



**IN THE HIGH COURT AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO 156 OF 2015**

**ROBERT A. AZARIAH.....1<sup>ST</sup> PETITIONER**  
**LITUNYA M. ALUSHULA.....2<sup>ND</sup> PETITIONER**  
**MURIITHI MAINA GACHANGI.....3<sup>RD</sup> PETITIONER**  
**JOSEPH O. NYANGA.....4<sup>TH</sup> PETITIONER**  
**HAGGAI O. O MUTANYI.....5<sup>TH</sup> PETITIONER**  
**RUFINUS ONYANGO.....6<sup>TH</sup> PETITIONER**  
**FAUSTUS BAHATI .....7<sup>TH</sup> PETITIONER**

**VERSUS**

**KENYA RAILWAYS STAFF RETIREMENT BENEFITS SCHEME ... RESPONDENT**

**RULING**

**Introduction**

1. In their application dated 20<sup>th</sup> April 2015 which was presented before the Court on 21<sup>st</sup> April 2015, the petitioners sought orders to restrain the respondent from holding its annual general meeting scheduled for the 24<sup>th</sup> of April 2015. Upon hearing the application inter partes on 23<sup>rd</sup> April 2015, in a brief ruling issued on the same day, I declined to issue the orders sought.
2. In opposing the application for conservatory orders, the respondent had made various arguments including the preliminary point that the issues raised in this petition are *res judicata*, having been canvassed in two previous consolidated petitions, an appeal on which was pending before the Court of Appeal. I reserved my ruling on these arguments, and this ruling pertains to the various issues raised regarding the competence of the petition, including the question whether the issues raised in the petition are *res judicata*.
3. The first objection to the petition and application related to the joinder of the 6<sup>th</sup> petitioner, Rufinus Onyango, as a party to the petition, and the lack of authorization from the other petitioners. The objection was on the basis that he is not a member of the Kenya Railways Staff

Retirement Benefits Scheme (the Scheme). It was further argued that the 1<sup>st</sup> petitioner had perjured himself by alleging that he had the authority of the other petitioners to file the petition, while he had not attached authority to this effect.

4. While it is correct that no authority has been attached to show that the petitioner had authority to file the present petition, and it has not been disputed by the 1<sup>st</sup> petitioner that the 6<sup>th</sup> petitioner is not a member of the Scheme, this would not in itself be fatal to the petition. The Court has the jurisdiction, under Rule 5 of the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (The Mutunga Rules)**, to remove from proceedings a party who has been improperly joined. Further, the 1<sup>st</sup> petitioner has the right, under Article 22, to bring a petition on his own behalf if he takes the view that there is a violation or threat of violation of his constitutional rights.
5. A second objection to the petition is that the petition could not stand since the Scheme could not be sued in its own name. The respondent contends that being a trust, it has no capacity to be sued in its own name, thus rendering the entire petition incurably incompetent. Again, in my view, this is a defect that can be cured under the provisions of Rule 5 of the Mutunga Rules. Under the said Rules, the Court is required to do justice and deal with the matter in dispute, and the joinder or misjoinder of a party is not reason, without more, for striking out a petition.
6. The third argument against the petition is that this Court is not the proper forum for adjudicating the issues in dispute. The respondent argues first, that its Trust Deed and Rules provide for arbitration under Article 34 and secondly, that there is a dispute resolution mechanism provided for under section 46, 47 and 48 of the Retirements Benefits Authority Act (RBA Act).
7. The response from the petitioners is that sections 47 and 48 of the RBA Act are clear that appeals to the Tribunal lie in relation to decisions of the Authority and of the Executive Officer of the Retirements Benefits Authority (RBA). Since the petitioners are not challenging decisions of the Executive Officer of the RBA but clauses 11, 18 and 28 of the Trust Deed, and since clause 34 of the Trust Deed relates to disputes between trustees, members and the sponsors, they had filed their dispute in the proper forum.
8. Section 46 (1) of the RBA Act states that:

***Any member of a scheme who is dissatisfied with a 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 established.***

9. Section 47 of the Act establishes an Appeals Tribunal, while section 48 sets out its jurisdiction as follows:

***(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.***

10. With respect to the provisions of the Trust Deed, there is incorporated within its provisions internal dispute resolution mechanisms. Clause 34 of the Trust Deed provides that:

***“Save where the decision of the Trustees is made final under the provisions of this Deed, if at any time hereafter any dispute, difference or question shall arise between the Sponsor,***

*the Trustees, the Members, the Member's Dependants or other persons or their Personal Representatives or any of them respectively touching the construction, meaning or effect of this Deed or any cause or thing therein contained or the rights or liabilities of any of them under this Deed or otherwise howsoever in relation to the Scheme then every such dispute or question shall be referred to arbitration by a single arbitrator appointed by the parties and in default of such agreement by the Auditor (sic) agreed upon by the parties in the dispute and the result of which arbitration shall be final and binding upon all parties and the proceedings shall be regulated by the provisions of the Arbitration Act, No 4 of 1995 of Laws of Kenya or any law or instrument amending, extending or replacing that Act."*

11. Evidently, there are clear mechanisms and processes established for dealing with disputes between members of the respondent *inter se*, or with the respondent itself. Under the Kenya Railways Staff Retirement Benefits Scheme Trust Deed and Rules, any dispute must first be subjected to arbitration, and under the RBA Act, any person aggrieved by the decision of the manager, administrator, custodian or trustee of any scheme may request in writing for a review of any such decision by the Chief Executive Officer of the RBA. A party dissatisfied with a decision of the Executive Officer has a right of appeal to the RBA Tribunal. See **High Court Petition Nos 353 of 2012 and 159 of 2012 - Tom Kusienya and 11 Others vs Kenya Railways Corporation and 2 Others**.

12. It is I believe well settled that where there are alternative mechanisms for resolution of disputes established by law, such procedures should be followed. In **Diana Kethi Kilonzo and Another vs The Independent Electoral and Boundaries Commission (IEBC) and 10 Others, Petition No 359 of 2012**, the Court observed as follows:

*"[73] We note that the Constitution allocated certain powers and functions to various bodies and tribunals. It is important that these bodies and tribunals should be given leeway to discharge the mandate bestowed upon them by the Constitution so long as they comply with the Constitution and national legislation. These bodies and institutions should be allowed to grow. The people of Kenya, in passing the Constitution, found it fit that the powers of decision-making be shared by different bodies. The decision of Kenyans must be respected, guarded and enforced. The courts should not cross over to areas which Kenyans specifically reserved for other authorities,"*

13. These sentiments echo the views expressed by the Court of Appeal in **Speaker of National Assembly vs Njenga Karume [2008] 1 KLR 425**, where it was 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."*

See also **Kipkalya Kones vs Republic & Another ex-parte Kimani Wanyoike & 4 Others (2008) 3 KLR (EP) 291** and **Francis Gitau Parsimei & 2 Others vs National Alliance Party & 4 Others Petition No.356 and 359 of 2012**.

14. The petitioners thus have two mechanisms open to them for resolution of their grievance. Their case is that they are dissatisfied with the Trust Deed on the basis that it infringes on their right to participate in the affairs of the Scheme. Under the Kenya Railways Staff Retirement Benefits Scheme Trust Deed and Rules, the petitioners are required to refer their dispute to arbitration where the dispute relates to, among others, the meaning and construction of the Trust Deed and any rights of the members arising out of the Trust Deed.

15. In my view, the matters that the petitioners raise in this petition fall squarely within the category of matters that were contemplated to be resolved by way of arbitration under the Trust Deed. A party would then, if still dissatisfied with the decision made on arbitration, have recourse to the

Executive Officer of the RBA, and thereafter to the Tribunal under sections 46, 47 and 48 of the RBA Act. In the circumstances, it is my finding and I so hold that in light of the provisions of the Trust Deed and the RBA Act, this Court is not the proper forum for dealing with the petitioners' grievance with regard to the contents and provisions of the Trust Deed.

16. Having reached the conclusion that this is not the appropriate forum for the determination of the issues raised in this petition, it follows that I should at this stage strike it out as prayed by the respondent. However, it is in my view useful to consider the final ground raised in opposition by the respondent, namely that the petition is *res judicata* and *sub judice*.
17. It was submitted on behalf of the respondent that there have been two previous petitions dealing with the same issue, namely **Tom Kusienya and 11 Others vs Kenya Railways Corporation and 2 Others (supra)** in which the same arguments with respect to the rules of the respondent were made. Its case is that the two petitions, which were consolidated, went through a full trial and a decision, in which the Court exhaustively examined the issues, was made on 13<sup>th</sup> November, 2013. The respondent contends that in this petition, the Court is being asked to re-open the same issues and render a decision, which amounts to an abuse of the court process. The respondent further argues that the petitioners in the consolidated petitions have lodged an appeal against the decision in the matter, which is pending hearing before the Court of Appeal, and the matter is therefore also *sub judice*.
18. In response, the petitioners argue that this petition differs from the **Tom Kusienya** case in that the two petitioners targeted a specific issue, namely the appointment of the sole trustee, Corporate and Pension Trust Ltd. They contend that in the present petition, they are seeking to challenge the constitutionality of clause 18 and Rule 28 of the Trust Deed and Rules of the respondent so far as they limit the participation of the members at the Annual General Meeting but does not provide a mechanism for the members to participate in holding the Trustees to account; and clause 11 of the Trust Deed and Rules in so far as it gives an absolute authority to the sponsor to appoint a sole trustee to the scheme.
19. The law with respect to when a matter is considered to be *res judicata* is set out in section 7 of the Civil Procedure Act, Cap 21 as follows:

***No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them can claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.***

20. With respect to the application of the principle, the Civil Procedure Act has also provided explanations, Explanation 1-3 of which are in the following terms:

***Explanation. (1)—The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.***

***Explanation.(2)—For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.***

***Explanation. (3)—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.***

21. Black's Law Dictionary (9<sup>th</sup> Edition) at page 1425 defines *res judicata* as follows:

***“Latin 'a thing adjudicated' 1 an issue that has been definitively settled by judicial decision. 2. An affirmative defence barring the same parties from litigating a second law***

*suit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been – but was not – raised in the first suit. The three essential elements are 1. An earlier decision on the issue, (2) a final judgment on the merits, and (3) the involvement of the same parties, or parties in privity with the original parties.....”*

22. In **Nicholas Njeru vs Attorney General & 8 Others (2013) eKLR**, the Court of Appeal expressed itself as follows:

*“This doctrine has been applied in a number of cases including; Reference No. 1 of 2007 EACJ, James Katabazi & 21 Others -vs- The Attorney General Of The Republic Of Uganda where the court stated that for the doctrine to apply;*

*-The matter must be directly and substantially in issue in the two suits.*

*-The parties must be the same or parties under whom any of their claim, litigating under the same title; and*

*-The matter must have been finally decided in the previous suit (see Uhuru Highway Development Limited -vs- Central Bank & 2 Others – Civil Appeal No. 3 of 1996.”*

23. See also **Job Kipkemei Kilach vs Director of Public Prosecutions and 2 Others (2014) eKLR**; **Charo Kazungu Matsere and 273 Others v Kencent Holdings Limited and Another (2012) eKLR**; and **Karia and Another v the Attorney General and Others (2005) 1EA 83**.

24. I am mindful also of the words of the Court in the English case of **Henderson vs Henderson (1843-60) ALL E.R.378**, in which the Court expressed the following view:

*“...where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special case, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.”*

25. In the **Tom Kusienya** case (*supra*), the petitioners stated at paragraph 11 of the said petition that:

*“...the 1<sup>st</sup> respondent’s Managing Director’s action of appointing the 2<sup>nd</sup> respondent as Corporate Trustee with effect from the 29<sup>th</sup> June, 2012 is irregular, illegal and unconstitutional as it makes the 1<sup>st</sup> respondent to take 100% control of the scheme in contravention of the members’ interest.”*

26. They argued further at paragraph 16 that:

*“... the Trust Deed and Rules of the Scheme are defective and there has been a resolution to have them amended which the 3<sup>rd</sup> respondent has failed to do.”*

27. At paragraph 18, they contended that:

*“...the Retirement Benefits Authority instituted an investigation into the malpractice by the 1<sup>st</sup> respondent and its trustees in the scheme and in the report on the findings made on*

**14<sup>th</sup> November, 2011, it was clear that the Scheme was fraught with corruption, breach of trust, abuse of office, fraudulent disposal of assets and other malpractices.”**

28.The petitioners then sought, among others, the following prayers:

.....

**c) A declaration that the current Trust Deed and Rules of the Kenya Railways Staff Retirement Benefits Scheme as they related to a normal scheme are defective.**

**d) An order that the 3<sup>rd</sup> respondent effects amendment of the defective Trust Deed and Rules.**

.....

29.It is thus evident that aside from being dissatisfied with the appointment of Corporate and Pension Trust Services Ltd, the petitioners in the **Tom Kusienya** case were also unhappy with the Scheme’s Trust Deed and Rules which they deemed defective. The Court heard the parties and rendered a decision and, dissatisfied with the said decision, the petitioners in that case have moved to the Court of Appeal.

30.In this petition, the petitioners also challenge the Scheme’s Trust Deed and Rules and seek, inter alia, the following order:

**“(a) A declaration that clauses 9, 11, 18 and rule 28 of the Trust Deed and Rules dated 3<sup>rd</sup> May, 2006 are null and void for violating Articles 2, 10, 23 (1), 24, 27 (1), (2), 28, 33 (1) (a), 36 (1), 43 (1) (e), 50 (1) and 57 (b) of the Constitution.”**

31.In asking the Court to issue the above order, the petitioners are in effect asking the Court to re-open issues that have been heard and determined by a Court of competent jurisdiction, and which are now pending appeal before the Court of Appeal. At paragraph 60 of its decision in the **Tom Kusienya** case the Court expressed itself as follows:

**“The respondents submit that the petitions raise no constitutional issue and were vague and general in nature. An examination of the pleadings, particularly in Petition No 353 of 2012, reveals that the petitioners merely set out the factual complaints without stating what the specific rights infringed by those complaints were. For instance, the Scheme’s Trust Deed and Rules are impugned on the ground that they were ‘defective’. It would have been expected that the petitioners would go further to point out to the Court what those defects were, and in what manner the ‘defects’ in the Trust Deed and Rules amounted to a violation of the petitioners’ constitutional rights. This was critical if the Court was to be persuaded to exercise its constitutional jurisdiction in a matter that on the face of it is entirely within the sphere and mandate of the RBA and the dispute resolution mechanism set up under the Act.”**

32.One is inclined to take the view that the present petition has been filed in order to seal the loopholes that had emerged from the previous suit under the guise of a new action challenging the constitutionality of the Scheme’s Trust Deed and Rules. This is what the *res judicata* rule seeks to prevent: unsuccessful litigants re-opening their cases again and again after a final verdict has been rendered, which would lead to unceasing litigation on the same issue, with the attendant prejudice to the administration of justice. It is my holding therefore that the matters raised in the instant petition are *res judicata* as the same were already adjudicated upon and determined on the merits by a court of competent jurisdiction.

33.In the circumstances, this petition is struck out but with no order as to costs.

**Dated, Delivered and Signed at Nairobi this 17<sup>th</sup> day of September 2015**

**MUMBI NGUGI**

**JUDGE**

**Mr. Omolo instructed by the firm of Opiyo & Omollo & Co. Advocates for the petitioner**

**Mr. Milimo instructed by the firm of Milimo, Muthoni & Co. Advocates for the respondents**