



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

(Coram: Ojwang, J.)

CIVIL SUIT NO. 345 OF 2010

1. EMMANUEL TITUS MAUNDU
2. HABEL MWACHUYA JAVAN
3. PETER KAMAU MBUGUA

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PLAINTIFFS/APPLICANTS

[suing on their own behalf and on behalf of 491 members of the Kenya Ports Authority Pension Scheme]

-VERSUS-

THE REGISTERED TRUSTEES OF THE
KENYA PORTS AUTHORITY PENSION
SCHEME....DEFENDANTS/RESPONDENTS

RULING

The plaintiffs moved the Court by Chamber Summons dated **24th September, 2010** and brought under Orders XXXIX (Rules 1, 2, 3 & 9) and I (Rule 8) of the applicable Civil Procedure Rules, and ss. 1A, 1B and 3A of the Civil Procedure Act (Cap.21, Laws of Kenya). The application's main prayers for resolution by this ruling are two:

- (i) *that, pending the reference of this matter to arbitration and its consequent hearing and determination, an order of temporary injunction do issue, restraining the defendants by themselves, their servants, agents, workmen and/or any other person whomsoever and whatsoever from transferring, alienating, disposing of all the immovable assets of the Kenya Ports Authority Pension Scheme, including properties set out in Legal Notice No. 173 of September, 2007;*
- (ii) *that, this matter be referred to arbitration in terms of the Trust Deed and Regulations of the Kenya Ports Authority Pension Scheme.*

The application rests on the following grounds:

- (a) *the plaintiffs contribute to, and are the beneficial owners of all the investments and the Scheme Funds under the Kenya Ports Authority Pension Fund Scheme;*
- (b) *the defendants, as appointed trustees for the plaintiffs, hold the Pension Scheme Assets and Funds*

for the benefit and on behalf of the plaintiffs herein;

(c) some of the assets of the Pension Scheme (including but not limited to residential houses) are in the possession of the applicants, but are in danger of being unlawfully disposed of;

(d) there is a fiduciary relationship between the plaintiffs and the defendants and the defendants are legitimately expected to act in the best interests of the plaintiffs in any investment made or action taken in relation to the Pension Scheme Funds and/or assets to which the plaintiffs have been either past or present contributors;

(e) the defendants have, in breach of their duty to act in good faith and for the benefit of the plaintiffs, sold and disposed of several assets and are in the process of making further disposals unlawfully;

(f) the defendants call for meetings which pass or propose resolutions that directly affect the acquisition or disposal of the defendants' assets, without the approval of the plaintiffs;

(g) the defendants have failed to give and/or provide full details of assets owned, disposed of or likely to be disposed of;

(h) the defendants have acted in breach of the Trust Deed and Regulations of the Kenya Ports Authority Pension Scheme;

(i) the defendants have acted in breach of the Retirement Benefits Authority Act and the regulations made thereunder;

(j) the plaintiffs may lose their pension and thereby, suffer irreparably;

(k) the balance of convenience tilts in favour of restraining the defendants as prayed, thereby maintaining the status quo.

Evidence to support the application and the foregoing grounds, is set out in the twenty-seven-paragraph affidavit sworn by 1st plaintiff on **24th September, 2010**.

The defendants responded by the replying affidavit of **Albert Chaurembo Mumba**, the Chairman of the defendant's Board of Trustees, sworn on **2nd October, 2010**. The deponent avers, in summary, as follows:

(i) that the defendant has managed, and continues to manage the Scheme in accordance with the Retirement Benefits Act, 1997 (Act No. 3 of 1997), the Retirement Benefits (Occupational Retirement Benefit Schemes) Regulations, 2000, and the Scheme Rules;

(ii) that he believes to be true counsel from the defendant's Advocate, that this Court has no jurisdiction to hear and determine the allegations made by the plaintiffs; and that if the plaintiffs have a complaint, they must lodge it with the Retirement Benefits Authority; and if they get no satisfaction, then they must lodge an appeal with the Appeals Tribunal provided for under the Act;

(iii) that the deponent believes to be true the advice of the defendant's Advocate, that this Court, further, lacks jurisdiction to hear and determine the matters pleaded by the plaintiffs, by virtue of the provisions of s. 11 of the Civil Procedure Act (Cap 21, Laws of Kenya);

(iv) that the Retirement Benefits Act, in Part IV, carries the regulations regarding the supervision of "unsafe and unsound practices";

(v) that by s. 34 of the Retirement Benefits Act, the Trustees of every scheme are required to keep proper books of account on the income, expenditure and assets of the Scheme;

(vi) that the Retirement Benefits (Occupational Retirement Benefits Schemes) Regulations, 2000 set out under Regulation No. 8 the duties of Trustees, and these include:

- administering the scheme in accordance with the provisions of the Act, Regulations and Rules;
- ensuring that the Scheme funds are invested by a manager duly appointed by the Trustees;
- convening an Annual Meeting of members, to enable them to raise any matters they wish to raise;
- ensuring that the Schemes have an investment policy;

(vii) that the deponent believes the suit has not been instituted in good faith, as the plaintiffs had already made, through their lawyers, queries to the Retirement Benefits Authority and due response has been provided;

(viii) that the deponent believes the plaintiffs' prayer for injunction to stop the scheduled meeting of **25th September, 2010** had not been made in good faith and was only made for the purpose of damaging the reputation of the Trustees;

(ix) that if the injunction is maintained, "it will deny the majority of the members of the Scheme participation in ... the affairs of the Scheme to their detriment";

(x) that the plaint does not disclose any dispute that is capable of being referred to arbitration as envisaged by the Scheme Rules.

The 1st plaintiff, on **27th October, 2010** swore a supplementary affidavit, the main content of which may be summarized as follows:

(i) that this Court indeed has jurisdiction to hear and determine the matter herein;

(ii) that the Kenya Ports Authority Pension Scheme is not being run in accordance with the regulations:

- the Trustees had sent false information to the Retirement Benefits Authority, regarding their activities which are prejudicial to the plaintiffs;
- the defendants have sold one property, the Lotus Complex, at a greatly under-valued price;
- the defendants have sold other properties, MN/232/2 and MN/II/235 at greatly under-valued prices;

(iii) that the plaintiffs have a legitimate grievance, in respect of which they seek judicial redress;

(iv) that the defendants have shown improper conduct, by dissuading some of the plaintiffs against proceeding with this suit.

This matter first came up *ex parte*, on **24th September, 2010** and, on that occasion, I granted interim injunctive relief; and it came up for *inter partes* hearing on **28th October, 2010** when learned counsel, **Mr. Mabeya** represented the plaintiffs/applicants, while learned counsel, **Mr. Gachuhi** represented the defendants/respondents.

Mr. Mabeya submitted that the Trust Deed and Rules governing the defendants, of 1998 but with amendments effected in 2001, made provisions for benefits to members (such as the plaintiffs) upon their retirement. The Trustees (the defendants) are required to hold the contributions coming from the plaintiffs and from the plaintiffs' employers, to invest the same, and to manage income from such investment.

By the Retirement Benefits (Occupational Retirement Benefits Schemes) Regulations 2000 [L.N. No. 119

of 2000], an obligation rests on the Trustees to administer the Scheme in accordance with the Act, the Regulations and the Scheme Rules. The Act requires the Trustees to take reasonable care to ensure that the Scheme is managed in the best interests of the members. The defendants are required to prepare annual accounts, to be audited; they are required to avail proper investment and actuarial reports prepared — and the same are to be availed to members, at the latest, within six months of the financial year.

Counsel urged that the plaintiffs were aggrieved, because of the defendants' failure to comply with the foregoing requirements of the law and the Trust Deed; that proper disclosure has not been made to members; and members' complaints have been routinely dismissed. A more urgent complaint raised is that the defendants have repeatedly disposed of prime properties held in trust, without any accounting, and for de-valued sale-price.

Counsel urged that, only after filing suit on **24th September, 2010** have the defendants now issued the annual reports for the period 2007-2009; and that retired members have complained that the benefits being paid to them were inordinately low in amounts. Counsel urged that the defendants have failed to provide actuarial reports to members, in respect of properties held in trust.

Mr. Mabeya submitted that the plaintiffs had a genuine and urgent interest deserving protection by injunction, pending the hearing and determination of the matter; and that there was a serious question to be referred to arbitration.

Learned counsel, **Mr. Gachuhi** urged that this matter should in the first place be dealt with under the Retirement Authority Act. The relevant provision of that Act thus reads (s. 39):

“(1) Where, in the opinion of the Chief Executive Officer a Scheme is pursuing an act or course of conduct which the Chief Executive Officer considers to be an unsafe or unsound practice, or in any way detrimental to the scheme, the Chief Executive Officer shall, by notice in writing, direct such trustee or manager to refrain from pursuing such act or course of conduct.

(2) trustee or manager who acts in contravention of a direction under this section commits an offence and shall be liable, on conviction, to a fine not exceeding five hundred thousand shillings, or to imprisonment for a term not exceeding two years, or to both”.

Learned counsel urged that the instant matter falls within the ambit of the foregoing provision; and consequently this Court lacks jurisdiction; and besides, the proposal for arbitration was out of place. In counsel's words: *“the Legislature's first port of call, where there is any complaint by members, is the Chief Executive Officer”*. Counsel urged that if the plaintiffs had followed that course, and they were dissatisfied with the Chief Executive Officer's answer, then they were to lodge an appeal before the Appeals Tribunal set up under s. 48 of the Act. Counsel urged that, by s. 11 of the Civil Procedure Act (Cap. 21), every suit *“shall be instituted in the court of lowest grade competent to try it ...”* Counsel submitted: *“[The plaintiffs] should begin with what the Legislature has provided, and it is not this Court”*.

Mr. Gachuhi submitted that this matter should not go to arbitration, because the applicants have not demonstrated that they have become entitled to pension benefits. Counsel contended that *“the plaintiffs have no rights to micro-manage the Scheme”*; for *“Trustees manage a scheme with the assistance of professionals ...”*

Counsel submitted that the applicants have no *prima facie* case in respect of which they may be granted an interlocutory injunction.

In response, **Mr. Mabeya** submitted that the dispute-resolution mechanisms provided for in ss. 39 and 46 of the Retirement Benefits Act did not exclude the jurisdiction of the High Court: the Chief Executive Officer of the Retirement Benefits Authority did not have the exclusive jurisdiction to deal with the questions now before the Court; it had not been provided that all issues of rights and obligations must go to the Chief Executive Officer. Counsel urged that nothing in the Retirement Benefits Act excludes the

jurisdiction of this Court.

Is the plaintiffs' complaint a matter of a **general nature**, or one forming part of a chain which lends itself to unspecified **administrative solutions**? Or is it a case of a clear, alleged **wrong**, requiring **final redress** under the law? Is it a complaint, failing to resolve which, with the passage of time, could cause **irreparable harm** to the complainants? If the first is applicable, then it will be a matter fit for reporting to the **Chief Executive Officer** under s. 39 of the Retirement Benefits Act, for suitable courses of **administrative action**. But if the matter fits in either of the two remaining categories, then it is a matter for **judicial redress**, and the appropriate forum would be the High Court. The suit filed on **24th September, 2010** is founded on **trust obligations; accounting for funds; disposal of real property; good faith in the management of assets; allegations of fraud; conduct of general meetings**.

Such claims inherently belong to the ordinary **civil jurisdiction** of the Courts, and the logical forum of redress is the High Court. I, therefore, do not accept the respondent's contention that this Court has **no jurisdiction**; and it is on this basis that I will dispose of the application.

Is there a *prima facie* case for granting an injunction? I have already enumerated the main features of the claim in the suit and the application. Given the vantage position enjoyed by the defendants in the **control of assets of the Trust**, which assets are so important to the members (the plaintiffs), as contrasted with the limited powers of the plaintiffs, the claim being made is, in my opinion, an **urgent** one; and I hold that a *prima facie* case is made for injunctive relief on an interim basis.

Precisely on account of the nature of the assets comprised in the Trust, and the delicate interests therein of the plaintiffs who have made their contributions from a plurality of sources over time, this is a matter in which a first solution through **arbitration** will be most appropriate.

I will, therefore, make orders as follows:

- (1) **the parties shall, within 21 days of the date hereof, draw and agree on the issues for arbitration;**
- (2) **the parties shall thereafter, within 14 days, make arrangements for an arbitrator to consider and decide upon the questions in dispute;**
- (3) **this matter shall be listed for mention on 28th April, 2011;**
- (4) **in the meantime, the order of temporary injunction shall remain in force, restraining the defendants by themselves, their servants, agents, workmen and/or any other person whomsoever and whatsoever from transferring, alienating or disposing of the immovable assets of the Kenya Ports Authority Pension Scheme, including but not limited to the properties set out in Legal Notice No. 173 of September, 2007.**
- (5) **The defendants shall bear the costs of this application.**

DATED and DELIVERED at MOMBASA this 4th day of March, 2011.

J. B. OJWANG
JUDGE