



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW MISCELLANOUS APPLICATION NO. 141 OF 2017

REPUBLIC.....APPLICANT

AND

THE RETIREMENT BENEFITS APPEAL TRIBUNAL.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

AND

THE RETIREMENT BENEFITS AUTHORITY.....1ST INTERESTED PARTY

BONIFACE MURIGA AND 948 OTHERS.....2ND INTERESTED PARTY

GIDEON MBURU NGANGA.....3RD INTERESTED PARTY

THE BOARD OF TRUSTEES TELEPOSTA PENSION SCHEME.....EX PARTE APPLICANT

RULING

The Application

The *ex parte* Applicant herein (herein referred to as “the Applicant”), is the Board of Trustees of the Teleposta Pension Scheme. The Applicant filed a substantive application for judicial review orders herein by way of a Notice of Motion dated 31st May 2017 pursuant to leave granted by the Court, in which it is seeking the following orders:

1. An order of certiorari to remove into this Court and quash the judgment and orders of the Retirement Benefits Appeals Tribunal made in Tribunal **Civil Appeal No. 7 of 2011 – Boniface Mariga & 948 Others vs The Retirement Benefits Authority and the Board of Trustees Teleposta Pension Scheme & Provident Fund**, which judgment is dated 13th February 2011.
2. An order of prohibition to prohibit the 1st Respondent from any further dealing with the **Tribunal Civil Appeal No 7 of 2011**, whether by way of further order or enforcement or otherwise whatsoever.

The application arises from a judgment delivered on 13th February 2011 by the Retirement Benefits Appeals Tribunal which is the 1st Respondent herein, in which it allowed an appeal by the 2nd Interested Party from a decision by the Retirement Benefits Authority (the 1st Interested Party herein) on their pension benefits. The 1st Respondent found that the main issue in the appeal was the proper method to be used in calculating the benefits due to the 2nd Interested Party and proceeded to rule thereon. The Applicant alleges that the said decision was *ultravires* the Retirement Benefits Act (No.3 of 1997) for various reasons.

Various individuals, (herein referred to as “the Intended Interested Parties”), thereupon filed four Notices of Motion applications filed on 2nd November 2017, 13th November 2017, 27th November 2017 and 22nd January 2018 seeking to be enjoined as interested parties in these judicial review proceedings. The first set of Intended Interested Parties are the 3rd Intended Interested Parties, who are 177 individuals and are seeking the following substantive orders in their Notice of Motion dated 2nd November 2017:

- a) **That there be a stay of proceedings in this matter pending the joinder of the Applicants as third interested party herein to avoid prejudice of their rights *inter alia*.**

b) That the Applicants herein be joined as third interested party individually and or jointly for purposes of prosecution and determination of this judicial review proceedings *inter alia*.

c) That this Court be pleased to individually admit each applicant as a direct beneficiary of the proceeds of the subject of Retirement Benefit Appeal Tribunal No.1 of 2011 ruling 13/2/2017.

d) That the Court do direct on the mode of payment of subject settlement herein to the 3rd parties

The application was supported by the grounds on its face together with the supporting affidavit of Gideon Mburu Nganga filed on 6th November 2017. In summary, the 3rd Intended Interested Parties deem themselves to be beneficiaries of the ruling of the Retirement Benefit Appeal Tribunal No 1 of 2011 delivered on 13th February 2011 which they say was a universal ruling affecting all staff in the Teleposta pension scheme, and that unless they are included in these proceedings they risk to being prejudiced and jeopardised and the pension wasted. They also claimed they are affected as they had not received their pension from the Applicant.

The 4th Intended Interested Parties are a set of 136 individuals, and in their Notice of Motion dated 13th November 2017 they seek the following orders:

a) That the Applicants herein be enjoined as the 4th Interested Party to avoid prejudice of their rights as beneficiaries *inter alia*.

b) That the Applicants be joined as 4th interested parties individually and or jointly for purposes of prosecution and determination of this Judicial Review Proceeding *inter alia*.

c) That this Court be pleased to individually admit each Applicant as a direct beneficiary of the proceeds of the subject of Retirement Benefit Appeal Tribunal No. 1 of 2011 of 13/2/2017

d) That the Court do direct on the mode of payment of the subject settlement herein to the 4th Interested Parties do not wish their pensions to be paid to any third party but rather direct the payment to their accounts and the Advocate be paid as per the agreement by separate cheque

e) That the figure of every individual be disclosed and that the applicant-Teleposta issue statements with details of payment and interests

The 4th Intended Interested Party in a supporting affidavit and supplementary affidavit sworn on 13th November 2017 and 3rd January 2018 respectively by Ben Otieno Oulo likewise allege that they deem themselves to be beneficiaries of the ruling of the Retirement Benefits Appeal Tribunal No 1 of 2011 of 13th February 2011, as they are yet to receive their pensions from the Applicant, and they do not wish their pensions to be paid to any 3rd parties but directly to their accounts.

The 5th Intended Interested Party is John Magailu Tanya, who filed a Notice of Motion dated 27th November 2017, seeking orders that he be enjoined in this Petition as an interested party forthwith. His grounds as set out in the said Notice of Motion and a supporting affidavit he swore on 27th November 2017, are that he was dissatisfied with the decision of the Industrial Court of Kenya on 28th June 2012 dismissing his claim. He stated that he had filed Cause No. 689 of 2011 in the Industrial Court alleging that the termination of his services by Telkom Kenya was unlawful and unfair. Further, that the judgment of the said Court was erroneous in law and fact as his dismissal was unlawful, and oppressive, and that he was not given a fair trial exposing him to massive losses.

The last set of Interested Parties (the 6th Intended Interested Parties, although they describe themselves in their pleadings as the 5th Intended Interested Parties), are 248 individuals. They seek orders in their Notice of Motion dated 22nd January 2018 that the Court be pleased to enjoin them as interested parties to this suit, and that they be at liberty to file replying affidavits to this suit and any applications thereto.

The application is supported by the grounds on its face as follows; that the 6th Intended Interested Parties are former employees of Telekom Kenya and pensioners with Teleposta Pension scheme; that the 6th Intended Interested Parties have an interest in the outcome of the suit property being members of the scheme; and that their interests will necessitate their inclusion to enable the court effectually adjudicate on all questions.

The application is further supported by the affidavit of Naftali Kanyoro dated 22nd January 2018, made on behalf of the others as former employees of Telekom. Basically they reiterated that they are beneficiaries of the decision made by the 1st Respondent, and that they are bound to be affected by the decision to be made by the court. They further contended they would be prejudiced if the orders are not granted and the Applicant would not suffer any prejudice

The applications for joinder were opposed by the Applicant, 1st Interested Party and 2nd Interested Party, who filed Grounds of Opposition dated 2nd February 2018, 7th February 2018 and 15th January 2018 respectively. The gist of the Applicant's opposition is that the proceedings before this court are seeking judicial review orders which are concerned with the process and not the merits of the case, and as such, the Intended Interested Parties joinder can only be admitted if they prove that the process affected them in any way, which they have failed to.

The reasons given by the Applicant for this position were that the Intended Interested Parties were not interested parties in the proceedings

before the Retirement Benefits Appeals Tribunal, which case was predicated on the purported award based on a claim made only by the parties to the proceedings before the tribunal and not pensioners generally, and they have not provided sufficient information to prove whether they have any *locus standi* as either deferred pensioners or retired pensioners.

The 1st Interested Party based its opposition on the provisions of sections 46 and 48 of the Retirement Benefits Act 1997, which is the law that governs retirement benefits and disputes that arise therefrom, and stated that any member of a scheme who is dissatisfied with a decision of the manager, administrator, custodian or trustees of a scheme is required to lodge an appeal to the Chief Executive officer of the Retirement Benefits Authority, and if dissatisfied by the decision of the Chief Executive Officer, he or she is the only person who has the right of appeal to the Retirement Benefits Appeals Tribunal.

Therefore, since the Judicial review proceedings instituted in this Court flow from the proceedings and determination of the Retirement Benefits Appeals Tribunal dated 13th February 2017 in **RBAT Appeal No.7 of 2011: Boniface Mariga & 948 Others vs The Retirement Benefits Authority & The Board of Trustees of Teleposta Pension Scheme & Provident Fund**, the proceedings should therefore be limited to the parties who participated in the proceedings before the Retirement Benefits Appeal Tribunal.

The 2nd Interested Party reiterated the grounds raised by the Applicant and 1st Interested Party, and in addition stated that the Intended Interested Parties are barred in the law from being enjoined in this matter at this stage. That the Retirement Benefits Act in Section 46 and 48 provides for the proper procedure to institute a Pension benefits claim which must be filed as a complaint in the Retirement Benefits Authority, which is then followed by an Appeal in the Retirement Benefits Tribunal. The 2nd Interested Party contended that the Intended Interested Parties are seeking to jump the two dispute resolution steps provided in law, and join the case at the third stage of dispute resolution.

Further, that the Intended Interested Parties have not followed due procedure enumerated above and for they have neither file a complaint with the Retirement Benefits Authority nor have they filed an Appeal from the same at the Retirement Benefits Appeals Tribunal, but intend to join this matter which action is premature and prejudicial. Therefore, that the outcome of the substantive judicial review application will hence not affect them, since they can independently proceed at the Retirement Benefits Authority.

This Court (Aburili J.) on 5th February 2018 directed that the Intended Interested Parties applications be heard by way of written submissions. The 3rd Intended Interested Parties submissions dated 12th February 2018 were filed by their Advocate, George N. Kimani & Co Advocates. Celyne Odembo for the 4th Intended Interested Parties filed submissions dated 29th January 2018, while the 5th Intended Interested Party did not file any submissions. Mbuthia Kinyanjui & Company Advocates filed submissions dated 9th February 2018 for the 6th Intended Interested Parties.

On the part of the Respondents, Oraro & Company Advocates filed submissions on behalf of the Applicant, while the 1st Interested Party's Advocates, Ochieng', Onyango, Kibet & Ohaga Advocates, filed submissions dated 7th February 2018. Koceyo & Company Advocates filed submissions dated 6th February 2018 for the 2nd Interested Party.

The Arguments

The Intended Interested Parties Cases:

The 3rd Intended Interested Parties submitted that their application is grounded on the rights of an individual under the Kenyan Constitution of 2010 and other relevant laws, and that they have *locus standi* to be joined in these judicial review proceedings as former employees and pensioners of Teleposta Pension Scheme. Further, that they were party to the subject Tribunal Proceedings but that their names were concealed by the firm of Advocate representing them.

It was also the 3rd Intended Interested Parties case that under Article 47 of the Constitution, they have right to fair and transparent administration of justice and they relied on the **Mumo Matemu Case, Civil Appeal 290/2012**. Reliance was also placed in this regard on Article 159(2)(d) of the Constitution for substantive justice and Article 48 for access to justice. Furthermore, that all parties in these judicial review proceedings opened the proceedings to the whole world when they consented to a newspaper advertisement on service of the proceedings, and that the provisions of section 46(1) and section 48(1) of the Retirement Benefits Act 1997 were thereby neutralised and the proceedings became a public interest matter.

The 4th Intended Interested Parties on their part submitted that that they needed to be enjoined in the proceedings as former employees of the Applicant, and as they would be affected by the decision to be made by the court. It was their submission that on the 7/11/2017 the court ordered for the advertisement to be made in the press that a party who demonstrates interest should be allowed in the proceedings, subsequent to which a number of pensioners came on board.

Reliance was placed on Articles 48 and 50 of the Constitution, the Protection of Rights and Fundamental Freedoms (Practice And Procedure) Rules 2013, and Order 1 Rule 10(2) Civil Procedure Rules as the provisions allowing for joinder of an interested party. Further, that the *locus standi* to file judicial proceedings has been greatly enlarged, and Articles 22 and 258 of the Constitution allows unhindered access to justice. The Supreme Court Rules 7(2), 23, and 25 was also cited as allowing a Court to join any interested party to the proceedings before it; and it was submitted that this is what this Court did on 7th November 2017.

According to the 4th Intended Interested Parties, they have demonstrated that they have a stake in the proceedings and their presence will help in determining the issues. With regard to their stake in the proceedings, they added they are former Telekom pensioners and their rights will not be served if they are treated as just watching brief. They urged in their submissions that these proceedings are about payment of their pensions, which the 2nd Interested Party wants to monopolise, and they therefore need to be protected by joinder.

Lastly, the 4th Intended Interested Parties submitted that the main purpose of joinder is to avoid multiplicity of suits, and that all the issues touching on the matter be determined. Further that the 2nd interested Party will not be prejudiced by the order sought Reliance was placed on the decisions in **Yusuf Abdi Adan and Another vs Hussein Ahmed Farah, High Court Civil Case 100/2016, Mumo Matemu versus Trusted civil Society of Human Right Alliance and 5 Others (2014) eKLR** and **Kenya Medical Laboratory Technicians and Technologists Board & 6 Others vs Attorney General & 4 Others (2017) eKLR**.

The 6th Intended Interested Parties relied on Article 50 of the Constitution, in submitting that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing. They also relied on the definition of an interested party in the Protection of Rights and Fundamental Freedoms (Practice and Procedure) Rules 2013, as a person or entity that has an identifiable stake or legal interest or duty in the proceedings and may not be directly involved in the litigation. A similar definition in **Black's Law Dictionary 9th edition** at page 1232 was also relied upon.

According to the 6th Intended Interested Parties, they are former employees of Telekom Kenya and that their interest is not only evident by the fact that they are pensioners of the Applicant, but also by the fact that the decision made by 1st Respondent affected all pensioners of the Applicant. They relied on the case of **Yusuf Abdi Adan and Another vs Hussein Ahmed Farah and 3 Others 2016 eKLR** where an interested party was clearly defined.

The Respondents' Cases

The Applicant submitted that the joinder of the 3rd to 6th Intended Interested Parties can only be done if they can show that they will be affected by the orders. In this respect, the Applicant argued that the 2nd Interested Party commenced proceedings in 2011, and the Intended Interested Parties had the time to seek joinder before the 1st Respondent since then, in line with section 46 and 48 of the Retirement Benefits Act. They were therefore precluded from seeking joinder in proceedings before this court, as the parties affected in the proceedings would be the 2nd Interested Party.

Further, that the Intended Interested Parties have provided their list of names of persons seeking to be enjoined, but have not provided the details of their employment to enable them carry out a verification process which is vital as the Applicant has many pensioners.

On the application by the 5th Intended Interested Party who seeks enjoinder from being dissatisfied with the decision of the Industrial Court, it was urged that the impugned decision has not been attached, and the grounds provided cannot be sufficient to allow them to join. It was submitted that the 5th Intended Interested Party is essentially asking the court to sit on appeal of a decision of the Employment and Labour Relations Court which cannot hold, as both are courts of concurrent jurisdiction established by the Constitution.

In conclusion the Applicant reiterated that judicial review proceedings are not about merits but process, and that what is in question is the process leading to the decision of the 1st Respondent. That for party to seek joinder they must show that they were affected by the procedure, which they have not.

Placing reliance on section 46(1) read with section 48(1) of the Retirement Benefits Authority Act, the 1st Interested Party submitted that retirees of the Applicant who were not part of the proceedings before the Retirement Benefits Tribunal were barred from the present proceedings. Further, that their addition would be prejudicial to the powers and functions of the Retirement Benefits Authority, as it would not have been afforded an opportunity to sit on the decision of the Intended Interested Parties as required by section 46(1) of the Retirement Benefits Act, and its rights of fair administrative action and right to access to justice under Articles 47 and 48 of the Constitution would be violated.

The 1st Interested Party relied on the case of **Rift Valley Railways Workers Union (K) vs Kenya Railways Staff Retirement Benefits Scheme and 6 Others, [2016] e KLR**, and **Mackenzie Moulding Mogere & Another vs the Trustees of Teleposta Pension scheme and Others, Civil Appeal No 221 of 2015**, for the proposition that parties cannot circumvent the dispute resolution mechanisms established under the Retirement Benefits Act and come to court directly.

The 2nd Interested Party on its part submitted that the Intended Interested Parties do not have any interests in the suit and should not be admitted, as they have not met the standard of what constitutes an interested party as set out in **Kingori vs Chege and 3 Others (2002) 2 KLR** where it was held that:

“he must be a necessary party, he must be a proper party,... the ultimate order or decree cannot be enforced without his presence in the matter and his presence is necessary to enable the court to effectively and completely to adjudicate upon and settle all questions involved in the suit”

They further submitted that the Intended Interested Parties were not parties in the **Boniface Mariga and 948 Others vs Retirement Benefits Authority, RBAT NO 7 of 2011**, which is sought to be reviewed in this suit. They are therefore not beneficiaries of the appeal which related to specific litigants who had filed the appeal. They are therefore not proper parties in the matter. It was the 2nd Interested Party's further submission that based on sections 46 and 48 of the Retirement Benefits Act, the Intended Interested Parties are seeking to jump the dispute resolution mechanisms provided therein.

Lastly, it was submitted that the judicial review court deals with procedure and not the merits of the case, and the outcome of the judicial review case will not affect Intended Interested Parties as their claim if any can independently proceed at the Retirement Benefits Tribunal. Further, that the Intended Interested Parties are seeking the payments of some unascertained amounts which touches on the merits of the tribunal.

The Issues and Determination

I have considered the pleadings and submissions by the Intended Interested Parties and Respondents. The Supreme Court of Kenya defined an interested party in the case of Trusted Society of Human Rights Alliance v Mumo Matemo & 5 Others [2014] eKLR, as follows:

”[18] Consequently, an interested party is one who has a stake in the proceedings, though he or she was not party to the cause *ab initio*. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause.”

The law on joinder of interested parties was also settled by the Supreme Court in the case of Francis Kariuki Muruatetu and Another vs Republic, Petition No 15 of 2016 when the said court set out what should be considered before a court admits a proposed interested party it thus observed as follows.

“From the foregoing legal provisions, and from the case law, the following elements emerge as applicable where a party seeks to be enjoined in proceedings as an interested party:

One must move the Court by way of a formal application. Enjoinment is not as of right, but is at the discretion of the Court; hence, sufficient grounds must be laid before the Court, on the basis of the following elements:

- i. The personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.**
- ii. The prejudice to be suffered by the intended interested party in case of non-joinder must also be demonstrated to the satisfaction of the Court. It must also be clearly outlined and not something remote.**
- iii. Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the Court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the Court.”**

From the foregoing it's quite clear that where a person seeks to be enjoined as an interested party, one must move the court by way of a formal application. The enjoinment is not as of right but is at the discretion of the court keeping in mind the above grounds.

In addition, Order 53 Rule 3 sub rule 4 of the Civil Procedure Rules provides as follows:

“(4) If on the hearing of the motion the High Court is of the opinion that any person who ought to have been served therewith has not been served, whether or not he is a person who ought to have been served under the foregoing provisions of this rule, the High Court may adjourn the hearing, in order that the notice may be served on that person, upon such terms (if any) as the court may direct.”

This Court on 7th November 2017 directed the Applicant to serve their pleadings on all persons who are likely to be affected by the proceedings herein by advertisement in one of the daily newspapers, and for such persons to enter appearance. The Court also directed any party who wished to be joined as an interested Party to do so by way of formal application.

Therefore, in judicial review proceedings, while the Court has discretion as to who can be served with pleadings in a judicial review application, my understanding of the law is that for a person has been so served to be further joined as a party to the proceedings, he or she must by way of formal application demonstrate how they will be directly affected by the proceedings. J. Odunga in explaining how such direct effect is to be demonstrated in judicial review proceedings held as follows in Republic v Office of the Director of Public Prosecution & 2 others Ex-Parte Sylvia Wairimu Njuguna also Known as Sylvia Wairimu Muli ,[2018] eKLR

“25. Since judicial review orders are concerned with the decision making process rather than the merits of the decision, a party who contends that he or she is directly affected by the proceedings ought to bring himself or herself within the ambit of the judicial review jurisdiction and ought not to apply to be joined thereto with a view to transforming judicial review proceedings into ordinary civil litigation. In my view, for a party to be joined to the proceedings under Order 53 rule 3(2) aforesaid the applicant ought to disclose to the Court how he or she is directly affected. The Court cannot be expected to act in the dark by joining such a person with a view to satisfying itself as to the effect of the orders sought on the applicant at a later stage of the proceedings.

26. However, the decision whether or not to join a party is an exercise of discretion and if no substantial purpose or benefit will be gained by the joinder of a person to the proceedings and where the said joinder will militate against the expeditious disposal of the said proceedings which by their nature ought to be heard and determined speedily, the Court will be reluctant to join the intended party to the proceedings.

27. In an application of this nature, the applicant ought to adduce some material upon which the Court can determine whether the applicant is directly affected by the proceedings. In judicial review especially where a party's interests can be catered for by another party participating in the proceedings, there would be no reason to join the party intending to join the

proceedings as a party thereto. It is therefore upon the applicant to satisfy the Court that the issues it intends to raise, which issues are relevant to the matter for determination before the Court, cannot adequately be canvassed by any of the parties before the Court.”

The issue in the present judicial review proceedings is the legality or otherwise of the proceedings leading to the judgment delivered on 13th February 2011 by the Retirement Benefits Appeals Tribunal, which is the 1st Respondent . I find difficulty in finding that the Intended Interested Parties are directly affected or prejudiced by, or will add value to the resolution of the said issue for the following reasons.

Firstly, the Intended Interested Parties were not party to the impugned proceedings nor have they shown any participation in the said proceedings for this Court to find that they will assist it in resolving the issues before it, which mainly revolve around the legality and propriety of he said proceedings.

Secondly, in the resolution of the issues before it, this Court as a judicial review Court will not pronounce itself on any substantive rights or merits of any of the parties’ respective cases, as its mandate is limited to the processes applied in reaching the impugned decision. It is therefore difficult to fathom how the Court in this proceedings is going to protect the Intended Interested Parties rights as beneficiaries of the Applicant as they seek. In addition some of the orders sought by some of the Intended Interested Parties particularly by the 3rd and 4th Intended Interested Parties as to mode of payment of their retirement dues, and the 5th Intended Interested Party as to the merits of his case before the Industrial Court go to the merits of their respective cases, which is outside the mandate of this Court.

Thirdly, I agree with the arguments made that the Intended Interested Parties ought to have followed the prescribed procedure set out in the Retirement Benefits Act for resolution of any issues they may have with the Applicant, and this Court as a judicial review Court is not the right forum to ventilate the claims they have against the Applicant of a substantive nature.

Lastly, no prejudice is likely to be suffered by the Intended Interested Parties if they are not joined as parties in these proceedings, as they still have procedure available to them to ventilate their issues as provided under the Retirement Benefits Act, and they can still have the benefit of whatever decision is reached by this Court, whether they are joined as parties or not.

In the premises, I find that the 3rd , 4th, 5th and 6th Intended Interested Parties’ Notices of Motion filed on 2nd November 2017 ,13th November 2017, 27th November 2017 and 22nd January 2018 seeking to be enjoined as interested parties in this judicial review proceedings are not merited, and the said Notices of Motion are accordingly dismissed with costs to the 2nd Interested Party.

Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 7TH DAY OF MAY 2018

P. NYAMWEYA

JUDGE