



Kombo v Board of Trustees KMFRI Staff Pension Scheme & another (Constitutional Petition E040 of 2024) [2024] KEHC 10844 (KLR) (25 July 2024) (Ruling)

Neutral citation: [2024] KEHC 10844 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CONSTITUTIONAL PETITION E040 OF 2024**

**OA SEWE, J
JULY 25, 2024**

BETWEEN

PETER OMARE KOMBO PETITIONER

AND

**BOARD OF TRUSTEES KMFRI STAFF PENSION SCHEME . 1ST RESPONDENT
ELECTIONS COMMITTEE OF THE KMFRI STAFF PENSION
SCHEME 2ND RESPONDENT**

RULING

1. This Petition was filed under Certificate of Urgency on 17th July 2024 by the petitioner, Peter Omare Kombo. In essence, he prayed for a declaration that the 2nd respondent's decision vide a letter dated the 4th July 2024 that the petitioner failed to meet the requirement of the Leadership and Integrity Act on a moral question, infringed the petitioner's rights under Articles 47 and 50 of the Constitution. He also prayed for other reliefs, as set out in his Petition, including an order for compensation in damages and costs.
2. Concomitantly, the petitioner filed a Notice of Motion dated 16th July 2024 praying for orders, *inter alia*, that a conservatory order be issued suspending the elections of the Kenya Marine and Fisheries Research Institute (KMFRI) Staff Pension Scheme then scheduled for 25th July 2024 pending the hearing and determination of the Petition. The said application was certified urgent and fixed for hearing *inter partes* on 23rd July 2024.
3. In response to the application, the respondents filed two Replying Affidavits, sworn by Juliet Furaha Karisa, the Chairperson of KMFRI Staff Pension Scheme and by **Priscilla Nyasuguta Boera, the Chairperson of the Election Committee of the KMFRI Staff Pension Scheme. In addition, the respondents filed a Notice of Preliminary Objection dated 22nd July 2024 in respect of both the application and the Petition on the following grounds:



- (a) That the dispute herein touches on the Election of the Trustees for KMFRI Staff Pension Scheme a Pension Scheme established under the provisions of the [Retirement Benefits Act](#). The said Act makes clear provisions on the mechanisms for handling disputes emanating within the affairs of Pension Schemes in Kenya.
 - (b) That KMFRI Staff Pension Scheme has its own Trustees' Election Policy Manual and Procedures which provide for avenues and timelines for lodging any complaint/disputes arising in the Trustees Election Process, and which process has to be exhausted and to which the Petitioner/Applicant submitted himself.
 - (c) That in the event one is dissatisfied with the internal processes of the Pension Scheme, the only other venue available is to lodge a Complaint with the Chief Executive Officer of the Retirement Benefits Authority; the Decision of the Chief Executive Officer of the Retirement Benefits Authority can only be challenged vide an Appeal to the Retirement Benefits Appeal Tribunal, which acts as the only Appellate body therefrom.
 - (d) That the Petitioner cannot thus file the Petition and Application before this court in utter breach of the dispute resolution mechanisms clearly provided for, both internally and under the parent Act, the [Retirement Benefits Act](#).
 - (e) That the Court is thus devoid of jurisdiction to hear and determine any issue in the entire Petition and the Application herein, and thus it has to down its tools.
 - (f) That having filed the Petition and Application before a Court lacking jurisdiction, the Petition and Application herein must be dismissed.
 - (g) That owing to the timelines for compliance ordered by this Court which necessitated the Respondents calling for urgent meetings within a very short time, and whose Members are dispersed in different parts of the Country, the Respondents ought to be awarded costs to the Petition and Application.
4. The respondents' Preliminary Objection was canvassed orally on the 23rd July 2024. The respondents' submission was that this court lacks the jurisdiction to determine pension issues; such being disputes between an employee and an employer and therefore are issues falling within the jurisdiction of the Employment and Labour Relations Court in accordance with Articles 162(2) (a) of [the Constitution](#). They relied on Owners of Motor Vessel Lillian S v Caltex Oil (Kenya) Ltd, Civil Appeal No. 50 of 1989.
 5. Secondly, it was the submission of the respondents that KMFRI Staff Pension Scheme has its internal mechanisms of dealing with election disputes. Their contention was that, since the petitioner had not exhausted all the internal mechanisms available for the resolution of election disputes under the Trustee Election Policy, this Petition is premature. They relied on Mutanga Tea and Coffee Company Ltd v Shikara Ltd [2015] eKLR and urged the Court to uphold the doctrine of exhaustion.
 6. Lastly, the respondents submitted that a party dissatisfied with the internal dispute resolution mechanisms is required by law to move the Retirement Benefits Authority Tribunal for redress pursuant to Article 169(1) of the Constitution and Sections 46 and 47 of the Retirement Benefits Authority Act. They therefore reiterated their stance that, in that scheme of things, the High Court has no role.
 7. In support of this argument the respondents placed reliance on the case of Albert Chaurembo Mumba & 7 others (sued on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) v Maurice Munyao & 148 others (suing on their own behalf and on behalf of the Plaintiffs and other Members/Beneficiaries



of the Kenya Ports Authority Pensions Scheme) [2019] eKLR and urged the Court to find that it lacks the requisite jurisdiction to entertain this Petition, including the Notice of Motion filed therewith.

8. The Petitioner on his part maintained that this Court has the requisite jurisdiction to hear and determine this suit because it is hinged on a letter dated 4th July 2024 the essence of which was that the petitioner failed to meet the requirements of the *Leadership and Integrity Act*. It was further the contention of the petitioner that this suit is about the infringement of his rights under Article 47 of *the Constitution*. Hence, according to the petitioner, no employment or labour related questions have been raised and that there is no employer/employee relationship between the Petitioner and the Respondents.
9. Counsel proposed, on the basis of the decision of the Supreme Court in Albert Chaurembo (supra) that, if the court is inclined to uphold the of Preliminary Objection it should instead transfer the matter to the CEO of the Retirement Benefits Authority for adjudication.
10. In their rejoinder, the respondents pointed out that what is challenged in this Petition are the elections of KMFRI and not administrative action by the respondents. They reiterated their assertion that this is not the right forum for challenging the said elections. They further submitted that there is no provision in Section 46 of the *Retirement Benefits Act* for a Petition to be transferred to the CEO of RBA for adjudication. Therefore, their prayer was for the dismissal of the Petition with costs.
11. What constitutes a preliminary objection was discussed in the case of Mukisa Biscuits Manufacturing Ltd v West End Distributors [1969] EA 696. The court held:

“...a preliminary objection consists 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 a contract giving rise to the suit to refer the dispute to arbitration”.

12. Sir Charles Newbold, P. added:

“a preliminary objection is in the nature of what used to be a demurrer. It 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. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop”.

13. In *Independent Electoral & Boundaries Commission v Cheperenger & 2 others (Civil Application 36 of 2014)* [2015] KESC 2 (KLR) (15 December 2015) (Ruling), the Supreme Court stated:

“...The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits...”

14. Accordingly, since the respondents’ Preliminary Objection was taken on the point of jurisdiction, it was well taken in the circumstances, save that reference by counsel for the respondents to the Trustees



Election Policy annexed to the Replying Affidavit was misplaced in this instance. I have accordingly ignored that invitation.

15. It is now trite law that jurisdiction is everything and without it, a court should down its tools. In *The Owners of Motor vessel Lillian 'S' vs Caltex Kenya Limited* [1989] KLR 1 the Court held:

“Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A Court of Law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

16. Moreover, in *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR, the Supreme Court pointed out that:

(68) A Court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, *In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011*. Where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law...”

17. The jurisdiction of the High Court is provided for in Article 165(3) of the Constitution thus:

- (3) Subject to clause (5), the High Court shall have—
- (a) unlimited original jurisdiction in criminal and civil matters;
 - (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
 - (c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;
 - (d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—
 - (i) the question whether any law is inconsistent with or in contravention of this Constitution;
 - (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;



- (iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
 - (iv) a question relating to conflict of laws under Article 191; and
 - (e) any other jurisdiction, original or appellate, conferred on it by legislation.
18. Article 165(5) of the Constitution is however explicit that:
- (5) The High Court shall not have jurisdiction in respect of matters—
 - (a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or
 - (b) falling within the jurisdiction of the courts contemplated in Article 162 (2).
19. Article 162(2) and (3) of the Constitution provides for Courts of equal status to the High Court. It provides:
- (2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—
 - (a) employment and labour relations; and
 - (b) the environment and the use and occupation of, and title to, land.
 - (3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).
20. In the light of the provisions of Articles 162(2) and 165(5) of the Constitution, Section 12 of the Employment and *Labour Relations Act* stipulates that:
- The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of *the Constitution* and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations..."
21. Having perused the Petition dated 16th July 2024, I agree with the Petitioner that the dispute before the court is not, strictly speaking one between employer and employee but arises from a decision made by a Pension Scheme regulated under the Retirement Benefits Authority Act.
22. In Albert Chaurembo (*supra*) the Supreme Court had occasion to discuss at length and determine the question of the jurisdiction under the *Retirement Benefits Act*. Here is what it had to say:
- (84) In determining the jurisdiction under the RBA Act, it is imperative to interpret the relevant provisions of the Act. In the course of interpretation of the provisions of the RBA Act, we are minded that the court should give life to and not stifle the intention of the legislature. We have no difficulty in interpreting the above provisions in view of the well-established principle of presumption of the constitutionality of a statute and of its provisions and that Courts must give due respect for a coordinate branch of government which entails assuming that parliament's legislative product was intended to pass constitutional muster.



23. In respect of the responsibilities of the CEO of RBA, the Supreme Court held:

“(86) Section 11 of the RBA Act establishes the office of the CEO and section 11(4) sets out his responsibility in the following terms:

(4) The Chief Executive Officer shall, subject to the directions of the Board, be responsible for the day to day management of the affairs of the Authority.”

(87) Section 46 (1) of the RBA Act on the other hand provides as follows:

Any member of a scheme who is dissatisfied with a decision of the manager, administrator, custodian or trustees of the scheme may request, in writing, that such decision be reviewed by the Chief Executive Officer with a view to ensuring that such decision is made in accordance with the provisions of the relevant scheme rules or the Act under which the scheme is established.” [Emphasis ours]

(88) A reading and interpretation of the provisions of the section 46(1) poses no difficulty and leaves no doubt that the section requires that any member, beneficiary or dependents of the Scheme who is aggrieved or dissatisfied by any decisions made by a manager, administrator or trustees of the Scheme while exercising their powers under the provisions of the relevant scheme rules or the Act under which the scheme is established, may if he or she wishes make a written request to the CEO to review such decisions with a view to ensuring that such decisions are in accordance with the provisions of the relevant Scheme Rules or the Act under which the Scheme is established and above all lawful.

(89) It is clear that the powers of adjudication given to the CEO under the said provision is in respect of the application of the rules of a retirement benefits scheme and the prevailing written law under which the scheme is established, in this case the Deed of Trust establishing the Kenya Ports Authority Pension Scheme.

[90] It is evident from the RBA Act that pursuant to section 11 and section 46, the CEO has a dual or a two-fold mandate under the Act. The powers vested under section 11 (4) of the Act as the accounting officer or the operational head of the Authority responsible for the day to day management of the affairs of the Authority while under section 46 (1) of the Act, the CEO is vested with a quasi-judicial mandate in adjudication of disputes arising under the RBA Act, in the first instance. Section 5 of the RBA Act in any event provides for the objects and functions of the Authority which include the regulation and supervision of the management of retirement benefits schemes and the protection of the interests of members and sponsors of retirement benefits sector.

(91) The CEO is therefore obliged while performing his quasi-judicial functions to objectively determine facts and draw conclusions from them as to provide the basis of official action. Such actions are able to remedy a situation or impose legal penalties, and may affect the legal rights, duties or privileges of



specific parties. The CEO is required when exercising discretionary power to maintain a proper balance between any adverse effects which his decision may have on the rights, liberties, or interests of persons and the purpose which he pursues...”

24. The court went on, under the heading Jurisdiction of the High Court or the Employment and Labour Relations Court and stated:

(145) On the other hand, section 2 of the *Employment and Labour Relations Court Act* defines the term an “employee” to mean a person employed for wages or a salary and includes an apprentice and indentured learner. The provision further defines “employer” to mean any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company. Thus, whereas a dispute between a Trustee and a beneficiary may well fall within an employment dispute, the meaning of a Pensioner is nowhere near the meaning of an employee neither can the scheme of organisation fit in the meaning of an employer.

(146) In our view, once a member leaves the employment of a Sponsor, by becoming a pensioner, there is no longer a relationship of employer-employee that exists between such a pensioner and the sponsor. The relationship that exists in that case becomes that of trustee and beneficiaries (members) of a trust and that relationship is governed by the *Retirement Benefits Act, Trustee Act* Cap 167 of the laws of Kenya and the general common law on the law of trusts. It is important to note that nowhere in the *Employment and Labour Relations Court Act* is there jurisdiction conferred on the Employment and Labour Relations court to resolve issues between trustees of a pension scheme and members of the scheme (pensioners)...”

25. It is clear that under Section 46 of the *Retirement Benefits Act*, the CEO is vested with quasi-judicial powers to handle disputes that arise under the Act in respect of the application of the rules of a retirement benefits scheme and the prevailing written law under which the scheme is established. Thereafter a party may appeal to the Retirement Benefits Appeals Tribunal under Section 48 of the *Retirement Benefits Act*. It is only thereafter that a party can invoke the jurisdiction of the High Court; the Supreme Court having ruled that there is no section in the Employment and *Labour Relations Act* that confers jurisdiction on the Employment and Labour Relations court to resolve issues between trustees of a pension scheme and members of the scheme.

26. In this case, the letter complained of emanated from the 1st respondent, and since the *Retirement Benefits Act* provides for an alternative method for dispute resolution before one can approach the court, it was imperative that the alternative mechanisms be exhausted first. Indeed, Section 9(2) of the Fair Administrative Actions Act requires that internal mechanisms for appeal or review and all remedies available under any other written law be exhausted first before a party can approach the court.

27. In *Geoffrey Muthinja Kabiru & Others v Samuel Muguna Henry & 1756 others* [2015] eKLR, the Court of Appeal made it clear that:

“It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews...The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. The Ex Parte



Applicants argue that this accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution.”

28. The principle was reiterated in *William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties)* [2020] eKLR, as follows:
52. The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. This encourages alternative dispute resolution mechanisms in line with Article 159 of the Constitution...”
29. Having carefully looked at the Notice of Motion and Petition dated 16th July 2024 it is my finding that the petitioner approached the Court prematurely and that he should have first sought the intervention of the CEO as required under Section 46 of the Retirement Benefits Act and if dissatisfied to file an appeal in accordance with Section 48 of the Retirement Benefits Act before approaching the Court.
30. In view of the above, I find merit in the Preliminary Objection dated 22nd July 2024. The same is hereby upheld with the result that the Notice of Motion and Petition dated 16th July 2024 are hereby struck out. Each party to bear their own costs of the Petition.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 25TH DAY OF JULY 2024

OLGA SEWE

JUDGE

