

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO. 88 OF 2020

BWANA MOHAMED BWANA.....PLAINTIFF

VERSUS

THE REGISTERED TRUSTEES, KENYA PORTS AUTHORITY PENSION SCHEME...DEFENDANT

RULING

The Defendant raise a preliminary objection on the following grounds that;

1. The ELC lacks original jurisdiction to entertain the dispute in light of sections 46 & 48 of the Retirement Benefits Act No. 3 of 1997.
2. Even the transfer of the suit from the High Court to the ELC does not clothe the ELC with jurisdiction in light of the exhaustion doctrine.

The defendant submitted that the jurisdictional challenge is taken on two grounds. First, as the suit was initially filed in the High Court which has held that it lacked jurisdiction, what has reached the ELC is a nullity which it has no jurisdiction to entertain. Second, even if the ELC has not received a nullity, it lacks jurisdiction to entertain a dispute on the management of a pension scheme. That the High Court has held, that the suit before it was beyond its jurisdiction. It sought to cure that by transferring the suit to the court supposedly with jurisdiction. It is, in their view, the position in law that no court, the ELC included, has original jurisdiction to entertain a dispute between a member and the Trustees of a Pension Scheme regarding the management of the Pension Scheme and that is precisely the dispute that the Plaintiff has presented to court. The Trust Deed, which governs the parties, mandates them to refer any dispute to arbitration. If the Plaintiff believes he has a dispute, his first port of call is arbitration. He tacitly concedes as much given the prayers he seeks. Even if he chooses to sidestep the arbitration, his next port of call, by Section 46 of the Retirement Benefits Act No. 3 of 1997, must be the Chief Executive Officer.

The Plaintiff submitted that there is a pending and active matter before the Court of Appeal on the same issues that is Civil Appeal Number 50 of 2020 The Registered Trustees Kenya Ports Authority Pension Scheme vs Bwana Mohamed Bwana and the same is to be listed in the month of April 2022 challenging the jurisdiction of this court. That the Defendant's contention that (his court has no jurisdiction over disputes between members is that the Plaintiff did in fact approach the authority and it is only after their reluctance to stop the auction of his house and considering that the auction was due that he approached the court for protection. That the dispute between the Plaintiff and the Defendant has visible elements of issues touching on land and housing rights. Several other members have been litigating the same issues for several years before the courts. In fact there are several pending matters against the Defendant herein touching on the issues of land and housing by its own members. They pray that the preliminary objection be overruled both in substance, merit and the technical aspect of its competency.

This court has considered the preliminary objection and the submissions therein. It is not in dispute that there is a pending and active matter before the Court of Appeal on the same issues that is Civil Appeal Number 50 of 2020 The Registered Trustees Kenya Ports Authority Pension Scheme vs Bwana Mohamed Bwana and the same is to be listed in the month of April 2022 challenging the jurisdiction of this court. Decisions of the Court of Appeal are binding on this court. Section 6 and 7 of the Civil Procedure Act Cap 21 provides as follows:

Section 6.

“No court shall proceed with the trial of any suit or proceedings in which the matter in issue is directly and substantially in issue in a previously instituted suit or proceedings between the same parties, or between parties under whom they or any of them claim, litigate under the same title, where such suit or proceedings is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed”

Section 7.

“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 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.”

I find this matter is sub judice as there is a pending matter touching on the same parties and the same issue. This preliminary objection is premature and the Defendant ought to have applied to stay these proceedings and await the outcome of the Court of Appeal decision. I find this Preliminary objection has no merit and I dismiss the same. Costs to be in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 23RD DAY OF MARCH 2022.

N.A. MATHEKA

JUDGE