



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISCELLANEOUS APPLICATION NO. 126 OF 2019

(CONSOLIDATED WITH NO. 147 OF 2019)

BENARD MUNYAO (Suing on his behalf and on behalf of the members of the Kenya Ports Authority Pension Scheme).....PLAINTIFF/APPLICANT

VERSUS

THE REGISTERED TRUSTEES OF THE KENYA

PORT AUTHORITY PENSION SCHEME.....DEFENDANT/RESPONDENT

RULING

1. Before me is a Chamber Summons Application dated and filed under certificate of urgency on 6th March, 2019 brought pursuant to Order 1 Rule 8 and Order 51 Rule 1 of the Civil Procedure Rules as well as Section 1A, 1B and 3A of the Civil Procedure Act CAP 21. The Applicant seeking to be granted Orders that: -

a) (spent)

b) That pending the reference of the matter to arbitration and its consequent hearing and determination, an order of temporary injunction do issue, restraining the Defendants by themselves, their servant agents from alienating, disposing off, transferring management of the pension properties including residential houses to property managers and/or any other person whomsoever and whatsoever.

c) That the matter be referred to arbitration in terms of the Trust Deed and Regulation of the Kenya Port Authority Pension Scheme.

2. The Application is premised on the grounds that the Plaintiff and other members of the Kenya Port Authority Pension Scheme who reside in houses owned and managed by the Defendant were issued with letters dated 11th and 14th February, 2019 which notified them that all pension Scheme houses would be put under the management of property managers and that the tenants do regularize their tenancies with the said managers on or before 15th March, 2019 or give vacant possession. The Plaintiffs' complaint is that they were never informed or consulted before the management of the property was transferred to property managers.

3. The application was supported by the affidavit of Benard Munyao sworn on the 6th March, 2019 and a supplementary affidavit sworn on 25th April, 2019. Those two affidavits reiterate the grounds on the face of the Application.

4. The Defendants are opposed to the Application and they rely on Grounds of Opposition dated 13th March, 2019, a Replying Affidavit sworn on 25th March, 2019 as well as a Further Replying Affidavit sworn on 12th June, 2019 by Maurice Mutia Munyao. In the three documents it is contended that the Defendant did not require the Plaintiffs to give vacant possession of the respective pension scheme houses occupied by them. It is equally not denied that by the said circulation dated 14th February, 2019, the Defendant notified the Plaintiffs to duly formalize their occupation of the relevant pension scheme houses with the pension scheme's duly appointed property managers on or before 15th March, 2019.

5. The Applicant also filed submissions in support of the Application. The Applicant submitted that the Trust Deed under clause 34 provides that any dispute involving the trust should be referred to arbitration. And that the Applicants had filed their Notice of Arbitration which is the first step towards initiating the arbitration process.

6. On the directions by the court, both parties filed written submission. The plaintiff's submissions are dated 25.04.2019 while those by defendant are dated the 22'05'2019.

7. In their submissions, the Applicants argued that the prayers they seek being in the nature of an injunction, the principles applicable to the grant of an interim injunction as laid down in the case of *Giella Vs Cassman Brown & Co. Ltd and Another* (1973) E.A. 358 had been met by their Application.

8. The Respondent on the other hand submitted that in so far as jurisdiction is concerned, this honourable Court lack jurisdiction and should not entertain the matter since The Retirement Benefits Act No. 3 of 1997 clearly outlines the procedure to be adopted and followed in the event a member of a scheme is dissatisfied with the decision of a trustee of the scheme. The Respondent also quoted section 46 of that statute which provides that any member dissatisfied with the decision of the manager, administrator, custodian or trustee of the scheme may request, in writing, that such decision be reviewed by the Chief Executive Officer and that therefore this matter should in the first place be dealt with under the Act.

9. On the merit, the Respondents submitted that the Applicants did not provide any iota of proof to substantiate the allegations raised and concerning the sale or disposal of the suit houses and that the Court should treat such as sweeping statement without seriousness. The Respondent also submitted that the Applicant has failed to demonstrate the conditions that warrant the grant of an interlocutory injunction and that the same should not be granted by the Court.

10. I have put into consideration the pleadings filed as well as the submissions by the two parties and have to the view and opinion that the following are the issues for Determination by this court: -

- i. Whether the Court has jurisdiction to hear and determine this suit and the Application?
- ii. Whether the Applicant has demonstrated to merit an injunction pending arbitration?
- iii. What orders should be made as to costs

Analysis and determination.

11. There being a challenge on the court's jurisdiction it is imperative that that hurdle be gone through first because without jurisdiction the court has no mandate to move one more step. It must down its tools. In **Kenya Ports Authority v Modern Holdings [E.A] Limited [2017] eKLR** the court of appeal in allowing an appeal on a point raised for the first time before it stated as follows;

“In our view, that remains the law and the earlier decisions including Kenya Ports Authority V Kuston (Kenya) Limited (supra) remain good law. We say, finally that where the Constitution or statute confers jurisdiction upon a court, tribunal, person, body or any authority, that jurisdiction must be exercised in accordance with the Constitution or statute. This has, time without number been stated by courts. We cite only two cases to demonstrate our point. Secretary, County Public Service Board & another v Hulbhai Gedi Abdille, Civil Appeal No. 202 of 2015, where this Court said;

“Time and again it has been said that where there exists other sufficient and adequate avenue or forum to resolve a dispute, a party ought to pursue that avenue or forum and not invoke the court process if the dispute could very well and effectively be dealt with in that other forum. Such party ought to seek redress under the other regime.”

12. In this matter it was contended without rebuttal that there are statutory provision setting out a procedure for dealing with disputes between a pensioner and a pension scheme. The defendant/Respondent has cited to court and relied on the provisions of section 46 of the Retirement Benefits Act, No of 1997 which provides: -

.46 (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.

13. In my opinion the statute creates an alternative dispute resolution mechanism that ought to be respected and exhausted before a party approaches the court. It is now called the doctrine of exhaustion of statutory remedies. In the Kenyan context I take the view that it finds a firm and solid foundation in no less a source but the constitution at article 159(2) c. In the decision of **Kenya Ports Authority vs Modern Holdings (supra)** the court of appeal clarified that such statutory provisions do not as such oust this courts unlimited jurisdiction but only postpones it. The court said: -

“It is, in our respectful view, a misapprehension of the law to argue that, to the extent that section 62 provides that, “where any person suffers damage, no action or suit shall lie”, that that section is inconsistent with the Constitution for limiting the right to access to justice. The provision does not at all oust the jurisdiction of the court but merely limits and postpones it in the first instance. By Article 165 (3) (e) and (6) the High Court retains both appellate supervisory jurisdiction. Article 165 (6), the High Court has supervisory jurisdiction:

“...over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function.....and may call for the record of any proceedings before any subordinate court or person, body or authorityand may make any order or give any direction it considers appropriate to ensure the fair administration of justice”.

14. I do therefore find that the court jurisdiction has been postponed and cannot be exercised until the statutory remedies are exhausted. With this finding the other issues isolated before for determination must take a back seat. The court cannot purport to take any extra-step when its jurisdiction is yet to crystalise.

15. In conclusion I do find merit on the challenge of the court’s jurisdiction which I uphold and order that the plaintiffs comply with the dictates of the Retirement Benefits Act. The application is thus adjudged to have been prematurely presented and I order that it be dismissed with cost.

Dated and delivered at Mombasa this 19th day of May 2020

P.J.O. OTIENO

Judge