



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

ELC NO.88 OF 2020

FORMERLY CIVIL SUIT NO. 79 OF 2019

BWANA MOHAMED BWANA.....PLAINTIFF

VERSUS

THE REGISTERED TRUSTEES

KENYA PORTS AUTHORITY PENSION SCHEME.....DEFENDANT

RULING

1. By way of **Notice of Motion** application dated **4th March, 2020** the Applicant seeks the following Orders: -

1. The Honourable Court be pleased to vary and set aside that part of its ruling transferring the suit to the Environment & Land Court for hearing and determination and in its place substitute it with an order striking out the suit for lack of jurisdiction.

2. The costs of this application and the struck out suit be awarded to the Defendant.

2. The **Notice of Motion** is supported by an **Affidavit** sworn on **4th March, 2020** by **Stephen Kyandih**, the Defendant's Scheme Secretary.

3. The **Notice of Motion** Application is premised on the grounds that: -

1. The Defendant's Notice of Motion dated 9th October 2019 sought to strike out the Plaintiff's suit on two grounds being;

(a) lack of jurisdiction over land matters; and

(b) lack of jurisdiction over disputes between a pension scheme and its members.

2. The Honourable Court, in its ruling delivered on 20th February 2020, properly captured those as the two grounds upon which the Defendant's objection was based.

3. However, the Honourable Court inadvertently considered the first ground only. It never considered the second ground at all.

4. Under the first ground, the Honourable Court held that it could transfer the matter to the Environmental & Land Court, which it did.

5. However, under the second ground, if it had been considered and upheld, the court would find that even the Environment & Land Court would not have jurisdiction to hear and determine a dispute between a pension scheme and its members.

6. The failure to consider the second ground has therefore led the court to transfer a matter to a court which in fact lacks jurisdiction to hear the matter. It has also denied the Defendant a right of appeal since no decision has been made on that point.

7. It is therefore necessary for the Honourable Court to consider the challenge based on section 46 & 48 of the Retirement Benefits Act No. 3 of 1997 and make a decision on it one way or the other.

8. It is in the interest of justice and in keeping with the rule of law that the jurisdictional challenge be addressed before the matter is referred to another court equally without jurisdiction.

4. The Plaintiff has opposed the said Application vide the **Replying Affidavit** sworn on **15th January, 2021** and a **Preliminary Objection on an even dated**.

5. In the **Preliminary Objection**, the Plaintiff/Respondent states that this court lacks jurisdiction to entertain the instant application in view of the **Notice of Appeal** lodged by the Applicant on **3rd March, 2020** and further that there exists an Appeal against this court's Ruling being **Court of Appeal Civil Appeal No.50 of 2020, The Registered Trustees, Kenya Ports Authority Pension Scheme –versus- Bwana Mohamed Bwana** wherein a **Record of Appeal** was filed on the **3rd August, 2020**.

6. The Plaintiff/Respondent maintain that this Court is *functus officio* having pronounced itself on the issue of transfer of this suit to the **Environment and Land Court** for hearing and determination vide its **Ruling** delivered on the **20th February, 2020**.

Directions of the Court

7. The parties took directions on disposal of the application by way of written submissions which were dutifully filed. The Applicant filed its submissions on the **2nd March, 2021** while the Plaintiff/ Respondent filed his submissions on the **12th March, 2021**. Parties relied on those submissions in their entirety.

8. I have read through the submissions by both parties and found they replicate much on the grounds in support and opposition of the application as captured above. There is therefore no need to duplicate the same.

Analysis and determination

9. Having considered all the pleadings and written submissions by the parties, the issue that arises for determination is whether this Court has the jurisdiction to hear and determine the application as brought by the Defendant/Applicant.

10. The Applicant has brought this application seeking orders that this court varies the **Orders** it made on **20th February, 2020** transferring the suit to the **Environment & Land Court** and substitute it with an order striking out the suit in its entirety.

11. The Applicant has categorically stated in its submissions that this is not an application for review as it has not been brought under **Section 80** of the **Civil Procedure Act** and **Order 45** of the **Civil Procedure Rules**. The Applicant further acknowledges that there is pending an Appeal before the Court of Appeal on the **Ruling** as delivered on **20th February, 2020**.

12. It is the Applicant's contention that this Court is being invited to deal with the jurisdictional question as was addressed in the **Ruling of 20th February, 2020**, which had determined their application dated **9th October, 2019**. It is averred that the said application had raised two jurisdictional questions being that the court lacked jurisdiction to entertain a matter reserved for the ELC and that the High Court lacked jurisdiction over disputes between a pension scheme and its members.

13. However, the Applicants submitted that they are before this court for the reason that this court only answered one jurisdictional question raised, that is, that the matter was that of the **Environment & Land Court** but ignored the other issue raised on whether the High Court lacked jurisdiction over disputes between a pension scheme and its members.

14. The Plaintiff/Respondent on the other hand has taken a firm stand and submitted that this Court is *functus officio* having pronounced itself in a **Ruling** that is now the subject of Appeal, being **Court of Appeal Civil Appeal No.50 of 2020, The Registered Trustees, Kenya Ports Authority Pension Scheme –vs- Bwana Mohamed Bwana**.

15. I have read through the **Ruling** dated the **20th February, 2020**, and reiterate that this Court found that the jurisdictional question as raised by the Defendant/Applicant relied on the wrong provisions of the law and thus their **Preliminary Objection** was defective and could not be upheld by this court. The Applicant therefore, cannot claim that one of their jurisdictional questions was not determined by this Court.

16. Nonetheless, this Court considered all the issues that came up and in the **Ruling** delivered on **20th February, 2020** found that it lacked jurisdiction for the reason that the matter being that of use and occupation of land, vested exclusive jurisdiction to the **Environment and Land Court**, and consequently the matter was transferred to the said court.

17. Be that as it may, the Applicants having filed an Appeal before the Court of Appeal against the **Ruling of 20th February, 2020** and having acknowledged that the application dated **4th March, 2020** was unnecessary since they cannot appeal and seek review against the same Ruling under **Section 80** of the **Civil Procedure Act** and **Order 45** of the **Civil Procedure Rules**, I have no business to entertain the instant application.

18. Further, it is my view that having found that this Court had no jurisdiction over the matter, I cannot now proceed to consider whether the High Court has jurisdiction over the Applicant. The High Court ceased to preside over the matter and it is for the Applicant to think of whether the Environment and Land Court has jurisdiction over them. That is an issue the Environment and Land Court will address if at all the same will be raised before it. But as things stand, this Court has conclusively pronounced itself with regard to this matter. I choose not to say more on that aspect since its upon the Applicant's Counsel to advise his client.

19. For the above reasons as explained above, I find no merit in the Applicant's Application dated **4th March, 2020** and dismiss it in its entirety.

20. Costs to the Plaintiff/Respondent.

It is hereby so ordered.

DATED, SIGNED and DELIVERED VIRTUALLY at MOMBASA this 13TH day of MAY, 2021.

D. O. CHEPKWONY

JUDGE