REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW NO. 3 OF 2017

IN THE MATTER OF AN APPLICATION BY FESTUS KIMUTAI LANGAT FOR AN ORDER OF CERTIORARI AND MANDAMUS DIRECTED TO THE 1ST RESPONDENT RETIREMENT BENEFITS APPEAL TRIBUNAL IN RETIREMENT BENEFITS APPEAL TRIBUNAL NO. 9 OF 2011

AND

IN THE MATTER OF THE JUDGMENT IN THE HIGH COURT OF KENYA GIVEN AT NAKURU, CIVIL SUIT 204 OF 1998

BETWEEN

FESTUS KIMUTAI LANGAT……...…….APPLICANT

VERSUS

RETIREMENT BENEFITS APPEAL TRIBUNAL…..…1ST RESPONDENT

TRUSTEES OF TELPOSTA PENSION SCHEME ….....2ND RESPONDENT

THE ATTORNEY GENERAL…….....3RD RESPONDENT

RULING ON LEAVE

1. The exparte applicant is **FESTUS KIMUTAI LANGAT.** He seeks in his application dated 5th January 2017 seeks leave of this court to apply for Judicial Review order of Certiorari to quash the decision of the 1st respondent Retirement Benefits Appeals Tribunal (RBAT) dated 2nd December 2016 dismissing the applicant's notice of motion dated 9th June 2016; leave to apply for Judicial Review order of mandamus to compel the 1st respondent to uphold and bind themselves with the court's judgment delivered on 14th October 2009 at **Nakuru, in Civil Suit No. 204 of 1998 Festus Kimutai Langat vs Kenya Posts & Telecommunications**, and order payment of the applicant's pension dues in accordance with the said judgment in respect of the applicant's last basis salary.

2. The exparte applicant's case is that he is an employee of Kenya Posts & Telecommunications. That vide HCC 204/98 at Nakuru, he filed suit for unfair dismissal from employment, which suit was heard and determined in his favour against his former employer. The judgment in that suit was determined on 14th October 2009 where D.K. Maraga J (as he then was) granted a declaration that the applicant's

dismissal was unlawful. That the court also awarded the applicant arrears half salary for the period of interdiction from March 1997 up to February 1998 amounting to shs 148,950 and one month's salary of kshs 42,985 in lieu of notice.

3. It is further claimed that the issue of the applicant's last pay slip was subject of court's determination on the aspects of terminal dues as well as the applicable last salary and that the court found the applicant's last salary to be kshs 42,985 and not the 1997 of shs 28,710. That on 10th June 2011 the applicant filed an appeal to the 1st respondent Retirement Benefits Appeals Tribunal claiming for retirement benefits from the Trustees of Teleposta Pension Scheme and obtained judgment in his favour.

4. The applicant claims that the 2nd respondent paid him a sum of shs 2,106,224 applying the previous salary of shs 28,710 on 27th March 2016 contrary to the 2nd respondent's allegation that the payment was pegged on the last final salary.

5. The applicant then filed a notice of motion dated 9th June 2016 before the 1st respondent Retirement Benefits Appeals Tribunal challenging the aforesaid payment and on 2nd December 2016 the 1st respondent stated that the tribunal was not the appropriate forum for enforcing judgments, decrees or orders of the High Court.

6. According to the applicant, the decision of the tribunal was made in error as the Tribunal did not take into account the fact that it has the same powers as the High Court and so, enforcing an order of the court would be well within its jurisdiction.

7. Further, that as it is the Appeals Tribunal that ordered the 2nd respondent to pay the applicant his dues, the 2nd respondent could not allege that it was not part of the suit and or that the judgment in the civil suit does not bind it.

8. The applicant averred that Section 49 of the Retirement Benefits Act empowers the 1st respondent to make orders that were sought and to enforce the said decree or order from the High Court at Nakuru since the applicant was not paid his correct amount.

9. In addition, it was alleged that the 1st respondent has a legal duty to make a decision that is not injurious to the applicant to whom the Tribunal owes a duty to, as long as it is not acting beyond its mandate.

10. The applicant therefore accuses the 1st respondent of committing an error by denying its responsibility and hence, the prayer that it should be compelled to review its decision since the error is very apparent.

11. The chamber summons was supported by the statutory statement, verifying affidavit and annextures which include a decree in Nakuru HCC 204 of 1998 and the ruling of 2nd December 2016 by the 1st respondent Tribunal.

12. The 1st and 3rd respondents did not file any replying affidavit or even submissions opposing the application although Miss Ngelechei counsel for the 1st and 3rd respondents intimated to court that she was not opposed to leave being granted to the exparte applicant to institute judicial review proceedings. Counsel however associated herself with submissions filed by the 3rd respondent trustees of Teleposta Pension Scheme.

13. The 2nd respondent filed a replying affidavit on 15th February 2017 sworn by Peter Rotich the Administrator and Trust Secretary of the 2nd respondent contending that following the 1st respondent's ruling of 11th November 2011 the 2nd respondent duly paid the applicant the sum of

kshs 2,106,224 being his pension dues based on the final pensionable salary, which pension payment was based on the Trust Deed and Rules of the Scheme and information provided by the scheme sponsor.

14. Further, it was deposed that the applicant was dissatisfied with the sums paid to him so he filed an application before the 1st respondent vide notice of motion dated 9th June 2016 seeking for enhancement of the amount paid to him, and citing Nakuru HCC 204/1998 wherein the 2nd respondent was not a party hence the judgment in *personam* was only binding upon parties to the suit. Further that the issue of the applicant's final pay was not an issue in the civil suit and that therefore the figure arrived at in the decree may have been in error.

15. The 2nd respondent contended that in any event, the calculation of the applicant's half salary based on shs 48,950 brings it to shs 24,825 hence the salary had been correctly calculated and paid in accordance with the Trust Deed and Rules of the Scheme and in accordance with the information provided by the scheme sponsor.

16. It was further claimed that Section 49 of the Retirement Benefits Authority Act which confers jurisdiction on the 2nd respondent does not give it power to enforce judgments of the High court. That therefore there is no prima facie case with real issues for hearing hence, the application is misplaced and does not warrant an inquiry.

17. The applicant and 2nd respondent filed submissions on 23rd February 2017 and 6th March 2017 respectively, which submissions mirror the grounds in support of the application and the depositions in the replying affidavit of Mr Rotich in opposition which I shall not reproduce but which I reiterate.

18. The two parties also relied on several authorities for and against the leave sought. The applicants cited **Republic vs Kenya Vision 2030 Delivery Board & Another exparte Engineer Judah Abekah [2015]eKLR** where Korir J on the of mandamus while maintaining that the error by the 1st respondent is apparent as regards its jurisdiction and that therefore this court has the power to issue Certiorari and Mandamus.

19. On the part of the 2nd respondent, it was contended that there is no *prima facie* case for investigation by this court; that the Tribunal had not power to enforce judgments of the High Court and that the 2nd respondent was not a party to the previous proceedings before the High Court hence it was not bound by that judgment.

20. On the scope of Judicial Review, the case of **Council of Service Union & Minister for Civil Service [1985] AC 374 at 401D** cited by Anyara Emukule J (as he then was) in **Republic vs Cabinet Secretary National Treasury & Another exparte Car Importers Association of Kenya[2016] e KLR** was cited. The 2ndrespondent also cited **Municipal Council of Mombasa v Republic & Umoja Consultants Ltd Civil Appeal No. 185/2001** where the Court of Appeal set the parameters for Judicial Review.

21. It was also argued by the 2nd respondent that this application is frivolous and without merit, citing **Sylvana Mpambwanayo Ntaryamira V Allen Waiyaki Gichuhi & Another [2015] e KLR** citing **Republic V Land Dispute Tribunal Court Central Division & Another Exparte Nzioka [2006] 1 EA 321.**

22. It was further argued that the Tribunal could not exercise jurisdiction that was not conferred on it by the statute. Reliance was placed on **Republic Vs Attorney General & 3 Others exparte KAA Staff Retirement Benefit Scheme [2015] e KLR** citing **exparte May fair Bakeries Ltd v Rent Restriction Tribunal** and **Rivit R(KIRT) Raval Nairobi HCC 246/1981**.

23. It was further contended that there was no demonstration of illegality, irrationality or impropriety to warrant intervention by this court for Judicial Review and the case of **Republic v Attorney General & 3 Others Exparte KAA Staff Retirement Benefit Authority** was cited as well as **EA Railways Corporation V Anthony Sefu Dar esaalam HCC 19/1971[1973] EA 327.**

24. the 2nd respondent urged the court to dismiss the application for leave with costs.

DETERMINATION

25. I have considered the foregoing and in my humble view, the only issue for determination is whether the applicant deserves the leave sought to apply for Judicial Review orders of Certiorari and Mandamus. The requirement for leave was set out by a three judge bench comprising Bosire, Mbogholi Msagha and Oguk JJ in **Matiba vs Attorney General HCC Miscellaneous Application No. 790 of 1993** in which the court held that leave is supposed to exclude frivolous, vexatious or applications which *prima facie* appear to be abuse of the process of the court of those application which are statute barred.

26. A similar holding was made in **Republic vs Land Disputes Tribunal Court Central Division and Another Exparte Nzioka [2006] 1 EA 21** where Nyamu J (as he then was) held that leave should be granted, if on the material available the court considers, without going into the matter in-depth, that there is an arguable case for granting leave and that leave stage is a filter whose purpose is to weed out hopeless cases at the earliest possible time, this saving the pressure on the courts and needless expenses for the applicant by allowing malicious and futile claims to be weeded out or eliminated so as to prevent public bodies being paralyzed for months because of pending court action which might turn out to be unmeritorious.

27. The same position was upheld in **Republic vs The Permanent Secretary Ministry of Planning and National Development Exparte Kamenyi[2006] 1 EA 353** and in **Republic vs County Council of Kwale & Another Exparte Kondo & 57 others HC MCA 384 of 1996; Mexner & Another vs Attorney General [2005] 2 KLR 189.** In the latter case the court held that leave of the court is a prerequisite to making a substantive application for Judicial Review and that the purpose of the leave is to filter out frivolous applications hence the granting of leave or otherwise involves on exercise of Judicial discretion.

28. The circumstances which guide the grant of leave to apply for Judicial Review remedies were set out in **Mirugi Kariuki v Attorney General CA No. 70 of 1991 [1990-1994] EA 156; [1992] KLR** as follows:

> ***" If he[the applicant] fails to show, when he applies for leave, a prima facie case on reasonable grounds for believing that there has been a failure of public duty, the court could be in error if it granted leave. The club represented by the need for the applicant to show when he seeks leave to apply, that he has a case, is as essential protection against abuse of the legal process. it enables the court to prevent abuse by busybodies, cranks and other mischief makers….."***

29. In **Re Bivac International SA(Bureau Veritas) [2005] 2 EA 43 HCK** the court expressed itself thus:-

> ***" Application for leave to apply for orders of Judicial Review are normally exparte and such an application does restrict the court to threshold issues namely whether the application has an arguable case, and whether if leave is granted the same should operate as stay. Whereas Judicial Review remedies are at the end of the day discretionary that discretion is a judicial discretion and, for this reason a court has to explain how the discretion, if any was exercised so that all the parties are aware of the factors which led to the exercise of the court's discretion .***

There should be an arguable case which without delving into the details could succeed and an arguable case is not ascertained by the court by tossing a coin or waving a magic wand or raising a green flag, the ascertainment of an arguable case is an intellectual exercise in this fast growing area of the law and one has to consider without making any findings, the scope of the judicial review remedy sought, the grounds on the possible principles of administrative law involved and not forger the ever expanding frontiers of Judicial Review and perhaps give an applicant his day in court instead of denying him. Although leave should not be granted as a matter of routine, where one is in doubt one has to consider the wise words of Megarry,J in the case of [John V Rees] [1970] ch-345 at 402 that in the exercise if the discretion whether or not to grant stay, the court takes into accounts the needs of good administration."

30. The above position was appreciated by Majanja J in **JR 139/2014 Vania Investments Pool Ltd & Capital Markets Authority & Others** in which the learned judge stated:

" I do not read the Court of Appeal to be saying the court should not have regard to the facts if the case or have at best a cursory glance at the arguments.

As I stated in Ocean Freight Transport Company Limited vs Purity Gathoni and Another Nairobi HC Miscellaneous Application JR No. 249 of 2011 [2014] e KLR, in my view, the reference to an arguable case in W'a Njuguna's case is not that the issue is arguable merely because one party asserts one position and the other takes a contrary view. The duty of the court to consider the facts is not lessened by the mere conclusion that the case if frivolous or that leave is underserved by examining the facts. Indeed if leave was to be considered a matter of right then the purpose for which leave us required would be rendered otiose."

31. From the foregoing case law it is established that the grant of leave to commence Judicial Review proceedings is not a mere formality and that leave is not granted as a matter of course. (See **Sylvana Mpabwanayo Ntaryamira v Allen Waiyaki Gichuhi & Another [2016] e KLR** per Odunga J.

32. The applicant for leave is therefore under an obligation to show to the court that he has a prima facie arguable case for grant of leave. Whereas he is not required at that stage to go into the depths of the application, he has to show that he has not come to court after an inordinate delay and that the application is not frivolous, malicious and or futile. The grant of leave being an exercise of discretion the conduct of the applicant must also be considered.

33. In this case, the applicant avers that the 1st respondent erred in finding that it has no jurisdiction to enforce judgments of the High Court yet Section 49 of the Retirement Benefits Authority Act gives it such mandate to exercise power as would the High Court. Secondly, that as the 1st respondent had passed judgment and ordered the 2nd respondent to pay the applicant his unpaid dues, the 2nd respondent cannot argue or allege that it was not part of the suit and that therefore the same decision in the civil suit does not bind it. It was claimed that in any case, the 2nd respondent does not exist without the existence of the Corporation which was the defendant in the civil suit at Nakuru.

34. It was submitted that the 1st respondent owes a legal duty to the applicant to make a decision that is not injurious to the applicant to whom the Tribunal owes a duty, as long as it is not acting beyond its mandate. That the 1st respondent acted in error for it to deny responsibility and hence it should be compelled to review its decision since the error is very apparent.

35. The 2nd respondent fully supports the position taken by the 1st respondent Tribunal and so does the 3rd respondent Attorney General despite having no issue with leave being granted.

36. I have perused Section 49 of the Retirement Benefit Act and nowhere does it confer upon the Tribunal powers of the High Court. The only mention of the High Court is Subsection (4) with regard to

award of costs and the scale prescribed for suits in the High Court. It therefore follows that there is no arguable case with regard to the claim that the 1st respondent erred in denying responsibility of enforcing orders, judgments and decrees of the High Court.

37. The section provides:

> **"49. Powers of Appeals Tribunal**
>
> ***(1) On the hearing of an appeal, the Tribunal shall have all the powers of a subordinate court of the first class to summon witnesses, to take evidence upon oath or affirmation and to call for the production of books and other documents.***
>
> ***(2) Where the Tribunal considers it desirable for the purpose of avoiding expense or delay or any other special reason so to do, it may receive evidence by affidavit and administer interrogatories and require the person to whom the interrogatories are administered to make a full and true reply to the interrogatories within the time specified by the Tribunal.***
>
> ***(3) In its determination of any matter, the Tribunal may take into consideration any evidence which it considers relevant to the subject of an appeal before it, notwithstanding that the evidence would not otherwise be admissible under the law relating to admissibility of evidence.***
>
> ***(4) The Tribunal shall have power to award the costs of any proceedings before it and to direct that costs shall be paid in accordance with any scale prescribed for suits in the High Court or to award a specific sum as costs.***
>
> ***(5) All summons, notices or other documents issued under the hand of the chairman of the Tribunal shall be deemed to be issued by the Tribunal.***
>
> ***(6) Any interested party may be represented before the Tribunal by an advocate or by any other person whom the Tribunal may, in its discretion, admit to be heard on behalf of the party.***

38. The powers of the Tribunal referred to above have nothing to do with exercise of jurisdiction of the High Court except as far as award of costs are concerned. Furthermore, the section is clear that the Tribunal shall exercise powers as those of the subordinate court as far as the ***summoning of witnesses, taking of evidence upon oath or affirmation and calling for the production of books and other documents is concerned.***

39. In addition, it is at section 51 of the Act where the Act makes it clear that:

> ***"51. Costs***
>
> ***(1) Where the Tribunal awards costs in an appeal, it shall, on application by the person to whom the costs are awarded, issue to him a certificate stating the amount of the costs.***
>
> ***(2) Every certificate issued under subsection (1) may be filed in the High Court by the person in whose favour the costs have been awarded and upon being so filed, shall be deemed to be a decree of the High Court and may be executed as such:***
>
> ***Provided that an order for costs against the Government shall not be enforced save in the manner provided for by the Government Proceedings Act."***

40. It follows that the High Court is only referred to as far as the filing of costs awarded by the Tribunal are concerned, not implementation of decisions of the Tribunal.

41. Secondly, albeit it is claimed that the 1st respondent erred in finding that the 2nd respondent which was not a party to the civil case could not be bound by the High Court judgment, as it paid to the applicant monies following the judgment of the 1st respondent, this court finds that the attack on the decision of the 1st respondent is an attack on the merits thereof and not on the legality, irrationality/unreasonableness or procedural impropriety of the decisions or decision making process. the 1st respondent may have erred in law and fact in arriving at the decision that it did. However, that error can only be corrected by an appellate court and not a court exercising Judicial Review jurisdiction. As was held in **Municipal Council of Mombasa vs Republic & Umoja Consultants Ltd** CA **No. 185/2001** the Court of Appeal made it clears that:

> "***Judicial Review is concerned with the decision making process, not with the merits of the decision itself; the court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision maker took into account relevant matters or did take into account irrelevant matter. The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself such as whether there was or there was not sufficient evidence to support the decision ."***

42. In this case, it has not been demonstrated that *prima facie*, the 1st respondent in its ruling of 1st December 2016 acted contrary to the rules of natural justice or acted illegally, irrationally and or with procedural impropriety. What the applicant is seeking to challenge is the merits s of the decision of the 1st respondent which does not warrant this court's intervention by way of Judicial Review. In **EA Railways Corporation V Anthony Sefu. Dar HCC 19/71 [1973] EA 327**, the court held and I concur:

> ***" An allegation that a tribunal has misconstrued the provision of the law or regulation does not entitle the court to question the decision reached in Judicial Review proceedings. Whereas that may be a ground for appeal, it does not amount to a ground for Judicial Review. It ought to be appreciated that there is a distinction between taking into account relevant or irrelevant matters which are grounds for Judicial Review and merely misconstruing a statutory provision or regulation which do not Ipso facto constitute grounds for Judicial Review.***

43. The applicant wants this court to determine in the intended motion, whether or not the 1st respondent erred in law and fact in refusing to exercise jurisdiction conferred by Section 49 of the Retirement Benefits Act and whether or not the 1st respondent was correct in its ruling that the 2nd respondent not being a party to the Nakuru HCC Civil suit No. 204/2009 could be bound by that judgment of Maraga J (as he then was). With utmost respect to the applicant, those issues are beyond the scope of Judicial Review. They are matters which the court exercising appellate jurisdiction would, pursuant to Section 78 of the Civil Procedure Act, re-examine and re-evaluate and reassess, based on the available evidence and arrive at the court's own independent conclusion, by way of rehearing of the case.

44. For the above reasons, I find that this application does not raise an arguable *prima facie* case for the court to carry out an inquiry into the matters complained of in the application for leave.

45. Accordingly, I find the application dated 1st December 2016 not merited. I decline to grant it and dismiss it with no orders as to costs.

Dated, signed and delivered in open court at Nairobi this 15th day of May 2017.

R. E. ABURILI

JUDGE

In the presence of:

Miss Maina for the applicant

N/A for respondents

CA: Mohamed