



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC NO. E195 OF 2019

RIFT VALLEY RAILWAYS WORKERS UNION (K)PLAINTIFF

VERSUS

KENYA RAILWAYS CO-OPERATION.....1ST DEFENDANT

KENYA COMMERCIAL BANK.....2ND DEFENDANT

KEYSIAN AUCTIONEERS.....3RD DEFENDANT

KENYA RAILWAYS STAFF RETIREMENT

BENEFITS SCHEME.....4TH DEFENDANT

RETIREMENT BENEFIT AUTHORITY.....5TH DEFENDANT

THE GOVERNOR, NAIROBI COUNTY.....6TH DEFENDANT

THE CORPORATE TRUST PENSION

SERVICES LIMITED7TH DEFENDANT

RULING

INTRODUCTION

1. The plaintiff herein, Rift Valley Railways Workers Union (K) sued the defendants herein through the plaint dated 25th June 2019 seeking the following orders:

1. That the subject elections and/or meeting as have been convened by the purported Trustees be permanently stayed until as shall be called by the requisite organ and or institution with the requisite locus standi to so convene the said members meeting.

2. That a declaratory order to the effect that any decision and or process that may be presented, proffered or commenced in other quarters by parties herein or their agents directed at revamping the Pensioners Scheme, outside the process as in court, must have all the parties herein included and must be predicated on the said process as was seized by the court in the year December 2015, for the assumption of subsequent legitimacy.

3. That permanent stay of the sale of any of the Pensioners Assets itemized in the legal notice number 169 of 2006 in any manner by any of the respondents herein or their agents or persons acting for their agents until the process of constituting a new Board of Trustees as have been proposed by the applicants herein in applications in matter 2289 of 2015, as has been suggested by the purported sponsor is completed.

4. That cost be provided for.

2. Concurrently with the plaint, the plaintiff also filed an application seeking the same reliefs sought in the plaint *albeit* pending the hearing and determination of the main suit.

3. In response to the plaintiff's pleadings the 1st defendant filed a Notice of Preliminary Objection on 8th August 2019 wherein it lists the following grounds:-

1. This court is functus officio and has no jurisdiction to entertain the current application and the plaintiff's suit is presently instituted.

2. The plaintiff has no requisite locus standi to institute and prosecute the present suit and application.

3. The issue raised in the suit and the current application are resjudicata and sub judice in view of the decisions in Rift Valley Railways Workers Union V Kenya Railways Staff Benefit Scheme & 6 Others[2017] eKLR, and Rift Valley Railways Workers Union V Kenya Railways Staff Benefit Scheme & 6 Others[2018] eKLR.

4. The entire suit and the application herein are hopelessly incompetent, fatally defective and inadmissible and the same ought to be dismissed forthwith.

5. That the plaintiff's application and the entire suit is an abuse of the court process and that there is no competent suit before this Honourable court.

4. The 4th and 7th respondents similarly filed identical Notice of Preliminary objection on the following grounds:-

1. That this honourable court lacks the jurisdiction to hear and determine the suit and application as filed.

2. That the application as filed and the entire claim herein are both resjudicata and subjudice.

3. That the application and claim are frivolous, vexatious, baseless and scandalous.

4. That the claimants have no locus standi to bring this claim and they have no nexus whatsoever with the 4th and 7th respondents and their claims are thus non justiciable.

5. That the claim and application as filed herein are an abuse of the court process of the court, are fatally defective, incompetent and monumental legal nullity and inconsequential.

5. The 2nd and 3rd respondents opposed the application through 2nd respondent's Legal Manager's replying affidavit wherein they state that the 2nd respondent does not intend to sell LR No. 209/6506 Oldeani Crescent (hereinafter "**the suit property**") and that the orders sought will be in vain and an abuse of the due process of court.

6. The respondent's deponent states that the issues raised by the applicant concern its affairs with the 4th and 5th respondents that have nothing to do with the 2nd and 3rd respondents. It is the respondents' case that the 2nd and 3rd respondents should be excluded from these proceedings.

7. Through the Notice of Motion filed on 9th July 2019, the 1st defendant seeks orders to strike out the plaint and plaintiff's application dated 25th June 2019 on the basis that:-

i. The suit and the application are res judicata in view of the decisions in; Rift Valley Railways Workers Union (K) vs Kenya Railways Staff Benefit Scheme & another [2017] e KLR, and Rift Valley Railways Workers Union (K) vs. Kenya Railways Staff Benefit Scheme & 3 Others [2018] eKLR; and Rift Valley Railways Workers Union (K) vs Rift Valley Retirement Benefits Scheme & 6 Others [2018] eKLR.

ii. The plaintiff lacks the locus standi to institute and prosecute the present suit and application.

iii. The suit and the application are vexatious and amount to an abuse of the court process.

8. The application is supported by the affidavit of the 1st defendant's advocates **Mr. Isaac Kiche** who avers that even though the plaintiff is a Trade Union registered under the Labour Relations Act, 2007 with the sole purpose of regulating relations between employees, employers and/or employer organizations, the plaintiff purports to bring this suit on behalf of pensioners who are members of the Kenya Railways Staff Retirement Benefits Scheme (the 4th defendant herein) as that the said pensioners are no longer members of the plaintiff in which case, the plaintiff cannot purport to advance their grievances.

9. He further states that the plaintiff, being a Trade Union has no locus standi to bring an action on behalf of the retirees.

10. He further states that on 13th October 2017, Honourable Abuodha J. delivered a ruling in ELRC Miscellaneous Civil Application No. 783 of 2017 **Rift Valley Railways Workers Union (K) v Kenya Railways Staff Benefit Scheme & another** wherein he dismissed the application on the ground that the claimant had no locus standi to bring an application on behalf of beneficiaries of Kenya Railways Retirement Scheme members as trade union should agitate on behalf of employees and not retirees.

11. He confirms that in one of the matters filed by the plaintiff at the Employment relations Court ELRC No.1625 of 2017 **Rift Valley**

Railways Workers Union (K) v Kenya Railways Staff Benefit Scheme & 3 others, Wasilwa J. delivered a ruling on 31st May 2018 in which she found that the claimant (the plaintiff herein) had not explained its relationship with the pensioners on whose behalf it purported to bring the claim and thus lacked locus standi.

12. He further states that he is aware that the plaintiff in this suit seeks inter alia, permanent stay of the sale of any of the pensioners assets itemized in legal notice No. 169 of 2006 and that the plaintiff herein filed *ELRC Cause No. 2289 of 2015 Rift Valley Railways Workers Union v Rift Valley Retirement Benefits Scheme & 6 Others* which is still an active matter at the Employment and Labour Relations Court. He avers that the plaintiff herein has filed two applications seeking to stop the sale of that of the properties in Legal Notice No. 169 of 2006 and that one of those applications has been determined and one is still pending. He attached a copy of the pending application to the replying affidavit as annexure marked “**IK-1**”.

13. He states that on 26th October 2018, Lady Justice Maureen Onyango delivered a ruling with respect to one of the plaintiff’s application in *ELRC Cause No. 2289 of 2015 Rift Valley Railways Workers Union v Rift Valley Retirement Benefits Scheme & 6 Others* seeking to halt the impending auction of the scheme’s properties. In the said ruling, the Judge listed all the causes initiated by the plaintiff herein and found the application to be res judicata and accordingly dismissed the same.

Preliminary objections.

14. Parties filed written submissions to the preliminary objections which their respective advocates highlighted at the hearing of the hereof. This ruling is therefore in respect to the said preliminary objections which can be summarized to be on three main points namely; the doctrine of *res-judicata*, the plaintiff’s *locus standi* and the court’s *jurisdiction* to hear and determine the matter.

Res judicata/locus standi

15. The plea of *re judicata* is provided for in section 7 of the Civil Procedure Act (CPA) which reads:

“No court shall try any suit in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim litigating under the same title, in a court competent to try such subsequent suit or in which such issue has been subsequently raised, and has been heard and finally decided by such court.

16. From the above provision, it is clear that the plea of *res judicata* is applicable only where the former judgment was;

- (a) That of a court of competent jurisdiction.**
- (b) Directly speaking upon the matter in question in the subsequent suit and;**
- (c) Between the same parties or their privies.**

17. The conditions which must be satisfied before Res judicata can successfully be pleaded can be summarized as follows;

- (i) The matter is directly and substantially in issue in the subsequent suit or issue must be the same matter which was directly and substantially in issue in the former suit.**
- (ii) The former suit must have been a suit between the same parties or between the same parties under whom they or any of them claim.**
- (iii) Such parties must have been litigating under the same title in the former suit.**
- (iv) The court which decided the former suit must have been a court competent to try the subsequent suit or the suit in which such issue is subsequently raised.**

18. There are at least three broad socially desirable ends served by the doctrine of *res judicata* namely;

- (a) The principle protects litigants from harassment through re-litigation of the same claims or issue.**
- (b) It helps to preserve the prestige of courts by avoiding inconsistent judgments.**
- (c) it saves the time of courts which could be spent on repetition of litigation.**

19. The defendants argued that the instant suit is res-judicata having been determined by different courts in other proceedings. In this regard the 1st defendant’s deponent referred to proceedings between the same parties herein being;

- a) ELRC Miscellaneous Civil Application No. 783 of 2017 which was dismissed on the basis that the claimant lacked the locus standi to bring the application on behalf of the beneficiaries of the Kenya Railways Retirement Scheme members as a trade union should agitate on behalf of employees and not retiree.**

b) ELRC No. 1625 of 2017 wherein Wasilwa J. found that the plaintiff had not explained its relationship with the pensioners on whose behalf it purportedly brought the claim and thus lacked the locus standi.

c) ELRC 2289 of 2015 which is still an active matter at the Employment and Labour Relations Court wherein the plaintiff has filed applications to stop sale of the suit property herein.

d) ELRC No. 2289 of 2015 seeking to halt the impending auction of the schemes properties. In the said matter, Onyango J. found that the application is res judicata and accordingly dismissed it.

20. In a rejoinder to the defendant's submissions, the plaintiff's representative, **Mr. Munayi**, conceded that there is a live matter over the same subject matter before the ELRC which was referred to the Tribunal but that the matter can be heard before this court as the subject matter of the dispute is commercial in nature.

21. My finding is that it is not in dispute that there are at least 4 different cases before the ELRC (hereinafter "**the ELRC cases**") between the plaintiff herein and the defendants. The subject matter of the ELRC cases is the impending auction of suit property which is the same as the subject matter of this case. It was also not in dispute that different courts have pronounced themselves on the application to stop the intended sale of the suit property especially in regard to the locus standi of the plaintiff to bring the instant suit.

22. In the present suit just like in the cited ELRC cases, the defendants challenged the locus standi of the plaintiff to institute the suit on the basis that the plaintiff, as a Trade Union, has no relationship with the 4th defendant which is a scheme for retirees, not employees.

23. Having regard to the above stated principles of the *res judicata* doctrine and applying the same to the present case, I find that different courts having already rendered themselves, in the ELRC cases, on the issue of the plaintiffs locus standi to institute this suit and having found that the plaintiff's lacks the locus standi, it is not open for the plaintiff to file a fresh suit before this court seeking the same orders that other courts, of equal jurisdiction, had already found that it lacks the locus standi to institute.

24. I note that when faced with a similar application to restrain the respondents from selling the suit properties in ELRC 2289 of 2015, which I have already referred to in this ruling, Onyango J. rendered herself as follows on the twin issues of locus standi and res judicata:

"I further perused the decision of Radido J. dated 16th February 2018 in which the subject matter and prayers were similar to this one but with reference to three properties which are among those listed in Legal Notice No. 2006, the subject matter of the present application. Radido J. held as follows –

"The application is therefore in vacuo and drawing from the holding by Ringera J in Kihara v Barclays Bank (K) Ltd (2001) 2 EA 420 in dismissing as incompetent an application for injunction when no such injunction was sought in the Plaint (situation here is worse as there is no Statement of Claim/Memorandum of Claim), I would conclude that on that single ground, the application is unmerited.

Two, there is material before Court that the Union in Cause No. 783 of 2017, Rift Valley Railways Workers Union (K) v Kenya Railways Staff Retirement Benefits Scheme & Ar. had moved Court seeking

1. ...

2.

3. That the Respondent's intended process of Sale of the Pensioners Asset Number LR/Number 209/6507 measuring 3.4 acres Matumbato Road Upper Hill area of Nairobi County be stayed until the issues as brought out in this application are heard and determined.

4. ...

In the very same file, the Union filed a Misc. Application No. 99 of 2017 seeking –

1. ...

2. ...

3. That the intended sale of the pensioners asset LN 209/378/5 measuring 0.48 acres located along woodland lane off Jabavu road Argwings Kodhek Road Hurlingham Estate Nairobi be stayed until the issues as are brought out in this application are heard and determined.

The applications were heard and in a ruling delivered by Abuodha J on 13 October 2017, the Judge held that the Union did not have locus standi to prosecute a claim over the properties in contention.

A Court of concurrent jurisdiction having determined that the Union could not litigate in respect of the named property (ies), this Court cannot by the stretch of our liberal Constitution admit a re-litigation over the same property (ies).

Three, Ndolo J had in a ruling delivered on 19 August 2016 in Cause No. 2289 of 2015, Rift Valley Railways Workers Union (K) v Kenya Railways Staff Retirement Benefits Scheme found and held that the parties had not exhausted the dispute resolution mechanisms established under the Retirement Benefits Act and thus declined jurisdiction and directed the parties to exhaust the mechanisms under that Act (the Union has legal representation in the Cause).

Despite the ruling, the Union went ahead to file another application in Cause No. 29 October 2017 seeking similar injunctive relief.

It appears from the record that the Union filed an Appeal being Retirement Benefits Authority Tribunal Civil Appeal No. 5 of 2016 which is still pending.

The Union might have genuine grievances but the route it is taking is prone with legal risks which may have unintended consequences on its capacity and ability to prosecute the complaints.

Considering that it has legal representation in one of the Causes, it should seriously take legal advice on how to conduct the pending litigation, both in this Court and before the Retirements Benefits Authority Tribunal.

As for the present application, the Court finds that it not only lacks merit but borders on abuse of the Court process. It could as well be vexatious.”

I would agree with my brother Radido J. that like the application he was dealing with the present application borders on abuse of court process and could as well be vexatious due to the number of pending as well as determined litigation over the same subject matter.

This takes care of issues no. 2 and 3.

Whether the claimant is entitled to the prayers sought

Having found that the prayers sought herein have been sought and refused before in several applications and suits, I must agree with the respondents and Interested Parties that the application is res judicata, that the claimant/applicant has suffocated the respondents with suits on similar grounds and that the claimant’s actions border on vexation of the respondents and Interested Parties and abuse of court process.”

25. Having regard to the above findings by Onyango J. I find that this court cannot reinvent the wheel and come up with a different verdict or deliberate on a matter that has been conclusively determined by a court of competent and equal jurisdiction. Needless to say, this latest attempt by the plaintiff to present the same application that has already been adjudicated upon by several courts amounts to an abuse of the court’s process.

26. I therefore reiterate the findings of my colleague judges in the ELRC Justices Abuodha, Wasilwa, Radido and Onyango in the cited ELRC cases that the plaintiff herein lacks the locus standi to bring this suit in behalf of the beneficiaries of the 4th defendants.

Jurisdiction

27. My findings on the issues of locus standi and resjudicata would have been sufficient to determine this matter but I am also minded to consider the issue of the jurisdiction of this court to hear and determine this suit.

28. While relying on the doctrine e of exhaustion, the 4th defendant argued that in view of the fact that the plaintiff’s grievance concerns the operations of the pension scheme especially in respect to the management of its elections and properties, Section 46 of the Retirement Benefits Authority Act, (RBA Act) provides for the procedure for challenging such decisions.

29. The 4th defendant observed that in a similar dispute between the same parties being ELRC 2289 of 2015 Ndolo J. declined to assume jurisdiction on the basis that there exists a dispute resolution mechanism provided for under the Retirement Benefits Authority Act. Section 46 of the Retirement Benefits Authority Act stipulates as follows:

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.

30. I have perused the Ruling by Ndolo J. delivered on 19th August 2016 in ELRC 2289 of 2015 and I note that the said judge in declining jurisdiction held as follows:

“15. The question on the jurisdiction of this Court to entertain the Claimant’s claim stems from provisions of the Retirement Benefits Act. Section 46(1) of the Act provides that a member of a scheme who is aggrieved by a decision affecting the running of a scheme may apply for review to the Chief Executive Officer of the Authority.

16. Further, Section 47 establishes the Retirement Benefits Appeals Tribunal to which appeals from decisions of the Authority and the Chief Executive Officer lie.

17. Section 12 of the Employment and Labour Relations Court Act confers jurisdiction on this Court to hear and determine employment and labour relations matters. It is my view however that this provision must be read together with other statutes dealing with matters falling within the general jurisdiction of the Court.

18. The 1st and 3rd Respondents as well as the 4th Interested Party submit that this Court has no jurisdiction at all to deal with disputes arising from retirement benefits schemes. I do not agree with this particular view. This Court, being of equal status with the High Court has supervisory jurisdiction over tribunals dealing with employment and labour relations matters. The Retirement Benefits Appeals Tribunal would fall under this category. I do not think however that this entitles a party to come to this Court before exhausting the dispute resolution mechanisms provided under the Retirement Benefits Act.

19. As held by Mumbi Ngugi J in Tom Kusienya & Others v Kenya Railways Staff Retirement Benefits Scheme (Petition No 353 of 2012) and Daniel Owuor Obop & 2 Others v Retirement Benefits Authority (Petition No 159 of 2012) parties cannot circumvent the dispute resolution mechanisms established under the Retirement Benefits Act and come to court directly.

20. I have looked at the Claimant's pleadings in this light and have reached the conclusion that the dispute resolution mechanisms established under the Retirement Benefits Act have not been exhausted and the claim is therefore prematurely before the Court.

21. That being the case, the Court must decline to exercise jurisdiction and refer the matter for resolution under the Retirement Benefits Act."

31. Having noted the decision by Ndolo J. on the issue of jurisdiction, this court is taken aback by the plaintiff's latest attempt to re-litigate the same matter before this court when the court had already declined jurisdiction and held that the plaintiff's grievance ought to be referred to resolution under the Retirement Benefits Act. The plaintiff has not demonstrated that it has exhausted the dispute resolution mechanism provided for under Section 46(1) of the Retirement Benefits Authority Act and I therefore find that this court lacks the jurisdiction to entertain this suit.

32. For the above reasons, I find that the preliminary objection raised by the defendants herein is merited and I allow it with the result that the plaintiff's suit and application dated 25th June 2019 are hereby struck out with costs to the defendants.

Dated, signed and delivered via Microsoft Teams at Nairobi this 14th day of May 2020 in view of the declaration of measures restricting court operations due to Covid -19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April 2020

W. A. OKWANY

JUDGE

In the presence of:

Munayi Isaac for Applicant

Dachi for 1st Defendant

Dachi for Opakas for 5th Defendant

Saini for 4th Defendant

Kamande for Prof.Muma for 1st Respondent & Interested Party.

C/A & DR Hon Wanyama

W. A. OKWANY

JUDGE