



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. 141 OF 2017

BETWEEN

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION.

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

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

THE ATTORNEY GENERAL.....2ND RESPONDENT

AND

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

BONIFACE MARIGA & 948 OTHERS.....2ND INTERESTED PARTY

EX PARTE:

THE BOARD OF TRUSTEES, TELEPOSTA PENSION SCHEME

RULING

Introduction

1. The Board of Trustees of the Teleposta Pension Scheme, which is the ex parte Applicant herein (hereinafter the Applicant”) filed a Notice of Motion application dated 11th April 2017, seeking an order of certiorari to quash the judgment and orders of the Retirement Benefits Appeals Tribunal (the 1st Respondent herein) dated 13th February 2017, made in Tribunal Civil Appeal No. 7 of 2011. The Applicant also sought an order of prohibition to prohibit the said 1st Respondent from any further dealing with the said appeal.

2. The 2nd Interested Party herein, who were the Appellants in Tribunal Civil Appeal No. 7 of 2011, subsequently filed an application by way of a Notice of Motion dated 27th September 2017, seeking that this suit be struck out. The main ground for the application is that this Court lacks jurisdiction to entertain the suit which arises out of employment benefits due to the 2nd Interested Parties, which is constitutionally the exclusive mandate of the Employment and Labour Relations Court. Further, that the suit discloses no reasonable cause which can be litigated before this Court other than the Employment and Labour Relations Court.

3. The Applicant filed Grounds of Opposition dated 6th November 2017 to the application. The first contention therein is that the Applicant’s judicial review application seeks to invoke the supervisory jurisdiction of the High Court over the Retirements Benefits Appeals Tribunal, which is a judicial or quasi-judicial authority established under section 48 of the Retirement Benefits Act, and has been granted the powers of subordinate court of the first class under section 49 of the said Act. Further, that Article 165(6) of the Constitution specifically vests in the High Court supervisory jurisdiction over subordinate courts and any person , body or authority exercising a judicial or quasi-judicial function

4. Second, that the Employment and Labour Relations Court is established under Article 162(2) of the Constitution as a specialized court to hear and determine disputes relating to employment and labour relations, and its jurisdiction is specifically set out in section 12 of the

Employment and Labour Relations Act. In addition, that the said section does not grant the Employment and Labour Relations Court supervisory jurisdiction over judicial and quasi-judicial authorities, nor exclusive jurisdiction over a dispute arising from the Retirement Benefits Appeals Tribunal.

5. Third, that the dispute herein does not relate to employment or labour relations as envisioned by Article 162 (2)(a) of the Constitution and section 12 of the Employment and Labour Relations Act, but concerns the exercise of jurisdiction by the Retirement Benefits Appeals Tribunal (the 1st Respondent herein) with regard to the imposition of a formula for calculation of lump sum retirement dues payable to pensioners, which formula is alleged to be *ultra vires* the Retirement Benefits Act and in breach of the Applicant's Trust Deed. That for the High Court to be stripped of jurisdiction, the dispute must fall exclusively within the jurisdiction of Article 162(2) of the Constitution which is not the case in the instant matter.

6. Lastly, that the 2nd Interested Parties have not demonstrated that it will suffer prejudice if the application is heard and determined by this Court, and that in any event save for the provisions of Order 53 of the Civil Procedure Rules including striking out provisions do not apply to judicial proceedings.

7. The Respondent did not respond to the 2nd Interested Party's application, while the Interested Party filed submissions in response.

The Determination

8. The application was canvassed by way of written submissions that were highlighted at a hearing held on 15th October 2018. Ms. Maina for the 2nd Interested Party relied on submissions dated 9th May 2018 filed by Koceyo & Company Advocates, and reiterated the grounds for the application. The counsel placed reliance on Article 162(2) of the Constitution, and various decisions including in **Anne Wangui Ngugi & 524 Others vs Retirement Benefits Authority & Another, ELRC Appeal No. 10 of 2014**, to urge that pension benefits are employment benefits arise out of an employee-employer relationship and are therefore within the exclusive jurisdiction of the Employment and Labour Relations Court.

9. Reliance was also placed by Ms. Maina on the decisions in **Amon Chuchu vs Retirement Benefits Authority, ELRC Appeal No. 6 of 2014** and **Rift Valley Railways Workers Union vs Kenya Railways Staff Retirement Benefits Scheme and Others, Cause No. 2289 of 2015** that the rights under section 12 of the Employment and Labour Relations Act can also be asserted by way of judicial review and that the Employment and Labour Relations Court, being a court of equal status with the High Court has supervisory jurisdiction over tribunals dealing with employment and labour relations matters.

10. Lastly, Ms. Maina urged that since this Court has no jurisdiction, the only remedy is to strike out this suit, and the Court has no power to transfer the suit to the Employment and Labour Relations Court in accordance with section 17 and 18 of the Civil Procedure Act, which only allows this Court to transfer a matter to a subordinate Court but not a Court of equal status.

11. Ms. Opaka for the 1st Interested Party relied on submissions dated 8th May 2018 filed by Ochieng' Onyango, Kibet & Ohaga Advocates, and while supporting the application, submitted that this Court has power to transfer this dispute to the Employment and Labour Relations Court for hearing and determination. Reliance was in this respect placed on the Court of Appeal decision in **Mackenzie Mogere & Another vs The Trustees of Teleposta Pension Scheme & 4 Others, Civil Appeal NO. 221 of 2015** that there was no error made by the High Court in transferring a constitutional petition to the Employment and Labour Relations Court for hearing and determination.

12. The 1st Interested Party however supported the 2nd Interested Party's position that it is the Employment and Labour Relations Court that has jurisdiction to hear and determine the dispute herein by virtue of Article 23(3), Article 162(2)(a) and Article 165(3)(b) of the Constitution as read with section 12 of the Employment and Labour Relations Act. Reliance was placed on the decision to this effect in **Judicial Service Commission vs Gladys Boss Shollei & Another, (2014) e KLR**. The 1st Interested Party also submitted that the nature of the dispute herein concerns employment and labour relations, as the employment relationship is the basis of a trust deed of a pension scheme.

13. Ms. Lubalo submitted for the Applicant, and relied on submissions dated 13th July 2017 filed by Oraro and Company Advocates. The Applicant present three fronts of arguments on the application. Their first was that Article 165(6) of the Constitution gives the High Court and not the Employment and Labour Relations Court supervisory jurisdiction over tribunals, and reliance was placed on the decision in **R vs Ordinance Factories Corporation ex parte Anne Gichimo, (2014) e KLR** for the position that the High Court cannot be locked out from exercising jurisdiction over supervisory bodies.

14. Further that while Article 162 (2)(a) of the Constitution grants exclusive jurisdiction to the on employment and labour relations matters, section 12 of the Employment and Labour Relations Court Act which was enacted pursuant to Article 162(2)(a) does not give any jurisdiction to the Employment and Labour Relations Court to hear issues of retirement benefits, and the case before this Court is between retirees and a pension fund and not between employer and employees.

15. Second, that the Employment and Labour Relations Court does not have exclusive jurisdiction in this case as there are mixed issues involved, the primary issue being the supervision of the exercise of power by the Respondent, and any employees issues raised are secondary. Therefore, that at the very best the High Court has concurrent jurisdiction with the Employment and Labour Relations Court. Reliance was place on the decision in **R vs Minister of Agriculture Livestock and Fisheries & 3 Others ex parte Douglas Barasa & Others (2015) e KLR** for this position.

16. Lastly, that should it be found that this Court has no jurisdiction, this Court still has the power to transfer the suit to the Employment and Labour Relations Court, and the Applicant submitted in this regard that the Civil Procedure Code does not apply to judicial review matters and section 17 and 18 of the Act only applies to transfer of suit between subordinate courts not the High Court. Further, that in of **Mackenzie Moulding Mogere & Another vs the Trustees of Teleposta Pension scheme and Others, (supra)**, a matter was transferred from the High

Court to the Employment and Labour Relations Court.

The Determination

17. I have considered the arguments made by both the Applicant and 1st and 2nd Interested Parties. The main issue for determination is whether this Court has jurisdiction to hear and determine the Applicant's Notice of Motion dated 11th April 2017. The secondary issue is whether this Court has the power to transfer the suit to the Employment and Labour relations Court.

18. This Court is in this respect guided by the often cited decision of the Court of Appeal in **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1** as follows:

“

By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given”

19. This Court's jurisdiction to hear and determine judicial review cases is granted by Article 165 (6) of the Constitution which provides that the High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function in this regard. It is notable that in the present proceedings, this Court is being asked in exercise of its supervisory jurisdiction, to review the lawfulness of the 1st Respondent's decision, and this is a case that would ordinarily be within this Court's jurisdiction, as no quasi judicial body is exempt from these provisions.

20. It has in this respect being argued that both the High Court and the Employment and Labour Relations Court do not have jurisdiction for different reasons. The first reason that has been given to divest the Employment and Labour Relations Court jurisdiction is that no specific provisions of law exist that grant the said Court supervisory jurisdiction over subordinate bodies. The relevant provisions that grant the Employment and Labour Relations jurisdiction are Article 162(2) of the Constitution which provides as follows:

“162. (1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts mentioned in clause (2).

(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—

(a) employment and labour relations; and

(b) the environment and the use and occupation of, and title to, land.

(3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).”

21. In the case **United States International University (Usiu) V Attorney General [2012] e KLR** of Justice Majanja observed as follows as regards the jurisdiction conferred to the Employment and Labour Relations Court by the Article 162, which opinion I am in agreement with:

“28. The Constitution does not define what “status” means but in my view it implies that the court so created must have the same juridical incidents as the High Court. The jurisdiction bestowed upon the High Court under Article 165(3) is not absolute but ‘subject to clause (5)’ whose provisions forbid the High Court from exercising jurisdiction over matters falling within the province of the Supreme Court and the specialized court established under Article 162(2). This status is to be determined from a textual consideration of the provisions governing the judicature. First, under Article 162, the courts of status of the High Court are considered superior courts save that their functions are to be defined by Parliament rather than the Constitution itself. Second, Part 2 of Chapter Ten titled “Superior Courts” sets out the jurisdiction of the Superior courts, that is, the Supreme Court, the Court of Appeal and the High Court. Though the Courts of status of the High Court are not defined their jurisdiction is dealt with in negative terms under Article 165. The High Court shall not exercise jurisdiction in matters reserved for status courts contemplated under Article 162(2). This implies that the High Court cannot deal with matters set out in section 12 of the Industrial Court Act, 2011. Third, the High Court does not have supervisory jurisdiction of superior courts, which includes courts with the status of the High Court.”

22. The second reason that has been propounded is one that divests the High Court of jurisdiction on the ground that the matter in this suit is one that falls within the exclusive jurisdiction of the High Court. The Supreme Court in **Republic vs Karisa Chengo & 2 Others (2017) e KLR** amplified and pertinently held that each of the Superior Courts established by or under the Constitution has jurisdiction only over matters exclusively reserved to it by the Constitution or by a statute as permitted by the Constitution. This Court has however noted that Article 165(6) expressly bestows and does not in any way limit the High Court's jurisdiction over tribunal and subordinate courts.

23. The Applicant in its application for leave and statutory statement filed herein and dated 28th March 2018 described itself as a pension scheme established by virtue of a trust deed for the then employees of the Kenya Posts & Telecommunications Corporation, who include the 2nd Interested Parties. It was further stated in the said statement that issue in the appeal before the Respondent was the method of computation of the benefits due to the 2nd Interested Party and specifically the basis of computation of a lump sum payment in lieu of retaining a deferred pension in the scheme for the pensioners leaving service. The Applicant was dissatisfied with the Respondent's decision on that issue, which it alleged varies the terms of its Trust Deed.

24. This suit is therefore a suit involving the 2nd Interested Party's rights arising from employment, and also therefore falls within the jurisdiction of the Employment and Labour Relations Court. It is therefore one of those hybrid cases where both the High Court and Employment and Labour Relations Courts have concurrent jurisdiction as the issues herein cut across the exclusive jurisdiction reserved for the two courts.

25. The Courts have resolved the issue by inquiring what the most substantial question or issue presented in the controversy is. In **Suzanne Butler & 4 Others v Redhill Investments & Another (2017) e KLR** the Court stated the test in the following words:

"When faced with a controversy whether a particular case is a dispute about land (which should be litigated at the ELC) or not, the Courts utilize the Pre-dominant Purpose Test: In a transaction involving both a sale of land and other services or goods, jurisdiction lies at the ELC if the transaction is predominantly for land, but the High Court has jurisdiction if the transaction is predominantly for the provision of goods, construction, or works.

The Court must first determine whether the pre-dominant purpose of the transaction is the sale of land or construction. Whether the High Court or the ELC has jurisdiction hinges on the predominant purpose of the transaction, that is, whether the contract primarily concerns the sale of land or, in this case, the construction of a townhouse.

Ordinarily, the pleadings give the Court sufficient glimpse to examine the transaction to determine whether sale of land or other services was the predominant purpose of the contract. This test accords with what other Courts have done and therefore lends predictability to the issue."

26. I find that the issues that arise herein are predominantly and substantially employment issues, since the question of the propriety of the Respondent's decision will have to be examined in light of the applicable employment laws and instruments. This is thus a matter that will be more competently heard by the Employment and Labour Relations Court, which has both the exclusive and supervisory jurisdiction to hear the matter, even though this Court also has supervisory jurisdiction over the Respondent.

27. Coming to the secondary issue, the 2nd Interested Party urged that if it is found that this Court does not have Jurisdiction the suit should be struck out because it equally does not have the power to transfer the same to the Employment and Labour Relations Court. The 1st Interested Party and Applicant the other hand contended that the High Court does have the power to transfer the matter to the Employment and Labour Relations Court.

28. This Court has found that the High Court does have jurisdiction to hear and determine this suit, considerations of efficiency, expedition and convenience dictate that it be heard by the Employment and Labour Relations Court. While it is arguable whether section 17 and 18 of the Civil Procedure Act on the transfer of suits are applicable to judicial review proceedings, the more important applicable provisions in this respect is Article 159 of the Constitution, which mandates this Court to dispense justice expeditiously and without undue regard to procedural technicalities. Therefore, to avoid further delay and in the interests of justice it is prudent that this matter be transferred to the Employment and Labour Relations Court for further hearing and determination.

29. In addition it has been held by the Court of Appeal decision in **Mackenzie Mogere & Another vs The Trustees of Teleposta Pension Scheme & 4 Others, Civil Appeal N0. 221 of 2015**, that to order such a transfer would not be in error on the part of this Court.

30. In light of the foregoing findings, the 2nd Interested Party's Notice of Motion dated 27th September 2017 only partially succeeds to the extent that this suit is hereby transferred to the Employment and Labour Relations Court at Nairobi for further hearing and determination. Each party shall bear its own costs of the said Notice of Motion.

31. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 6TH DAY DECEMBER 2018

P. NYAMWEYA

JUDGE