



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 983 of 2004

JIMMY KAULU & 14 OTHERS.....PLAINTIFF

VERSUS

STANBIC BANK KENYA LTD. & 6 OTHERS.....DEFENDANT

RULING

NO. 1

The background information to this ruling is to the effect that a total of 13 plaintiffs by name Jimmy R. Kaulu, Bernadette Kariuki, John Njuguna Nganga, John Makimi, Jane Wahumwangi, John Gachamba Gachoka, Keziah Njeri Mugnai, Prisca Nyaruai, Cecilia Kagire, Leonora Achieng Singa, Jane Alice Abeka and Salome K. Kilozongo moved to this court vide a plaint dated 20th day of September 2004.

The defendants to the said action are indicted in the original plaint as Stanbic Bank Kenya Ltd. as the first defendant and The Trustees of Stanbic Bank Kenya Ltd. staff pension and life assurance scheme as the second defendant.

On the same record, there is an amended plaint which was even filed before summons to enter appearance. It is indicated to have been amended at Nairobi this 29th day of June 2005. It introduced new defendants which were interposed in between the first defendants as defendant number 2 – 7. These are named as Philip Samuel Odera, Maurice Toroitich, Wilson Odadi, Christine Sabwa, Wendo Mukiru and Peter Makeu.

The date the amendment was effected and the amended plaint filed is the same date that the summons to enter appearance were issued. There is no R/S to show when there were served, but the court notes that memorandum of appearance was dated 4th July 2005 and filed on July 2005. It is indicated that it is defence for all the defendants. The statement of defence is dated 19th July 2005 and filed the same 19th July 2005.

Reply to defence is dated 26th July 2005 and filed the same 26th July 2005. There is also traced on the record an amended reply to defence amended on 19th day of August 2005 and filed the same date.

On the same date that the reply to defence was amended and filed a re-amended plaint which was re-amended on the same 19th August 2005 and filed the same date of 19th August 2005.

Further perusal of the record reveals that on 29th August 2006 an application by way of chamber

summons seeking among others an injunctive relief was filed dated the same date. Among others it sought an injunctive relief which this court has been informed is still operational.

Briefly the scheme features of the re-amended plaint are as follows:-

- (a) 1st defendant set out a Trust deed in 1978 as amended from time to time a scheme to provide pension and other benefits to the employees upon retirement and relief to dependants of deceased employees.
- (b) Plaintiffs were employees of the 1st defendant before retirement and were entitled to retirement benefits from the said scheme.
- (c) Upon causing actuarial calculation the plaintiffs discovered that the defendant had reduced the lump sum equivalent amounts due to them as a result of fraudulent misrepresentation, concealment and or non-disclosure of material facts thereby resulting in the plaintiffs being paid reduced amounts contrary to the trust deed and rules which action was illegal, null and void particulars of fraudulent misrepresentation concealment and non-disclosure and damages suffered by each plaintiff are given.
- (d) The reliefs sought among others are:-
 - (i) Particulars of special damage to each plaintiff interest payable on each amount claimed by each plaintiff.
 - (ii) A declaration that the purported conversion of the scheme from a defined benefits to a contributory scheme with effect from the 30th September 2001, vide the deed of amendment dated 27th September 2001 was illegal, null and void.
 - (iii) An injunction restraining the defendants their servants and or agents and each or any of them or however from continuing with the operation of the new contributory pension scheme commenced on the 30th September 2001 until the plaintiffs have been paid the balances of their lump sum benefits as at retirement together with interest.
 - (iv) Special damages prayed in the plaint.
 - (v) Damages for breach of contract.
 - (vi) Costs of this suit.
 - (vii) Interest on (g), (h) and (i) at the commercial rate of 20% p.a. until payment in full.
 - (viii) Any other or further relief as this Honourable court may deem fit to grant.

Paragraph 4 of the defence pleads among others that the entire suit is misconceived, bad in law and an abuse of the court process and shall at the earliest opportunity apply to have the suit struck out. Vide paragraph 5, that they will have the suit struck out for being a misjoinder of actions and or of parties and that the suit in its present form will prejudice a fair trial and disposal thereof. Vide paragraph 36 denied perpetrating any fraud or conceding misrepresentation or failing to disclose any facts or information plaintiffs attributable to each plaintiff. There is also a reply and amended reply to defence.

Against this background the defence filed on preliminary objection dated 4th day of September 2006 and filed the same date. It is to the effect that the Honourable court has no jurisdiction to hear this case at this stage. this ruling is in respect of the said preliminary objection.

The defendants counsel has put forward arguments on two limbs in order to support their contention on lack of jurisdiction. The first limb touches on the competence of the re-amended plaint. It is the defences

contention that the current re-amended plaint is incompetent because:-

(1) Under order 6 A rule 11 a party has a right to amend his pleadings once before closure of pleadings without leave of court. After closure of pleadings any amendment has to be done with the leave of court. After closure of pleadings any amendment has to be done with the leave of court. It is their contention that the re-amended plaint which is the current plaint was re-amended without leave of court and as such since it is the current operation and plaint the same is incompetent.

(2) The second limb of the objection is that the suit in its entirety is incompetent because of the plaintiffs failure to follow the laid down procedures under the Retirement Benefits Authority, Act No. 3 of 1997. It is therefore premature.

(ii) It is the learned counsel's contention that the plaintiffs before moving to court should have filed a complaint with the chief executive officer under Section 46 of the said Act and if satisfied move to the tribunal and when dissatisfied is when one can move to the High Court. That failure to follow the procedure laid down in Sections 46, 47 and 58 of the said Act makes the suit premature and incompetent.

(3) It is the counsel contention that this Act has primacy over any other unwritten laws save for the constitution and since the suit is initiated under the provision of the civil procedure Act compliance was necessary.

(4) The defence further contends that the plaintiffs cannot take refuge under the provision of the constitution because:-

(i) The suit has not mentioned breaches of any of their fundamental rights and freedoms.

(ii) The suit has not been initiated by way of a constitutional reference under the former Chinga rules but new Gicheru rules.

(iii) Section 60 on unlimited jurisdiction of the court can only be invoked after the exhaustion of the section 46, 47 and 58 procedures.

(iv) In the circumstances of this case there is no infringement of any constitutional right until the process under the Retirement Benefits Authority is exhausted.

(5) It is further their contention that the election under the Act by virtue of the use of the word "may" does for the beneficiary to elect to follow that procedure if he/she has a complaint or elect not to complain. But it does not provide room for a party to elect to invoke those procedures by laying a complaint with the chief executive officer or move to the High Court.

In opposition the plaintiffs counsel moved to oust the preliminary objection on the grounds that objections on both limbs are bound to fail on the following grounds:-

(1) As regards objection on the first limb of the re-amended plaint being incompetent, learned counsel asserts that it is not incompetent as asserted because:-

(i) The plaint that was served was the amended plaint. For this reason they contend that the amended plaint is to be taken as the original pleading because it is the one served. Whereas the re-amended plaint is to be taken as the first amendment after the original pleading. As such no leave was required from court to re-amend.

(ii) That the rules relied upon by counsel for the defendant objection refer to amendments after a party has been served and this is what happened herein hence the re-amended plaint is not incompetent.

(iii) Pleadings close 14 days after the filing of the last pleading. Here in the amended plaint was filed on the 14th day and as such the same was not filed after closure of pleadings.

(iv) The defendant objection has not filed an affidavit to show when they were served so as to show that the re-amend plaint was filed outside the 14 days requisite period.

(2) Even if this court were to fault the re-amended plaint, that alone itself would not render the court to lack jurisdiction because upon such faulting the amended plaint will revert to support the plaintiffs case.

(ii) No prejudice will be suffered by either party as what is being introduced in the re-amended plaint is simply deletion of parties and correction of a typographical error.

(iii) In the alternative the court has a discretion to deem the re-amended plaint as being properly filed. It also has power to remove and add new parties under parties donated by order 1 rule 10 (2) Civil Procedure Rules.

(iv) They also content that the alleged preliminary objection on the first limb is not sustainable because it requires facts which were disputed to be proved and secondly it tends to invoke the discretion of the court to determine whether to allow or to disallow the re-amended plaint to stand or not to stand. For this reason the preliminary objection on the first limb has been ousted.

(3) As regards the preliminary objection on the second limb of the action being premature due to failure to comply with the Retirement Benefits Authority procedures they contend this too cannot stand because:-

(i) The legislature did notemploy the use of the word “*shall*” which would have meant that the procedure is mandatory and plaintiffs would have been obligated to follow it.

(ii) Herein the legislature chose to use the word “*may*” which gave the plaintiffs an election. Their construction of this election is that a litigant is free to elect to follow the administrative procedures laid out in the Act or come to the High Court. Where the administrative procedures have not been invoked, there is no bar to move direct to the High Court. As such there is no absolute requirement to exhaust these administrative procedures before moving to the High Court. As such the jurisdiction of the High Court is not completely ousted.

(4) It is further submitted that the Retirement Benefits Authority procedure is to be taken to be an alternative remedy to the plaintiffs. In their view where the alternative remedy is not convenient or effectual in finally determining the issue between the parties, the affected litigant is entitled to elect to move to a forum which will finally determine the issues between them.

(5) As regards constitutional rights, counsel contends that:-

(i) The plaintiffs are not seeking the exercise of the inherent powers of the court because they have moved to the court procedurally.

(ii) The court is urged to construe the jurisdiction of the court in favour of the plaintiffs who have sought audience in it. Bearing in mind the fact that unless if there exists express mandatory provisions the court would not normally construe a legislation to exclude its jurisdiction.

(iii) What the plaintiffs are seeking from the court is not a determination of whether their rights have been infringed or not but a determination of issues presented by the averments in the plaint namely breach of trust, fraud, concealment and misrepresentation which issues the court is in a better position to interpret than a tribunal.

(iv) They also contend that since an election exists in favour of the plaintiffs under the Retirement Benefits Authority, the provisions of the Retirement Benefits Authority cannot be construed in such a manner so as to allow an inferior tribunal to oust the jurisdiction of the court.

(v) They also contend that the objection is belated since the defendants have already admitted and submitted themselves to the jurisdiction of this court. As such the defendant cannot plead prematurely

and lack of exhaustion of alternative remedies when they did not enter appearance and file defence under protest.

(6) The court is also invited to consider the nature of the reliefs being sought and decide whether these could be comfortably handled and finally determined through the administrative procedures under the Retirement Benefits Authority before deciding whether the courts jurisdiction is capable of being ousted in the circumstances or not.

(i) It is their contention that the nature of the reliefs being sought are incapable of being effectively determined by the said administrative procedures.

(ii) They dispute that resorting to administrative procedures under the Retirement Benefits Authority would have shortened the process as there is provision for an aggrieved party to move to the High Court and have all the issues reconsidered. This in itself prolongs litigation.

In response to the plaintiffs' counsels submissions, counsel for the defence reiterated his earlier submissions and then stressed the following points:-

(1) Still maintained that the plaintiffs have come to court prematurely because they have not exhausted the procedures under the Retirement Benefits Authority.

(2) Still maintain that the re-amended plaint is irregular as they single amendment allowed to a litigation was fully taken up by the amended plaint. This being the case and there being no provision which can entitle this court to take cognizance of the said re-amended is null and void and of no consequence and it should be struck out with costs to the defendant.

(3) Still reiterate that the alternative judicial process should have been entertained and exhausted before invoking this courts jurisdiction

(ii) Still maintain that the apparent of elections to a litigation to elect whether to proceed under the Act or move to the High Court has been taken away by the provision of Section 58 of the same Act since it overrides the Civil Procedure Act procedure on institution of disputes.

(iii) Still maintain that the right of election under Section 46 of the Retirement Benefits Authority is limited only to the right to sue or not to sue. But once an election is made to initiate proceedings the Retirement Benefits Authority procedures have to be exhausted first before coming to court.

(4) It is their stand that in order for this court to ignore the provision of Section 46 and 58 of the Retirement Benefits Authority, the plaintiffs have to invoke the constitutional jurisdiction of this court by way of reference under the Chinga rules or the new Gicheru rules.

(ii) The plaintiffs cannot be allowed to hide under Section 60 of the constitution because the court can not use that to defeat the intention of the legislative in Section 46 and 58 of the Retirement Benefits Authority.

(iii) They maintain that although they concede that the tribunal under the Retirement Benefits Authority is inferior to the High Court they still maintain that that inferior tribunal can only be avoided if the litigant invokes the jurisdiction of the superior court through constitutional reference which is not the case here.

(iv) At all times the court should always have regard to the intention of the legislative which is to the effect that the Retirement Benefits Authority procedures be exhausted before moving to the court.

(5) They contend that the mere fact of entertaining appearance and filing of defence is not a matter to raise objection because they pleaded the objection in their defence.

(6) They do not agree with the plaintiffs counsels stand that the prayers being sought in the plaint are

beyond the authority of the Chief executive officer as this case matters which are provided for and envisaged under the Retirement Benefits Authority.

(ii) The tribunal established under the Retirement Benefits Authority falls into the definition of an adjudicating authority and is capable of making final orders.

(7) Still maintain that the preliminary objection has merit and that the same should be upheld.

Both sides referred to case law at length and this court would be doing a lot of disservice to the counsels' efforts if it fails to reflect principles in most of them on record.

The applicant relied on the case of the SPEAKER OF NATIONAL ASSEMBLY VERSUS THE HON. JAMES NJENGA KARUME NAIROBI HCCC MISC. APPLICATION NO. 388/1992. The brief facts are that the respondent had been elected on a Kanu ticket and appointed a Minister. He resigned his position and joined D.P. Party. The speaker of the National Assembly declared the seat vacant. The respondent then filed an election petition to challenge the decision of the Speaker declaring the seat vacant. Allegedly realizing that the parties' procedure would take long, moved to the High Court by way of judicial review to quash the speaker's decision. Leave to apply for judicial review was granted with an order that the leave granted to operate as a stay. Upon appeal to the court of appeal by the Attorney General against the orders of the superior court the court of appeal held inter alia that:-

“Parliament in its wisdom having prescribed the procedure to be followed by any one seeking to challenge a declaration made by the speaker under Section 18 of the Elections Act, it was not open to the respondent so as to pass this procedure by invoking the prerogative orders under order 53 of the Civil Procedure Rules. Where there is an effective remedy available it is not open to a party to invoke order 53 of the Civil Procedure Rules”.

The case of KENYA TELECOMMUNICATIONS INVESTMENT GROUP LTD VERSUS TELECOMMUNICATION COMMISSION OF KENYA, NAIROBI MISC. APPL. NO. 1267 OF 2003.

The brief facts are that preliminary points were raised before the hearing of the interlocutory application, one of them being that there was an alternative remedy which should have been exhausted before applying for judicial review. The alternative remedy is found in Section 102 (1) of the Kenya Communication Act which establishes an appeals tribunal for purposes of arbitrations in cases where disputes arise between parties under the Act. The applicant therein had appealed to the tribunal but then had it withdrawn. After the consideration the court was of the view that “in view that there is an alternative remedy in this case this is one of those cases where judicial review proceedings should not be invoked. Nothing had been shown to the court that in exceptional circumstances in this case. It might be considered to be a speedier procedure however that in itself would not be sufficient parliament has under the Act provided a tribunal which indeed with the question of the refusal of a licence. That tribunal has special expertise in dealing with such matters. It is only if this tribunal fails in some way to dispense justice that a case for judicial review could be preferred against its decision.

The case of ADERO AND ANOTHER VERSUS ULINZI SACCO SOCIETY LTD [2002] 1 KLR 577 where the plaintiffs who were members of a society filed a dispute in the high court against the society. It was held inter alia by Ringers J. as he then was that as the subject matter of the suit was of dispute between a registered co-operative society and its members, the dispute should not have been filed in the High Court byof the provisions of the Corporate Societies Act Section 76.

(2) The jurisdiction either exists or does not ab initio and the non-constitution of the forum created by statute to adjudicate on specified disputes could not of itself have the effect of conferring jurisdiction on another forum which otherwise lacked jurisdiction.

(3) Jurisdiction can not be conferred by the consent of the parties or be assumed on the grounds that parties have acquiesced in actions which presume the existence of such jurisdiction.

- (4) Jurisdiction is such an important matter that it can be raised at any stage of the proceedings and even an appeal.
- (5) Where a cause is filed in Court without jurisdiction there is no power in the court to transfer it to a court jurisdiction.
- (6) The co-operative tribunal is not a subordinate Court and as such the High Court had no power under Section 18 of the Civil Procedure Act to transfer any suit to it.

The case of TAXFAIR INVESTMENT LTD VERSUS KENYA AIRPORTS AUTHORITY NAIROBI, MILIMANI COMMERCIAL COURTS CIVIL CASE NO. 1238 OF 1999. At stake was the construction of Section 33 of the Kenya Airports Authority Act Cap. 395 which required disputes involving the exercise of powers under Section 12, 14, 15 and 16 of the Act to be referred to a single arbitrator.

At page 8 of the judgment Onyango Otieno J as he then was (now JA) made observations that:

“in my humble opinion, Section 33(1) of Kenya Airports Authority Act does not seek to oust the powers of the court although I do agree that if it were to seek to oust the powers of the court then the provisions of the Constitution which bestows the High Court within limited jurisdiction to require and determine all civil and criminal matters in the country would prevail over the provisions of Section 33(1) of the Act. However have all that the Act says is that in case of any person who suffers damage as a result of the activities of the authority in exercise of its powers under section 12,14,15 and 16 then such a power would have to first seek arbitration proceedings to determine such a matter. It does not state that such a determination if any by a single arbitrator shall be final. I do feel after such a determination if any party including the original complainant is aggrieved he would still have a recourse to the court. In that section 33(1) merely provides a first step in such a situation but does not provide a final step”

In the case of KENYA BUS SERVICES LIMITED VERSUS THE KENYA ALLIANCE INSURANCE CO LTD NAIROBI MILIMANI COMMERCIAL COURT NAIROBI, HCC NO. 247 OF 2003. The brief facts are that the Plaintiff filed action against the defendant. There had existed an insurance policy between the parties. The insurance cover contained clause 9 which gave authority to the insurance company to disclaim liability. The same clause provided that upon such disclaimer, the client was to refer the matter to arbitration within 12 months. Liability was disclaimed thereafter not referred to arbitration. Instead action filed in court.

Upon an application to strike out the suit for being incompetent Njagi J. upheld the objection and struck out the plaint.

Also the case of RUBIRMINGHARM CITY COUNCIL EX PARTE FERRER LTD [1993] 1 AER 530. The brief facts are that the appellant laid authority through its trading standards officer issued a suspension notice under Section 14 of the Act 1987 prohibiting the supply of eggs containing pink panther toy for a period of 6 months. It declined to withdraw the respondents who would have appealed against the refusal to withdraw the notice under section 15 of the same Act, appealed for judicial review. It was held inter alia that where there was an alternative remedy especially where parliament had provided a statutory appeal procedure it was only exceptional that judicial review would be granted in determining whether an exception should be made and judicial review granted. It was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and to ask itself what in the context of the statutory provisions was the really issue to be determined and whether the statutory appeal procedure was suitable to determine it.

Reference was also made to cases dealing with in vocation of the inherent jurisdiction of the court. In the case of WANJAU VERSUS MURAYA [1983] KLR 276 Kneller JA as he then was held inter alia that Section 3A of the Civil Procedure Act Cap.21 although saving the inherent powers of the court to make such orders as may be necessary for the ends of justice or to prevent the abuse of the power of the court should not be evicted where there is an appropriate section or order and rule to cover the relief sought.

The case of *MEDITERRANEAN SHIPPING COSA. VERSUS INTERNATIONAL AGRICULTURAL ENTERPRISES LTD ETCO (MSA) LTD & 1990 KLR 183*; where it was also held inter alia that it is now trite law that the inherent jurisdiction of the court should not be invoked where there is specific statutory provisions which would meet the necessities of the case.

(2) Section 3a of the Civil Procedure Act ought not be called into the aid of a litigant in all situations not specifically legislated for. It all depends on the circumstances of each case.

The case of *TANGU VERSUS ROITEL [1968] E.A. 618* where it was held inter alia that the courts inherent jurisdiction should not be invoked where there was a specific statutory provision to meet the case.

The case of *WILKINSON VERSUS BANKING CORPORATION [1948] 1 KCB 721 (CA)*. At page 724 Asquith L.J. observed *“it is undoubtedly good law that where a statute creates a right and in plain language gives a specific remedy or appoints a specific tribunal for its enforcement a party seeking to enforce the right must resort to that remedy or that tribunal and not to others. The Court then went on to hold that:*

(1) *Parliament having in Section 35 appointed a specific tribunal for dealing with the rights and liabilities of the employees of a local authority not all of the parties could caveat in the court jurisdiction which Parliament had vested exclusively in some other body and the defendants therefore could not submit to so as to make effective a jurisdiction which did not exist and*

(2) *That section 35 was not confined to cases in which an employee was in the employment of a local Authority and that the Plaintiffs rights must be determined in the first instance by the authority and an appeal by the minister.”*

There was also reference to texts in Mulla on the code of the Civil Procedure 16th Edition Vol.I BUTTERWORTHS pg. 110 on exclusion line 2 from the bottom it is stated *“The named rule of law is that Civil Courts have jurisdiction to try all suits of a civil nature except these of which cognizance by them is either expressly or impliedly excluded. Such exclusion is not to be readily informed the rule of construction being that even presumption should be made interior of the existence rather than the exclusion of jurisdiction of civil courts. Consequently Statutes ousting the jurisdiction of civil Courts must be strictly constructed.”*

The 3rd set of authorities are those which provided for the construction of the statute and the intent can of parliament. In the case of *PADFIELD AND OATHERS VERSUS MINISTER OF AGRICULTURE, FISHERIES AND FOOD AND OTHERS [1968] A.C.997*. The legislation subject of the proceedings read thus:

“The minister if he thinks fit to do so after considering the report (a) Many by order make such amendments in the scheme as he considers necessary or expedient for the purpose of rectifying the matter (b) may by order resolve the scheme (c) in the event of the matter being one which it is within the power of the board to rectify may by order direct the board to take such steps to rectify the matter as may be specified in the order.....

LORD DENNING MR as he then was at pages 1006-1007 had this to say *“It is plain to me that by these provisions parliament has provided machinery by which complaints of farmers can be investigated by a Committee which is independent of the board and by which those complaints, if justified can be remedied good administration requires that complaints should be investigated and that the grievances should be remedied. When Parliament has set up machinery for that very purpose its not for the minister to brush I ton one side. He should not refuse to have a complaint investigated without good reason while quoting LARGREENE MR. IN ASSOCIATED PROVINCIAL PICTURE HOUSES LTD VERSUS WEDSBURY CORPORATION [1948] 1KB 223 went on to say).*

A person entrusted with administration must so for peak direct himself property in law. He must call

himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider”

While Lord Diplock L.J. in the same decision had this to say “*The composition of a duty by a statute does not require any particular form of words. It is perhaps unusual for a duty to be imposed in respect of an act in a mere poetic phrase such as that under consideration in the present statute. But even such a phrase can do so if the subject matter with which it deals compels the conclusion that Parliament must have intended to impose a duty in respect of the doing of that act”.*

One of the questions for determination in this decision was whether the minister was under a duty to refer the appellants complaint to the committee of investigation appointed by the Minister under the Section.

The test to be applied for determining whether discretionary words imposed such a duty so that the enabling words are compulsory are:-

- (1) The power has to be deposited with the public officer.
- (2) To be used for the benefit of persons,
- (3) Who are specifically pointed out and in which its exercise can be called for”.

The concluding remarks are that unless the duty is complied with a legal right its exercise is discretionary.

In the case of SHETTIELD CORPORATION VERSUS LUXFORD AND SHEFFIELD CORPORATION VERSUS MANEL [1929] 2 KB 180. The Court was called upon to construe a provision which read “*may order*”, It was held inter alia that the ward may order in S.138 of the County Courts Act 1888 are enabling words only but where the legal right of a landlord to the possession of premises has been established it is the duty of the judge notwithstanding the permissive form of the Section to make an order for possession.

The case of REGINA VERSUS GOVERNOR OF BRIXTON PRISON AND ANOTHER EX PARTE ENAHARO [1963] 2 QB 455 it was held inter alia that in the phrase a Secretary of State “*may*” if he thinks just by warrant order the return of the fugitive in Section 6 was not mandatory and that once the minister had decided that it was just, he was under no immediate duty to issue the warrant but had a discretion as to when it should issue.

Extracts from a text titled the law of crimes 19th Edition a law revision have the following controlling message in the passages referred to Court “*But in each case the Court has to decide the legislature intent. Did the legislature intend in making the statutory provisions that non observance of this would entail invalidity or did it not so decide this we have to consider not only the actual words used but the scheme of the statute the intended benefit to public of what is enjoined by the provisions and the material danger to the public by the contravention of the same.*

The court has to decide not only the actual words used but the scheme of the statute, the intended benefit to public of what is enjoined by the provisions and the material danger to the public by the contravention of the same.

The case of FREDERIC GUIDER JULIUS VERSUS THE RIGHT REV. THE LORD BISHOP OF OXFORD, THE REV. THOMAS THE LLUSSONCATER [1880] H.L.E. 214 where it was held inter alia that the words in a statute “*It shall be lawful*” of themselves merely make that legal and possible which there would otherwise be no right or authority to do.

- (3) Enabling words are always compulsory where they are words to effectuate a legal right. They confer a legislative right and power on an individual named to do a particular thing and the question is not

whether they mean something different, but whether regard being had to the person so enabled to the subject matter to the general objects of the statute and to the person or a loss of persons for whose benefit the power may be intended to have been conferred they do - or do not create a duty in person or whom it is conferred to exercise it.

(4) Regard being had to the subject matter to the position and character of the person empowered - to the general objects of the statute and above all to the position and rights of the powers or class of persons for whose benefit the power was conferred to exercise of any discretion by the person empowered could not have been intended.

In the case of *RE-SHUTER* [1959] 1 QB 142, it was held inter alia that the true construction of Sections 7 the word “*may*” should be interpreted mandatory in the absence of sufficient cause being shown to the contrary. That there was no jurisdiction for holding a man beyond one month unless sufficient cause has been shown.

In the case of *KING VERSUS ROBERTS* [1901] 1 KB 117 whereby Section 13 of the Weights and Measures Act 1889 an Inspector of Weights and Measures may take in respect of the verification and stamping of weights and measuring instruments, the fee specified in the first schedule to this Act and no other was held to mean that this enactment was obligatory.

In all *INDIA* 6 observation is made that “*it is the duty of the courts in constructing a statute to give effect to the intention of the legislature. A literal construction may defeat the object of the legislature. The word may has been used by the legislature in some cases as a matter of pure conventional courtesy though the word is intended to be mandatory in force. In order to interpret the legal import of the word “may” the context in which the word is used and the background against which the word has been used and the purpose and the advantages ought to be achieved here to be considered.*”

In the case of *JHAZI VERSUS CHEROGONY* [1984] KLR 814 561 objection was raised on the competent election petition which had been signed by an advocate instead of the petitioner as required by the rules. The petitioner's response to the objection was that the omission to comply was merely technical and that should not be upheld to deny the petitioner justice.

It was held inter alia that in order to determine the intention and purport of legislation, it is imperative to look at the legislation as a whole. Where the national Assembly elections/election petitions rules intended that certain acts shall be done by advocates or agents that is also stated expressly.

(2) As the matter of signature to a petition had been specifically dealt with in the National Assembly Elections (Election Petition) the civil procedure rules did not apply to it.

(3) The provision of rule 4 (3) of the National Assembly Elections is mandatory and not a mere formality.

(4) By not signing the petition the petitioner did not take responsibility of the allegations made in the petition against the second respondent and the petitioner therefore contrary to equity assumed no burden should the allegations prove to be infringed.

(5) As the petition had not been signed by the petitioner it was not properly before the court.

The case of *LEVY VERSUS MITCHELL AND ANOTHER* [1913] KB 561 where it was held inter alia that in the phrase “There upon the court of summons jurisdiction may deal with the case in all respects as if the accused were charged with an individual offence and the offence maybe prosecuted an indictment the word “*may*” is an enabling word empowering the court of summons jurisdiction to give effect to the right of the accused which accordingly that court is bound to do.

Lastly in *Black's Law Dictionary* Eighth Edition “*may*” is defined as to be permitted – to a possibility. “*shall*” must in most case courts have held may to be synonymous with shall, or must. In an effort the

effectuate legislative intent.

In Stroud's judicial dictionary of words and phrases at page 1567 the possible meanings of may is given as:-

§ It has upon those who contend that an obligation exists to exercise this power to show on the circumstances of the case something which according to the principles I have mentioned creates this obligation.

§ Where power is deposited with a public officer for the purpose of being used for the behalf of person who are specifically pointed out and with regard to whom a definition is supplied by the legislature of the conditions upon which they are entitled to call for its exercise, that power ought to be exercised and the court will require it to be exercised.

§ Enabling words are construed as compulsory where the object of the power is to effectuate a legal right and if the object of the power is to enable the donee to effectuate a legal right, then it is the duty of the power to exercise the power when those who have a right call upon him to do so.

§ They are grouped into:-

- (a) an obligatory duty.
- (b) A discretionary or enabling power.
- (c) Undetermined.

Turning to the plaintiffs authorities reference was made to Halsbury's Laws of England volume of page 350 paragraph 822 the meaning of jurisdiction is given. Jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute charter or commission under which the court is constituted and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited.

At page 353 paragraph 825 an ouster of jurisdiction it is stated that "but the language of any such statute will be jealously watched by the courts and will not be extended beyond its leastmeaning unless clear words are used to justify such extension . . . where an issue arises upon proceedings before the court the jurisdiction of the court to dispose of that issue can only be ousted by the plain words of a statute.

In the case of NAROK COUNTY COUNCIL VERSUS TRANSMARA COUNTY COUNCIL [2000] IEA 157 (CAK). The brief facts are that the then Minister for Local Government exercising powers under the Local Government Act carried the Trans Mara County Council out of the territory of the Narok county council and established it as an independent local authority. A dispute arose between the two authorities regarding the distribution of various assets and liability including the entry fees collected from five lodges. Following a failure to resolve the dispute amicably, on 11th January 1996 Transmara filed a suit in the High Court against Narok and Kenya Association of Toru Operators seeking Kshs.69,362,400.00 being monies collected by the latter from the lodges in question on behalf of Narok.

On appeal the court of appeal held inter alia that Section 270 (b) of the Local Government Act Chapter 265 provided inter alia that where a part of Local Government area became a part of a different Local Government area, the apportionment of rights liabilities and assets between the two local authorities concerned would be undertaken on a fair and equitable basis either as agreed between them or in default of agreement as directed by the Minister.

(2) Though Section 60 of the Constitution gave the High Court unlimited jurisdiction it did not clothe it with jurisdiction to deal with matters that a statute had directed should be done by a Minister as part of his

statutory duty.

- (3) In the instant case the statute clearly provide that in default of agreement between the two contracts the apportionment of assets and liabilities would be undertaken as directed by the Minister.
- (4) The jurisdiction of the High Court could only be invoked where the Minister refused to give a direction or in purporting to do so arrived at a decision that was grossly unfair or perverse.
- (5) Where the Minister refused or neglected to act, the proper course was for either party to apply to the High Court for an order of mandamus compelling the Minister to perform his statutory duty.
- (6) The Ministers refusal to act could not confer on either party a right to initiate proceedings in court to determine the apportionment of the assets and liabilities.
- (7) All the High Court could do was enforce by way of judicial review proceedings the implementation of Section 270.
- (8) The trial court therefore erred in apportioning assets between the two councils as it had no jurisdiction to deal with the matter at that stage.

The case of OMONDI AND ANOTHER VERSUS NATIONAL BANK OF KENYA LTD AND 2 OTHERS [2001] KLR 579 where it was held inter alia that it is forbidden for counsel to take and the court to purport to determine a point of preliminary objection on contested facts or in the exercise of a judicial discretion.

The case of R. VERSUS PADDINGTON VALUATION OFFICER AND ANOTHER EX PARTE PEACEY PROPERTY CORPORATION LTD [1965] 2 ALL 3R in which it was held inter alia that the existence of the statutory remedy is nobler to this application. The case falls within the general principle that the jurisdiction of the High Court is not to be taken away without express words . . .

In miscellaneous Appl. No. 169 of 2004 in the matter of the REPUBLIC VERSUS NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY AND 2 OTHERS EX PARTE GREEN HILLS INVESTMENT LTD AND 2 OTHERS Ibrahim J. construed section 129 (1) and 129 (2) which provide “129 (1) (e) the imposition against him of an environmental restoration order or environmental improvement order by the authority under this act or regulations made there under:

May within sixty days after the occurrence of the event against which he isappeal to the tribunal in such manner as maybe prescribed by the tribunal.

(2) Unless otherwise expressly provided in this Act, where this Act empowers the Director – General, the Authority or committee is of the authority to make decisions, such decisions may be subject to an appeal to the tribunal in accordance with such procedures as may be established by the tribunal for that purpose.

At page 10 of the ruling the learned judge made the following observation remarks:-

(1) This provision does not oust the jurisdiction of the High Court of considering applications for judicial review of the decision of the national environmental management authority. However, it is an arguable point of law whether the existence of the statutory or alternative remedy in law precludes the applicants from coming to the High Court to seek judicial review orders. This is quite different from a claim that this court has no jurisdiction to hear the application by virtue of section 129 of the Act. I see no ouster of the courts jurisdiction. The ex parte applicants may well be entitled to argue that the right of appeal can only be exercised if there was due process before the decisions were relied and that an inquiry of the manner in which the decisions were reached can only be fairly inquired into by the High Court by way of judicial review.

In ReJohannisbers Land and Gold Trust Company [1892] ch. 583, the court was called upon to determine

a provision which reads, “the court may any appointment order required to give effect to any such determination” Chitty J. at page 586 line 14 from the bottom gave the following observation on the word “may” it would be absurd to suggest that “may” in the section means “must” I think therefore that the word “may” here confers a discretion on the court to be exercised as all judicial discretions are to be exercised according to the judicial rule and consequently that the court in the present case has a discretion whether it will accept or not the person who has obtained the majority of votes at the meet of contributories and of creditors.

(At page 588 line 15 from the bottom the learned judge went on) in my opinion both the legislature and those who formed the rules intended to leave a discretion any power in the court to be exercised in a proper manner, where the resolutions at the two meetings are carried by majorities but there are still some dissentients.

In the case of the QUEEN VERSUS HIS HONOUR JUDGE TURNER AND HODSON [1897] IQB 445 where a question arose as to the interpretation of the phrase “may be commenced”.

At page 446 line 8 from the top observation is made to the effect that “may be commenced” show clearly that it was intended that the judge or registrar should have a discretion as to granting or refusing leave. . . . (page 447) I think that great misconception is caused by saying that in some cases “may” means “must” so long as the English language retains its meaning but it gives a power and then it may be a question in what cases where a judge has a power given to him by the word “may” it becomes his duty to exercise it.

In the case of JULIUS VERSUS THE BISHOP OF OXFORD VOL. 49 C.J. O.B577 at page 580 left column line 10 from the bottom it is observed “that where a power is deposited with a public officer for the purpose of being used for the benefit of persons who are specifically pointed out and with regard to when a definition is supplied by the legislature of the conditions upon which they are entitled to call for its exercise. That power ought to be exercised, and the court will require it to be exercised.

In the case of POLYTHENE INDUSTRIES LIMITED VERSUS THE KENYA POWER AND LIGHTING COMPANY LTD NAIROBI MILIMANI COMMERCIAL COURT CASE NUMBER 266/2004 in which an application was made under section 87 of the Electrical Power Act No. 11 of 1997 to have the dispute referred to the electricity board. Waweru J. set out the provision of the Electricity Act at page 3 of the ruling. After due construction of the same the learned judge ruled from line 3 from the bottom of page 5 to page 6 that it seemed to the learned judge that all the issues are outside the mandate of the electricity Regulatory Board as set out in Section 87 of the Act. That the prohibitions injunction and the declaration sought in paragraphs (a) of the reliefs in the plaint cannot be granted by the board. The learned judge went in to hold that in his considered view the substantive dispute fell outside the parameters of the electricity board and ought to be decided by the court.

After laying out the rival arguments as supported by legal provision and case law relied upon by either side the court has a duty to identify the question for determination in the reduction of this matter.

It is on record that what is under consideration in this ruling is a preliminary objection raised by the defendant against the plaintiffs latest pleading on the record that is the re-amended plaint) and the entire process of initiation of the suit in this forum. As noted the objection is on two limbs namely objection as to the competence or validity of the re-amended plaint and the premature of the suit initiated in this forum by reason of which this court is allegedly robbed of its rightful and lawful jurisdiction to determine the matter. In this court's opinion after due consideration of what has been laid out above has identified the following as the question for determination.

(1) Whether the preliminary objection raised satisfied the ingredients for raising a preliminary objection.

(2) Whether it is necessary for this court to determine the issue as to whether it has jurisdiction to determine the matter at this interlocutory stage.

- (3) Whether the re-amended plaint is incompetent and therefore a nullity.
- (4) What is the effect of the courts findings in number 3 above if found in the affirmative what is the effect of that finding on the plaintiffs claim.
- (5) If the plaintiff is not axed on the finding in number 4 above is it in the wrong forum in other words is it premature.
- (6) What are the final orders in this matter.

On the ingredients necessary for sustaining of a preliminary objection it is now trite law that this has been settled by the guiding principles established by case law in the case of MUKISA BISCUIT MANUFACTURING CO. LTD VERSUS WEST END DISTRIBUTORS LTD [1969] EA 696.

At page 700 law J.A. as he then was at paragraph D – E had this to say, “*so far as I am aware a preliminary objection consist of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.*”

Whereas Sir Charles New Bold P. on page 701 on the same subject at paragraph A – C had this to say “*a preliminary objection is in the nature of what used to be a demurrer. Ti raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.*” Applying the above ingredients to the facts presented for and against the preliminary objection raised herein it is the finding of this court that the preliminary objection raised herein has met the above ingredients because:-

- (a) The defence pleaded in their defence that they would move at an appropriate move to have the proceedings struck out.
- (b) Issue of incompetence of a pleading is a legal issue and if is held it can dispose of a suit where the pleading objected to is the only pleading on record.
- (c) There is also the issue of jurisdiction which is pertinent to the right of a court to be seized of any proceedings and finally determine it. It is a legal issue as will be shown. Also if decided in the affirmative it can bring a proceeding to an end.
- (d) Issues touching on facts as tow hen the pleadings closed were raised from the bar. They can easily be dealt with by looking at the dates on the proceedings. They do not write the discretion of the court as to whether a pleading was filed out of time or not. As such these do not operate to oust the preliminary objection ingredients which have been satisfied.

As for issues touching on jurisdiction this Court stands guided by the decision of the Court of Appeal in the case of LILIANS VERSUS CALTEX OIL (K) LTD [1989] 1653 (CAK) that where the issue is raised the court has to put everything aside and determine it first. At page 9 of the judgment line 18 from the bottom it is stated “*Jurisdiction is everything without it a court has no power to make one step. Where a court has no jurisdiction there would be no basis for a continuation to proceedings pending other evidence. Account of law down tools in respect of a matter before it the moment it holds the opinion that it is without jurisdiction. (At lien 13 from the bottom).* By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of the matters presented in a formal way for its decision. The limits of this authority are imposed by the statute charter, or commission under which the court is constituted and may be extended or restricted by the like means if no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the end and nature of the actions and matters of which the particular court has cognizance or as to the area over which the jurisdiction shall extend or it may partake of both these characteristics”. (see also the decision of a court of concurrent jurisdiction by Ringera J. a she then was in the case of ADERO AND

Applying these ingredients to the issues raised herein it is clear that this court has to determine that it has jurisdiction to deal with the Preliminary Objection raised. In this court's opinion by virtue of the authority vested in it by the provisions of Section 60 of the Kenya Constitution this court is vested with authority to inquire into chambers summons own authority to deal with the dispute herein. On that account it makes findings that it has jurisdiction to deal with the preliminary objection as the any method of confirming virtue of authority to dispose of the dispute where in, or confirm of the authority to determine the said issue there will be dealt with under questions number 4.

On the competence or incompetence of the Re-amended plaint there are certain factors which are common or in agreement to both sides:-

- (1) There is an record on original plaint which was not served.
- (2) There is an amended plaint which found its way on the record before summons to enter appearance were taken out.
- (3) It is the amended plaint which was served.
- (4) This amended plaint was a first amendment of the plaintiff and the same was amended without leave of Court.
- (5) Upon service of the amended plaint with summons to enter appearance, the defendant duly entered appearance and filed a defence.
- (6) Upon service upon them of the defendant's defence the plaintiff put in a reply to defence and amended reply to defence and on the same date of filing an amended reply to defence and a Re-amended plaint.

Against this scenario the defence Counsel has contended that the plaintiff exhausted his right to amend without leave of court when they filed the amended plaint as the law allows them only one such amendment.

The response of the plaintiff's Counsel to this is that since the amended plaint was amended before service of the summons to enter appearance were served then it should be taken as the first pleading of the plaintiff and therefore the Re-amended plaint to be taken as the first amendment of the plaintiffs.

To resolve this the court was referred to the provisions of order VI A Rule (1) 5,8, and order VI rule 11 and 12.

These provide:

“6 rule 1- a party may without leave of the Court amended any pleading of his once at any time before the pleading are closed rule 5(1) for the purposes of determining the real questions in controversy between the parties or of convicting any defect or error on any proceedings the court may either of its own motion or in the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise rule 8 – Applications under this order shall be made by summon but the court may nevertheless hear and determine an oral application made in court.

Order VI rule 11 – the pleadings in a suit shall be closed fourteen days after service of the reply or defence to the counterclaim or if neither is served fourteen days after service of the defence, notwithstanding that any order or request for particulars has been made but not complied with rule 12 – no technical objection may be raised to any pleading on the grounds of any want of form”.

This Court has considered these provisions in the light of the objection raised by the defence and the

plaintiff's response to it and it proceeds to make the following findings:-

(1) The operative word in order 6A rule 1 is 'once'. There is no distinction made that the pleading that qualifies to be amended once before close of the pleadings is the one which is amended before summons to enter in the absence of such a qualification it means that what courts is the original pleading and it is this original pleading which a party is allowed to amend once before close of pleading. By implication any other subsequent amendments have to receive the blessing of the court either on an oral application or a formal application as the case may be.

Having made the foregoing finding order 6A rule (1) does not aid the plaintiff as it is mean to be exercised before the resultant pleading finds its way on record on the one hand. On the other hand there is room for such a document to receive the blessing of the court after the courts attention has been drawn to irregularity on the record either by the court on its own motion, or through as oral or formal application by the beneficiary party. Herein since the attached pleading was attacked before any of the options in order 6A rule 5 and 8 were exercised all that the court can do now is to rule whether it is irregular or not irregular and if irregular what are the appropriate directions on the matter.

Order 6 rule 11 on the other hand only aids the plaintiff in so far as it is shown that in order to fault the filing if the same is found to be regular then it has to be shown that it was filed beyond the 14 days stipulated by that rule. As submitted there is no revelations to when the reply to defence or Amended reply to defence was served in order to show that the 14 days are outside that period. In the absence of that the said pleading the Re-amended plaint cannot be faulted by virtue of the date of filing.

Order 6 rule 12 and the other hand does not assist the plaintiff because what is being objected to is not the want of form but failure to comply with the rules as regards amending without leave.

The Re-amendment should have been made with leave of Court either orally or formally. Alternatively the court could have been asked either formally or orally to deem it properly Re-amended and filed. The request to do so was made as part of the submissions and as such these cannot be taken to be such request as they came after the objection had already been raised. The reamended plaint has therefore been faulted and it is liable to be struck out.

The net question paused as number 4 is to determine the effect of the striking out of the Re-amended plaint on the amended plaint. This court had occasion to read a decision of a Court of concurrent jurisdiction in the case of MUTUKU AND 3 OTHERS VERSUS UNITED INSURANCE CO. LTD [2002] KLR 250. The brief facts are that the defendant filed a defence to amend it later. The amended defence was unsigned. However upon realizing the mistake the defendant filed a further amended defence without leave of the court. The Plaintiffs filed an application to strike out the defence on the basis that it was unsigned and therefore not a defence at all and the amendment was therefore illegal as it purported to amend that which did not exist in law and that the purported amendments only made and filed without leave of the Court.

Ringers J. as he then was held inter alia that:

- (1) An impinged pleading cannot be valid in law. It is the signature of an appropriate person which authenticates a pleading and an unauthenticated document is not a pleading of anybody. It is a nullity.
- (2) Where a pleading has been amended and the same has been struck out the party affected has simply no valid pleading left on record.
- (3) The effect of an amended defence is to supercedes and replace the original defence.
- (4) The further amended the defence was a nullity as it purported to amend the amended defence which was a nullity.

This court has given due consideration to this decision which is a persuasive authority and considered the

same in the light of the provision of law cited above and finds that it is not correct that a subsequent invalid proceedings struck out the striking out goes to erase the original pleading, in this courts won considered judicial wisdom once a pleading is found to be a nullity it means that it is non existent and if it is non existent then its non existence does not operate to over show the original pleading that it is meant to replace. The original pleading remains in fact.

For this reason the re-amended plaint herein which finds its way on the record without leave of the court has been ruled to be a nullity. By virtue of that it is deemed non existent and being non existent it does not over show the amended plaint on the record which becomes the operation plaint.

The Plaintiffs move to Re-amend without leave of the court is simply a failure to comply with the rules. One may ask as to whether this may be exercised. Case law on the subject provides guidance. In the case of SARAH HARSI VERSUS KENYA COMMERCIAL BANK CIVIL APPEAL NO. NAI 165 of 1999 Akiwumi JA as he then was ruled that Rules are hand maidens of this court which Court is called upon to ensure that the hand maidens do not become bad masters. In the case of WACHIRA NDEWA VERSUS RECORDS WANJIRU NDANJERU [1982 -88] 1 KAR 1062 also a court of appeal decision it was held inter alia that when a breach of the rules is not fundamental the proceedings will not be set aside.

In the case of MACHAKOS RANCHING COMPANY LTD VERSUS JOSEPH KYALO MUTISO CIVIL APPEAL NO. NAI 12 OF 1997 as consolidated with MACHAKOS RANCHING COMPANY LTD VERSUS WAEMA ITUMO MUOKA CIVL APEPAL NUMBER 123 OF 1997 also a Court of Appeal decision where it was held inter alia that it is the duty of the court to strive to do justice between the parities un deterred by technical procedural rules.

Applying these to the facts herein it is clear that, apart from saying that the re-amendment was made without leave, there is no other complaint colluded against that pleading. In that case it will be unfair to deny the plaintiff the right to re-amend. On the other hand the plaintiff has to note that rules of procedure were not made for cosmetic value. They are mean to be followed and obeyed especially by senior lawyer who firmly look upon as elders of the legal practice. No explanation has been given as to why that procedural step was not taken. For this reason there will be no harm in sending the [..... back on his drawing table to introduce a re-amended plaint procedurally should the pleading service the next handle. In otherwise the re-amended plaint introduced in procedurally which is a nullity can be struck out with leave to the plaintiff to introduce an order one un procedurally. As stated this faulting of the re-amended plaint is hers in the amended plaint as the current plaint on record.

The ushering in of the amended plaint as the current plaint brings to the fore the 5th question which is a determination as to whether the plaintiffs claim is in the wrong forum.

The basis for saying so is the provisions of Section 46, 47 and 58 of the Retirement Benefits Act No.3 of 1997 as well as case law relied upon by the defence. The benefit contention is whether the Retirement Authority or this court is the proper forum for the resolution of the dispute herein.

On the par to the Court there is common ground that Section 60 of the Kenya Constitution vests it with unlimited jurisdiction both in civil and criminal law. It reads Section 60(i). There shall be a high court which shall be a superior court of record and which shall have unlimited original jurisdiction in civil and criminal matters and such other jurisdiction and powers as may be conferred on it by this constitution or any other written law". As noted when dismissing limits of jurisdiction, it was noted that jurisdiction is conferred by statute. It may be limited or unlimited. The stand of the defence is that this is a matter that falls squarely within the jurisdiction of the RBA.

The relevant legislation is the BBA Act No. 3 of 1997. Section 3 thereof establishes the authority. It is indicated that it is a body corporate with perpetual succession and a common zeal and shall in its corporate name be capable of:-

- suing and being sued

- taking purchasing or otherwise acquiring, holding, charging or disposing of movable property.
- Borrowing or handling money and
- Doing or performing all other things or acts for the furtherance of the provisions of this Act which may be lawfully done or performed by the body corporate.

The objects and functions of the Authority are found in Section 5 thereof and these are:

- regulate and supervise the establishment and management of the retirement benefits scheme.
- Protect the interest of members and sponsors of retirement benefits.
- Promote the development of the retirement benefits Sector.
- Advise the minister on national policy to be followed with regard to retirement benefits schemes and to implement all government policy relating thereto and
- Perform such other functions as are conferred on it by this Act or by any other written law.

Section 6 enumerates persons eligible for appointment to the Board of Directors. Among them is the Chief executive officer appointed under Section 11 of the Act. Section 11 makes provisions for the establishment of the office of a Chief Executive Officer. Among others the role of the Chief Officer is responsible for the day to day management of the affairs of the Authority.

A perusal of the Act does not make provisions for general provisions that disputes under the Act are to be handled in a particular manner save for Appeals which are provided for in Sections 46, 47, 48, 49. These provide:

“46 (1) Any member of a scheme who is dissatisfied with a decision of the manager, custodian or trustee of the scheme “may” request in writing that such decision be revived 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.

(2) A copy of every request under this Section shall be served on the manger or trustee of the scheme”.

Section 47 establishes an appeal Tribunal. Section 48 on the other hand gives a right of appeal to the tribunal to any person aggrieved by a decision of the authority of the Chief Executive Officer under the provisions of this Act or any regulations made there under many appeal to the tribunal within 30 days of the receipt of the decision.

Section 48(2) provides *“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 a manner as may be prescribed.*

Section 49 makes provisions for the powers of the tribunal thus:-

- 49(1) on the hearing of an appeal, the tribunal shall have all the powers of a subordinate court of the first class to summon witnesses, to take evidence upon oath or affirmation and to call for the production of books and other documents.

(2) where the tribunal considers it desirable for the purpose of avoiding expenses or delay or any other special reason to so do it may receive evidence by affidavit. and administer interrogatories and require the powers of whom the interrogatories are administered to make a full and true reply to the interrogatories within the times specified by the tribunal.

- (3) *In its determination of any matter the tribunal may take into consideration any evidence which it considers relevant to the subject of an appeal, before it notwithstanding that the evidence would not otherwise be admissible under the law relating to admissibility of evidence.*
- (4) *The tribunal shall have power to award the costs of any proceedings before it and to direct that costs shall be paid in accordance with any scale prescribed for suits in the high court or to award a specific sum.*
- (5) *All summons notices or other documents issued under the hand of the chairman of the tribunal shall be deemed to be issued by the tribunal.*
- (6) *Any interested party may be represented before the tribunal by an advocate or by any other person whom the tribunal may, in its discretion admit to be heard on behalf of the party”.*

The Court was also invited to take into consideration the provisions of Section 58 which reads:-

“where there is a conflict between the provisions of this Act and the provisions of any written law other than the (constitution) with regard to the powers or functions of the authority under this Act the provision of this Act shall prevail”.

The general observations made by this court on the afore set out provisions are as follows:-

- (1) There is no general provisions on dispute resolution in their raw form.
- (2) The Chief officer who has authority to exercise appellate jurisdiction on appeals to him only has general sweeping administrative powers under the enabling Section 11(4) namely responsibility for the day today management of the Authority.
- (3) The Court has not traced any provision or regulation laying down procedures on how the said Chief Officer is to receive and process the said appeals.
- (4) There is no enabling provisions that he has power to set up a secretariat or other machinery for effective disposal of appeals referred to him.
- (5) The central theme or operative words in section 46 of the said Act is that the call is directed to any member of a share who is dissatisfied with a decision of the manager, custodian or trustee “may” request in writing that such a decision be received by the Executive Officer The operative word here is “may”.
- (6) A reading of Section 46(1) of the said Act tends to suggest that where a dispute is between a member and his manager as to when or trustee the highest authority to reconsider it is the Chief Executive officer. There is no mention that there is right of appeal from the Chief Executive Officer’s decision to the tribunal or any other authority. There is also no mention that such a decision is final. Neither is there provision on how such a decision is to be enforced for the benefit of the aggrieved party.
- (7) The 48(2) procedure involves disputes between any person and the Authority. Once again the operative hand here are “*either party may appeal to the tribunal*”.

There is a clear structure on how the appellate tribunal is to conduct its work up to the final determination.

- (8) There is no provision as to whether the resultant decision is final or not.
- (9) There is no provision under the Act as to whether the said decision of the tribunal on appeal is to be taken to any court of law of adoption.

(10) There is no mechanism for enforcement.

It therefore follows that although there exists a mechanism for dispute resolution under the said Act the said remedy is not effective as it does not provide machinery for enforcement of the said resultant decision. Turning to case law in support of the defence stand:

(1) There is the case of SPEAKER OF THE NATIONAL ASSEMBLY VERSUS HON. NJGENGA KARUME NAI CIVIL APP.NO. 92 OF 1992. Under the consideration was the correct procedure to be followed when determining a dispute arising under the said Act. Under consideration was Section 29(c) of the said Act. It reads:

“An application to the high court under the Constitution to hear and determine a question whether (c) the seat in the National Assembly of a Member thereof has become vacant shall be made by way of a petition and shall be tried by an election Court constituting of three judges” The operative word here is “shall”.

(2) The case of KENYA TELECOMMUNICATIONS INVESTMENT GROUP LTD VERSUS TELECOMMUNICATION COMMISSION OF KENYA NAIROBI MIS.APP.NO. 1267 of 2003 under Construction was Section 102 (1) of the Kenya Communications Act No.2 of 1998 *“There shall be established an appeals tribunal for the purpose of arbitrating cases where disputes arise between the parties under this Act”.* The operation word here is shall.

(3) The case of ADERO AND ANOTHER VERSUS ULINZI SACCO SOCIETY LTD [2002] 1 KAR 577 under Construction was Section 76(1) of the Cooperative Societies Act No.12 of 1997. It reads:

“If any dispute concerning the business of a co-operative society arising:

(a) among members past members and persons claiming through members, past members or deceased members.

(b) Between members, past members or deceased members and the society its committee as any officers of the society.

(c) Between the society and any other co-operative society its shall be regard, to the tribunal.” Once again the operative word here is ‘shall’.

(4). The case of TAXTAR INVESTMENTS LTD VERSUS KENYA AIRPORTS AUTHORITY, NAIROBI, MILIMANI, NAIROBI MILIMANI COMMERCIAL COURT CASE NO. 1238 OF 1999. Under construction in Section 33(1) of the Kenya Airports Authority Act Cap.395. It reads

“In the exercise of the persons confirmed by Section 12,14,15 and 16, the Authority shall do as little damage as possible and where any person suffers damage no action or suit shall be but he shall be entitled to such compensation therefore as may be agreed between him and the Authority or in default of agreement as may be determined by a single arbitrator as pointed by the Chief Justice”. The operative words here are no suit shall we”.

5. The case of KENYA BUS SERVICES LTD VERSUS THE KENYA ALLIANCE INSURANCE CO. LTD MILIMANI COMMERCIAL COURT case no 247 of 2003. Under construction was clause 9 of the conditions in the policy of insurance. This reads:

“All differences arising out of this policy shall be referred to the decision of an arbitrator ... and the making of an award shall be a condition precedent to any right of action against the company.

If the company shall decide on liability to the injured for any claim hereunder and such claims shall not within twelve calendar months from the date of such disclaimer have been referred have arbitration

under the provisions herein contained then the claim shall for all purposes be deemed to have been abandoned and shall not thereafter be recoverable here under”.

Once again the operative words here are “shall”.

The case of NAROK COUNTY COUNCIL VERSUS TRANS MARA COUNTY COUNCIL [2000] 1E.A. 161 under construction was Section 270 (b) of the local government Act. It reads “and any apportionment of rights, liabilities property, assets or any other of the matter or things mentioned in those paragraph shall be made between the several local authorities commenced on a fair and equitable basis either as agreed between them or in default of agreement as directed by the minister. Once again the operative word in that provision is “shall”.

Due consideration has been given by this Court to the foregoing case law and the court makes a finding that the operative words in the relevant provision of law under Construction in those Sections which made the courts seized of the matter decline jurisdiction and refer the disputes to the dispute resolution mechanisms in built in those legislations is because the command in those provisions was mandatory and or compulsory.

The command on the provisions under consideration in this ruling is different. It is ‘may’.

The rural arguments presented by the defence in support of the preliminary objection is that the word “may” as used in section 46 and 48(2) means must and for this reason the plaintiffs are in the wrong forum and for this reason this fault showed not hesitate in directing them to the right forum.

The Plaintiffs on the other hand, have submitted that the words “may” in those sections was simply elective on the part of the plaintiffs. Them having allegedly realized that the remedies that may result from the said determination are not effectual decided to move this forum and as such they should be heard.

In attempting to resolve the issue it is necessary to take note of the steps provided by the authorities on her the court can construct the same. These have already been set out in the bodily of the ruling and so only a summary of the same will be high lighted here.

(1) In R VERSUS BIRMINGHAM CITY COUNCIL, EXPARATE FEHERO LTD (SUPRA) the guiding principles are:-

(i) The court to look at the suitability of the statutory appeal in the context of the particular case.

(ii) It has to determine what was the really issue to be determined by the said procedure.

(iii) decide whether the procedure provided was suitable to determine it.

(2) In order to determine whether discretionary words imposed such a duty so as the enabling words are compulsory the court has to determine the following:

(a) That the power has been deposited with a public officer.

(b) to be used for the benefit of persons

(c) Who are specifically pointed out and in which its exercise can be called for (see PADFIELD VERSUS MINISTER OF AGRICULTURE (SUPRA)).

(3). Enabling words are construed as compulsory whenever the object of the power is to effectuate a legal right. Further that “may” is a permissive or enabling expression, but there are cases in which for various reasons as soon as the person who is within the statute is entrusted with the power it becomes his duty to exercise it.

(4) In the law of crimes nineteenth edition (bundle0 it is noted that the court has to decide the legislative intent. In doing so he court is not only to confine itself to the particular ward but to look at the scheme of the statute the intended benefits to the public of what is enjoined by the provisions and the material danger to the public by the contravention of the same.

(5) In FREDERIC GUIDER JULIUS VERUS THE RIGHT REV. THE CARD BISHOP OF OXFORD THE REV. THOMAS THE LLUSSON CARTER (SUPRA) the court is enjoined to note that enabling wards are always compulsory where they are wards to effectuate a legal right.

(6) On construction of Ouster Clauses Mulla on the code of civil procedure sixteenth Edition page 111 where it is stated “such exclusion is not to be readily inferred, the rule of construction being that every presumption should be made in favour of the existence rather than the exclusion of jurisdiction of the Civil Courts must be strictly construed..

(ii) In POLYTHENCE INDUSTRIES LIMITED VERSUS THE KENYA POWER AND LIGHTING OCOMPANY LTD NAIROBI MILIMANI COMMERCIAL COURTS CASE NO. 266 OF 2004 Waweru J. was construing Section 87(1) which reads:

“87(1) which reads if any dispute arises any consumer and the licence as to whether any meter where by the value of the supply is ascertained (whether belonging to the consumer or to the licensee) is or not in proper order for correctly registering that value or as to whether that value has been correctly registered in any case by any meter that difference shall be determined upon the application of either party by the Board and the Board shall also order by which of the parties the costs of incidental to the proceedings before it shall be paid and the decision of the board shall be final and binding on all parties and in determining the said costs the Board may take into account any fee paid under Section 80”.

(3) *Subject is aforesaid the reading of the matter shall be conclusive evidence in the absence of fraud as to the value of the supply”.*

After drawing out issue of determination the learned judge ruled *“it seems to one that all these issues are outside the mandate of the Electricity Regulatory Board as set out in Section 87(1) of the Act. Besides, the prohibitory injunction and the declaration sought in paragraph (a) and (b) of the reliefs in the plaint cannot be granted by the board. The substantive dispute in this suit must be determined by the court. This is a dispute that is clearly outside the parameters set by Section 87(1) of the Act and must be determined by the court. For the above reasons I must refuse the main prayers of application by chamber summons dated 15th August, 2005”.*

This Court has given due consideration to these guiding tips on construction of exclusion clauses and applied them to the provisions of Section 46, 47, 48 and 49 of the RBA. The court has then applied then the nature of the reliefs being sought and the court makes filings to the effect that:

(1) Although there is provision of in administrative machinery for dispute resolution in the RBA the remedies provided are not effectual in that there is no provision for adoption of the resultant decision in any of the court for purposes of execution.

(2) Considering two of the reliefs claimed namely a declaration that the purported conversion of the scheme from a defined benefits to a contributory scheme was illegal, null and void. And an injunction restraining the defendants, their servants and or agents and each or any of them or however from continuing with the operations of new contributory pensions scheme commenced on 30th, September 2001 until the Plaintiffs have been paid the balances of their lump sum benefits as at retirement together with interest, are candidates for settlement by a court of law.

Truncating the dispute so that portions of it be dealt with through the administrative procedures and others to be dealt with in court is likely to increase litigation costs, prolong litigation and might head to different decisions by the different forums over the same subject matter affecting some people.

Turning to Section 48 of the RBA it can only be upheld if the mechanism put in place procedure on effectual remedy. In the absence of a guarantee for an effectual remedy Section 48 cannot be allowed to stand in the path of a litigants basic right of a right to access the seat of justice of own choice. This Section cannot operate the basic right of the litigants to elect to go to court or follow the most effective process for their benefit. For this reason this court finds no fault a that the plaintiffs choice of a court room as the right forum for their dispute resolution.

For the reasons given in the assessment the court makes the following findings:-

- (1). The preliminary objection raised is sustainable because it satisfied the ingredients for raising a preliminary objection as for principles set out in the Mukisa case.
- (2) It is also the finding of this court that the court has jurisdiction to determine the preliminary objection.
- (3) The first limb of the preliminary objection as regards to objection to the plaintiffs re-amended plaint has been upheld for the following reasons:-
 - (i) Order 6A Rule 1 Civil Procedure Act allows a litigant to amend his pleading once before the close of the pleadings. It does not make any qualification that the pleading should be the one on record before the service of the summons to enter appearance. There being no such qualification it means that the plaintiffs' amended plaint is the only plaintiffs pleading that can be brought under order 6A rule 1.
 - (ii) The finding in number (i) above means that the re-amended plaint is the plaintiffs' second amendment. As such leave of court was necessary.
 - (iii) Since the said re-amended plaint was presented without leave of court the same is incompetent and a nullity.
 - (iv) Being a nullity it is of no consequence and it is a proper candidate for striking out and it is accordingly struck out.
 - (v) The striking out of the said re-amended incompetent plaint does not affect the amended plaint already on record. The striking out of the incompetent re-amended plaint ushers in the operation of the amended plaint.
 - (vi) The striking out is not a bar to the plaintiff going back onto the drawing board to present of competent one with leave of court.
 - (vii) The re-amended plaint could not be served by the courts discretion under order 6A rule 5 Civil Procedure Rules because the courts discretion was invoked from the bar by counsel after objection had already been raised against.
 - (viii) It could not also be saved under order 6 rule 12 civil Procedure Rules because objection raised to it is not on want of forum but in failure to follow the correct procedure in presenting the same.
 - (ix) The same could not be served by the rule that where breach of rules of procedure is involved, the court should opt for substantial justice because no prejudice or injustice is bound to be suffered by the plaintiff by virtue of the said re-amended plaint being struck out as there is room for it to be regularized and presented afresh.
- (4) The second limb of the preliminary objection has been rejected for the following reason:-
 - (i) The administrative structure put in place under the Retirement Benefit Authority for dispute resolution as vested in the chief executive officer does not have any laid down structure both in the substantive Act as well as the regulations on how this function is to be carried out. There is also no

mention as to whether the resultant decision is to be final or not whether it is appealable or not and if appellable to which upon the appeal is to be and how the grant is to be lodged, notwithstanding the provision of Section 48 (2) of the same Act.

(ii) The quasi judicial procedure provided for under Section 47, 48, and 49 of the same Act indeed provides an alternative remedy but the said remedy is not effectual as it does not provide for adoption of the resultant tribunals decision either by the subordinate court or any other court for purposes of execution. In the absence of a mechanism to providing for execution the remedy available is in effectual and will not allow the aggrieved party to realized the fruits of the litigation process under that procedure.

(iii) The case law relied upon by the defence and in which the court upheld the ouster of the courts jurisdiction temporarily and directed litigants to exhaust the alternative remedy under the overting status before having recourse to the courts had a compulsory as opposed to a permissive command in the enabling sections and are therefore distinguishable from the enabling provision subject of this ruling which is merely permissive.

(iv) Case law set out herein providing tips on how to construct the word “*may*” in a legislation show that the proper meaning to be attached to that word is that it is merely permissive. It turns to mean “*must*” where the section confers a legal right to an identifiable beneficiary and legal duty to a public officer. In this courts opinion when construed in the light of the entire statute and taking into account the benefits to the beneficiary and the legal duty to the public officer namely the chief executive officer and the tribunal, the right to elect tilt in favour pf the beneficiary. It only becomes a legal duty when the lection is made by the beneficiary.

(v) Case law relied upon enjoins the constructing court to consider the nature of the reliefs being sought when so considered indeed there are reliefs being sought when so considered indeed there are some reliefs claimed by the plaintiffs which can be handled administratively i.e. recalculation of benefits. However, the declarations relief and injunctive relief being sought cannot be handled administratively order 39 Civil Procedure Rules under which injunctive reliefs are accessed require such a relief to be accessed through a relief.

(5) Access to the duly established and constituted courts by a litigant within this jurisdiction is a basic right under Section 77 (9) of the Kenya Constitution. For this reason the provision of Section 48 of the Retirement Benefit Authority cannot operate to bar the plaintiffs from proceeding with litigation in this forum.

(6) For the reason given above the defendants’ preliminary objection has succeeded on the first limb as regards the faulting of the re-amended plaint. The same preliminary objection as regards the second limb of lack of jurisdiction on the part of the court to hear the dispute is dismissed.

(7) Each party will bear own costs since the defence succeeded only half way on their preliminary objection.

DATED, READ AND DELIVERED AT NAIROBI, THIS 23RD DAY OF MAY 2008.

R. N. NAMBUYE

JUDGE