



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 88 OF 2018**

1. ALICE ANYONA MUMO
2. ANDREW MWAMBINGU THOMAS
3. ASNATH N. CHEPKWONY
4. ATHANAS KILENGE KISUMBA
5. AYUB KABURUM NKANATHA
6. BATHOLOMEN KITAU MWAGHESHA
7. BEATRICE KODODA
8. BEATRICE NGIMA GICHUKI
9. BEATRICE NTHENYA KYALO
10. BENEDICT GICHUHI NGATIA
11. BETTY GATAKAA KARIUKI
12. BONIFACE MUNYINYI MUKURIA
13. CAROLINE A. MUENI NZIOKA
14. CAROLINE WANJIRU MBUGUA
15. CATHERINE WAITHIRU MATAHA
16. CHARLES MAGONDU WAICHINGA
17. CHALRES MUHUNI MURIITHI
18. CHARLES ODONGO OPONDO
19. CONSLATE OTIENO AUYA
20. DAVID AKUNDA OSOTSI
21. DENNIS OGOTI ORINA
22. DINAH WANJIRU MAKERI

23. DONALD MBOGHOLI MKONGO
24. DAN NGURI NGUCHU
25. DUNCAN SAMUEL MACHARIA
26. ELIZABETH AWINO ONYANGO
27. ELIZABETH NDURU RIUNGU
28. ESTHER CHEPKURUI CHEPKWONY
29. ESTHER KAREN AWUOR
30. ESTHER MUMBUA KYEVA
31. ESTHER N. MBUGUA
32. ESTHER NJERI GITHAGUI
33. FARAJI FADHILI MDAWIDA
34. FELIX MWAMBURI MWADIME
35. FESTUS RUNGUMA MUGAMBI
36. FLORENCE AOKO NG'ONG'A
37. FLORENCE ATIENO ODHIAMBO
38. FLORENCE D. KIAMBA
39. FRANCIS LINUS EMUKULE
40. FREDRICK NJOKA KABUNGO
41. GEDION MUIA SILA
42. GEORGE KIRIGI THOGO
43. GEORGE MULWA SILLA
44. GEORGE OGEMA BILY
45. GERALD MUGO KANGANGI
46. GRACE RIMA ABURU
47. GRACE TIMPIYIAN ROIMEN
48. GRAHAM WALIAULA SOITA
49. GRAVILLE MKULA MSHOTE
50. GREGORY TIBERIOUS MAERA
51. HELLEN MUGAMBI
52. HELLEN OUYA
53. HUNDSON MAYAKA NYOKWOYO
54. JACKTONE OTIATO SEWE

55. JAMES KARWE MWANGI
56. JAMES MUTEGI KAMUNDE
57. JAMES NYAKERI NYARONDIA
58. JSAON NGURI NJIRU
59. JENNIFER WANJIRU KIARIE
60. JEREMIA KOBIA
61. JOHN NYABUTO
62. JOHN KUNGU GACHERU
63. JOHN MARTIN AMBETSA
64. JOHN MURIUNGU ITONGA
65. JONATHAN S. KIROREI
66. JOSEPH GITURU KIGUTU
67. JOSEPH KILILO MWAGHAZI
68. JOSPEH KIPLILACH
69. JOSEPH MWAI KARIUKI
70. JOSEPH WAINAINA MWICIGI
71. JOSEPHAT MAUNDU WAMBUA
72. JOSEPHINE WANJIRU KARIGE
73. JOSHUA KIMETO
74. JOYCE JAMES
75. JOYCE MWIKALI MUINDI
76. JOYCE NJERI MWAURA
77. JULIUS WARUI
78. JUSTINA WAYUA NGUSU
79. KEN WILLIAMS GACHURU
80. KENNEDY ODERA
81. LORAIN W. MAINA
82. LUCY NGANGA
83. LUCY WANJIRU KIRUHI
84. LUCY WANJIRU MBUGUA
85. MARGARET NJERI WOKABI
86. MARGARET MUGURE MWORIA

87. MARY F. K. MUROKI
88. MARY GITHUI
89. MARY MWIKALI KIVUWA
90. MARY WAMBUI WAHOME
91. MICAH OCHWANG'I
92. MICHAEL NGATIA NDAMBUKI
93. MOSES KARIUKI
94. MOSES OTIENO OWEYA
95. MUKAMI MUNGE
96. NANCY NYAERA NYANG'AU
97. PAUL MUKUMU MBUGUA
98. PAUL OCHIENG WAUDI
99. PAUL A. OTIENO
100. PAULINE KATUNGE
101. PENINA GESARE NYAKANGA
102. PETER GITONGA KARUTHIRU
103. PETER GITUNGO WAKABA
104. PETER KUNI MIIO
105. PETER L. MWNAGI
106. PETERSON WANGAI MURAGE
107. RUKIA SAID RASHID
108. ROSEMARY W. BICHAGE
109. REUBEN KIPKORIR A. SEREM
110. REVEL KINYANJUI NDUNG'U
111. RHODA MUTHOKI KIOKO
112. RICARDA WANJIRA GUTU
113. RICHARD KIPROP KIPTOO
114. RICHARD LEPOSO
115. ROSE NDERITU KANGELA WANGARI
116. ROSEMARY THUKU
117. RUTH NYAMBOKE SAGWE
118. SALMA SEIF SULEIMAN

119. SAMUEL ISOE
120. SAMUEL KARAMJA KAGWI
121. SAMUEL KARANJA MURIAKIARA
122. SHOLA NJAMBI GICHURU
123. SCHOLASTICA NYAGUTHIE MUTURI
124. SCOLASTICA MWIKALI ONCHONGA
125. SEBASTIAN NJUE
126. SOLOMON MUHOYA MATHENGE
127. SOLOMON ONYANGO ODIDI
128. SOPHIE M. NDALANA
129. STANISLOUS KUMBA NZETI
130. STELLA KINANA KIRIMI
131. STELLA M. ILLUMBA
132. STEPHEN MUSYOKI MUSANGAO
133. TABITHA BITHE SUKALI
134. THOMAS NJAGI GUTU
135. TOWETT MBATHI KAMUKWA
136. VIRGINAIA WANJIRU GETATA
137. WILFRED SIMON HARE
138. WILSON NZUKI KAVEKE
139. WILSON SAMSON ODUOR
140. WINFRED KAGOMBE
141. ZAKAYO OBWAYA
142. STEPHEN M. MURIUKI GATWAGI
143. SERAH SAMATO ROIMEN
144. THOMAS NYAKAMBA OKONGO
145. NORAH NYABOKE OGETO
146. SHENAN GACHEKE KAMOTHO
147. EPHANTUS W. NGOCHI
148. HASSAN MALIBE MOROWA
149. FRANCIS OCHIENG OWINO
150. ESTHER WAMBUI GITHAIGA

151. ELVIS TOLE RIGHA
152. DRCAS MKUNGUSI
153. ANNE CHEPKURUI MULU
154. JANE WANJIRU NGENGA
155. JHN STEPHEN OTWANE
156. JACINTA AKINYI MZEE
157. BOAZ PHILIP OUMA
158. JAMES KAMAU KIBATHI
159. MARION GATUMWA MWORIA
160. HUTCHINSON WAHOME KAROGO
161. NELLY WAVINYA
162. EDWARD MWANGI KAMAU
163. IRENE NJERI KAMAU
164. JAMES MBUGUA KIIRU
165. JOSEPH MWANGI MAIRUNGI
166. NELSEN KITELE
167. JOSEPH WANG'ANG'A
168. PHILIP KENYA
169. RITA NALIAKA
170. ABRAHAM MACKIE MUTISYA KILONZO
171. ALICE WAKIURU MAU
172. ANGELO MUNENE WACHIURU
173. ANNE NYAMBURA MACHARIA
174. ANNE WANGARI THIONGO
175. ANNE WANGUI MATU
176. ANTHONY A. J. M. NJAU
177. CATHERINE WANGUGU NJOGU
178. DAVID K. KAMAU ASHFORD
179. DIANAH WAMVUA GONAH
180. HANNAH N. WAMBUI
181. GABRIEL L. WANGUI MUNGAHU
182. ISHMAEL NYAMBU MWANDAWIRO

183. JAMES CHEGE THIONGO
184. JANE WAIRIMU NGANGA
185. JOHN MUTISYA MUINDE
186. JOSEPH KAKOLE
187. JOSEPH KAMAU GICHUKI
188. JOYCE KIUNGA ISAIA
189. LOISE MUTHONI GIKONYO
190. MARY WATARE KIUMI
191. MERCY NJOKI KINYUA
192. MILDRED KAREN SANDE
193. NAHASHON WAWERU KAMAU
194. OMWENGA EUNICE MORAA NYARIBU
195. PAUL N. KITEMA
196. PETER M. MWANGI
197. PETER NGANGA KARIUKI
198. PHILIP P. NJAGI
199. RACHEL NYAMBURA GICHIA
200. ROSE OCHINGWA
201. RUTH WATHARA NJATHIKA
202. SAMUEL MUNYAU NZIOKA
203. STELLA JANET NZISA KITALE
204. TERESIA WANGUI KANILI
205. VERONICA WANJIKU KING'ORI
206. VINCENT KIBOI WAKABA
207. ZIPORA JALEGA MUSALIA
208. CELESTINE ROBERT SUTI
209. JOHN NGARI THIONGO
210. MOSES O. ONDINGO
211. WANJALA MARTIN KISOMBE
212. JACKSON KALYA KENDUIYWO
213. NEHEMIA ONYANGO ONYANGO
214. OLIVIA PENIAH OWUOR

215. PRISCA JERONO KAOKO

216. DAVID OMONDI OKEBIRO

217. DICKSON OPOLO OKUMU

ALL SUING AS.....PETITIONERS

VERSUS

THE ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT

HON. HENRY ROTICH

CABINET SECRETARY FOR FINANCE.....2<sup>ND</sup> RESPONDENT

NZOMO MUTUKU, ACTING D.E.O.

RETIREMENT BENEFITS AUTHORITY.....3<sup>RD</sup> RESPONDENT

### JUDGMENT

1. The 217 Petitioners are retirees of the Co-operative Bank of Kenya Limited, Housing finance company of Kenya Limited, Kenya Post and Telecommunications Corporation, National Museum of Kenya and Nairobi water and Sewerage Company Ltd. They filed this Petition against the Attorney General, the Principal Legal Advisor to the Government and Legal Representative of the National Government in Civil Proceedings in which the National government is a party, and the Cabinet Secretary in-charge of Finance, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents respectively.

2. The Petitioners aver that on leaving their employment in the various organizations, they lodged various claims regarding their underpaid pension benefits with the Retirement Benefits Authority and later with the Retirement Benefits Appeal Tribunal, a body that is supposed to be constituted by the 2<sup>nd</sup> Respondent.

3. The Petitioners further aver that their claims were lodged pursuant to section 46(1) of the Act and by virtue of section 48, being dissatisfied with the decision of the Authority; they appealed to the tribunal which is established under section 47 of the Act.

4. It is the Petitioner's case that since the expiry of the term of members of the tribunal in 2017, the 2<sup>nd</sup> Respondent has not appointed members as required, with the effect that the Petitioners' appeals cannot be heard in the absence of members of the tribunal. It is the Petitioners' further case that as a result of the 2<sup>nd</sup> Respondent's neglect in appointing members of the tribunal, they have been denied the right of access to justice since their appeals cannot be heard in the absence of members of the tribunal.

5. The Petitioners therefore sought the following reliefs:

*(a) A declaration that the 2<sup>nd</sup> Respondent has breached the Petitioners' constitutional and fundamental freedoms enshrined in Articles 22, 23, 44, 47, 48, 57, 73, 75 and 159 of the Constitution.*

*(b) A declaration that the 2<sup>nd</sup> Respondent is not fit and proper person with due regards to their conduct (sic) dignity personal integrity and suitability to hold public offices.*

*(c) An order directing the 2<sup>nd</sup> Respondent to discharge his statutory duty to reconstitute the Retirement Benefits Appeal Tribunal under section 47 of the Retirement Benefits Act*

*(d) Alternatively, an order directing that the pending cases at the Tribunal filed by the Petitioners be transferred to the Employment and Labour Relations Court for hearing and disposals.*

*(e) Costs of the Petition be borne by the Respondents.*

#### **Respondents' response**

6. No response on behalf of the Respondents is on record.

#### **Petitioners' submissions**

7. Miss Maina, learned counsel for the Petitioners, relied on their written submissions dated 8<sup>th</sup> November, 2018. She added that failure to appoint members of the tribunal has in effect violated and continues to violate the Petitioners' rights of access to justice. In the counsel's view, the Petitioners are advanced in age and members of a vulnerable group whose rights continue to be violated.

8. In their written submissions the Petitioners submitted that there is no reason or excuse given by the 2<sup>nd</sup> Respondent for not appointing members of the tribunal and, therefore, this is a dereliction of his statutory duties which has had a detrimental effect on the Petitioners' rights. They submitted that Article 48 of the Constitution protects their right of access to justice which right should not be unreasonably denied; that the Petitioners have a constitutional right and legitimate expectation that their appeals to the tribunal under section should be heard and determined without delay and that the 2<sup>nd</sup> Respondent while exercising his authority and powers under the Act, is subject to the standards prescribed under Chapter 6 of the Constitution.

9. According to the Petitioners, a considerable period has lapsed without action being taken by the Respondents to ease the Petitioners' concerns. In the Petitioners' view, the delay in appointing members of the tribunal has denied them the right to fair hearing and, as such, the Respondents have violated and continue to violate the Constitution and the law. They relied on the Supreme Court decision in *Kenya Wildlife Services v Agricultural Corporation* (Petition No. 11 of 2015) for the submission that where a statutory obligation is imposed on a person, such obligation cannot be abdicated by that person even if it is expressly permissible under the constitution or statute to do so.

10. On what amounts to access to justice, the Petitioners relied on *Okeyo Omwansa George & Another v Attorney General & 2 Others* (Petition No. 126 of 2011) with regard to the definition of the phrase 'access to justice'.

11. The Petitioners further submitted that the 2<sup>nd</sup> Respondent's inaction violates their right to a fair administration guaranteed under Article 47 of the Constitution and relied on the decision in *Dairy Associates Ltd v Capital Markets authority and Another* (Petition No. 328 of 2011). The Petitioners argued that their right to fair administration has been violated since they are unaware of the reasons why the tribunal has not been constituted.

### ***Respondents' submissions***

12. Mr. Mombo, learned counsel for the Respondents, relied on their written submissions dated 6<sup>th</sup> November 2018 and filed in court on 7<sup>th</sup> November 2018 and urged the court to dismiss the Petition.

13. In the written submissions the Respondents argued that the court cannot declare the 2<sup>nd</sup> Respondent unfit to hold public office. It is their submission that section 42 of the Leadership and Integrity Act provides that a person who alleges that a state officer has committed a breach of the code, is required to lodge a complaint with the relevant public entity (the Ethics and Anti-Corruption Commission) which has then to enquire into the complaint. It is their further submission that section 43 provides what has to be done where investigation discloses that either civil or criminal proceedings ought to be instituted against the state officer concerned. They argued that the order sought to declare the 2<sup>nd</sup> Respondent unfit to hold public office cannot therefore be granted. They relied on *Benson Ritho Mureithi v J. Wakhungu & 2 Others* [2014] e KLR and *Speaker of the National Assembly v James Njenga Karume* [1992] e KLR.

14. On whether the cases should be referred to the Employment and Labour Relations Court, the Respondents contend that the *ELRC* cannot replace the tribunal. In the Respondents' view, where there is a procedure for redress of any particular grievance prescribed by the Constitution or statute, that procedure should be followed. They relied on *Hadkinson v Hadkinson* (1952) 2 ALLER and *Speaker of the National Assembly v James Njenga Karume* (Supra).

15. They contended that under Articles 162 (2) and 165 (5) of the Constitution, the matters reserved for the *ELRC* are Employment matters only and, therefore, *ELRC* cannot substitute the tribunal.

### ***Determination***

16. I have considered the petition, submissions made on behalf of the parties and the authorities relied on. The Petition raises one fundamental issue, namely; whether the 2<sup>nd</sup> Respondent is in a dereliction of his duty in failing to appoint members of the tribunal and depending on the answer to this issue, and whether as a consequent he has violated the Petitioners right to access to justice.

17. The facts of this petition are not in dispute. The Petitioners plead that they were employees of various organizations and on leaving employment, they lodged claims with the Retirement Benefits Authority over what they say was unfair or under paid pension benefits. The claims were lodged as required by section 46(1) of the Act. On the Authority making decision, they lodged appeals with the Retirement Benefits Tribunal, established under section 47 of the Act.

18. The Petitioners contended, however, that their cases have not been heard by the tribunal simply because the tribunal's mandate expired in February 2017 and to date the 2<sup>nd</sup> Respondent has not appointed members to the tribunal and for that reason, there is no tribunal in place. The Petitioners therefore argued that this has violated their rights of access to justice since their appeals cannot be heard and determined in the absence of members of the tribunal. They argued that the 2<sup>nd</sup> Respondent has violated the law, their rights, is in dereliction of duty and is not fit to hold office.

19. The court has not been able to trace the Respondents' response to the petition at least from the record. Even in their oral submissions the Respondents' counsel did not allude to any response having been filed. They however filed written submissions which I have carefully gone through. I am not able to trace any submission on whether members of the tribunal have been appointed or not, and if not why this has not been done.

20. The Retirement Benefits Tribunal is established under section 47 of the Act under which members are appointed. The section states that the Minister shall by order published in the Gazette establish an Appeals Tribunal to hear appeals under the Act. The Tribunal consists of a chairperson and four members appointed by the minister to hold office for three years. The chair person should be an advocate of the High Court of not less than seven years standing while quorum should be the chairperson and four members. Under section 48(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.

21. The Petitioners have argued that the term of the previous team expired in February 2017. Whereas this petition was filed on 12<sup>th</sup> March 2018 one year after expiry of the term of the members of the tribunal, no action had been taken to reconstitute the tribunal. Even at the time of hearing of this petition, the 2<sup>nd</sup> Respondent had not discharged his statutory obligation. In the absence of any explanation on the part of the 2<sup>nd</sup> Respondent for his failure to act as required by law, I take it that the Respondents have no answer to the Petitioners' claim. I therefore hold that the 2<sup>nd</sup> Respondent is in dereliction and abdication of his duty.

***Whether Petitioners' right of access to justice has been violated***

22. The law requires anyone aggrieved by the decision of the authority to appeal to the tribunal established under section 47 of the Act. The Petitioners argued that they filed appeals before the tribunal but their appeals have not been heard due to the absence of members of the tribunal. Appointment of members of the tribunal is a statutory function of the 2<sup>nd</sup> Respondent. The mandate of the tribunal is to hear appeals, a procedural of law that is to be followed before one can access the mainstream court system in the event there is need to have any dispute resolved by the court. An aggrieved party cannot readily access the court without going through the procedure laid down in the statute.

23. In that respect, it is important to appreciate the position as stated by the Court of Appeal in *Speakers of the National Assembly v James Njema Karume* (Supra) that ***"where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed."*** It is therefore an established principle of law that a party may not access the High court where there is an alternative remedy available for resolving such a dispute or procedure provided for like in the petitioners' case through the tribunal.

24. The 2<sup>nd</sup> Respondent has not discharged his statutory obligation as required by law. He has not explained as he has not done so and he has not given any explanation or justification to this court for his inaction. He has simply remained silent leaving everyone to guess what.

25. The petitioners have argued that the 2<sup>nd</sup> Respondent's inaction has had the effect of violating their right of access to justice; that failure to appoint members of the tribunal has stalled hearing of their appeals and as a result, they cannot access justice, a right guaranteed by Article 48 of the Constitution. Article 48 grants every person the right of access to justice. It enjoins the state to ensure access to justice for all.

26. In *Dry Associates Limited v Capital Markets Authority and Another* [2012] e KLR, the court addressed the issue of access to justice stating:

***"[110] Access to justice is a broad concept that defies definition. It includes the enshrinement of rights in the law; awareness of and understanding of the law; easy availability of information pertinent to one's rights; equal right to the protection of those rights by law enforcement agencies; easy access to the justice system particularly the formal adjudication processes; availability of physical legal infrastructure; affordability of legal services; provision of a conducive environment within the judicial system; expeditious disposal of cases and enforcement of judicial decision in without delay."*** (Emphasis).

27. One of the fundamental values of the right of access to justice is quick disposal of disputes which cannot be achieved in the absence of a tribunal contemplated under section 47 of the Act. Apart from Article 48 which provides for access to justice, Article 159(2)(a) and (b) of the Constitution restates the principle of quick disposal of disputes thus;

***"In exercising judicial authority, the courts and tribunals shall be guided by the principle that (a) justice shall be done to all irrespective of status. (b) justice shall not be delayed."***

28. Resolving disputes without delay is a constitutional principle that justice should be dispensed without delay and therefore it binds every person as demanded by Article 10 because it is an incidence of the rule of law and human rights. The fact that the petitioners' cases are still pending before a nonexistent tribunal because its members are yet to be appointed more than two years since the term of the previous team expired, with no prospect of their appointment in the near future, means the Petitioners' cases will not be heard that soon. This, in my view, is a clear violation of the Petitioners' constitutional rights to access justice and have their disputes resolved without delay and therefore contravenes Articles 48 and 159(2)(b) of the Constitution.

29. The 2<sup>nd</sup> Respondent is a state officer who should act in accordance with the Constitution and the law. The failure to discharge his mandate in so far as appointment of members the tribunal is concerned violates fundamental principles of our constitution.

30. The 1<sup>st</sup> Respondent is the principal legal advisor to the Government. His mandate flows from the Constitution. Article 156(6) places on his office the duty to promote, protect and uphold the rule of law and defend public interest. The 2<sup>nd</sup> Respondent as a public officer performs public functions. His actions in so far as appointing members of the tribunal is concerned affect the vital aspect of the rule of law and administration of justice which falls within the scope of the 1<sup>st</sup> Respondent's mandate.

31. The 1<sup>st</sup> Respondent as a protector of the rule of law and public interests would include ensuring that the tribunal functions for purposes of administering justice to the people of Kenya. He has the onerous responsibility of advising the 2<sup>nd</sup> Respondent to act as required by law. He also seems to have failed to discharge his mandate as the court has not been able to trace any reasons on record why this state of affairs continues to afflict the Petitioners whose quest to access to justice appears frustrated in his own eyes. This is so because it is not clear to the court whether the 1<sup>st</sup> Respondent has in anyway tried to advise the 2<sup>nd</sup> Respondent to act and, if not why. In the circumstances, the 1<sup>st</sup> Respondent cannot escape blame for the situation the Petitioners find themselves in.

32. From the analysis above, it is clear to me and, I so find, that the 1<sup>st</sup> Respondent's inaction a violation of the law and amounts to a dereliction of duty whose result has violated the Petitioners' constitutional rights including the right of access to justice.

33. The Petitioners urged the court to find that the 2<sup>nd</sup> Respondent is not fit to hold office by virtue of this violation of the law and sought a declaration to that effect. I do not think this one time infraction is sufficient to form a basis for such a finding and or declaration.

34. Having therefore considered the Petition the constitution and the law, I am satisfied that the Petitioners' have made out a case and their petition should succeed. Consequently, the petition dated 8<sup>th</sup> March 2018 is allowed and I make the following orders which I find appropriate in the circumstances of this case.

***(a) A declaration is hereby issued that the 2<sup>nd</sup> Respondent's failure to appoint members of the Appeals Tribunal as contemplated by section 47(2) Of the Retirement Benefits Act has violated the Petitioners' constitutional rights and fundamental freedoms guaranteed under Articles 47, 48, and 159 of the Constitution.***

***(b) An order is hereby issued directing the 2<sup>nd</sup> Respondent to discharge his statutory mandate and reconstitute the Retirement Benefits Appeal Tribunal under section 47 of the Retirement Benefits Act within sixty (60) days from the date of this judgment.***

***(c) The Respondents do bear costs of this Petition***

**Dated, Signed and Delivered at Nairobi this 13<sup>th</sup> Day of September 2019.**

**E C MWITA**

**JUDGE**