



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURT

PETITION NO. 57 OF 2014

ANNE WANGUI NGUGI & 2,222 OTHER.....PETITIONERS

VERSUS

EDWARD ODUNDO, C.E.O

RETIREMENT BENEFITS AUTHORITY.....RESPONDENT

JUDGMENT

Introduction

1. The gist of this petition is that the petitioners, all of whom are retirees from various private sector institutions, are unhappy with the conduct of the respondent and have brought this petition seeking to have him declared unfit to hold office. They contend that they filed their respective complaints relating to their retirement benefits with the respondent on diverse dates pursuant to the provisions of Section 46(1) of the Retirement Benefits Authority Act (RBA Act), but that the respondent has failed to act as he is required to do. They therefore allege violation of their right to access justice under Article 48 of the Constitution, as well as violation of Article 47 with regard to fair administrative action.
2. The petitioners describe themselves as adult persons of sound mind and former employees of and retirees from the Co-operative Bank of Kenya, Barclays Bank of Kenya, Telkom Kenya, Postbank, Postal Corporation of Kenya, National Bank of Kenya, National Museum of Kenya and Kenya Airports Authority, Kenya Commercial Bank and Standard Chartered Bank.
3. They have brought this claim against the respondent who is the Chief Executive Officer of the Retirement Benefits Authority (hereinafter “RBA or Authority”) and who is responsible for supervision and direction of all matters involving the retirement benefits industry players and, pursuant to the provisions of Section 11(4) of the RBA Act, is responsible for the day to day running of the RBA.

Background

4. The petitioners are all former employees of various public and private sector institutions. Upon leaving their employment on retirement and in accordance with the provisions of **Section 46 (1)** of the **RBA Act**, they lodged various claims regarding their underpaid pension benefits with the respondent and the Retirement Benefits Appeals Tribunal (hereinafter “the Tribunal) which has the mandate to hear appeals from decisions of the respondent.

5. The petitioners are aggrieved by the manner in which the respondent has and continues to handle their complaints. They have lodged the instant petition challenging the competence of the respondent in continuing to hold office and aver that his continued stay in office amounts to further infringement of their constitutional rights. Additionally, they have challenged the constitutionality of Section 46 (1) of the RBA Act.

The Case for the Petitioners

6. The petitioners' case is contained in their Amended Petition dated 4th April 2014 which is supported by an affidavit sworn by the 1st petitioner, Ms. Anne Wangui Ngugi, on 5th February 2014, a further affidavit sworn by Mr. Stephen Wahome Ihiga on 6th March 2014 and submissions dated 21st May 2014. Their Advocate, Mr. Amadi, presented their case.
7. It was submitted on their behalf that Article 48 of the Constitution protects the petitioners' right of access to justice and it should not be unreasonably denied as they have a constitutional right that their complaints under Section 46 (1) will be determined without undue delay. They contend that the respondent, as the person responsible for the day to day operations of the RBA, has developed a Service Charter and made communications to the public that complaints filed with his office will be determined expeditiously.
8. The petitioners aver that upon determination of their complaints by the respondent, they have a right of appeal to the Tribunal pursuant to section 48 of the RBA Act but until and unless the respondent makes a decision under section 46(1), they are unable to file their appeals with the Tribunal. In the circumstances, it is their submission that the respondent's continued stay in office means that they will continue suffering as he has used his public office to prejudice and violate their rights to access justice.
9. The petitioners claim further that the respondent's dispute resolution mechanisms are dysfunctional and ineffective owing to gross ineptitude; and that the respondent, while exercising his authority and powers under the RBA Act, is subject to the provisions of the standards prescribed under Chapter 6 of the Constitution.
10. The petitioners state that they are elderly retirees who have, since 2004, been seeking legal redress for their under-paid pension dues; that they filed their complaints with the respondent for determination on various dates, but that the respondent in all cases unjustly delays determination of such complaints for an inordinate number of years and in a few cases, where the respondent determines the complaints, he normally operates at the discretion of their former employers.
11. The petitioners allege further that every time they file their cases with the respondent, he has orchestrated a no-action approach to their complaints, thus denying them their constitutional right to have their cases determined without unreasonable delay.
12. The petitioners claim that the RBA Tribunal has on numerous occasions directed the respondent to perform his duties of expeditiously determining their complaints but the respondent has refused to comply with the directions of the Tribunal in order to escalate the suffering of the petitioners. He is therefore, in their view, unfit to hold public office and his continued stay in office amounts to a continuation of violation of their constitutional right to fair and just determination of their cases. It is also their contention that his conduct does not bring honour to the public office he occupies and falls short of the requirements of Chapter 6 of the Constitution.
13. The petitioners submit that Article 47 of the Constitution provides that they have a right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. They submit that the respondent has breached this Article as well as the provisions of Article 73. They contend further that the respondent has breached all the provisions of Article 57 on protection of the rights of older persons, as well as Article 21 which contains the state obligations on the implementation of the Bill of Rights. They therefore ask the Court to make a declaration that the

respondent is unfit to hold public office and issue a permanent injunction to restrain the respondent from holding any public office.

14. In the alternative, the petitioners seek a declaration that Section 46 (1) of the Retirement Benefits Act is unconstitutional as it purports to vest a judicial function on an office not recognized under Chapter 10 of the Constitution. They further submit that in any event, section 46 (1) of the RBA Act is unconstitutional as it purports to subordinate their constitutional rights to a fair hearing to the discretion of the incompetent and unresponsive respondent. They also urge the Court to issue an order directing the respondent to transfer all their pending cases to the Industrial Court, which is the constitutional court mandated to hear and determine disputes between employers and employees.
15. The petitioners submit that as retirees, they are required by law to file any complaint against the Trustees of a Pension Scheme with the respondent. They allege that in all cases, the respondent adopts an attitude against the petitioners' complaints and either refuses to act at all or takes inordinately long periods of time to resolve even a single dispute or in some cases he refers the complaints back to the Trustees, who in all cases do not bother to act and as a result, the matters have been left in abeyance for quite a long time.
16. They allege further that upon the enactment of the Retirement Benefits Act, they were given by Section 46 an unfettered right to lodge their complaint with the respondent without a pre-condition of going to arbitration which is an expensive affair. They claim that as retirees, they have no money to pay arbitrators and the law allows them free services under Section 46. It is their contention that the respondent is aware of the financial impediment to arbitration but is using it to frustrate their access to justice.
17. The petitioners have cited several cases to illustrate the failures of the respondent. According to the petitioners, on 23rd June 2011, the Retirement Benefits Appeals Tribunal issued an order in Case No. 9 of 2010 directing the respondent to hear and determine a complaint filed by a former employee of Standard Chartered Bank within a period of 30 days. They claim, however, that despite numerous requests to the respondent to comply with the Tribunal's order, the respondent, without any lawful excuse and due to sheer incompetence, refused to act. They have also given a number of illustrations of cases in which they allege the respondent has failed to act on complaints lodged by pensioners, instead referring their cases back to the trustees, leading to some former employees writing complaints to the Commission on Administrative Justice.
18. They also give illustrations of cases in which the respondent took an unduly long time to resolve complaints, in which complaints are yet to be resolved, or were resolved against the complainants, as including:
 - i. The complaint by Josephine Waithira Nganga against the Trustees of National Bank of Kenya Pension Scheme, filed on 23rd September 2013;
 - ii. A complaint that was filed by former employees of the Co-operative Bank against the trustees on 21st May 2010 which the respondent took a period of 4 years until 8th May 2013 when the respondent determined the case against the complainants;
 - iii. The complaint by Stephen Wahome Ihiga and Others –vs- the Trustees of KAA Staff Superannuation Scheme, in which former employees of Kenya Airports Authority filed a complaint with the respondent on 7th June 2013 which the respondent declined to determine vide his letter of 1st August 2013 without any lawful excuse.
 - iv. Tribunal Case No. 8 of 2010, Elias Maina Murigi & 133 Others –vs- National Bank of Kenya Staff Retirement Benefits Scheme.
 - v. Tribunal Case No. 1 of 2012, Sarah Njoroge and Others –vs- Retirement Benefits Authority and

Barclays Bank Staff Pension Fund.

19. The petitioners claim that in light of the above matters, they rightly believe that it is a deliberate effort by the respondent to frustrate them in the pursuit of their rights. They claim, further, that in any event, there is no requirement that the petitioners must file their complaints with arbitrators before invoking the provisions of section 46 of the RBA Act, and that such provisions of the Rules were made prior to the coming into force of Section 46 of the Act and therefore cannot override the rights given to them under the Act.
20. The petitioners contend that in his replying affidavit, the respondent has admitted to delay and refusals in discharging his statutory duties under section 46(1) of the RBA Act, and has only given numerous excuses which are not legally justifiable. They urge the court to disregard the contents of the replying affidavit and treat it as admissions of the respondent's incompetence.
21. The petitioners rely on the case of **Benson Riitho Mureithi -vs- J.N. Wakhungu Cabinet Secretary Ministry of Environment Pet No. 19 of 2014** and submit that the Court held in the matter that appointments to and continued holding of public office is subject to the provisions of Chapter 6 of the Constitution. They also refer the Court to the decision in **Republic -vs- Commissioner of Police ex parte Simon Merebu Kikwai, JR Misc. Application No. 93 of 2012** in which the Court held that where a public officer does not perform his administrative duties within the confines of Article 47 of the Constitution, the High Court would intervene. The petitioners also urged the Court to be guided by the decision in **Republic -vs- Principal Registrar, of Government Lands Misc. Application No. 10 of 2013** with regard to the jurisdiction to enforce Article 47 of the Constitution where there has been breach thereof.
22. The petitioners submit that in light of the fact that the respondent is purporting to cling to Section 46 (1) of the RBA Act to continue breaching their rights under Article 47, the Court should declare the section inconsistent with the Constitution as it denies them the right to have their complaint determined by an independent and impartial judicial body created under the Constitution.
23. In their Amended Petition dated 4th April 2014, the petitioners have asked the Court to grant the following orders:
 - a. ***A declaration that the respondent has breached the petitioners' constitutional fundamental rights enshrined in Articles 6, 12, 22, 23, 47, 48, 73, 75 and 159 of the Constitution.***
 - b. ***A declaration that the respondent is not fit and proper with due regard to his conduct dignity, personal integrity and suitability to hold public office.***
 - c. ***An order directing the respondent to discharge its statutory duties by determining the petitioners' pending cases and reconstitution of the Tribunal respectively.***
 - d. ***Alternatively:***
 - i. ***A declaration that Section 46 (1) of the Retirement Benefits Act is unconstitutional, null and void.***
 - ii. ***An order directing the respondent to forthwith transfer all the petitioners' pending cases to the Industrial Court for hearing and disposal***
 - e. ***Cost of the Petition be borne by the respondent.***

The Case for the Respondent

24. The respondent the current holder of the office of the CEO of the RBA, who is named as the sole

- respondent in the Amended Petition, has filed a replying affidavit sworn on 14th April 2014, as well as written submissions dated 5th June 2014. His case was presented by his Learned Counsel, Mr. Kiche.
25. The respondent denies that there has been a violation of the petitioners' rights as alleged, and contends that the petitioners have failed to meet the requirements in the case of **Anarita Karimi Njeru -vs- R (No. 1) 1979 KLR 154** to set out with a reasonable degree of precision the Articles of the Constitution that have been violated, and the manner of violation.
26. With regard to the allegation that there has been a violation of the petitioners' right to access justice under Article 48, the respondent submits that the Court has had occasion to define the term 'access to justice' under Article 48 of the Constitution in the case of **Dry Associates Limited -vs- Capital Markets Authority and Another Nairobi Petition No. 358 of 2011 (Unreported)** which was adopted with approval by Majanja J in the case of **Okenyo Omwansa George and Another -vs- The Attorney General and 2 Others, Petition No. 126 of 2011**, where it was held:
- “Access to justice is a broad concept that defies easy definition. It includes the enshrinement of rights in the law; awareness of and understanding of the law; easy availability of information pertinent to one's rights; equal right to the protection of those rights by the law enforcement agencies; easy access to the justice system particularly the formal adjudicatory processes; availability of physical legal infrastructure; affordability of legal services; provision of a conducive environment within the judicial system; expeditious disposal of cases and enforcement of judicial decisions without delay.”*
27. The respondent submits that while the petitioners have alleged infringement of Article 48, they have not indicated with particularity the manner in which each of their individual rights of access to justice has been infringed or impeded; and there is no clarity or precision with respect to the alleged delay by the RBA in determining the complaints lodged by the 2,223 petitioners.
28. The respondent concedes that the RBA has developed a Service Charter which unequivocally provides that when the RBA receives a complaint that can be upheld, then investigations begin, and that on average, complaints take about one month to resolve. He submits, however, that the investigation process may sometimes take a while because some complaints may be complicated and everyone has to be given a chance to express their views. Those who file complaints are requested to be patient while the RBA investigates the complaints, a position articulated in its Service Charter. He maintains that he has always expeditiously determined the complaints in light of the attending circumstances in each complaint.
29. The respondent has also made submissions with regard to some of the specific complaints referred to by the petitioners, He concedes that on 30th May, 2007, the RBA received complaints from members of the Kenya Airports Authority Staff Superannuation Scheme and the Authority expeditiously considered their complaint and rendered its decision on 16th July, 2007. However, the complainants, being aggrieved by the decision of the RBA, appealed to the Tribunal pursuant to Section 48 of the Act, and the Tribunal allowed the appeal in its decision of 23rd February, 2012.
30. He states that in that case, the Kenya Airports Authority Staff Superannuation Scheme, filed an application for judicial review in the High Court being **Judicial Review Case No. 223 of 2012** challenging the orders of the Tribunal and obtained orders restraining the RBA from acting in compliance with the Tribunal's decision of 23rd February, 2012. Ultimately, the High Court quashed the decision of the Tribunal, noting that the appeal was filed out of time and was thus untenable as the Tribunal had no authority to extend time for filing appeals. The respondent submits therefore that in the circumstances, he was inhibited from effecting the decision of the Tribunal.
31. The respondent submits therefore that the request by the petitioners for the RBA to revisit a matter

already determined by the High Court amounted to abuse of the court process. He refers the Court to the definition of abuse of court process in the case of **Microsoft Corporation –vs- Mitsumi Computer Garage Ltd (2001) 1 EA 127, at 136.**

32. With regard to the petitioners' contention that their right of access to justice has been impeded by the directive of the RBA that some of them submit to the dispute resolution mechanisms, including arbitration, under the respective Scheme Rules before filing complaints to the RBA, the respondent observes that in the case of the complaint regarding the Kenya Airports Authority Staff Superannuation Scheme, the complaint was filed by 17 members of the Scheme. Yet, according to the respondent, Article 26 of the Kenya Airports Authority Staff Superannuation Scheme provides for a dispute resolution process binding on all the members of the Scheme. It was on this basis that the RBA advised the Scheme members to submit to the dispute resolution process and that it would act upon receiving the certified copies of the award of the arbitrator. He submits that the advice was not followed as the respondent has not been presented with certified copies of the award.
33. The respondent further argues that submission to a dispute resolution process in the Scheme Rules is a statutory requirement under Regulation 7(v) of the Retirement Benefits (Occupational Retirement Benefits Scheme) Regulations, 2000. It is his case therefore that the RBA could only adjudicate upon disputes once the dispute resolution mechanism under the Scheme rules has been followed. In his view, the refusal by the petitioners to submit to a dispute resolution process such as arbitration under the Scheme Rules on account of the expense was untenable as the parties are not entitled to abandon the right forum at will and subject to their convenience.
34. It was his further contention that Article 159 (2) (c) of the Constitution encourages alternative dispute resolution, relying in support on the decision in **The Matter of the Estate of Reuben Kiplagat Chesire (Deceased), Succession Cause No. 1194 of 2009 (Unreported)**. The respondent submitted that the directive by the Authority for the petitioners to submit to the dispute resolution process under the respective Scheme Rules is consistent with the Constitution as well as the Act and thus cannot amount to violation of their right of access to justice under Article 48.
35. The respondent has also made specific responses to the other cases cited in the petition such as those of Hezekiel Isambo Sakwa, Evanson Mwangi Gakuu, the complaint by former employees by Barclays, among others. However, in light of the fact that this Court is not engaged in an appeal on the decisions of the respondent or the Tribunal, I need not go into an examination of the specifics of his response.
36. It is his case that while the petitioners have alleged that he has violated their rights under Articles 6, 12, 22, 23, 47, 57, 73, 75 and 159 of the Constitution they have not stated with a reasonable degree of precision the manner in which the aforesaid Articles have been infringed by him as required in law pursuant to the decision in **Anarita Karimi Njeru**. It is his case that in determining the complaints by the petitioners, he strictly adhered to the provisions of the Constitution, the RBA Act, respective Scheme Rules and the RBA's Service Charter; that he determined the complaints expeditiously, fairly, efficiently and lawfully; and that he has neither violated nor threatened the petitioners' fundamental rights as alleged.
37. The respondent concedes that he is a public officer as defined in Article 260 of the Constitution, and in the performance of his duties, is guided by principles set out in Article 75. He argues that Parliament enacted the Ethics and Anti-Corruption Commission Act, 2011 establishing the Ethics and Anti-Corruption Commission and the Leadership and Integrity Act, 2012 pursuant to Article 79 and 80 of the Constitution respectively. It is his submission that the Leadership and Integrity Act in Part IV provides for the enforcement of the Leadership and Integrity Code; that Section 41 provides for breach of the Code while Section 42 provides for lodging of complaints and investigations upon breach of the Code.
38. He therefore contends that since the petitioners allege that he has, in the performance of his duties

as a public officer, violated or infringed their rights, in effect breaching the leadership Code, particularly Section 7 (3) of the Leadership and Integrity Act, they ought to have filed a complaint as provided by Sections 42 of the Leadership and Integrity Act rather than directly invoking the jurisdiction of this Court through a constitutional petition. It is his submission that decisions of the Court have been emphatic that where there is a procedure prescribed by an Act of Parliament for redress of a particular grievance, such procedure must be strictly followed. He relies, among others, on the decision in **Speaker of the National Assembly –vs- Karume, Civil Application No.92 of 1992; Jimmy Mutinda –vs- Independent Electoral and Boundaries Commission and 2 Others and Ex parte Sheilesh Kumarnata Verbai Patel and 20 Others (2013) eKLR.**

39.The respondent urges the Court to be persuaded by the holding of the Constitutional Court of Trinidad and Tobago in **Re Application by Bahadur (1986) L.R.C (Const.) 297 at 298** in which the Court stated that

“The Constitution is not a general substitute for the normal procedures for invoking judicial control of administrative action. Where infringements of rights can found a claim under substantive law, the proper course is to bring the claim under that law and not under the constitution.”

40.He further submits that the petitioners have used the wrong channel to air their administrative grievances; that this Honourable Court is not the proper forum to which a matter seeking to declare the respondent unfit to hold public office should be brought as there exists a statutory framework for addressing the issue under the Leadership and Integrity Act, 2012. The respondent urges the court to be guided by the decision of Lenaola J in **Papinder Kaur Atwal -vs- Manjit Singh Amrit (2009) eKLR** in this regard.

41.To the petitioners’ submission that section 46 of the RBA Act should be declared unconstitutional, the respondent relied on the decisions in **Olum and Another –vs- Attorney General [2002] 2 E.A. 508, Dadoo Ltd –vs- Krugersdorp Municipal Council, 1920 AD 530, and Dileep Manibhai Patel and 3 Others –vs- Municipal Council Of Nakuru and Another [2014] eKLR,** to submit that there is a general presumption of law that statutes enacted by Parliament are constitutional and the burden falls on the person who alleges otherwise to rebut this presumption. The respondent relied for this proposition on the decision in the Supreme Court of India case of **Hambardda Wakhana –vs- Union of India Air [1960] AIR554.**

42.He submitted further that the Court will not nullify legislation merely because it is thought that such law is in ‘bad taste’ or ‘unconscionable’ or ‘inconvenient.’

43.The respondent argued that section 46(1) of the RBA Act is constitutional since it is in tandem with Article 159 (2) (c) of the Constitution which promotes alternative dispute resolution mechanisms. It was his argument further that his statutory duty is limited to reviewing the decision of the manager, administrator, custodian or trustees of pension schemes in order to ensure such decision is in accordance with the provisions of the relevant scheme rules or the Act under which the scheme is established; and further, that his statutory functions are pursuant to the objectives of the Act and the principles of the Constitution. He argued further that the said Section 46(1) is not a *cul de sac* since the decisions made pursuant thereto can be challenged by filing an appeal to the Appeals Tribunal pursuant to Section 48 of the RBA Act; and that the Appeals Tribunal, in hearing the appeal, has all the powers of a Subordinate Court of the first class.

44.To the petitioners’ argument that section 46 is unconstitutional as it vests judicial authority in a body not established under Chapter 10 of the Constitution, the respondent submits that his statutory mandate under Section 46(1) is quasi-judicial and is in line with the RBA Act and the Constitution; that the Constitution recognizes persons, bodies and authorities performing quasi-judicial functions under Article 165 (6) of the Constitution and grants the High Court a supervisory role over them; and that consequently, the petitioners’ argument that Section 46(1) is unconstitutional as it purports to vest judicial functions in an office not recognized under Chapter

10 of the Constitution is misplaced as the Constitution recognizes quasi-judicial functions of persons and authorities, such as the respondent.

45. In response to the petitioners' plea that their respective pension claims be sent to the Industrial Court for hearing and determination, the respondent argues that the Industrial Court would not have jurisdiction to deal with such claims as jurisdiction is vested in the RBA. He submits that from their Amended Petition, it is clear that all the petitioners are former employees and retirees; their claims are in respect of their underpaid pension benefits; and that the jurisdiction of the Industrial Court as envisaged at Section 12 of the Industrial Court Act, 2011 as read with Section 87 of the Employment Act, 2007 is limited to disputes relating to or arising out of the employment between an employer and an employee. It is his submission therefore that the Industrial Court lacks jurisdiction to determine disputes regarding underpaid pension benefits, which disputes fall within the ambit of the RBA which is established as a body corporate for the regulation and supervision of the management of retirement benefits schemes as provided under Sections 46 (1) and 48 of the Act.
46. The respondent maintains that the RBA and the Tribunal have the jurisdiction to determine employment issues in so far as they are incidental to claims falling within the Act such as claims by the petitioners for underpaid pension benefits. It is his submission that this position was enunciated by Justice Majanja in **Republic -vs- Retirement Benefits Appeals Tribunal Ex-parte Professor George Albert Amore Mogaha and 12 Others [2013] eKLR**.
47. The respondent further argues that the petitioners have previously sought similar orders against him in **Philip Kairu and 7 Others -vs- the Attorney General and Others Petition No 441 of 2012** and in **Alexander Mungai Muchuku and 42 Others -vs- The Attorney General and Others Pet No 441 of 2012**. It is his submission that the present petition as framed is an attempt to intimidate and influence him in the exercise of his statutory mandate under the pretext of the alleged violation of their rights and that there has been no violation of the Constitution as alleged or at all. It was his case that the petitioners had lodged their complaints in terms of section 46 of the Retirement Benefits Act; he had rendered decisions in good faith in compliance with the Act and the applicable Scheme Rules; and he prayed that the petition be dismissed with costs against the petitioners.

Determination

48. The crux of the petitioners' claim is their dissatisfaction with the manner in which the respondent carries out his mandate as the Chief Executive Officer of the RBA. It is on this basis that they seek orders to have him declared unfit to hold public office, and it would appear that, failing such declaration, they seek to have section 46 (1) of the Retirement Benefits Act declared unconstitutional so that they would not need to lodge complaints against their Schemes with the RBA but can go to the Employment and Labour Relations Court.
49. I have considered the respective pleadings and submissions of the parties which I have set out above, and I take the view that three issues arise for determination in this matter. The first is whether there has been a violation of the petitioners' right to access justice and to fair administrative action guaranteed under Article 47 and 48 of the Constitution. The second is whether the Court should find and declare the provisions of section 46 (1) of the Retirement Benefits Act unconstitutional. Should the Court find in favour of the petitioners, it will need to consider what relief they are entitled to.
50. I have set out elsewhere above the grievances that the petitioners have against the respondent. They contend that the respondent has been directed on many occasions by the Retirement Benefits Appeals Tribunal to perform his duties of expeditiously determining their complaints, but he has failed to do so, in the petitioners' view, to escalate their suffering. Their view is that he should not continue to hold public office, and his continued stay in office amounts to a continuation of violation of their constitutional right to fair and just determination of their cases.

51. As observed earlier in this judgment, this Court is not and cannot enter into a consideration of the matters alleged to have been lodged with the respondent and not determined to the satisfaction of the petitioners. This is because there is an elaborate system under the provisions of the Retirement Benefits Act for the resolution of disputes relating to retirement benefits-see Sections 46 and 48 of the Act.
52. The issue which the petitioners have placed before the Court for consideration is whether the respondent is fit to hold public office. This issue leads to the question which this Court should consider: is the matter of the suitability of the respondent a matter to be determined by way of a constitutional petition alleging violation of constitutional rights?
31. As observed by the respondent, resort to the Constitution cannot be had when there are other processes and procedures for dealing with disputes. As this Court observed in **High Court Petition No. 353 of 2012 (Consolidated with Petition No. 159 of 2012 Tom Kusienya & Others –vs- Kenya Railways Corporation & Others**, one of the principles of the exercise of judicial authority under Article 159 is the promotion of alternative forms of dispute resolution. The Court cited with approval the decision in **International Centre for Policy and Conflict and 5 Others –vs- The Hon. Attorney-General & 4 Others [2013]eKLR** in which the Court observed as follows:

***“[109] An important tenet of the concept of the rule of law is that this Court before exercising its jurisdiction under Article 165 of the Constitution in general, must exercise restraint. It must first give an opportunity to the relevant constitutional bodies or State organs to deal with the dispute under the relevant provision of the parent statute. If the court were to act in haste, it would be presuming bad faith or inability by that body to act. For instance, in the case of IEBC, the court would end up usurping IEBC’s powers. This would be contrary to the institutional independence of IEBC guaranteed by Article 249 of the Constitution.** “*

***[110] Where there exists sufficient and adequate mechanisms to deal with a specific issue or dispute by other designated constitutional organs, the jurisdiction of the court should not be invoked until such mechanisms have been exhausted...**”(Emphasis added)*

32. The Court also relied on the decision in **Re Application by Bahadur[1986] LRC (Const)** at page 307,

“The Courts have said time and again that where infringements of rights are alleged which can be founded in a claim under substantive law, the proper course is to bring the claim under such law and not under the Constitution. This case highlights the unwisdom of ignoring that advice....

*The Constitution sets out to declare in general terms the fundamental concepts of justice and right that should guide and inform the law and the actions of men. While an infringement of the Constitution might in certain cases give rise to the redress provided for at section 14, yet, as has been proclaimed by the highest Court in the land, it is not, “a general substitute for the normal procedures for invoking judicial control of administrative action.” (See *Harrikissoon v A-G [1979] 3 WLR 62*).*

33. Further, as observed in the case of **Minister of Home Affairs vs Bickle & Others (1985) LRC Const** (per (Georges C.J):

“Courts will not normally consider a constitutional question unless the existence of a remedy depends on it; if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a Court will usually decline to determine whether there has been in addition a breach of the Declaration of Rights.”

34. See also the decision of Lenaola J in **Papinder Kaur Atwal -vs- Manjit Singh Amrit Nairobi**

Petition No. 236 of 2011 where after considering several authorities on the issue, the Learned Judge remarked as follows:

“[24] All the authorities above would point to the fact that the constitution is a solemn document, and should not be a substitute for remedying emotional personal questions or mere control of excesses within administrative processes

....

[27] I must add the following; Our Bill of Rights is robust. It has been hailed as one of the best in any Constitution in the World. Our Courts must interpret it [with] all the liberalism they can marshal. However, not every pain can be addressed through the Bill of Rights and alleged violation thereof.” (Emphasis added)

53.To the question before the, whether, where an allegation is made that a public officer is not fit to hold public office, the remedy lies in a constitutional petition alleging violation of constitutional rights, we turn to Article 79 and 80 of the Constitution and Legislation made pursuant thereto.

54.Article 79 of the Constitution, which is contained in Chapter 6 of the Constitution and violation of which the petitioners allege against the respondent, provides as follows:

“Parliament shall enact legislation to establish an independent ethics and anti-corruption commission, which shall be and have the status and powers of a commission under Chapter fifteen, for purposes of ensuring compliance with, and enforcement of, the provisions of this Chapter.”

55.At Article 80 titled “Legislation on Leadership”, the Constitution provides that:

Parliament shall enact legislation—

(a) establishing procedures and mechanisms for the effective administration of this Chapter;

(b) prescribing the penalties, in addition to the penalties referred to in Article 75, that may be imposed for a contravention of this Chapter;

(c) providing for the application of this Chapter, with the necessary modifications, to public officers; and

(d) making any other provision necessary for ensuring the promotion of the principles of leadership and integrity referred to in this Chapter, and the enforcement of this Chapter.

56.Pursuant to this provision, Parliament enacted the Leadership and Integrity Act, 2012 which sets out the procedure for filing complaints pertaining to violations of the Act. It is the Ethics and Anti-Corruption Commission, established under the Ethics and Anti-Corruption Commission Act, 2011 (No. 22 of 2011), established pursuant to the provisions of Article 79 set out above, that is given the legal mandate under section 42 of the Leadership and Integrity Act to investigate complaints against public and State Officers for breach of the provisions of Chapter 6 of the Constitution. That being the case, this Court cannot properly enter into an inquiry into whether or not the respondent is fit to hold public office.

57.The petitioners have the right to lodge a complaint with the Ethics and Anti-corruption Commission which can inquire into the conduct of the respondent and recommend appropriate action to the RBA, whose Board appoints the respondent pursuant to the provisions of Section 11(1) of the RBA Act, should his conduct fail to meet the constitutional threshold set in Chapter 6. Indeed, one would expect that the RBA Board, which is given the mandate to appoint the

respondent by section 11, would set performance indicators in his terms and conditions of service, and seek his removal should he fail to meet them. Section 11(1) provides that

11.(1) There shall be a Chief Executive Officer who shall be appointed by the Board in consultation with the Minister and whose terms and conditions of service shall be determined by the Board in the instrument of appointment or otherwise in writing from time to time.

58. It is not for this Court to micro-manage the RBA with respect to the performance of its Chief Executive Officer. Having said, that the Court cannot be oblivious to the distress of the petitioners, who say that they have been waiting for a resolution of their complaints since 2004. Such a delay suggests failures in the RBA system. It is incumbent on the Board and the respondent to look into the matter and remove the bottlenecks to the dispute resolution process.

Whether There is a Violation of the Petitioners' Constitutional Rights

59. The petitioners allege violation of their constitutional rights under Articles 6, 12, 22, 23, 47, 48, 73, 75 and 159 of the Constitution. Article 6 makes provisions with regard to devolution and access to services, 12 relates to citizenship, while Articles 22 and 23 contain general provisions with regard to enforcement of fundamental rights. These provisions, as well as Article 159 which relates to the exercise of judicial authority do not contain constitutional guarantees of fundamental rights and freedoms. Similarly, Articles 73 and 75 relate to the responsibilities and conduct of state officers. Consequently, in considering the alleged violation of the petitioners' rights, I do so by considering whether there has been a violation of Articles 47 and 48 of the Constitution.

60. Article 47 guarantees to every one administrative action that is expeditious, efficient, lawful reasonable and procedurally fair. Article 48 provides that ***"The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice."***

61. I have set out above the petitioners' complaints against the respondent. The question is whether the accusations leveled against him rise to the level of constitutional violations of the petitioners' fundamental rights and freedoms under Articles 47 and 48.

62. The petitioners correctly point out, as was held in **Republic –vs- Commissioner of Police ex parte Simon Merebu Kikwai** referred to above, that where a public officer does not perform his administrative duties within the confines of Article 47 of the Constitution, the High Court would intervene, and in **Republic –vs- Principal Registrar, of Government Lands** that the High Court has jurisdiction to enforce Article 47 of the Constitution where there has been breach thereof.

63. The evidence before the Court indicates that the respondent handled various matters relating to former employees of various organizations belonging to different Retirement Benefits Schemes. For instance, the case of **Hezekiel Isambo Sakwa** involved 53 complainants, while that of **Elias Maina Murigi** had 134 complainants. The cases also required different kinds of action for their resolution: some involved the appointment of third parties such as the appointment of actuaries, while others wound up in the High Court, for instance the complaint relating to the **Kenya Airports Authority Staff Superannuation Scheme**, while others went before the RBA Tribunal.

64. In other cases, from the evidence adduced by the respondent, the delays in dealing with the complaints appear to have been caused by the complainants themselves. In the complaint lodged by former employees of the Co-operative Bank of Kenya, on 24th May 2010, the RBA had requested the complainants to submit detailed worksheets within 21 days to enable the Authority expeditiously determine the matter. However, the complainants, by a letter dated 11th June 2010, requested for a further 21 days, and then a worksheet in respect of only 15 members was provided. A worksheet in respect of another 16 members was submitted later.

65. In the circumstances, and based solely on the material before the Court, the delays in handling and

conclusion of the matters before the respondent cannot be said to have been due solely to his inaction. It appears that there were a combination of factors, some attributable to members of the Retirement Benefits Schemes, and other factors and circumstances which I have set out above which were outside the control of the respondent.

66. It is also worth observing that in some cases, there has been no delay in dealing with the complaints as alleged. In the case of the complaint by one David Nyakundi Okebiro, a member of the National Museums of Kenya Staff Retirement Fund who is also one of the petitioners in this matter, the complaint was received on 18th December 2013. His complaint was hardly a month old at the time this petition was filed. That being the case, it is difficult to find that the respondent failed to act as he is required to, and that he violated the petitioners' rights under Articles 47 and 48 of the Constitution.

67. On the facts before me therefore, this Court is unable to find a violation of the rights of the petitioners by the respondent.

Whether Section 46 (1) of the Retirement Benefits Authority Act is Unconstitutional.

68. In what is clearly a reaction to their dissatisfaction with the manner in which the respondent has been dealing with their complaints, the petitioners have asked the Court to declare the provisions of Section 46(1) of the Retirement Benefits Authority Act unconstitutional. This section provides as follows:

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.***

69. The petitioners contend that the section is unconstitutional as it purports to subordinate their constitutional right to a fair hearing to the discretion of the incompetent and unresponsive respondent, and that it denies them the right to have their complaints determined by an independent and impartial judicial body created under the Constitution.

70. Section 46(1) gives a member of a Retirement Benefits Scheme the right to challenge a decision made by the Manager, Administrator, Custodian or Trustees of the Scheme before the Executive Officer of the RBA. The challenge to the decision, in accordance with the provisions of the Section, is intended to ensure that the decision of the Manager, Administrator, Custodian or Trustee of the Scheme is made "***...in accordance with the provisions of the relevant scheme rules or the Act under which the scheme is established.***"

71. That being the case, it is difficult to see how the provisions of Section 46(1) amount to an impediment to the petitioners' right to a fair hearing. It does not, in my view, subordinate the constitutional rights of the petitioners to a fair hearing to the discretion of the respondent, whom the petitioners accuse of being incompetent and unresponsive. Nor, in my view, does it deny them the right to have their complaint determined by an independent and impartial judicial body created under the Constitution.

72. As observed earlier, the RBA Act sets up a mechanism for the resolution of complaints regarding the management of Retirement Benefits Schemes, and for dealing with the grievances of members of such schemes. Such a mechanism is underpinned by the Constitution, and a party alleging that it is unconstitutional or in any way violates his or her rights has an obligation to demonstrate in which way it violates specific rights: see **Anarita Karimi Njeru -vs- R and Trusted Society of Human Rights -vs- The Attorney General**.

73. In the present case, what the petitioners have done is allege, among other things, incompetence on

the part of the respondent, as well as delay in the handling of the complaints before him. However, as the Court has found above, the delays of which the respondent has been accused have been occasioned by many factors, including some attributable to the petitioners. However, even had the respondent been found to be incompetent, and even were the appropriate authority under the Leadership and Integrity Act, upon a complaint by the petitioners, to find him unfit to hold public office, that would not, in my view, render Section 46(1) unconstitutional.

74. A provision of law cannot be rendered unconstitutional because of the limitations and weaknesses of the individual officer(s) mandated to execute its requirements. Such an officer is subject to the oversight of the appointing authority, in this case the Board. Should he fail to perform, he can be removed in accordance with his terms of appointment. To declare a provision of law unconstitutional because an officer is incompetent to implement it properly would be the equivalent of throwing out the proverbial baby with the bath water.

75. In any event, the decision of the respondent is not final. It is subject to appeal before the Retirement Benefits Tribunal established under Section 48 of the RBA Act. Thus, the RBA Act establishes a mechanism for accessing justice, and provides a system of appeal where one is unhappy with a decision reached at first instance. I cannot therefore find any basis for contending, as the petitioners do, that Section 46 (1) of the RBA Act is in any way unconstitutional.

76. The petitioners are also unhappy that the respondent requires that they submit their disputes with their Retirement Benefits Schemes to arbitration. They submit that under Section 46, they have an unfettered right to lodge their complaint with the respondent without a pre-condition of going to arbitration which is expensive, and that they do not have money for arbitration.

77. From the material before me, it appears that the requirement that disputes between members and their schemes be submitted for arbitration is pursuant to a scheme's rules and regulations. As members of their respective schemes, the petitioners are required to follow the scheme rules, and only thereafter to lodge complaints with the respondent, and if still dissatisfied with the outcome, appeal to the Tribunal. I am unable therefore to find that the requirement for arbitration violates any of their rights. Indeed, Article 159 of the Constitution encourages the use of alternative dispute resolution mechanisms such as arbitration in order to ensure expeditious access to justice.

Remedies Available to the Petitioners.

78. The petitioners have urged the Court to direct that their complaints pending before the respondent be transferred to the Industrial Court, which is the constitutional court mandated to hear and determine disputes between employers and employees. The respondent argues that the disputes cannot be taken to this Court, as they are not between employers and employees, the petitioners having retired.

79. Article 162(2)(a), pursuant to whose provisions the Employment and Labour Relations Court is established, provides that Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to employment and labour relations. By the provisions of the Industrial Court Act, 2011, Parliament established the Industrial Court, now renamed, pursuant to amendments in 2014, the Employment and Labour Relations Court. **Section 12 of the Industrial Court Act**, read together with **Section 87 of the Employment Act, 2007** stipulates that the jurisdiction of the Employment and Labour Relations Court is limited to disputes relating to or arising out of the relationship between an employer and an employee. The complaints giving rise to the present petition arise in respect of pension and retirement benefit dues, which are governed by the RBA Act. They cannot be said to be disputes between an employee and an employer and therefore as falling within the jurisdiction of the Employment and Labour Relations Court.

80. A plain reading of the RBA Act manifests the legislators' intention to put in place mechanisms to deal with matters arising from retirement benefits as such and disputes arising thereunder. This Court cannot therefore oust the jurisdiction of the dispute resolution mechanism under the RBA

Act by taking away their powers, functions and duties and purporting to direct, as the petitioners demand, that the petitioners' complaints should be heard by the Employment and Labour Relations Court. Indeed, this Court would be arrogating to itself power to expand the jurisdiction of the Employment and Labour Relations Court, which is, under the Constitution, a Court of the same status as this Court, were it to purport to do as the petitioners demand.

Disposition

81. In the circumstances, the Court is not satisfied that the petitioners have demonstrated any violation of their rights by the respondent, nor is the Court satisfied that there is any merit in the claims of unconstitutionality made in respect of the provisions of section 46(1) of the RBA Act. The Court is satisfied, however, that the petitioners may have legitimate concerns about the manner and speed at which their complaints are being addressed by the respondent, particularly given the fact that some complaints have allegedly taken in excess of ten years to resolve.

82. While their complaints fall short of constitutional violations, the petitioners have recourse with other institutions such as the Commission on Administrative Justice and the Anti-Corruption Commission; which can inquire into the complaints regarding the performance and conduct of the respondent. The petitioners are at liberty to present their complaints against the respondent to these bodies with a view to their inquiring into and exercising their statutory mandates with respect to the conduct of public officers such as the respondent should he be found to be in breach of the Leadership and Integrity Code.

83. At any rate, the petition is hereby dismissed. Each party shall bear its own costs of the petition.

Dated, Delivered and Signed at Nairobi this 10th day of March 2015

MUMBI NGUGI

JUDGE

Mr. Amadi instructed by the firm of Koceyo & Co. Advocates for the Petitioner.

Mr. Kiche instructed by the firm of Ochieng, Onyango, Kibet & Ohaga & Co. Advocates for Respondent.