



**IN THE HIGH COURT AT NAIROBI**

**MILIMANI LAW COURTS**

**JUDICIAL REVIEW DIVISION**

**MISC. APPL. NO. 415 OF 2012**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**AND**

**THE RETIREMENT BENEFITS APPEALS TRIBUNAL.....RESPONDENT**

**ABIGAIL WANGUI DOUGLAS.....1<sup>ST</sup> INTERESTED PARTY**

**UNIVERSITY OF NAIROBI.....2<sup>ND</sup> INTERESTED PARTY**

***EX PARTE***

**PROFESSOR GEORGE ALBERT AMORE MOGAHA**

**PROFESSOR PETER MULWA FELIX MBITHI**

**ISSAC ODUNDO AWUONDO**

**PROFESSOR LUCY WAHUHI IRUNGU**

**GERISHON PETER MBUGUA**

**NAFTALI ARODI OYUGI**

**DR. JOHN MWANGI**

**TOM OWANGO KONGERE all sued as trustees of the University of Nairobi Pension Scheme**

**JUDGMENT**

**Introduction**

1. The matter for consideration is a Notice of Motion dated 11<sup>th</sup> December 2012, in which the Trustees of the University of Nairobi Pension Scheme (“the Scheme”) have moved the court to quash the judgment of the Retirement Benefit Appeal Tribunal (“the Tribunal”) issued on 24<sup>th</sup> July 2012 in favour of the 1<sup>st</sup> interested party, Abigail Wambui Douglas.

2. The respondent was did not participate in these proceedings despite being served with court process.

**Factual Background**

3. The facts giving rise to this matter are not in dispute and are set out in the verifying affidavit of Theresia Kathae, the Scheme Administrator, sworn on 9<sup>th</sup> November 2012 and the replying affidavit of Abigail Wangui Douglas (“Abigail”), the 1<sup>st</sup> interested party. The ex-parte applicant and the 1<sup>st</sup> interested party have also filed written submissions.

4. Abigail was an employee of the University of Nairobi ('the University'), the 2<sup>nd</sup> interested party and therefore a beneficiary of the Scheme. Her employment was terminated on 31<sup>st</sup> May 1989 and as her pension dues were not paid as anticipated, she lodged a complaint with the Chief Executive of the Retirement Benefits Authority ('the Authority') on 14<sup>th</sup> July 2007. The University contended that she was not eligible for a pension on the grounds that she had been dismissed for fraud, dishonest and or gross misconduct, a fact she denied. The Authority found that she had been paid her retirement benefits in accordance with the provisions of the scheme and the rules applicable when her services were terminated.

5. As she was aggrieved by the Authority's decision, she lodged an appeal to the Tribunal being **Tribunal Appeal Case No. 3 of 2007**. On 28<sup>th</sup> February 2008, the appeal was allowed and the Scheme directed to pay her benefits in terms of the Trust Deed and Rules of the Scheme which were in force at the time. In its decision the Tribunal noted that the main bone of contention was the manner in which Abigail was terminated, it proceeded to consider the evidence and concluded that her appointment was governed by the University's Terms of Service and that her services had been terminated in accordance therewith thus entitling her to be paid her pension dues.

6. The decision of the Tribunal was challenged by the Trustees of the Scheme through an application for Judicial Review lodged in the High Court to wit; **Misc. Appl. JR No. 397 of 2008 Republic v The Retirement Benefits Appeal Tribunal ex-parte Professor George Magoha and Others**. The matter was heard and determined by Gacheche J., who delivered the judgment on 2<sup>nd</sup> August 2011 quashing the Tribunal's decision.

7. The decision by Gacheche J., dealt with two issues. The first one concerned jurisdiction. It was argued by the Scheme, that the Tribunal did not have jurisdiction to entertain Abigail's claim as it arose before the **Retirement Benefits Act** ("the Act") was enacted and that the Act was not retrospective. The learned judge dismissed this contention and found that the Tribunal had jurisdiction to deal with the dispute as the Act was intended to regulate, supervise and promote retirement benefit schemes and it was clearly intended to have retrospective effect in order to achieve this purpose.

8. The second issue for consideration in that decision concerned whether the ex-parte applicant was accorded audience before the Tribunal before the decision was made. The court concluded that on the facts the ex-parte applicant was not accorded that opportunity hence the Tribunal acted contrary to the principles of natural justice. It is for this reason that the judgment of the Tribunal was quashed.

9. The matter was reheard by the Tribunal and it delivered its judgment dated 24<sup>th</sup> July 2012. In that decision, the Tribunal directed the Scheme to pay Abigail her dues in accordance with the Trust Deed and Rules.

#### **Ex-parte Applicant's Case**

10. The Scheme's contention and the issue raised in this matter is whether the judgment was *ultra vires* the Tribunal's statutory authority and whether the Tribunal had jurisdiction to deal with the issue of Abigail's termination by the University.

11. Mr Gachuhi, counsel for the Scheme, argued that the Act defines the kind of disputes to be determined by the Authority that is, complaints made by members of retirement benefit scheme who are dissatisfied with the decision of the manager's, administrators and/or trustees of the scheme. The Tribunal, which is also established under the Act, determines appeals from persons aggrieved by the decisions of the Authority and or the Chief Executive of the Authority. As a result, the Tribunal appellate jurisdiction is limited to considering only the Authority's decision relating to retirement benefits schemes pursuant to the provisions of the Act and the Scheme rules establishing the scheme.

12. Counsel cited several authorities to buttress the argument grounded on jurisdiction and that once there is no jurisdiction then the Tribunal could not proceed to conduct the inquiry; **Owners of Motor Vessel 'Lilions' v Caltex Oil (K) Ltd [1989] KLR1, Republic v Funyula land Dispute Tribunal Misc. Appl. No. 78 of 2003**. Counsel also cited the decision by Justice Gacheche in **Misc. JR No. 397 of 2008**.

13. Mr Gachuhi submitted that the Tribunal misdirected itself and went outside its jurisdiction when it purported to deal with the manner in which Abigail was terminated as its jurisdiction did not extend to determining matters of employment. According to counsel, all matters of employment and termination thereof are governed by the **Employment Act (Act No. 11 of 2007)** and the same can only be dealt with by courts of competent jurisdiction; the magistrate's court and the Industrial Court.

14. The University supported the Scheme's position in the matter.

#### **1<sup>st</sup> Interested Party's Case**

15. The position of the 1<sup>st</sup> interested party is that these proceedings are *res-judicata* in view of the decision of Gacheche J., in **Misc Appl. No. 397 of 2008** in which the learned judge held that the Tribunal had jurisdiction to hear and determine the case. According to Mr Ogunde, counsel for the 1<sup>st</sup> interested party, that judgment was conclusive on the issue whether the Tribunal had jurisdiction to deal with matter and as such it could not be re-litigated. Counsel relied on several authorities; **Minza & Another v Ikinyua & 2 Others [2005] eKLR, George Makelo v Housing Finance of Kenya [2006] eKLR and Yat Fang Investments Co. Ltd v Dao Heng Bank Ltd & Another [1975] AC 581**.

16. The 1<sup>st</sup> interested party also supported the decision of Tribunal and contended that the Tribunal had jurisdiction to deal with the matter before it. Mr Ogunde submitted that if the court were to accept the applicant's argument, then the tribunal would remain a phantom tribunal without the power to determine issues before it.

#### **Determination**

17. From the pleadings, depositions and submissions, two issues fall for consideration;

1. Whether this matter is *res-judicata* in light of the judgment of Gacheche J., in **JR NO. 397 of 2008**.
2. Whether the Tribunal had jurisdiction to deal with matters of employment.

### ***Res-judicata***

18. On the first issue, the issue of jurisdiction was raised in reference to the issue whether the Act was retrospective as I have set out in the paragraph 7 above. On that issue Gacheche J., held that the Tribunal had jurisdiction.

19. The issue of jurisdiction in this case, which is the second issue I have framed for consideration in this matter, is different. It concerns whether the Tribunal could deal with the employment aspect of the case before it.

20. Further, the Court having quashed the initial decision, the Tribunal was entitled to hear the matter afresh. Its decision, which is a different decision, is now under attack on the ground of jurisdiction albeit on different grounds. In the circumstances, I find and hold that this matter is not barred by the doctrine of *res-judicata*.

### ***Whether decision ultra vires***

21. It is not disputed by the parties that the Tribunal is a statutory body whose jurisdiction is governed by **section 48** of the Act. The Tribunal hears appeals from decision of the Authority or its Chief Executive under **section 46(1)** of the Act which provides;

*46. (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 Act under which the scheme is established.*

**Section 48** of the Act provides as follows;

*48. (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.*

22. The principles that govern jurisdiction are well settled. I would also adopt and re-state what Gacheche J., in **Republic v The Retirement Benefits Appeal Tribunal ex-parte Professor George Magoha and Others (supra)** stated, “It is imperative to note that all inferior courts and tribunals have only limited jurisdiction whose limits they must observe, otherwise the doctrine of *ultra vires* comes into play, and any decision by such a court or Tribunal is bound to be declared null and void and should be quashed. Jurisdiction goes to the root of all causes and where it is lacking, any decision made by the Court or Tribunal would be null and void *ab initio*. It is trite that parties cannot confer jurisdiction upon a court or Tribunal where none exists in the first place. The position was laid down in the case of *Carmella Wathugu Karigaca vs Mary Nyokabi Karigaca [1997] eKLR*, where the court stated that “... is a matter of jurisdiction which cannot be conferred on this Court by consent or default. A question of jurisdiction is, however, a matter of which the court should take cognisance whether or not the matter is raised in argument.”

23. It not in contention that the Tribunal could entertain the matter before it and that the dispute fell within the borders of **section 48** of the Act, the issue raised by the ex-parte applicant is whether in exercising jurisdiction, it could make a finding on the issue of Abigail’s employment.

24. Guidance on this issue can be found in some observations of the Court of Appeal in **Kenya Pipeline Company Limited v Hyosung Ebara Company Limited and Others Nairobi CA Civil Appeal No. 145 of 2011 (Unreported)** where it observed, “[21] Moreover, where the proceedings are regular upon their face and the inferior tribunal has jurisdiction in the original narrow sense (that is, to say, it has power to adjudicate upon the dispute) and does not commit any errors which go to jurisdiction in the wider sense, the quashing order (*certiorari*) will not ordinarily be granted on the ground that its decision is considered wrong either because it misconceived a point of law or misconstrued a statute (except a misconstruction of a statute relating to its own jurisdiction) or that its decision is wrong in matters of fact or that it misdirects itself in some matter.”

25. The principle was clearly spelt out by Lord Reid in **Anisminic Limited v Foreign Compensation Commission [1969] 1 All ER 208, 213H – 214A** where his Lordship stated, “It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word “jurisdiction” has been used in a very wide sense and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the inquiry in question. But there are many cases where, although the Tribunal had jurisdiction to enter on the enquiry, it had done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirement of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it. It may have refused to take into account something that it was to take into account. Or it may have based its decision on some matter which under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide rightly.”

26. Taking these principles into account, I find that the dispute before the Tribunal concerned an appeal from a decision of the Authority finding that Abigail was entitled to certain pension benefits. The issue of her entitlement was intimately connected with the manner in which she was terminated. The Tribunal had jurisdiction to deal with and apply its mind to all the issues necessary for the determination of the core issue before it.

27. The jurisdiction of the Tribunal is to hear appeals from the Chief Executive of the Authority on complaints relating to Retirement Benefits Schemes. Retirement Benefits Schemes are by their very nature related to employment. In fact, from many schemes, the payment of terminal dues is related to the manner in which the employment is terminated. Thus, a decision as to whether retirements benefits are payable must *ipso facto* involve a determination of how the employment was determined should a dispute arise. The purpose and intent of the **Retirement Benefits Act** is to provide a dispute resolution mechanism for determination of such disputes that is efficient and effective.

28. The contention by the Scheme is untenable and unsupported by the terms of the Statute. As long as the issue for determination is connected to the primary issue of retirement benefits then the Tribunal has jurisdiction to deal with it. The Act does not expressly exclude from the jurisdiction of either the Authority or Tribunal jurisdiction to deal with employment issues as long as it is incidental to claim falling within the Act. Further, there is nothing in the **Magistrates Court Act** or the **Industrial Court Act** that limits the jurisdiction of the Tribunal and Authority from determining the matters of employment that are incidental to and ancillary to the core determination of retirement benefits disputes. To accede to such a position would render the Tribunal a phantom body, undermine the rights of access to justice and fair efficient and effective administrative action. I therefore find and hold that the Tribunal had the jurisdiction to deal with the 1<sup>st</sup> interested party's termination of employment in so far as the matter was incidental to the determination of her retirement benefits.

29. During the hearing, Mr Gachuhi submitted, that the Tribunal could not deal with the matter of termination including fraud and gross misconduct as these necessitate a full hearing of the matter involving taking of oral evidence, examination or cross examination of witnesses. Whether or not the Tribunal could deal with employment issues does not depend on the manner the inquiry would be conducted. The Authority and/or Chief Executive has power and authority, to investigate the complaint submitted by examining documents, taking oral evidence, or any other means that is necessary provided the process is fair. The Tribunal on the hand is an appellate Tribunal whose procedure is governed by the **Retirement Benefits (Tribunal) Rules 2000** which includes the rules for taking evidence where necessary. On the whole therefore, there is no reason or difficulty in Authority/Chief Executive or Tribunal dealing with employment issues that arise in the cause of its proceedings.

#### **Disposition**

30. Having considered the issues raised in this matter, I have come to the conclusion that the Notice of Motion dated 11<sup>th</sup> December 2012 lacks merit. It is dismissed.

31. The ex-parte applicants shall pay the 1<sup>st</sup> interested party's costs.

**DATED and DELIVERED at NAIROBI this 4<sup>th</sup> day of October 2013.**

**D.S. MAJANJA**

#### **JUDGE**

Mr Gachuhi instructed by Kaplan and Stratton Advocates for the ex-parte applicant.

Mr Ogunde instructed by Walker Kontos Advocates for the 1<sup>st</sup> interested party.

Mr Onyango instructed by Oraro and Company for the 2<sup>nd</sup> interested party.