



REPUBLIC OF KENYA

IN. THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO.80 OF 2019

OSCAR NYERERE MAGERO.....PLAINTIFF

VERSUS

1. KENYA PORTS AUTHORITY

2. THE REGISTERED TRUSTEES, KENYA PORTS

AUTHORITY PENSION SCHEME.....DEFENDANTS

RULING

1. This Honourable Court has been called upon to determine two applications both brought by way of **Notice of Motion** dated **8<sup>th</sup> October 2019** and **14<sup>th</sup> October, 2019** respectively.

2. The application dated **5<sup>th</sup> September, 2019** by the Plaintiff/Applicant is brought under **Article 40** of the **Constitution of Kenya**, **Order 40 Rules 1, 2, 2 and 4**, **Sections 3A and 63 (c ) and (e)** of the **Civil Procedure Act** and **Order 40 Rules 1, 2, 3 and 4** and **Order 51 Rules 1 and 3** of the **Civil Procedure Rules 2010** and all the enabling provisions of the law. It seeks the following orders:-

a. Spent;

b. Spent;

c. THAT this Honourable court be pleased to grant **Temporary Injunction** to restrain the Respondents by themselves their **Agents, Servants, Employees, Representatives and assignees** from dealing, transferring, disposing, alienating or otherwise interfering with the plaintiff quite tenancy, possession of the (K.P.A) **PENSION SCHEME** property **HOUSE NO. 1345/1/MN** scheduled pending hearing and determination of the case and/or until further orders from this Honourable court;

d. THAT this Honourable court be pleased to compel/order the Defendants/Respondents to allow the Plaintiff/Applicant who is a member of the **K.P.A PENSION SCHEME** to participate in the purchase of the houses;

e. THAT this Honourable court be pleased to compel/order the Defendants/Respondents to consider members of the **K.P.A PENSION SCHEME** who are occupants of the said houses first priority to purchase the houses;

f. THAT this Honourable court be pleased to make such orders it deems fit and convenient to meet the ends of justice;

g. THAT the costs of this Application be in cause;

3. The application is premised on the grounds set out on the face of it and it is supported by the annexed **affidavit** of **Oscar Nyerere Magero** the Plaintiff/Applicant herein sworn on the **8<sup>th</sup> October 2019**.

4. **Mr. Oscar Nyerere** has stated that he was an employee of the 1<sup>st</sup> Respondent as an **Assistant Internal Auditor (Revenue) Grade PA 4** since the **26<sup>th</sup> January 1991** and is a member of the 2<sup>nd</sup> Respondent by virtue of having been issued with a **letter** dated **12<sup>th</sup> October, 1992**, by virtue of being a Permanent and Pensionable employee.

5. **Mr. Nyerere** has also stated that he owns and resides with his family, in **House No.1345/1/MN** at the property of the **K.P.A PENSION**

**SCHEME** located in Nyali, Kisauni Sub County, Mombasa.

6. It has been deponed that on the 3<sup>rd</sup> July 2009, the former K.P.A **Managing Director (Mr. James Mulewa)** issued a circular to all staff under **K.P.A PENSION SCHEME** that all those who wish to continue living in Scheme's quarters should acquire formal lease agreements. Further the circular provided that the **Pension Scheme** would sell the same houses to any person who was interested and the members of the **Pension Scheme** were to be given the first priority.

7. According to the Plaintiff/Applicant, the Defendant/Respondent issued a tender document for the disposal of scheme properties being **Tender No.KPAPS/PM/03/2019** dated **September, 2019** inviting sealed bids from eligible candidates to enter into a contract for the sale of the Scheme Properties. The Applicant has stated that he purchased the tender from the 2<sup>nd</sup> Respondent at a non-refundable fee of **Kshs.1,000/=**.

8. On opening the tender document, it was deponed by the Applicant that his house was among the properties that had been listed for disposal as provided under **Section V** of the **Tender Document**, as **Property No.Mainland North/Section 1/1345** and with information that the interested bidders had already toured the sites and inspected the properties as advertised.

9. The Applicant's contention is that the houses were transferred from the 1<sup>st</sup> Respondent to the 2<sup>nd</sup> Respondent and that they were at an in-house value of **Kshs.4,500,000/=** and market value of **Kshs.12,000,000/=** but as it stands now, the said houses are being sold at **Kshs.56,000,000/=** an amount he found to be deliberately high. He deponed that he is not opposed to **Kshs.56,000,000/=** rather it is his humble request that the terms of sale be reasonable/favourable.

10. The Applicant has averred that he is a pensioner and a member of the 2<sup>nd</sup> Respondent who resides in the premises and he ought to have been included and/or advised on how the price had been arrived at, so as to be able to propose a payment plan considering he is on a monthly salary and may not be able to raise a lump sum amount that would be demanded immediately.

11. It has been stated that the decision to dispose off his staff housing was made in bad faith as they failed to consider that he is a current employee and that once he retires, he should be entitled to a housing scheme as a pensioner.

12. Further, the Applicant has deposed that the Respondents have failed to acknowledge that he has been in occupation of the house with his family since the **year 1991**; that the houses are being sold at very high prices; that he was never consulted on his interest to purchase the property and that the 2<sup>nd</sup> Respondent being a trustee cannot act against the will of the scheme members.

13. Finally, he states that the Respondents will not suffer any prejudice if a temporary injunction is granted pending the hearing and determination of the suit herein.

14. In response to the application dated **5<sup>th</sup> September, 2019**, the 1<sup>st</sup> Respondent filed **Grounds of Opposition** dated **22<sup>nd</sup> October 2020**. Wherein it has stated that the application was wrongly filed as against them since they have no ownership rights nor any interest on the subject property **Plot No.1345/1/MN**. It has also stated that it transferred the said property to the 2<sup>nd</sup> Respondent who has exclusive rights towards it. The 1<sup>st</sup> Respondent has added that it is a state corporation that should not be confused with the 2<sup>nd</sup> Respondent, a registered retirement benefits scheme whose assets are held in trust by its Board of Trustees in accordance with the **Retirement Benefits Act**.

15. On the other hand, the 2<sup>nd</sup> Respondent has filed an application brought under **Sections 1A, 1B, 3 & 3A** of the **Civil Procedure Act, Cap 21** and **Order 2 Rule 15** and **Order 40 Rule 7** of the **Civil Procedure Rules 2010**. The application seeks the following orders: -

**1. Spent;**

**2. The interim injunctive orders issued on 8<sup>th</sup> October 2019 be vacated and set aside in their entirety;**

**3. The Plaintiff's suit be struck out for want of jurisdiction under Article 163 (5) of the Constitution and Sections 46 & 48 of the Retirement Benefits Act No.3 of 1997.**

**4. In any event, the Plaintiff's suit be struck out for disclosing no reasonable cause of action known to law and for being an abuse of the court process;**

**5. The costs of this application and the suit be awarded to the 2<sup>nd</sup> Defendant.**

16. The application is premised on the grounds set out on the body of the same and on the annexed **affidavit** sworn on **14<sup>th</sup> October, 2019** by **Stephen Kyandih** the 2<sup>nd</sup> Respondent's Secretary.

17. In this application, the Applicant/2<sup>nd</sup> Respondent avers that the orders of the court issued on **8<sup>th</sup> October, 2019** barring it from selling or in any way disposing parcel number **Mainland North/Section I/1345** in **Nyali Mombasa** be set aside for the reason that the **RBA Investment Regulations and Policies** requires the 2<sup>nd</sup> Respondent to hold immovable property that does not exceed 30% of its total assets and as at **March 2019** the assets were at 52.5%.

18. It has been stated that the disposal of the immovable properties including the suit property herein was aimed at complying with the **RBA Investment Regulations and Policies** and the order issued on **8<sup>th</sup> October, 2019** has since made that impossible.

19. The Applicant/2<sup>nd</sup> Respondent also contends that the **Tender Number KPAPS/PM/03/2019** required bidders to deposit 10% of the open market which had already been paid. The 2<sup>nd</sup> Respondent/Applicant has received oral demands for a refund of the said deposits and the refund will result into an evaluation committee being formed to review all bids received for all parcels of land put up for sale, which will be at a great cost to the 2<sup>nd</sup> Respondent's members.

20. It has been stated that the complaint by the Plaintiff that the suit property will be sold to a third party, yet he has occupied the property since **1991** is not a reasonable cause of action as against the 2<sup>nd</sup> Respondent since the court cannot dictate how the 2<sup>nd</sup> Respondent will sell its property, to whom and at what price. The court cannot take over the management of the 2<sup>nd</sup> Respondent and make decisions on its behalf.

21. The 2<sup>nd</sup> Respondent has also deponed that this court lacks jurisdiction to entertain the application by the Plaintiff dated **8<sup>th</sup> October, 2019** by virtue of him being a member of the 2<sup>nd</sup> Respondent as there is available Alternative Dispute Resolution Mechanisms found at **Clause 27** of the **Trust Deed** which the Plaintiff has not invoked before coming to this court.

22. Additionally, the Applicant/2<sup>nd</sup> Respondent avers that **Section 46** of the **Retirement Benefits Act No.3 of Retirement Benefits Act No.3 of 1997** requires that all disputes between a Pension Scheme and its members be referred to the Chief Executive Officer with a right to appeal to the **Retirement Benefits Tribunal** as provided under **Section 48** of the **Act**.

23. It was averred that there is no provision granting the High Court original jurisdiction to hear disputes between a scheme and its members unless it is by way of a Judicial Review or a Constitutional Petition from a decision of the Tribunal.

24. Following the directions given by the court, the matter was disposed of by way of written submissions. The Plaintiff/Applicants' submissions are dated the **24<sup>th</sup> May, 2021** and filed on an even date whilst the 2<sup>nd</sup> Respondent's submissions are dated the **4<sup>th</sup> March, 2021** and were filed on **8<sup>th</sup> March, 2021**. The parties opted to rely on their respective written submissions in their entirety.

#### **THE PLAINTIFF/APPLICANT'S SUBMISSIONS**

25. The Plaintiff/Applicant only submitted to the 2<sup>nd</sup> Respondent's application dated **14<sup>th</sup> October, 2019**. He submitted that the operative word in **Section 46** of the **Retirement Benefits Act, No.3 of 1997** the is '**may**' and not '**shall**' and thus this court is not divested of jurisdiction to determine the suit herein. He placed reliance on the case of **Republic –Vs- Firearms Licensing Board & Another Ex parte Boniface Mwaura [2019] eKLR**, where the court held that the word '**may**' is discretionary as opposed to mandatory.

26. The Plaintiff/Applicant has urged the court to dismiss the 2<sup>nd</sup> Respondent's Application dated **14<sup>th</sup> October, 2019** for the reason that **Sections 46** and **48** of the **Retirement Benefits Act, No.3 of 1997** are not couched in mandatory terms.

#### **THE 2<sup>ND</sup> RESPONDENT'S SUBMISSIONS**

27. The 2<sup>nd</sup> Respondent has submitted that this court lacks jurisdiction to hear the suit herein by virtue of the provision of **Article 165(5)** of the **Constitution** and **Section 46** of the **Retirement Benefits Act No.3 of 1997**.

28. It has stated that the crux of the dispute herein is whether the Plaintiff is entitled to continue being in occupation of the suit property which plainly is a dispute on occupation and use of land that falls squarely under the ambit of the **Environment and Land Court** and thus this court lacks jurisdiction as provided under **Article 165(5)** of the **Constitution**.

29. It also submits that the court lacks jurisdiction as the **Trust Deed** of the 2<sup>nd</sup> Respondent mandates the parties to refer any dispute between it and its members to arbitration.

30. It further submits that **Section 46** of the **Retirement Benefits Act No.3 of 1997** provides that if a member has any complaint it must first be made to the Chief Executive Officer.

31. The 2<sup>nd</sup> Respondent has urged this court not to transfer the matter herein to any of the specialized courts namely the **Environment and Land Court** and the **Employment and Labour Relations Court** for the reasons that all these courts have decided that once any dispute arises between the 2<sup>nd</sup> Respondent and its members, the **Retirement Benefits Act No.3 of 1997** provides for an Alternative Dispute Resolution Mechanism before parties can approach the court. The court has been referred to the cases of **Benard Munyao –vs- Registered Trustees of Kenya Port Authority Pension Scheme [2020]eKLR**, **Fredrick Okwomi Anyasi & 4 Others –vs- Kenya Railways Retirement Benefits Scheme & Another [2020] eKLR** and **Ann Wangui Ngugi & 524 Others –vs- Kenya Commercial Bank Staff Pension Fund & 2 Others [2020] eKLR** to be persuaded to dismiss the application herein by virtue of **Section 46** of the **Retirement Benefits Act No.3 of 1997**, that parties are enjoined to refer any dispute to Alternative Dispute Resolution Mechanism before they approach the courts.

32. Lastly, by virtue of the court's lack of jurisdiction, the 2<sup>nd</sup> Respondent has submitted that the court should not grant any injunction as sought by the Plaintiff as he has not established a *prima facie* case for the court to intervene into the running of its operations and urges the court to strike out the Plaintiff's suit and allow its application dated **14<sup>th</sup> October, 2019**.

#### **ANALYSIS AND DETERMINATION**

33. I have considered the two motions together with the rival affidavits and submissions. I have also considered the relevant legal framework

and jurisprudence. I have established that in its Motion dated **14<sup>th</sup> October, 2019**, the 2<sup>nd</sup> Respondent has raised a question that relates to the jurisdiction of this court to entertain this matter. The 2<sup>nd</sup> Respondent contended that the Petitioner has ignored the Dispute Resolution Mechanisms provided for under the **Retirement Benefits Act** and under **Clause 27** of the relevant **Trust Deed**.

34. It is now a settled principle of our law that whenever a question of jurisdiction of a court is raised, the court must dispose of that question before dealing further with the matter. [see Samuel Kamau Macharia & Another –vs- Kenya Commercial Bank Limited & 2 Others [2012] eKLR].

35. The Plaintiff has filed a suit challenging the decision of the 2<sup>nd</sup> Respondent to dispose property **Plot No.1345/1/MN** an asset of the Scheme. The Plaintiff contend that he has lived on the property **since 1991** and as a member of the Scheme, he ought to have been informed of the sale of the said property and given first priority to purchase the said property, and that it is unfair that prices have been set at an astronomical high rate that he cannot afford. The Plaintiff is therefore dissatisfied with the Trustees' decision to dispose of the assets via **Tender Number KPAPS/PM/03/ 2019**.

36. The Supreme Court in 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) –vs- 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, has addressed at length the question of the court's jurisdiction over the disputes between trustee and its members, and held that the original jurisdiction as was held by the court lay with the Chief Executive Officer of the Retirements Benefits Authority by virtue of

**Section 46(1) of the Retirement Benefits Authority Act.**

37. **Section 46** of the **Retirement Benefits Act** provides for the procedure for dispute resolution relating to decisions made by managers, administrators, custodians or trustees of Retirement Benefits Schemes as follows:

#### **46. Appeals to the Chief Executive Officer**

**(1) 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.**

**(2) A copy of every request under this section shall be served on the manager, administrator, custodian or trustees of the scheme.**

38. **Section 48** of the **Act** further provides for an avenue of appeal against any decision made by the Chief Executive Officer of the Retirement Benefits Regulatory Authority pursuant to **Section 46**.

#### **48. Appeals to the Tribunal**

**(1) Any person aggrieved by a decision of the Authority or of the Chief Executive Officer under the provisions of this Act or any regulations made thereunder may appeal to the Tribunal within thirty days of the receipt of the decision.**

**(2) 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 manner as may be prescribed.**

39. Similarly, **Clause 27** of the **Trust Deed and Rules** of the 2<sup>nd</sup> Respondent provides the following dispute resolution mechanism:

**27. Arbitration Save where by this Deed or the Rules the decision of the Employer or the Trustees is made final, if at any time hereafter any dispute, difference or question shall arise between the Employer, the Trustees, the Members, Dependents, Pensioners or other persons or their personal representative or any of them respectively touching the construction, meaning or effect of this Deed or the Rules or any Clause or thing herein contained or the right or liability of the said parties respectively or any of them herein contained or the right or liability of the said parties respectively or any of them under this Deed or the Rules or otherwise howsoever in relation to the fund, then every such dispute or question shall be referred to arbitration, the result of which shall be final and binding upon all parties and the proceedings shall be regulated by the provisions of the Arbitration Act in force in Kenya at the time of such arbitration or any Law or instrument taking the place of such Act.**

40. It is clear from the above provisions of law and internal rules of the 2<sup>nd</sup> Respondent's Scheme that there are primary dispute resolution mechanisms which the Plaintiff has indeed ignored to pursue.

41. The courts have often stressed that where a certain procedure has been laid down to be followed by the Constitution or an Act of Parliament or by the parties, the said procedure should be adhered to strictly. See the Court of Appeal case **Speaker of National Assembly – vs- Njenga Karume [2008] 1KLR 425**.

42. That further to the above, the case of **Albert Chaurembo Mumba & 7 Others (supra)** at paragraph 155 held that the High Court does not have jurisdiction over disputes under the **Retirements Benefits Act** where a specialized mechanism has been provided by the

Constitution and/or statute. The Supreme Court stated as hereunder: -

**“...Once the parties became wary of the new constitutional dispensation after the year 2010 and sought to comply with it in purporting to transfer the case from the High Court, this should not have been done in isolation. The RBA Act was enacted in the year 1997 and was in existence by the time the suit was filed. It is our view, as already stated earlier in this judgment that the RBA Act mechanism was applicable. We add that that mechanism falls within the constitutional ambit as stated in Article 165(5)(b) of the Constitution for which the High Court cannot usurp the jurisdiction of a specialized mechanism provided for by statute and the Constitution. In a nutshell, we conclude that the High Court whether under the repealed or new constitution does not have jurisdiction...”**

43. The totality of the foregoing is that the Plaintiff's suit dated **8<sup>th</sup> October, 2019** is premature before this court.

44. In view of the above the Plaintiff's suit dated and filed on **8<sup>th</sup> October, 2019** is struck off. The 2<sup>nd</sup> Respondent's application dated **14<sup>th</sup> October, 2019** succeeds with regard to the jurisdiction of this court as provided for under **Section 46 and 48** of the **Retirement Benefits Act**.

45. There being a subsisting relationship between the Plaintiff and the 2<sup>nd</sup> Respondent, I direct that parties bear their own costs with respect to the suit.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 7<sup>TH</sup> DAY OF JULY, 2021.**

**D. O. CHEPKWONY**

**JUDGE**