACKENZIE NDOLA.....2ND PLAINTIFF
SAMUEL K. MWANGANGI.....3RD PLAINTIFF
JACKSON KIMUZI MWAMBELA.....4TH PLAINTIFF
MUSHELLUM NDUNGU MAINA.....5TH PLAINTIFF
WALTER MUNGAI MUIGAI.....6TH PLAINTIFF
PETERSON WERU MWETHIA.....7TH PLAINTIFF

(Suing on behalf of former Kenextel Employees)

VERSUS

TELEPOSTA PENSION SCHEME.....DEFENDANT/APPLICANT

RULING

The application before this court for determination is the Notice of Motion dated 26th September 2013 brought under Order 2 Rule 15 (1), (b), (c) and (d) Order 26 Rule 1 and, Order 50 Rule 1 of the Civil Procedure Rules and section 3A of the Civil Procedure Act seeking for orders that:

1. The plaintiff's suit filed by way of plaint dated 1st July 2013 and filed on 2nd July 2013 by the plaintiffs be struck out with costs.
2. That in the alternative to prayer 1 above the Honourable court make an order directing the Plaintiffs to deposit in court a sum of Ksh 2,729,120/-

The application is premised on the grounds stated on the face of the application and the supporting affidavit of Peter K. Rotich who stated that he was the administrator and trust secretary for the defendant and has instructions from the Board of trustees to swear the affidavit. He avers that the plaintiff's suit amounts to a grave abuse of the court process and must be struck out because:-

- a. The issue as to who the funds subject of the claim herein should vest was determined by the liquidator of Kenya External Communication Company Limited staff Retirement Benefits Scheme

- and who ruled that the funds shall vest to the defendant.
- b. Under the Retirement Benefits (Minimum Funding level and winding up of Schemes) Regulations 2000, the plaintiffs were required to lodge an objection with the Retirement Benefits Authority against the liquidator's decision within 14 days from the date of inspection of the preliminary accounts and which objection the plaintiffs did not lodge.
 - c. Under the Regulations aforesaid, the plaintiffs had a better option of lodging an appeal against a decision of the Retirement Benefits Authority with the Appeals tribunal established under section 47 of the Retirement Benefits Act and which they did not.
 - d. The issue as to the ownership of the sum of Ksh 100,005,460:30/- has already been heard and determined and the plaintiffs cannot re-litigate once again in a court of law.

He however stated that in the unlikely event that the court does not strike out the plaint he prays that the court directs the plaintiffs to furnish security for costs that the defendants will incur in successfully defending the suit. He relied on schedule VIR (1), (b) and (d) and schedule VIB of the Advocates Remuneration (Amendment) Order 2006 to arrive at the sum of Ksh 2,729,120/- adding that the defendant does not know of any assets owned by the plaintiffs within which it can lay claim to recover costs incurred in the event that the plaintiff's suit is unsuccessful and it is in the interest of justice that the plaintiffs be ordered to deposit security for costs in the unlikely event that the court sustains the suit.

This application was opposed. The plaintiffs through the 3rd plaintiff filed a replying affidavit on 10th July 2014 stating that the application by the defendant was without merit since this is the first suit filed by the plaintiffs against the defendant with regards to monies held by the defendant since July 2010 and that the assertion by the defendants that the liquidator's decision was final is prejudicial to the plaintiff's rights to seek legal remedy in a court of law and infers that the plaintiffs have no option but to accept the findings of a liquidator who denied them their rightful claim. He further stated that the liquidator together with the defendant took out a paid advertisement in the Daily Newspaper dated 21st June 2010 stating that the liquidator had transferred the plaintiffs' funds to the defendant and that it had obtained from the defendant an irrevocable undertaking to pay to members of the scheme their benefits. They objected to the liquidation decision vide a letter dated 21st July 2010 in which the Regulator replied to the letter absolving itself from any claims and stated that they were bound by a series of legal notices and court decisions which would not have seen the Regulator nor the Liquidator make a contrary decision other than vest their private contributions to the defendant, they had no choice but to come to court.

Their contention is that their direct contribution from their salaries earned from their previous employer prior to the merger of KPTC and KENEXTEL and having been vested in a private members scheme before them joining the employer a member of the defendant's scheme should not vest and should never have been treated as an asset of the KPTC. He believes that section 46 (1) and section 48(1) of the Retirement Benefits Act states that a person "may" file an appeal before the tribunal does not limit the plaintiffs from filing their case in court adding that the issues raised in their plaint are weighty and in many instances the defendant is in breach of the plaintiffs constitutional rights which issues can properly be canvassed before the court and pray the application be dismissed.

Parties filed written submission. The defendant filed its submissions on 26th June 2014 where it stated that this court lacked jurisdiction to deal with this matter for the reasons that **section 46 (1) of the Retirement Benefits Act 1997** states that, "*Any member of a scheme who is dissatisfied with decision of the manager 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 which the scheme is established*". It also relied on **section 48 (1)** of the same Act that states, "*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 30 days of the receipt of the decision*"

Learned Counsel submitted that the decision being contested is the defendant's refusal to pay the plaintiffs the monies it received pursuant to the liquidation of Kennextel therefore the court has no jurisdiction in light of the sections stated above and the plaint should be struck out. He further relied on section 7 (7) of the Retirement Benefits (minimum funding level and winding up scheme) Regulations

2000 that state that, “*The Authority may (Retirement Benefits Authority) at the cost of the scheme cause to be published in the Gazette and in a widely circulated newspaper a notice stating the period during which and the places at which the preliminary accounts and report may be inspected and any interested person who has an objection to the said preliminary accounts and report may lodge their objections in writing with the authority and a copy thereof shall be served on the liquidator within a period stated in the notice not being less than 14 days as from the last day on which the aforesaid documents were inspected*” and Rule 7(14) that states that “*all claims against the scheme shall be proved to the satisfaction of the liquidator, subject to right of appeal to the Appeals Tribunal and the liquidator may require any claim to be made by way of an affidavit*”. It was submitted that under the said rules the court has no original jurisdiction in so far as disputes arising from the winding up of the Pension Schemes.

The plaintiffs filed their submissions on 16th July 2014 where they submitted that Article 165 (3) of the Constitution confers on the High Court unlimited original jurisdiction and Article 165 (7) The High Court may make any other order or direction it considers appropriate to ensure the fair administration of justice. They further stated that the subject matter being the property of the plaintiffs vested in the defendant by a liquidator appointed by the Regulator the Regulator obtained an irrevocable undertaking from the defendant against any claim that may rise from the members of Kennxtel scheme which the plaintiffs were members. They relied on Rule 29 of the Teleposta Pension Scheme which provided that, “*The trustee may accept from the registered scheme or any other scheme /fund which has been registered under the RBA of which any member was previously a member any monies annuity, contracts or policies or other assets which the trustees of such other Registered scheme or other persons having the requisite power are empowered to assign or transfer to the trustees and in such event the member may be entitled to such additional benefits under the scheme as the trustees after consultation with any actuary or such other person as the trustees may determine may consider appropriate provided that no such transfer shall become effective until it shall have been notified to the commissioner (if the scheme shall then be a registered scheme)*”. That the scheme having accepted liability and issued an undertaking to discharge its mandate the defendant cannot now raise the issue of jurisdiction simply because it has failed, ignores and refused to discharge its mandate. That though section 47 of the Retirement Benefits Act states that an aggrieved party may file proceedings in the Appeals Tribunal, case law has shown that due to the lack of regulations the tribunal is not able to handle complex matters raised in some cases such as this one. They relied on the case of **Jimmy Kaulu & 14 Others –vs- Stanbic Bank Kenya Limited HCCC No 983 of 2004** where Nambuye J (as she then was) stated that there were no regulations laying down procedures on how the Chief officer is to receive and process appeals and that there were no provisions that the officer had power to set up a secretariat or other machinery for effective disposal of appeals referred to him. They concluded that the matter was properly before the court and the application to strike out the plaintiffs' plaint was bad faith, unfounded and without merit.

The issue for determination is whether this court has jurisdiction to determine this suit. Jurisdiction is everything and without it the court cannot do anything. This was clearly stated in the celebrated case of **Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] KLR 1** Justice Nyarangi held as follows, “*I think that 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. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.*”

The plaintiffs' claim against the defendant is a claim of special damages of Ks 100,005,460/- arising from a dispute on the payment of pension funds which the defendants have not paid the plaintiffs. The defendant has stated in its defence that the funds were vested with the defendants and that after the decision by the liquidator there has not been any appeal against that decision as required by the law and that the period for lodging the appeal has lapsed. My understanding of this matter is that the plaintiffs who are pensioners have a decision from liquidator. At paragraph 6 of the plaintiffs' replying affidavit sworn on 16th July 2014 it is averred that the plaintiff after obtaining a decision from the liquidator wrote a letter dated 21st July 2010 to the Chief Executive Officer of the Retirement Authority objecting to the liquidator's decision.

The Retirement Benefits Act Cap 196, Laws of Kenya is an Act of Parliament which establishes a Retirements Benefits Authority for the regulation, supervision and promotion of retirement benefit schemes, the development of the retirement benefits sector and for connected purposes. Under section 46 (1) of the Retirement Benefits Authority a member who is dissatisfied with the decision of the manager, administrator ,custodian or trustees of a scheme may request in writing that such decision be reviewed by the Chief Executive Officer. In my view this is the first step the plaintiffs ought to have taken. There is a letter dated 21st July 2010 from the Plaintiffs advocates notifying them of their client’s position and seeking audience with the view of reviewing the decision. There was a response from the compliance manager indicating their position. It would appear that the matter did not proceed before the CEO as provided under section 46(1).Section 48(1) provides for an appeal from the CEO’s decision. The mandate of the Act is very clear as it deals with issues of benefits schemes which the subject matter between the parties herein. Article 165 of the Constitution provides that the High Court has unlimited jurisdiction but where an act of Parliament as in this case, confers jurisdiction on a tribunal such as the Retirement Benefits Authority then persons aggrieved ought to follow the laid down procedure of having their grievance heard in the first instance by the tribunal before seeking redress in court. In the case of **Spiliada Maritime Corporation v Cansulex Ltd (1986) 3 All ER 843** the court held that, **“In considering whether there was another forum which is more appropriate the court would look for that forum with which the action had been the most real and substantial connection e.g. in terms of convenience or expense, availability of witnesses, the law governing the relevant transaction, and the places where the parties resided or carried on business.”**

In the instant case, the law governing the issue in dispute between the parties is provided under the Retirement Benefits Act which provides internal mechanisms where the parties’ disputes can be heard and determined before they can seek redress in a court of law. Section 48(2) of the said Act provides that either party may appeal to the tribunal. Article 169(1) (b) of the Constitution defines subordinate courts as any other court or local tribunal as may be established by an Act of parliament other than the courts established as required by Article 162(2).Therefore the plaintiffs should file their appeal at the tribunal as provided by the Act and it is after they have been heard and a decision made by the tribunal, then they can appeal to this court if the Act so provides. I therefore find that this court has no jurisdiction to hear this suit. I allow the defendant’s application dated 26th September 2013 in terms of prayer 1.The plaint dated 1st July 2013 and filed on 2nd July 2013 by the plaintiffs is hereby struck out. Having noted the nature of dispute between the parties it is my view that each party should to bear its own costs.

Orders accordingly.

Dated signed and delivered this 23rd day of **January 2015**.

R. E. OUGO

JUDGE

In the presence of;

.....**For the Plaintiffs**

.....**For the Defendant**

.....**Court Clerk**