



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

(CIVIL APPEALS DIVISION)

CIVIL APPEAL NO. 108 OF 2012

NASIM DEVJI.....1ST APPELLANT

BEATRICE KABUTHU.....2ND APPELLANT

FRED OLANDE3RD APPELLANT

STEPHEN KODUMBE4TH APPELLANT

(SUING AS TRUSTEES OF DIAMOND TRUST BANK LIMITED STAFF PENSION AND LIFE ASSURANCE SCHEME)

VERSUS

THE RETIREMENT BENEFITS AUTHORITYRESPONDENT

(An Appeal from the ruling of the Retirement Benefits Appeals Tribunal dated 15th February 2012 in the Retirement Benefits Tribunal Appeal No. 2 of 2011)

RULING

1. The Respondent filed a Notice of Preliminary Objection dated the 17th of September 2013. The preliminary objection is on a point of law that this Court lacks jurisdiction to hear an Appeal from the Retirement Benefits Appeals Tribunal.
2. Parties filed written submissions. The Respondent in its submissions gave a background of the matter at the Tribunal as follows; that the appellants filed Appeal No. 2 of 2011 appealing against the decision of the Retirement Benefits Authority ordering Diamond Trust Bank Kenya Limited Staff Pension and Life Assurance scheme to pay one Peter Omondi Omeno his dues. The appellants did not attend the hearing and the appeal was dismissed for non attendance. Subsequently the appellants filed an application to reinstate the appeal and again the said application was dismissed for non attendance. The appellants thereafter filed an application to set aside the dismissal order and the said application was dismissed by the Tribunal. The appellants subsequently filed a Memorandum of Appeal appealing against the decision of the Tribunal dated the 15th of February 2012 declining to reinstate the Notice of Motion dated the 3rd of November 2012.
3. According to the Respondent the Appeals Tribunal is established under section 47 of the Retirement Benefits Act, Cap 197. That section 48 provides that;

- i. Any person aggrieved by a decision of the Authority (Retirement Benefits Authority) or the Chief Executive Officer under the provisions of this Act may appeal to the Tribunal (Retirement Benefits Appeals Tribunal) within 30 days of the receipt of the decision
 - ii. 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.
4. Section 49 provides that, the Tribunal shall have power to award costs of any proceedings before it and to direct the costs shall be paid in accordance with any scale prescribed for suits in the High Court or to award specific sum as costs.
 5. Section 51 (2) further provides that every certificate issued by the Tribunal may be filed in the High Court by the person in whose favor the costs have been awarded upon being filed, shall be deemed to be a decree of the High Court and may be executed as such.
 6. It is submitted that the Act is silent on the issue of appeal from the decision of the Retirement Benefits Appeals Tribunal. Learned Counsel referred this court to the decision in the case of **The Trustees, Teleposta pension Scheme –vs- Mackenzie M. Mogere and Another [2013] eKLR** where Justice Onyancha ruled as follows;

“The Retirement Benefits Appeals Tribunal established under Section 47 of the Retirement Benefits Act, Cap 197 of the Laws of Kenya, is an Appeals Tribunal endowed with Appellant jurisdiction equivalent to that of the High Court in all matters appealed to it under Section 46 of the Act.

7. It was submitted that an appeal from the High Court or from a Tribunal with High Court jurisdiction such as the Retirement Benefits Appeals Tribunal cannot lie with another High Court or the High Court’s equivalent.
8. The appellants opposed the Preliminary Objection. The appellants too gave a background of the matter. The appellants are in unison with the Respondent that jurisdiction is core to any matter, but submit that this court has the jurisdiction to hear and determine the matter for the following reasons; that the Retirement Benefits Appeal Tribunal is a subordinate court; that Section 49 (1) of Cap. 197 outlines the powers of the Tribunal that in hearing appeals shall have powers of a subordinate court; that if Parliament intended to give the Tribunal the same status of the High Court it would have expressly stated so. The appellants referred to the status of the High Court as defined in the old Constitution Sections 60 (1),65 (1) & (2) and Section 3 of the Interpretation and General Provisions Act Cap. 2; that the old Constitution and Cap 2 clearly show that the Tribunal can only be an inferior court to the High Court. The appellant went further to cite Article 169 (1) of the Constitution which defines the subordinate courts as being the Magistrate’s Courts, Kadhis Courts, Court Martial and 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); that since the Tribunal is established by an Act of Parliament then it is a subordinate court; that since the Constitution is the supreme law the Tribunal remains a subordinate Court.
9. It was submitted that Section 49 (4) and 51 (1) and (2) of the Retirement Benefits Act are purely in relation to costs as they facilitate the pursuit of an individual that has been awarded costs by the Tribunal and that they do not evaluate the status of the Tribunal to the High Court; that the said sections can be distinguished with section 49 (4) of the Cap. 197 which deals with subordinate jurisdiction provisions on the power of the Tribunal; that that Act Cap.197 directs that the certificate of costs be filed in the High Court to have legal effect and to be executed, that this too shows that the Tribunal is a subordinate court; that section 52 of the Retirement Benefit Act provides that there shall be rules for the Tribunal but if the rules have not been made then the provisions of the Civil Procedure Rule shall apply; that this being so section 75(1)(h) provides that an appeal shall lie as of right from specific orders or any other order with the leave of the Court; that since their application dated the 9th of December 2011 was brought under Order 12 rule 7 of the Civil Procedure and since the Civil Procedure Rules apply to the Tribunal the decision of 15th February 2012 is appealable as a matter of right pursuant to Order 43 rule1 of the Civil Procedure

Rules. The appellant relied on the Court of Appeal case of **Abok James Odera t/a A. J. Odera & Associates –vs- John Patrick Machira Company Advocates [2013] eKlr.**

10. Having considered the rival submissions. It is not in dispute the Retirement Benefit Act provides for a tribunal under section 47. The Act provides for appeals under section 46 and 48 of the said Act. An appeal from the Chief Executive Officer shall be heard by the tribunal within 30 days of receipt of the decision. Section 49 the Act provides that on hearing an appeal the tribunal shall have all the powers of the subordinate Court to summon witnesses, take evidence upon oath, this section in my view equates the tribunal to the subordinate Court of first instance and not the High Court. Article 169(d) of the current Constitution provides a local tribunal as a subordinate Court and states that “any other court or other tribunal as may be established by an Act of Parliament by article 162 (2). This tribunal has been established under the Retirement Benefit Act. With respect I differ with the holding of my brother Justice Onyancha in the case of **The Trustee, Teleposta Pension Scheme -vs- Mackenzie Mogere & Another (supra)** where he held that “*the appeals tribunal is endowed with appellant jurisdiction equivalent to the High Court.*”
11. Section 51 of the Retirement Benefit Act that deals with costs provides how costs are to be awarded by the tribunal and in my view this section does not equate the tribunal to the High Court neither does Section 51(2) give the tribunal powers equivalent to the High Court, but provides that a certificate issued by the tribunal may be filed in the High Court for execution purposes. Having stated thus and noting that the Act is silent on the issue of appeals from the decision of the tribunal then the provisions of the Civil Procedure Act shall apply on appeals. I therefore find no merit on the preliminary objection and dismiss it with costs. The appeal should proceed for hearing.

Orders accordingly.

Dated, signed and delivered this **30th** Day of **January** 2014.

R. E. OUGO

JUDGE

In the Presence of:-

..... **For the Appellants**

.....**For the Respondent**

.....**Court Clerk**