



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO 377 OF 2013

BETWEEN

BETHWELL ALLAN OMONDI OKAI.....PETITIONER

AND

TELKOM (K) LTD (FOUNDER).....1ST RESPONDENT

RETIREMENT BENEFIT AUTHORITY2ND RESPONDENT

CHAIRMAN BOARD OF TRUSTEE.....3RD RESPONDENT

KENYA COMMERCIAL BANK LTD.....4TH RESPONDENT

ALEXANDER FORBES FINANCIAL SERVICES.....5TH RESPONDENT

CO-OP INVESTMENT TRUST.....6TH RESPONDENT

OLD MUTUAL ASSET MANAGER.....7TH RESPONDENT

LLOYD MASIKA LTD.....8TH RESPONDENT

REGENT MANAGEMENT LTD.....9TH RESPONDENT

DELLOITTE AND TOUCHE.....10TH RESPONDENT

JUDGMENT

Introduction

1. The Petitioner, **Bethwell Allan Omondi Okai**, was employed by Telkom (K) Ltd as a Telecommunication Technician in 1988 on permanent and pensionable terms. He was sent on early retirement sometimes in the 1997 while he was 36 years old. Subsequently, he was entitled to a monthly pension emolument and thereby became a member of the Telposta Pension Scheme and identified as PF 62924.
2. In his Petition dated 19th July 2013, he seeks the following orders;

“a) A declaration that the election of members nominated trustees rules and regulations are

discriminative, non- inclusive, biased and an affront to the fundamental human right as is contemplated in Article 38 and 27 and therefore be declared null and void. And a declaration of the principle and purpose of Annual General Meeting which must be all inclusive and facilitated as a one event each year.

b) A permanent injunction restraining the Respondent whether by itself, its officers, agents and or servants or whomsoever is acting on its behalf from entering any agreement for the transferring, disposing, selling assets of Telposta Pension Scheme in any way whatsoever interfering with the financial standing until the Petitioner outstanding demands are addressed satisfactorily. And operate, manage and obey within the instruction of Article 43, 21, 22 and 25 of the new Constitution and the universal declaration of human rights under the United Nations conventions governing Rights, Principles and Policies.

c) A declaration that the trivial pension payout is injurious dehumanizing discriminative Autocratic repressive and traumatic and a travesty of justice system wrong in law principle and policy as covered in the objects of Retirement Benefit authority Act as the instrument of labour practice and abuse fundamental rights and freedoms as contained in Article 43 and 57 henceforth a restitutive justice be ordered to address inadequacies.

d) A declaration that the Petitioner is entitled to guaranteed payment of pension increment. In strict observance of Article 1, 5, 7 8, 22 and 25 of United Nations Universal Declaration of human rights agreements and the subsidiary legislation contained in the instrument of discrimination or such policy that TRIVIALIZES a group of Retiree Removed or Made livable or Reviewed in strict observance to the new Constitution.

e) The declaration that the hiring of six Corporate Consultants or Managers is Exploitative to the extreme as fund income are wiped out in their fees and their continued presence be declared an abuse of public procurement and disposal Act of 2005 and therefore a violation of the rule of law, the abuse of office is therefore by omission and commission and therefore an act of impunity on the sponsor, the administrator and the board of trustees. They be surcharged for resultant loses and irregularities incurred by the scheme.

e) General, Punitive and Exemplary damages for scandals, trivialities, favouritism, discrimination and degrading treatment causing wanton destruction and untold harm to my public image, credential, eligibility, reputation and disharmony to my family in contravention to my Rights as contemplated in Articles 27, 28, 33 and 43 with a further violation of my fundamental freedom and Right of Expression, equality and information as elaborately addressed through the Article 33, 35 and for the honour associated with the recognition of the voting rights Article 38 and those contemplated in Article 57 of the Right of senior citizens – the older persons Rights.

f) A mandatory injunction restraining the defendant whether by themselves, their agents, servants, representatives or otherwise from administering the fund until a proper AGM is called to deliberate and interrogate the budgetary estimates, the future health, viability and relevancy of the pension scheme in the face of multiple intermediaries, agents, managers whose yearly ballooning cost is a threat to the fund health future.

g) The cost of this suit.”

Case for the Petitioner

3. The Petitioner in his Petition claims that the Respondents have implemented a discriminative scheme called 'trivial pension pay out' so as to weed out vulnerable members of the scheme whose monthly take home falls below Kshs.5000/-. He claimed that the Respondents have over the years called Annual General Meetings (AGMs), whose resolutions they have failed to implement thus displacing the members' legal, policy and constitutional position as they are deemed irrelevant in

determining the future of the Pension Fund. He claimed that monetary estimates are not given to members during the AGMs thus making members helpless in the management of their financial affairs.

4. He contended that the Respondents have designed and employed discriminative election rules which have excluded, barred and eliminated the participation of members and has also extended the term of the Board of Trustees beyond the legally acceptable mandate.
5. He also claimed that the Retirement Benefits Authority (RBA) had been compromised and thus lacks passion and willingness to inculcate order in view of the misappropriation and mismanagement of the pension fund and is therefore violating its powers under the Act. He alleged that he wrote to RBA questioning the financial management of the scheme, for example, where in the financial report, administrative expenses are increasing every year and footnotes are not given for double entries made in the said financial report. That those anomalies violate the provisions of Chapter 12 of the Constitution which requires probity in financial matters but RBA has never responded to him.
6. The Petitioner also takes issue with the manner in which pension is paid by the 1st Respondent and is aggrieved by the fact that the management has decided to spend money to the tune of Kshs.500,000,000/- million in fees, charges to agents and consultants while they implement a 3% increment to junior pensioners which translates into an increment of Kshs.30/- only. That in his case he had never received more than Kshs.700/- as increment per month while the privileged get Kshs.6000/- or more as increment. He claimed that junior pensioners are the ones who implemented the 1st Respondent's mandate while risking their lives by working in extremely dangerous situations, such as; installing and maintaining of polls which are 50m above the ground, being exposed to dangerous chemicals while working in radiation prone areas. He stated that some of these junior employees who are being discriminated against today suffered immensely due to the working conditions they were exposed to and he claimed that some fell off overhead poles and high radio masts while some succumbed to the effect of radiation, power leakages and thunder bolts. He thus claimed that in line with labour policies, these junior employees ought to have been compensated by the implementation of a free and fair pension package which has not been implemented todate.
7. On fraud and mismanagement, he claimed that the 1st Respondent has procured goods without regard to the **Public Procurement Act**, has recruited many agents towards the fund administration thus paying levy fees that diminish or wipe out the gains which would otherwise go to members as Bonuses; has appointed the 5th and 10th Respondents to offer financial services and has thereby compromised financial performance leading to misappropriation of funds as they have downplayed the ever rising head cash and hidden bad debts. That further, RBA is paid a sum of Kshs.5M to play an oversight role and monitoring the Pension Scheme with a view to avoiding financial pitfalls or mismanagement which actions are all detrimental to the life and health of the Pension fund.
8. On discrimination, he claimed that the election of trustees is conditionally guided such that only workers who served as senior managers and above are allowed to contest and be elected as trustees. That the said measure attests to the principles of Apartheid since it exacerbates class war, pride and feelings. Further, that documents presented to members during AGMs, especially the financial statements are commonly printed in very small font to deliberately conceal facts to members whose sight has been affected by age thus discriminating against them on grounds of old age. He also claimed that the Tribunal Pension pay out scheme aforesaid amounted to discrimination as the 1st Respondent was only interested in remaining with a few privileged pensioners so that they can all plunder the treasures of the Pension Scheme.
9. He now claims that the Respondents have violated his and the other Pensioners' freedom of expression and information, right to human dignity and right to equity, freedom from discrimination and the right to social security. That as a result of all these actions, his reputation,

character, integrity, dignity and social standing as a former employee and now as a pensioner, have seriously been damaged and he has consequently been subjected to public ridicule, contempt, opprobrium, embarrassment and his public esteem has been greatly lowered in the eyes of members of the Pension Scheme and colleagues thus causing him considerable distress, hatred, ridicule, contempt and embarrassment.

For the above reasons, he seeks the orders set out elsewhere above.

1st Respondent's case

10. The 1st Respondent, **Telkom Kenya**, in opposing the Petition filed grounds of opposition dated 4th October 2013. In those grounds it claims that the Petition as filed is misconceived, frivolous and vexatious, incomprehensible and lacks merit as it does not disclose any cause of action and is thus fatally defective and an abuse of the Court process.

11. In her submissions, Mrs. Mbaabu for the 1st Respondent urged me to dismiss the Petition for the above reasons and also submitted that the role of the 1st Respondent in the deed is clear and there is no wrong doing alleged on its part by the Petitioner.

2nd Respondent's case

12. The 2nd Respondent, Retirement Benefits Authority (RBA) did not file any response to the Petition. However, Mr Echessa made oral submissions and stated that the Petition did not disclose a cause of action as against the RBA and urged me to dismiss it as the Petitioner had also not proven any violations on the part of the 2nd Respondent.

Case for the 3rd, 4th, 5th, 6th, 7th, 8th, 9th and 10th Respondents

13. The 3rd, 4th, 5th, 6th, 7th, 8th, 9th and 10th Respondents in opposing the Petition filed grounds of opposition dated 23rd September 2013 which are as follows;

“1) That there is no legal entity known as chairman, Board of Trustee capable of being sued and as such no orders can issue against the entity purportedly sued as the 3rd Respondent.

2) That Articles 38 and 27 of the Constitution of Kenya are irrelevant in so far the petitioner's allegations are concerned and cannot support prayers (a) and (f) of the Petition or at all.

3) That the Petitioner has dismally failed to demonstrate in the Petition the nature of his rights or fundamental freedoms which the Respondents have denied him and or violated and or threatened.

4) That the Petitioner has not demonstrated in any manner that the Respondents have in any way transferred disposed or sold the assets of Telposta Pension Scheme and or interfered with its financial standing and as such prayer (b) of the petition cannot be granted. That Petitioner has dismally failed to demonstrate the manner in which the Respondents have violated Articles 43, 21, 22 and 25 of the Constitution and the universal Declaration of Human Rights under the United Nations Conventions governing rights, principles and policies. (sic)

5) That the Respondents do not pay pension to the Petitioner who has not alleged so and accordingly prayer (c) of the Petition cannot be ordered as against the Respondents or at all. The Petitioner has not demonstrated in any that the Respondents are involved in the computation of the amount of pension to be paid to the Petitioner. (sic)

6) That the declaratory orders sought against the Respondents and pleaded as prayer (d) in the Petition cannot be legally granted against the Respondents or at all as the Respondents are not engaged in provision of pension to the Petitioner.

7) That prayer (e) of the Petition seeks a declaratory order against six corporate consultants or managers who have not been named or identified in the prayer and as such the order cannot be granted as against the Respondents or at all. It is instructive to note that the Respondents are ten (10) in number.

8) That notwithstanding the Respondents' position in ground Number (7) herein before, the Petitioner has not demonstrated in any manner how the hiring of the Corporate Consultants or managers is exploitative and scandalous and or an abuse of Public Procurement and Disposal Act of 2005 and or is a violation of the rule of law and or an abuse of office and or act of impunity on the Sponsor, administrator and Board of Trustees. The prayer seeking the unnamed corporate consultants or managers to be surcharged for resultant losses and irregularities allegedly incurred by the Scheme has no legal basis as No evidence to support the allegations has been tendered by the Petitioner.

9) That the Retirement Benefits Act and the Rules or Regulations thereunder clearly provide for procedures and avenues in which such disputes and or any grievances by members of a Pension Scheme can be adjudicated and determined. It is clear that the Honourable Court lacks the jurisdiction to adjudicate the Petitioner's claim.

10) That the Petitioner seeks orders against a party who is not sued as a Respondent in the suit. The allegations have largely been made against an entity who is not a Respondent in the suit.

11) That the allegations set out in the Petition cannot be said to amount to a violation or infringement of the fundamental rights and freedoms of the Petitioner or at all and are squarely (if the same had merit and which is denied) within the purview of the Retirement Benefits Act and the Regulations hereunder.

12) The 10th Respondent is a partnership of practising members of the Institute of Certified Public Accountants of Kenya. The 10th Respondent is not a limited liability company registered under the Companies Act, Cap 486 Laws of Kenya as alleged by the Petitioner.

13) There is no legal requirement that an auditor should be a watchdog of a Retirement Benefits Scheme. Section 34 of the Retirement Benefits Act only requires that the financial statements of a Retirement benefits of a scheme to be audited. If an auditor becomes a watchdog, they will lose their independence and will not be eligible to conduct an audit as envisaged in the Retirement Benefits Act.

14) The 10th Respondent is bound by IFAC Code of ethics, Financial reporting is governed by the Retirement Benefits Act and the International Financial Reporting Standards (IFRS). The Petitioner has not demonstrated in any manner how the perpetual appointment of the 10th Respondent as auditors of the Scheme will result in a compromise in the financial reporting.

15) That the petition herein amounts to a grave abuse of the Court Process.”

14. They also filed a replying affidavit sworn by Peter K. Rotich, the Administrator/Trust Secretary of Tel Posta Pension Scheme Trustees.

15. Mr. Bundotich further presented its case and in essence the gist of their case is that if the Petitioner had felt aggrieved in the manner the scheme was being run, his remedy lies in

arbitration in accordance with the provisions of the Trust Deed for Telkom Kenya Ltd. That the Petitioner had not followed that mechanism and in any event, the audit report, subject of the Petition was debated at the last AGM and if he was dissatisfied with the resolutions made, he should have followed the procedure in the Deed and not by-pass it and rush to Court.

16. On the nomination of trustees, that Clause 2 of the Deed stipulates that any person with the set qualifications can be nominated and on the amount of pension payable to the members, the issue is addressed by Rule 7 of the 2nd Schedule to the Deed. Further, that it is within the powers of the trustees to appoint consultants to provide services to the Scheme and there was nothing unlawful about that action.
17. On the allegations of discrimination, Mr. Bundotich submitted that the Pension Scheme has 9646 members and it was only the Petitioner who was complaining. That there was no evidence in any event that he was being discriminated as against the others and that the facts did not reveal in any way what Article of the Constitution had been violated including the one on discrimination.
18. He thus urged me to dismiss the Petition as it did not have any merit and even if it had any merit, the Petitioner should follow the laid down procedures in ventilating his grievances. He relied on the cases of *Susan Kariuki v Town Clerk Nairobi City Council Petition No. 66 of 2010* and *Wilfrida Arnodah Itolondo v Board of Trustees of Kenyatta University Petition No. 410 of 2013* to support that proposition.

Determination

19. Before considering the issues before me, I must express my serious disquiet about the pleadings and the facts that the Petitioner has presented before the Court in support of his case. I am aware that the Petitioner was acting in person, but even so, this Court has in the past expressed its concerns about the manner in which parties coming before the court and alleging a violation of constitutional rights have presented their cases. As a basic minimum, a Petitioner is required to cite the provisions of the Constitution which have allegedly been violated, and the manner in which they have been violated, and the remedy which he seeks for that violation - See *Annarita Karimi Njeru v Republic (1976-1980) 1 KLR 1272*. In demonstrating the manner in which there has been a violation, a Petitioner should present before the Court evidence of the factual basis upon which the court can make a determination whether or not there has been a violation.
20. Applying this basic and generally accepted principle to this case, the Petitioner has made serious allegations of discrimination and unequal treatment and also a violation of **Chapter 12 of the Constitution** without presenting any evidence to support the allegations. Indeed, looking at the Petition again, most of the complaints are based on allegations whose factual basis is completely missing.
21. As far as I know it, the key purpose of pleadings is to set out facts which constitute a cause of action. That is the reason why the 1st and 2nd Respondents have claimed that there is no disclosed cause of action against them and in that regard I agree with both Mrs Mbaabu and Mr. Echesa, that there is no cause of action disclosed in the Petition against the 1st and 2nd Respondents. Similarly, the Petitioner sued the 3rd to 10th Respondents and has completely failed to disclose the manner in which they have violated his constitutional rights.
22. That would have been the end of the matter. But If I understand the Petitioner well, his real complaint is with the 'trivial payment' he is paid. That is why he states that low ranking junior employees have been discriminated by the well and mighty. However, he completely failed to show how the Respondents are involved in the computation of his pension. In fact, the 4th to 10th Respondents are consultants who have been hired to provide various services to the Petitioner's Scheme. How have they violated the Petitioner's constitutional rights by that fact alone? No basis for such an allegation was made at all.

23. Further, I am in agreement with Mr. Bundotich that the Trust Deed, the Retirement Benefits Act and the Rules or Regulations thereunder have clearly provided for procedures and avenues in which disputes relating to pension can be adjudicated and determined. **Clause 36** of the **Consolidated Deed of Trust and Rules** provides as follows with regard to arbitration;

“Save where the decision of the Trustee is made final under the provisions of this Trust Deed, if at any time hereafter any dispute, difference or question shall arise between the Founder, the Trustees, the Members, the Dependants, Pensioners or other persons or their personal representatives or any of them respectively touching the construction, meaning or effect of this Trust Deed or any cause or thing therein contained or the rights or liabilities of any of them under this Trust 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 agreement between the parties, and in default of such agreement within fourteen days by the then senior partner for the time being of the auditors of the founder and the proceedings shall be regulated by the provision of the Arbitration Act, No. 54 of 1995, or any law or instrument amending, extending or replacing that Act provided that a member who is dissatisfied with a decision of the Scheme/Fund Trustee may request that such decision be reviewed by the Chief Executive Officer and provided further that a member aggrieved by a decision of the said Chief Executive Officer or of the Authority may appeal to the Appeals Tribunal established under the RBA.”

24. The High Court has previously held that a Petition under the Constitution not a substitute for known legal procedures and that is why in *Alphonse Mwangemi Munga & 10 others v African Safari Club Limited [2008] eKLR*, the Court stated that whereas a party has unhindered access to the High Court under the Constitution,

*“that does not give the licence to every litigant to come to court by way of a constitutional application even where there is no constitutional issue arising and where there are adequate remedies provided in other laws to cover such situations. This court has considered similar applications where the Petitioners seek to enforce service contracts by way of constitutional applications and have held them to be an abuse of Court process – eg in *Rashid Odhiambo Aloggoh & 245 Others vs Haco Industries Ltd HCC Misc 1520/1999*, and *Stephen Ndiboi & 27 Others vs Brookside Dairy Ltd Misc Applic. No. 764/05.*”*

25. Further in *Harrikisson v Attorney General of Trinidad and Tobago [1980] AC 265*, a teacher was transferred to another school without being given 3 month’s notice as required by the provisions of the **Teachers Service Commission Act**. He applied under **Section 6 (1)** of their **Constitution** for redress (similar to our **Article 22** of the **Constitution**) and the Privy Council in rejecting his appeal stated at page 268 paragraph B – C as follows;

“The notion that whenever there is a failure by an organ of Government or a Public authority or public office to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by Chapter 1 of the Constitution is fallacious. The right to apply to the High Court under Section 6 of the Constitution for redress when any human right or fundamental freedoms is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action. The mere allegation that a human right has been or is likely to be contravened is not itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the section if it is apparent that the allegation is frivolous, vexatious or abuse of the process of court, as being made solely for the purpose of avoiding the necessity of applying in the normal way for appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom.”

I agree and even with **Article 23(f)** of our **Constitution** providing for Judicial review orders as a remedy under the Constitution, the above holding remains true.

26. In the instant case, the Petitioner has to make use of the procedure provided for under the Consolidated Deed of Trust and Rules to pursue any remedy available to him instead of making constitutional complaints out of non-constitutional issues.

27. But suppose I am wrong in interpreting the law as above? I would still arrive at the same decision given the fact that there is a procedure provided elsewhere which the Petitioner has not exhausted. While I am alive to this Court's unlimited jurisdiction under **Article 165 (3) (a)** of the **Constitution**, I do not think as can be seen elsewhere above that the Petitioner has raised any constitutional matters to warrant the intervention of the Court under **Article 165 (3) (a)**. In any event, this Court in **International Center for Policy and Conflict & 4 Others v The Hon. Uhuru Kenyatta and Others, Petition No. 552 of 2012** held that the unlimited original jurisdiction of this Court could not be invoked where Parliament has specifically and expressly prescribed procedures for handling grievances such as the one raised by the Petitioners. The Court of Appeal has also upheld this reasoning in **Speaker of National Assembly v Njenga Karume [2008] 1 KLR 425**, where it held that:-

“In our view there is considerable merit.....that where there is clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.”

28. As can therefore be seen from the above decisions, it is now a well accepted principle that even if this court has jurisdiction to determine alleged violation of provisions of the Constitution under **Article 165** (which is not the case in this Petition), it must exercise restraint and first give an opportunity to the relevant constitutional bodies or State organs to deal with the dispute as provided in the relevant statute. This was well articulated by the Court of Appeal in **Narok County Council v Trans Mara County Council [2000] 1 EA 161** at page 164 where it stated that;

“It seems to me to be plain beyond argument that the jurisdiction of the High Court can only be invoked if the Minister... refuses to give a direction or in purporting to do so, arrives at a decision which is grossly unfair or perverse. In the latter case his decision Page 15 of 24 can be challenged by an application to the High Court for a writ of certiorari because under the relevant section, the decision is to be made on a fair and equitable basis.”

29. I fully agree and having held so, and looking at the Petition again, there is nothing left for me to determine. In the circumstances I find no merit in the Petition.

30. The final orders will be as follows;

(a) The Petition dated 19th July 2013 is hereby dismissed.

(b) Let each party bear its own costs.

31. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 18TH DAY OF DECEMBER, 2013

ISAAC LENAOLA

JUDGE

In the presence of:

Irene – Court clerk

Petitioner – present

Prof. Ojiowa holding brief for Mrs. Mbaabu for 1st Respondent

Miss Onsando holding brief for 2nd Respondent

Mr. Nyaosi holding brief for Mr. Bundotich for 3rd – 10th Respondents

Order

Judgment duly read.

ISAAC LENAOLA

JUDGE