



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL SUIT NO. 55 OF 2010(OS)

**IN THE MATTER OF STAFF RETIREMENT BENEFITS SCHEME (SRBS) OF EX-STAFF
MEMBERS OF AFRICAN RETAIL TRADERS (K) LIMITED RULES**

AND

**IN THE MATTER OF VOLUNTARY WINDING UP OF A COMPANY SECTION 207 AND 241
OF COMPANY ACT CAP 486 LAWS OF KENYA**

AND

**IN THE MATTER OF THE SALE OF ART (K) LTD TO PELELE LIMITED SECTION 286 O
TRANSFER OF BUSINESS ACT CAP 296 LAWS OF KENYA**

**AND IN THE MATTER OF NULLIFICATION OF SALE AND ART(K) LTD TO PELELE
LIMITED AND LATER TO ART (2005) LTD**

**IN THE MATTER OF PAYMENT OF EX-ART (K) LTD MEMBERS AND THEIR
RETIREMENT BENEFITS**

BTWN

OTULO OLOOO SISSI & OTHERS.....PLAINTIFF

VERSUS

**1. HARISH MEDIRAATTA HITESH MEDIRATTA, DIPAK MEDIRATTA.....1ST
RESPONDENTS**

(DIRECTORS ART (K) LTD IN RECEIVERSHIP)

**2. BARCLAYS BANK OF KENYA LIMITED.....2ND
RESPONDENT**

**3. ROGER URIOT/a KINGSLAND COURT (interim administrators SRBS).....3RD
RESPONDENTS**

4. PELELE LTD (NOW ART (2005) LTD).....4TH RESPONDENT

**5. MR.HITESH MEDIRATTA, A.M.NTHIGA (TRUSTEES SRBS).....5TH
RESPONDENT**

**6. ART (K) LTD (CORPORATE TRUSTEE SRBS).....6TH
RESPONDENT**

RULING

1. The plaintiff filed an originating summons dated 3rd March 2010 under **order XXXVI Rule 1(a),(b), (c),(e) and (f) Section 3G Civil Procedure Rules ,sections 212,241,207 & 311 Companies Act Cap 486 Laws of Kenya , Section 12 of the Retirement Benefits Authority Act and Section 7 Bankruptcy Act** seeking this court to answer the following questions interalia:-

- 1. What were the objectives of the formation of the ART (K) Ltd Staff Retirement Benefit Scheme?**
- 2. Who were the Beneficiaries and Trustees of the Scheme at its formation?**
- 3. What was the ART (K) Ltd's Role as a corporate Sponsor of the SRBS?**
- 4. Did the trustees and Managers of SRBS comply with the retirement Benefits Authority Act, the statutory regulation body of Retirement Scheme's Rules and regulations?**
- 5. Did the Trustees of the Scheme separate the SRBS Accounts from the Business Accounts of the ART(K) Ltd and if so why did the scheme go down with the collapse of the ART (K) Ltd?**
- 6. Was the acquisition of ART (K) by the Pelele Limited less than a year after the former was placed under receivership proper and lawful?**

2. The above originating summons was supported by a lengthy supporting affidavit deponing interalia:

- 1) That he is bringing this suit in a representative capacity as the chairman Ex-ART welfare association.**
- 2) That I am a member of the ART (K) Ltd Staff Retirement Benefits Scheme (SRBS)- which scheme was established on the 1st day of January 1977 and executed on the 29th day of December 1978 under irrevocable trusts.**
- 3) That the ART (K) Ltd was the sponsor and corporate trustee of the scheme.**
- 4) That, before it went under receivership in 2005, Kenya National Assurance Ltd (KNAC) was the initial underwriter of the Staff Retirement Benefit Scheme.**
- 5) That the sinking of KNAC, the company retained premiums paid by the employees without remitting the same to the company manager /administrator AON Minet.**
- 6) That as from July 2004 ART (K) Ltd acted both as the Trustee and Fund Manager and investor contrary to the rules of Natural Justice and conflict of interest cannot be overruled.**
- 7) That, the scheme had provisions on how contributions were to be remitted and employer as well as provision on how the contributions were to be remitted and invested.**
- 8) That the company did not comply with all the minimum requirements of the Retirements Benefit Act as contained in the letter dated 6th December 2001.**
- 9) That, on 3rd day of October 2001 the ART (K) Ltd wrote to the Retirements Benefits Authority (RBA) the statutory body regulating body of retirement schemes, in compliance with the requirements a letter which is the clear proof that the company had not complied with many of the requirements at its inception.**

10) That, after the collapse of KNAC, ART (K) Ltd sought to continue the old scheme without seeking the members consent.

11) That on 28th day of October 2002 ART (K) Ltd in a notice to all members of staff claimed that the scheme did become insolvent and recommended it should wind up.

12) That on 18th January 2002 the Managing Director, the 1st respondent herein purported to redefine their rules and suspend temporarily the deductions and remittances to the scheme with effect from 30th January 2002 until further notice.

13) That single handedly, the company sought to redefine the scheme rules and contributions to commence by December 2002 until further notice.

14) That ART (K) SRBS was part and parcel of terms and conditions of service as the main requirements to enter the scheme were twelve months service subject to the rules of the scheme and shall remain a member of the scheme while in the service.

15) That although the employees satisfied these conditions and there is no claim to the contrary by the company, on leaving service the company failed to honour its obligations to pay members for their contributions in clear breach of the aims and rules of the scheme.

16)

17)

18)

3. The matter initially proceeded before Sitati J, but when it came before me on 26th April 2016, I noted that there was an element of labour/ employment aspect in the case whereupon I directed that parties highlight their submissions on this fact. When the matter came up again before me on 3rd October 2016 both parties had filed their submissions but did not highlight the same.

4. Before I proceed to consider the questions posed by the plaintiff in his originating summons, this court needs to determine whether it has jurisdiction to hear this case. I say so because I note that the plaintiff's originating summons touch on issues of terminal benefits, staff retirement benefits scheme pensions, rules of the scheme and e.t.c. which to my mind now fall under the jurisdiction of the Employment and Labour Relations Court.

5. The Industrial Court is established by **section 4(1) of the enabling Act** (the Industrial Court Act). The said Act reads as follows:

In pursuance of Article 162 (2) (a) of the Constitution, there is established the Industrial Court for the purposes of settling employment and industrial disputes and the furtherance, securing and maintenance of good employment and labour relations in Kenya.

The specific Jurisdiction of that Court is granted by section 12 of the Industrial Court Act which reads thus:

The court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 62(2) of the constitution of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the court relating to employment and labour relations including:

a) Disputes relating to or arising out of employment between an employer and an employee.

b)

c)

d)

6. It is my opinion that the Employment and Labour and Relations Court has jurisdiction to hear and determine disputes relating to employer or employee relating to queries on terminal benefits, staff retirement benefit and rules of a scheme.

7. However as I had indicated earlier in this ruling, this matter commenced in 2010 before the Employment and Labour Relations Court was constituted. Is it therefore in order to transfer a matter which had already commenced in the High court to the Labour and Relations Court? The answer to this question can be found at **Article 165(6)(b)** of the Constitution which categorically states that this court (High Court) is not to exercise jurisdiction of the courts established in **Article 162(2)**. Establishment of the Industrial Court was complete once judges to that court were appointed. (See **Brookside Dairy Limited -vs-Attorney General and the Industrial Court [2012] eKLR** and **James Kuria Ndirangu-vs-Dr. Willy Mutunga and Others Nairobi Petition No. 50 of 2012(unreported)**)

8. In **United States International University (USIU) -vs-Attorney General [2012] eKLR** Majanja J observed:

" This would only leave the Industrial Court as the only other forum for the exercise of the jurisdiction over cases dealing with matters described in section 12 of the Industrial Court Act,2011. My reasoning is further fortified by the provision of section 23 of the Sixth Schedule to the Constitution which provides that "All Judicial proceedings pending before any court shall continue to be heard and shall be determined by the same court or a corresponding court established under this constitution or as directed by the Chief Justice or the Registrar of the High Court[Emphasis mine.]"

In view of the fact that a corresponding court to the High Court , that is the Industrial court has now been established to deal with the employment and labour matters; it follows then that all employment and labour relations matters pending in the High Court shall now be heard by the Industrial Court which is now a court of the status of the High Court. The High Court therefore lacks jurisdiction to deal with all matters of employment and labour relations whether filed in the High Court before or after the establishment of the Industrial Court."

9. It is therefore the finding of this court that the subject of whether there can be inter transfer of cases between the High Court and courts of equal status has been discussed in many authorities. In the case of **Prof Daniel N. Mugendi vs Kenyatta University, Benson I. Wairegi, Eliud Mathu and Prof. Olive Mugenda CA. No. 6 of 2012**, at page 11, the court of Appeal held as follows:

" Believing as we do that the approach taken by Majanja J is the correct one, and in endeavouring to meet the ends of justice untrammelled by procedural technicalities, we set aside the order striking out the appellants' petition and direct that the High Court do transfer it to the Industrial Court which also has jurisdiction and authority to consider the claims of breach of fundamental rights as pertains to Industrial and Labour Relations matters. It is only just and proper that the industrial court do exclusively entertain these matters in the context and with regard to Article 165 (5) (b). And in order to do justice, in the event where the High Court or the Environment and Land Court comes across a matter that ought to be litigated in any of the other courts, it should be prudent to have the matter transferred to that court for hearing and determination. These three courts with similar/equal status should in the spirit of harmonization, effect necessary transfers among themselves until such time as the citizenry is well acquainted with the appropriate form for each kind of claim. However, parties should not file "mixed grill" causes in any court they fancy. This will delay dispensation of justice."

10. In the circumstances I direct this file be transferred to the industrial Court at Kisumu for hearing and

determination. Mention in Kisumu on 14/12/2016.

Dated, signed and delivered in open court this 5th day of December, 2016

HON. W. A OKWANY

JUDGE

In the presence of:

- Mr. Osoro for the Applicants
- N/A for the Respondents
- Omwoyo: court clerk