



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Appeal 141 of 2012

THE TRUSTEES, TELEPOSTA PENSION SCHEME.....APPELLANT

VERSUS

MACKENZIE M. MOGERE.....1ST RESPONDENT

THE RETIREMENT BENEFITS AUTHORITY.....2ND RESPONDENT

RULING

The application before this court is a Notice of Motion dated 19th September, 2012, by the Respondents in this appeal. It seeks the dismissal of the appeal on one, several or all the grounds upon which the application is brought, that is to say: -

- a) that this court lacks jurisdiction to entertain and determine the appeal.**
- b) that in the first alternative the appeal is an abuse of the process of the court.**
- c) that the appeal, in the 2nd alternative, should be dismissed for lack of prosecution.**

The Memorandum of Appeal was filed on 23rd March, 2012 against the judgment of the Retirement Benefits Appeals Tribunal constituted under the Retirement Benefits Authority Act, 1997. The judgment dated is 23rd February, 2012. The Tribunal was constituted of five members of which the chairman was Justice (Rtd) Sheikh M. Amin, a retired High Court Judge. The judgment appealed from appears to have been properly signed by all the Tribunal's five members who heard and determined the dispute in the form of an appeal from the Chief Executive Officer of the Retirement Benefits Authority, in accordance with the provisions of Section 46(1) of the Act. The section provides thus: -

“46(1) Any member of the 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.”

The “**Scheme**” is defined in the Act, as the Retirement Benefits Scheme whose members are and include

persons entitled to or receiving a benefit under a retiring benefits scheme. Retirement Benefits Scheme is itself described to mean any scheme or arrangement whether established by a written law for the time being in force or by any other instrument, under which persons are entitled to benefits in the form of payments, determined by age, length of service, amount of earnings or otherwise and payable primarily upon retirement or upon death, termination of service or upon the occurrence of such other event as may be specified in such written law or other instrument.

In this case, as much as I understand from the records before me, the 1st Respondent, Mr. Mackenzie M Mogere, was an employee of Telkom Kenya Limited, the sponsor of the Appellant herein - The Trustees, Teleposta Pensions Scheme and the 1st Respondent, Mackenzie M. Mogere, was a person entitled to benefits created under the above scheme.

The 1st Respondent had apparently appealed to the 2nd Respondent herein, complaining that the Appellant had calculated and paid him a retirement benefit using a wrong pension method, period or formula, which he asserted, led to a wrong and lower pension sum being offered to him. By a letter dated 11th June 2009, through its Chief Executive Officer, the Appellant herein denied the allegation and informed the 1st and 2nd Respondents that the 1st Respondent's complaint had been investigated, found unwarranted and accordingly dismissed. That, as this court understands, aggrieved the 1st Respondent who then filed an appeal to the Retirement Benefits Appeals Tribunal. The Tribunal heard the 1st Respondent's appeal as provided under Section 48 and 49 of the Act and made a judgment in favour of the 1st Respondent Mr. Mackenzie M. Mogere. The finding did not however please the Appellant, the Teleposta Pensions Scheme, who in its wisdom, decided to appeal to this court in this appeal. As the appeal pended however, the 1st Respondent filed this application seeking dismissal of the appeal on the three grounds shown at the beginning of this Ruling.

I have carefully perused the said grounds of the application and I am of the view that the 3rd ground that the appeal should be dismissed for lack of prosecution was not really argued at all. The court felt that it was in effect abandoned. The 2nd ground that the appeal is an abuse of the court process, is in the view of the court, directly related to the first ground of lack of jurisdiction to which it is depended. This leaves the first ground as the main ground for determination, which in any case shall have also resolved the 2nd ground.

The Applicants/Respondents case is that this court has no jurisdiction to entertain and/or determine this appeal. That he said, is because, first, the Retirement Benefits Appeals Tribunal is an Appellate tribunal equivalent to the High Court and secondly, because, the Act has deliberately not provided for a right of appeal to this court. The Appellant in reply, conceded that the Act indeed has not provided for a right of appeal since it is silent on the issue. However, the Appellant argues that such silence by the Act does not interfere with or eliminate a citizen's constitutional right of appeal which the Appellant herein chose to exercise in filing this appeal. Thirdly, the Appellant argued that the Retirement Benefits Appeals Tribunal is an ordinary subordinate tribunal as is provided under Article 169(1) of the Constitution. In which case the Tribunal is a local tribunal established under an Act of Parliament and an equivalent of a subordinate tribunal whose decision can be appealed only to the High Court.

It is clear, therefore, that if this court has no jurisdiction to entertain and determine this appeal, then its best and only course, is to allow this application and dismiss or strike out the appeal as the case may require. To that end both sides to this dispute were in agreement and requested this court to determine this application first. The court thanks them for accepting the court's apology to them for being unable to determine the application before the court rose for the Christmas Vacation.

I now turn to the relevant issues before the court, to determine whether it has jurisdiction to hear and determine this appeal. I will first examine the nature, structure, powers and jurisdiction of the Retirement Benefits Appeals tribunal.

The Tribunal is established by the Minister under Section 47 of the Retirement Benefits Act, Cap 197. It

is constituted of five members whose Chairman shall be an advocate of the High Court of Kenya of seven years standing. That means that the Chairman under the old Constitution must be qualified to hold the office of a High Court Judge.

The Tribunal in exercise of its powers, has jurisdiction to sit on appeal, on decisions made by the Retirement Benefits Authority or one or several of the Authority's constituent institutions which include, inter alia, the Chairman, the Chief Executive Officer, the Commissioner of Insurance, Chief Executive Capital Markets Authority etc as provided under Section 6 of the Act. The Tribunal has all powers of a subordinate court to summon witnesses and summon for and admit any relevant evidence in respect of the appeal before it. It has power to determine the appeal before it and order for costs in favour of any party before it, the same to be assessed in accordance with any scale prescribed for suits in the High Court. Representation by advocates before the Tribunal is authorized. A certificate of costs issued by the Tribunal in favour of a party, shall be executed by the High Court as if it were its own decree.

I have carefully considered the above facts and situation of this law. In my understanding and view, the Retirement Benefits Appeals Tribunal is a local tribunal whose purpose, functions and powers are expressly provided under sections 49 of 51 of the Act. Examination of those powers shows that the tribunal, like many similar tribunals established under Acts of Parliament, has special powers to hear and determine disputes filed by certain persons or institutions forming the membership of the Retirement Benefits Scheme.

Unlike similar tribunals formed under various Acts of Parliament however, the Retirement Benefits Appeals Tribunal does not entertain or determine original disputes, which in this respect are first determined by various officials and/or institutions forming the Retirement Benefits Authority established under Section 3 of the Act. Instead the Tribunal was established to only determine appeals arising from the determinations or awards of officials or institutions forming the Retirement Benefits Authority. Section 47 (1) of the Act, describes the Tribunal as “**Appeals Tribunal**” for the purpose of hearing appeals under the Act.

Furthermore, I find that the Act then endows the Appeals Tribunal with powers, not only of the subordinate courts to summon witnesses and take evidence of all kinds, but in addition, gives it powers to order for costs on the High Court scales. Even more revealing in relation to the Appeals Tribunal's capacity and powers, a certificate of costs granted by the Tribunal can be executed only by the High Court under Section 51 of the Act.

The final provision by the Act in relation to the Retirement Benefits Appeal Tribunal's powers and jurisdiction are revealed under Section 52 of the Act under which the Chief Justice was empowered to make rules to govern the making of appeals from decisions of the officials and institutions of the Retirement Benefits Authority to the Tribunal. The provision is clear that decisions appealed against from those officials or institutions, to the Tribunal were to be regarded as “**a decree of a subordinate court exercising original jurisdiction.**”

It is in my view and finding very clear, therefore, that 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 Appellate jurisdiction equivalent to that of the High Court in all matters appealed to it under Section 46 of the Act. That is the reason why all the decisions or rulings made by the various officials or institutions forming the management of the Retirement Benefits Authority, are regarded as decrees equivalent to decrees of a subordinate court exercising original jurisdiction. Indeed, that is also why Parliament took care to align the Tribunal's consequential actions such as those of assessing costs and executing the certificate of costs, to be a jurisdiction of the High Court in consonance with the jurisdiction of the Tribunal. It is not surprising, therefore, and it makes sense, that the Chairman of the Tribunal must be an advocate qualified to be a High Court Judge. In this case before me, the Chairman was a retired judge. The argument by the Appellant that this Tribunal is a tribunal within the meaning of Article 169(2) (d) of the Constitution and that it has only a jurisdiction of a subordinate court, does not fit in or make relevant sense. Furthermore, while the constitution is the Supreme Law, it nevertheless clearly indicates that the jurisdiction of the High Court to hear appeals must be based on a

provision in the law or statute that provides such jurisdiction.

Taking into account the above conclusions which come out of the interpretation of the relevant provisions of the Act, it now behoves me to proceed to find that this appeal goes against the principle of precedent that forms the core or substratum of our judicial system. Under the principle, an appeal where sanctioned, lies only to the tribunal with a higher jurisdiction. That is to say, an appeal from the High court or from a tribunal with High Court jurisdiction, such as the Retirement Benefits Appeals Tribunal, cannot lie to another High Court or High Court's equivalent.

The principle stated above must have been the reason why Parliament found it unnecessary or uncalled for, to provide a further system of appeals from the Retirement Benefits Appeals Tribunal to the High Court. That also means and it is my further finding, that Parliament never intended to have a further appeal from the decision of the Tribunal. Had parliament intended to grant any further appeals from the Tribunal, nothing would have prevented it from promulgating relevant provisions to that end. However, whether or not a right of appeal is available to an aggrieved party where the relevant law is silent, is an issue now not relevant to be decided by this court, in view of the conclusions it has already reached concerning the jurisdiction of the Retirement Benefits Appeals Tribunal.

The final results of this court accordingly, is that this application must be allowed on the basis that this court has no jurisdiction to entertain and/or hear and determine this appeal. The consequence is that this appeal is fatally incompetent and must and is hereby struck out and dismissed, with costs to the Respondents. Orders are made accordingly. The result and ruling hereinabove applies to High Court Appeal No. 435 of 2012 mutatis mutandis.

Dated and delivered at Nairobi this 26th day of February, 2013.

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D A ONYANCHA

JUDGE