



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC PETITION NO. 13 OF 2020**

**FREDRICK OKWOMI ANYASI**

**JACKTON M MALONZA**

**JOSEPH MOSOTTA BIKANI**

**EVANSON MUHIA GACHOHO**

**HARUN SIMBIRI SHAMALA**

**(Suing in their own capacity as Members of the Kenya Railways Retirement Benefits Scheme and  
on behalf of 7000 other Members.....PETITIONERS**

**VERSUS**

**KENYA RAILWAYS RETIREMENT BENEFITS SCHEME.....1 ST RESPONDENT**

**THE TRUSTEES OF KENYA RAILWAYS**

**RETIREMENT BENEFITS SCHEME ..... 2 ND RESPONDENT**

**RULING**

1. The petitioners brought this petition through a petition dated 8/5/2020. Their case was that they were members of the Kenya Railways Retirement Benefits Scheme (**the 1st respondent**) and the 2nd respondents were trustees of the 1st respondent. They contended that they had become aware that the 2nd respondent intended to sell and transfer some of the 1st respondent's properties through public tender. They added that they had not authorized the intended sale and that sale of the properties would amount to irregular disposal of property and would lead to a reduction of their entitlements in the Scheme.

2. Consequently, the petitioners sought the following verbatim orders in the petition:

**1. A declaration that the respondents have breached the petitioners fundamental rights under Articles 10(2), 35(1), 40, 43(1) (e), 47(1), 57(b) and 64 of the Constitution of Kenya.**

**2. That a permanent injunction be issued against the respondents, their employees, agents, and servants restraining the respondents whether by themselves, their officers, agents or servants or whomsoever is acting on their behalf from opening of the tenders, awarding the tenders, entering any contract for selling or disposing of the following properties:**

**a. Land Reference Number 209/378/5 measuring 0.48 acres located along Woodlands Lane off Jabavu Road/Argwings Kodhek Road Hurlingham Estate Nairobi.**

**b. Tender Number KRSRBS/022/PLM.2020 Land Reference Number 209/19382 Ngara Estate, Nairobi 43 acres as a whole and/or any portion thereof.**

**c. Land Reference Number Mombasa/Block XXVI/941 measuring 2.67 acres located along Chambilo Road, Kizingo area Comprising 2 four story block of flats each comprising 16 units of two bedrooms each.**

**d. Land Reference Number 1/420 measuring 0.71 acres located along Kindaruma Road, off Ngong Road.**

3. Together with the petition, the petitioners brought a notice of motion dated 8/5/2020 in which they sought a conservatory order restraining the respondents against disposing the suit properties. Further, they sought an order compelling the respondents to render a detailed and true account to the petitioners. Lastly, they sought an order directing the respondents to first collect outstanding balances of previous sale proceeds in the sum of Kshs 892,270,548 before proceeding with any intended sale of assets of the 1st respondent in accordance with the resolution dated 24/4/2015. That application is the subject of this ruling. It was supported by a joint affidavit sworn by the five petitioners.

4. The respondents opposed the application through a replying affidavit sworn on 10/6/2020 by **Victoria Mulwa**. She deposed that the 2nd respondent had a trust deed wherein they drew their mandate to perform their duties, including leasing, mortgaging, and selling of land forming part of the assets of the Scheme, to ensure the provision of pension and other retirement benefits of the Scheme's members. She further deposed that the sole source of investment of the Scheme, was in its immovable properties that vested in it by the Scheme's sponsor vide a vesting order dated 7/9/2006. She added that the trustees were added to liquidate some of the assets of the Scheme to ensure compliance with the Retirement Benefits Act and to also ensure payment of retirement dues to Scheme's members. She added that on 25/10/2019, the trustees resolved to dispose some of the assets of the Scheme to improve the Scheme's liquidity level in compliance with the Retirement Benefits Authority Regulations. She urged the court to dismiss the application.

5. The application was canvassed through written submissions dated 17/6/2020. Counsel for the applicants argued that the impugned actions of the respondents had breached the applicants' constitutional rights under Articles 40, 64, 47, 10, 35 and 43 of the Constitution. Relying on the decisions in: (i) **Judicial Service Commission v Speaker of the National Assembly & Another (2013) eKLR**; (ii) **Dr Alfred N Mutua v Ethics & Anti-Corruption Commission (EACC) & others [2015] eKLR**; and (iii) **British American Tobacco (K) Ltd v Attorney General & 3 others [2016] eKLR**, among other decisions, counsel urged the court to grant the orders.

6. The respondents filed written submissions dated 30/6/2020. They argued that the respondents were discharging their obligations under the law and under the Trustee Deed and had not violated any of the rights enumerated by the petitioners. Reliance was placed on, *inter alia*, the following decisions, to reinforce this argument: (i) **E Muriu Kamau & Another v National Bank of Kenya Limited [2009] eKLR**; (ii) **High Court Petition Nos 353 of 2012 of 2012 and 159 of 2012; Tom Kusienya and 11 others v Kenya Railways Corporation and 2 others**; and (iii) **Speaker of National Assembly v Njenga Karuma [2008] 1 KLR 425**. Counsel argued that both the Retirement Benefits Act and the relevant Trust Deed contained dispute resolution mechanisms which the petitioners had ignored. They urged the court to strike out the petition on this ground.

7. I have considered the motion together with the rival affidavits and submissions. I have also considered the relevant legal framework and jurisprudence. One of the grounds upon which the motion was opposed relates to the jurisdiction of this court to entertain this matter [*see paragraphs 31 to 41 of the Respondents' Written Submissions*]. The respondent contended that the petitioners had ignored the dispute resolution mechanisms provided under the Retirement Benefits Act and under the relevant Trust Deed.

8. It is now a settled principle of our law that whenever a question of jurisdiction of the court is raised, the court must dispose that question before dealing further with the matter. [*see (i) Owners of Motor Vessel "Lillan S" v Caltex Oil (Kenya) Ltd (1989) and (ii) Samuel Kamau Macharia & Another vs Kenya Commercial Bank Limited & 2 Others [2012] eKLR*].

I will therefore dispose the issue of jurisdiction first.

9. The centrality of jurisdiction in court adjudication of disputes was recently emphasized by the Court of Appeal in **Phoenix of E.A Assurance Company Limited vs S. M. Thing'a t/a Newspaper Service [2019] eKLR** in the following words:

***"It is a truism jurisdiction is everything and is what gives a court or a tribunal the power, authority and legitimacy to entertain any matter before it."***

10. The Court of Appeal asserted further:

***"If a court therefore proceeds to hear a dispute without jurisdiction, then the result will be a nullity ab initio and any determination made by such court will be amenable to being set aside ex-debito justitiae"***

11. The petitioners in this petition are challenging the decision of the Trustees (2nd respondent) to dispose some of the assets of the Scheme. The petitioners contend that they are members of the Scheme. They are dissatisfied with the Trustees' decision to dispose the assets.

12. Section 46 of the **Retirement Benefits Act** contains the following framework in relation to resolution of disputes relating to decisions made by managers, administrators, custodians or trustees of Retirement Benefits Schemes:

**46. Appeals to the Chief Executive Officer**

***(1) Any member of a scheme who is dissatisfied with a decision of the manager, administrator, custodian or trustees of the scheme may request, in writing, that such decision be reviewed by the Chief Executive Officer with a view to ensuring that such decision is made in accordance with the provisions of the relevant scheme rules or the Act under which the scheme is established.***

***(2) A copy of every request under this section shall be served on the manager, administrator, custodian or trustees of the scheme.***

13. Section 48 of the Act provides the following mechanisms of appeal against any decision made by the Chief Executive Officer of the Retirement Benefits Regulatory Authority (RBA) pursuant to Section 46.

#### 48. Appeals to the Tribunal

*(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.*

*(2) Where any dispute arises between any person and the Authority as to the exercise of the powers conferred upon the Authority by this Act, either party may appeal to the Tribunal in such manner as may be prescribed.*

14. Similarly, Clause 34 of the Trust Deed and Rules of the 1st respondent provides the following dispute resolution mechanism:

#### 34. Arbitration

*Save where the decision of the Trustees is made final under the provisions of this Deed, if at any time hereafter any dispute, difference or question shall arise between the Sponsor, the Trustees, the Members, the Members' Dependents or other persons or their Personal Representatives or any of them respectively touching the construction, meaning or effect of this Deed or any cause or thing therein contained or the rights or liabilities of any of them under this Deed or otherwise howsoever in relation to the Scheme then every such dispute or question shall be referred to arbitration by a single arbitrator appointed by the parties and in default of such agreement by the Auditor agreed upon by the parties in the dispute and the result of which arbitration shall be final and binding upon all parties and the proceedings shall be regulated by the provisions of the Arbitration Act No 4 of 1995 of Laws of Kenya or any law or instrument amending, extending or replacing the Act.*

15. It is clear from the above legal framework and internal rules of the Scheme that there are primary dispute resolution mechanisms which the petitioners have ignored. Our courts have oftentimes stated that, where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be exhausted before the jurisdiction of the court is invoked. Echoing this principle, the Court of Appeal rendered itself on this issue in **Speaker of the National Assembly v Njenga Karume [2008] IKLR 425**;

*“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”.*

16. Reiterating this legal position, the Court of Appeal stated as follows in **Bethwell Allan Omondi Okal v Telkom (K) Ltd (Founder) & 9 Others [2017] eKLR**:

*“The appellant might want to argue that he has a constitutional right of access to justice, and we agree that he does, but the High Court and this Court have pronounced themselves many times to the effect that a party must first exhaust the other processes availed by other statutory dispute resolution organs, which are by law established, before moving to the High Court by way of constitutional petitions”*

17. Not too long ago, the Court of Appeal emphatically rendered itself on a constitutional petition crafted to appear to be a ventilation of rights under the Bill of Rights in **Kibos Distillers Limited & 4 Others vs Benson Ambuti Odega & 3 Others [2020] eKLR**:-

*“A party or litigant cannot be allowed to confer jurisdiction on a court or to ask jurisdiction of a competent organ through the art and craft of drafting of pleadings. Even if a court has original jurisdiction, the concept of original jurisdiction does not operate to oust the jurisdiction of other competent organs that have legislatively been mandated to hear and determine a dispute. Original jurisdiction is not an outer clause that ousts the jurisdiction of other competent organs. Neither is original jurisdiction an inclusive clause that confers jurisdiction on a court or body to hear and determine all and sundry disputes. Original jurisdiction simply means the jurisdiction to hear specifically constitutional or legislatively delinated disputes of law and act at first instance”.*

18. The totality of the foregoing is that this petition is prematurely before this court. The inevitable consequence is that the petition stands to be struck out. The petitioners are directed to exhaust the available primary dispute resolution mechanisms before inviting this court to exercise its jurisdiction.

19. Having come to the above finding and decision, I will not make any pronouncement on the merits of the dispute in this suit because doing so may prejudice the parties when they appear before the primary dispute resolution forum/fora.

20. In view of the existing relationship between the parties to this petition, they will bear their respective costs of the petition.

#### Disposal Orders.

21. In light of the foregoing, the petitioners notice of motion dated 8/5/2020 is disposed in the following terms:

*a) The respondents' objection to the jurisdiction of this court at this point of the dispute is upheld and the petition herein is struck out.*

*b) Parties shall bear their respective costs of the petition.*

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 22ND DAY OF JULY 2020**

**B M EBOSO**

**JUDGE**

**In the presence of: -**

Ms Maina for the Petitioners

Court Clerk - June Nafula