



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Appeal 108 of 2012

Editorial Summary

1. *Civil Appeal*
2. *Civil Practice and Procedure: Stay of execution*
3. *Subject of Tribunal matter*

The Retirement Benefits Act Cap 197 (Rev 2010)

- 3.1 *Dismissal of employee from employment
(3rd November 2011)*
- 3.2 *Staff Pension and Life Assurance Scheme pays
employee Ksh. 395,955/40 as terminal dues.*
- 3.3 *Allegation staff utilized dues to settle debts owed
to employer.*
- 3.4 *Employee files complaint to the Retirement Benefits
Authority. Dues incapable of assignment.*
- 3.5 *Retirement Benefits Authority upheld employee.
That dues paid to employee cannot be assigned to
pay debts. Employer ordered to issue a new cheque for
Ksh. 395,955/40 to employee.*
- 3.6 *Employers – trustees to pension scheme appeal to the
Retirement Benefits Appeals Tribunal.*
- 3.7 *Hearing 26th September 2011 and 19th October 2011*

adjourned.

- 3.8 *19th October 2011 advocate for appellant (Trustees Pension Scheme) fails to attend court.*
- 3.9 *Appeal dismissed for lack of prosecution and non-attendance.*
- 3.10 *Application by appellant Notice of Motion 9th December 2011 to set aside dismissal orders set for hearing 15th February 2012.*
- 3.11 *Application dismissed for lack of merit.*
- 3.12 *Appellant (Trustees Pension Scheme) file application dated 20th March 2012 seeking orders of stay of proceedings.*

4. Application 30th March 2012

Stay of proceedings.

- 4.1 *Appeals tribunal made orders requiring appellants (Trustee Pension Scheme) pay employee Ksh. 395,955/40 and interest.*
- 4.2 *Failure to pay sum, the Retirement Benefit Authority threatens to place an interim administrator and remove the trustee from office.*
- 4.3 *High Court orders application be served. (22nd March 2012).*
- 4.4 *On 26th March 2012 parties agree to interparte hearing 11th June 2012. Interim orders of stay granted till finalization of application.*
- 4.5 *During court vacation, the Retirement Benefits Authority appointed administrator to take over*

scheme.

- respondent
- 4.6 *Application by appellants (trustee to scheme)*
Notice of Motion 30th March 2012 to cite
for contempt.
 - 4.7 *Respondent withdraws interim administrator.*
 - 4.8 *Interparte hearing 11th June 2012 adjourned to*
13th June 2012 as matter not listed and advocate
for respondent absent.
 - 4.9 *Hearing 13th June 2012. Further hearing*
20th June 2012

5. *Arguments*

By Applicant:

- 5.1 *Issue is whether Retirement Benefits Authority*
has alternative method of enforcing directive.

By Respondent:

- 5.2 *The law was correctly applied by the respondents.*
- 5.3 *Application be dismissed.*

6. *Held:*

- 6.1 *Application granted.*
- 6.2 *Main appeal – issue dismissal of*
Notice of Motion 9th December 2011.
- 6.3 *Whether interim administrator can be*
Appointed?
- 6.4 *Section 45(c) of Act.*

7. *Case Law:*

Statute Law

The Retirement Benefits Act

Cap 197 Laws of Kenya (Rev 2010)

Section 45

Section 53

Section 45(c)

8. *Advocates* :

i) *M/s J.R. Rimuii instructed by Mohammed Madhani & Co
Advocates for appellant/original defendant*

ii) *M/s L Kambuni instructed by L.M. Kambuni & Co Advocates
for respondent/original plaintiff*

NASIM DEVJI

BEATRICE KABUTHU

FRED OLANDE

STEPHEN KODUMBE APPELLANTS

(AS TRUSTEES OF THE DIAMOND TRUST BANK OF KENYA

LIMITED STAFF PENSION AND LIFE ASSURANCE SCHEME)

VERSUS

**THE RETIREMENT BENEFITS AUTHORITY
RESPONDENT**

*(Being an appeal from the ruling and order of the Retirement Benefits Appeals Tribunal dated the 15th
February 2012 in Retirement Benefits Tribunal appeal No. 3 of 2011)*

RULING

Application for Stay of Proceedings

Dated 20th March 2012

Order 46 r 6 Civil Procedure Rules

I. BACKGROUND OF APPLICATION

1. The application before court touches on the Retirement Benefit Act Cap 197 (Rev 2010) Laws of

Kenya.

2. In brief, on the 3rd November 2011, an employee of M/s Diamond Trust Bank Ltd was dismissed from employment. The employee was a member of the Staff Pension and Life Assurance Scheme (herein referred to as Trustees Pension Scheme.). He was paid his dues Ksh. 395,955/40. There arose an allegation by the employee that the dues were utilized to settle debts he owed to his employer. The employee then filed a complaint to the Retirement Benefits Authority on grounds that the dues were incapable of being assigned to pay the debts owed to the employer. The Retirement Benefits Authority upheld the employee's complaint. It ordered that the employer to issue a new cheque for the same amount of Ksh. 395,955/40 and pay the employee.

3. Being dissatisfied with this decision, an appeal was referred to the Retirement Benefits Appeals Tribunal (herein referred to as the Tribunal) by the Trustees Pension Scheme.

4. A hearing date was set by the Tribunal, which the appellants(Trustees Pension Scheme) alleged was adjourned severally, but a date of 26th September 2011 had been finally set down. This was further adjourned to the 19th October 2011. It is without a doubt that the advocate for the appellants (Trustees Pension Scheme) failed to attend court. The appeal was dismissed for lack of prosecution and non attendance to the tribunal on 15th November 2011. The advocate for the appellant then filed a Notice of Motion dated 9th December 2011 to set aside the dismissal orders by the tribunal. This application was set down for hearing on the 15th February 2012. The said application was dismissed as lacking merits.

5. It is then that the appellants (Trustees Pension Scheme) filed an appeal to this High Court on the 14th February 2012. On the 22nd March 2012, an application dated 20th March 2012 was filed under Certificate of Urgency seeking orders of stay of proceedings, the subject of this ruling.

II APPLICATION FOR STAY OF PROCEEDINGS

i) Procedure

6. The applicant, appellants were apprehensive on this matter. The effect of the dismissal of their appeal meant the orders of the tribunal would still be in place, namely that they are to pay Ksh. 395,955/40 to the employee. They did not wish to do so on reasons. If they did not pay the employee the funds, they were made aware that the respondent, the Retirement Benefits Authority would appoint an administrator to take over the affairs of the appellants pension scheme. The application in essence was to stop any further proceedings to be taking place until the appeal is heard and determined.

7. The parties came to court on 22nd March 2012 *ex parte*. This court gave stay orders and that they serve the respondent, with the date of 26th March 2012 set for *interparte* hearing. On that day, the respondent required time to make a reply to the application. This was granted by court. The parties both agreed that there would further extend the interim orders to the finalization of the application.

8. As the court was going for vacation and with the vetting on-going process affecting the civil court judges in May and June 2012, the hearing *interparte* was given for 11th June 2012.

9. The respondent, the Retirement Benefits Authority appointed an administrator on the 27th March 2012 during the court vacation. The appellant filed an application dated 30th March 2012 that came before the vacation judge on 5th March 2012 (Kimondo J). The application on certificate was withdrawn when the interim administrator was not so appointed upon the advice of the advocates.

10. The application of 20th March 2012 came for hearing on 11th June 2012 but was not listed. This court noting the error gave *interparte* dates for 13th June 2012 when the parties addressed this court. Further submissions on the Retirement Benefits Authority Act was permitted by this court to be

made on 20th June 2012.

III SUBMISSIONS

i) By the Applicants/appellants

11. The basis of the whole application, argued the applicants, is whether the Retirement Benefits Authorities were allowed to enforce directive requiring an interim administrator to be appointed to take over the affairs of the appellants pension scheme? Or do they have an alternative method of enforcing such directive?

12. The directive as stated above is for the appellants to pay the employee the pension scheme termination dues of Ksh. 395,955/40. Off the record, the appellant stated that the same was paid into the account of the employee but was frozen.

13. The applicants relied on **Section 45** of the **Retirement Authority Benefits Act** that deals with the appointment of an interim administrator. This is where, if the trustees of a scheme

a) ...fail to submit to the Chief Executive Officer the annual accounts required under Section 34 for over 6 months after the end of the financial year to which they relate.

b) ... are found to have submitted or proved any accounts, returns, statements, books, records, correspondence, documents or other information relating to the financial year to which they relate.

Other circumstances being:-

c) if the chief Executive Officer, whether on inspection or otherwise becomes aware of any fact or circumstances which, in his opinion warrants the exercise of the relevant power in the interest of the sponsors and members of the scheme or in the public interest.

14. The applicant's arguments was that the above section does not apply to the issue of enforcing its directives that has not been obeyed. There are other methods that this could be done and not necessarily the removal of the trustee of the pension scheme and appointing an interim administrator.

15. There is already an appeal preferred to this High Court. The action of taking over the appellant's pension scheme by the appointment of an interim administrator is unwarranted.

16. Section 53 of the Act was referred to. This involves the general penalties that may be imposed on any person who

"1(a) contravenes any provision of this act which is expressly stated to be an offence but for which, no other penalty is prescribed or

b) fails to comply with any direction given by the Chief Executive Officer under this Act. Commits an offence and shall be liable, or conviction, to a fine not exceeding one hundred thousand shillings or to imprisonment for a term not exceeding one year or to both.

2 . -----"

17. There is within the Act alternative methods to enforce the orders of the respondents, through the Chief Executive Officer. The appointment of an interim administrator should not have been ordered.

18. In reply the advocate for the respondent conceded that Section 45 was correctly applied and is indeed applicable. The court's attention should be on Section 45(c) that gave the Chief Executive Officer the powers to appoint the interim administrator.

19. The powers of the tribunal is to award costs, its powers is to make decisions. The Chief Executive Officer gave directions that is to be so obeyed and was not. He/she was therefore correct in issuing a notice of appointment of an interim administrator of the appellant's, including their disqualification of the scheme trustees.

20. Whereas, the funds are said to have been placed in the employee's account, the purpose was defeated when the account was frozen thereby not giving the employee access to the said funds.

21. The application should also be dismissed on grounds that the sponsor was the chairman of the Board of Trustees as well as the Human Resources assistant manager of the employer. There was no distinction, that was required to be made, on these two roles.

22. The court in this application is asked whether a stay of proceedings should be granted or not pending the determination of the appeal?

IV OPINION

23. The main appeal touches on the dismissal of the Notice of Motion dated 9th December 2012 by the applicants to have the appeal filed with the Retirement Benefits Appeals Tribunal to be reinstated. This application was dismissed on 15th February 2012 by the tribunal as lacking in merit.

24. This issue on appeal would be heard before two judges of this High Court.

25. In the meantime, the next step that the respondent wishes to take through its Chief Executive Officer is to appoint an interim administrator, this in essence removing the trustees from the pension scheme.

26. The issue, to my mind would be, whether the interim administrator can be appointed for non-compliance with the directive of the Chief Executive Officer or is there another alternative that he/she could have applied?

27. Whereas this too was the thinking of the applicant appellant, the respondent states yes indeed the chief executive was within its mandate under Section 45(c) of the Act. This section I note is indeed wide but it is rendered with the word that in the opinion of the chief executive there "warrants the exercise of the relevant power in the interests of the sponsors and members of the scheme or in the public interest."

28. The issue herein involves that of "the interest of the parties and members" and or the "interest of the public."

29. There is therefore merit in the present application. The court requires to stay further proceedings in this matter pending appeal and the question that has now arisen under Section 45 of the Act.

30. The application dated 20th May 2012 be and is hereby allowed. that this Hon. Court hereby stay any further proceedings between the applicants and the respondent including the respondent appointing an interim administrator thereby removing the appellants from office and or taking adverse disciplinary action against the appellants pending the hearing and determination by this Hon. Court of the appeal against the order of the Retirement Benefits Appeals Tribunal made on 15th February 2012.

31. The appellants are to deposit the sum of Ksh. 395,955/50 in an interest earning account in the names of both advocates as security.

32. The costs will abide the appeal.

DATED THIS 25TH DAY OF JUNE 2012 AT NAIROBI

M.A. ANG'AWA

JUDGE

Advocates:

i) *M/s J.R. Rimuii instructed by Mohammed Madhani & Co
Advocates for appellant/original defendant*

ii) *M/s L Kambuni instructed by L.M. Kambuni & Co Advocates
for respondent/original plaintiff*