



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

(PETITION NO. 356 OF 2008)

**IN THE MATTER OF THE CONSTITUTION OF KENYA AND THE CONSTITUTION OF
KENYA (SUPERVISORY JURISDICTION AND PROTECTION OF FUNDAMENTAL RIGHTS
AND FREEDOMS OF THE INDIVIDUAL) HIGH COURT PRACTICE AND PROCEDURE
RULES, 2006**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND
FREEDOMS UNDER SECTION 70(A), 82(1) AND (2) AND 84**

AND

IN THE MATTER OF RETIREMENT BENEFITS ACT

BETWEEN

- 1. JULIUS KIMOLO MASEKI**
- 2. MARY O. CHECHE**
- 3. HILDA ATIENO OCHAM**
- 4. ALICE NEKESA GACHERU**
- 5. PAMELA APOLLO**
- 6. LYDIA K. KIETANY**
- 7. SEBENCIA W. AKWATA**
- 8. JANE C.**

**ODINDO.....PETITIONERS/
APPLICANTS**

VERSUS

**THE REGISTERED TRUSTEES POSTAL CORPORATION OF KENYA STAFF PENSION
SCHEME.....RESPONDENT**

J U D G M E N T

Before me is a petition dated 16th June, 2008 filed by M/s Kingo'o Wanjau & Company Advocates for the petitioners, who are eight (8) in number. The petition was filed under the provisions of Rules 11 and 12 of the Constitution of Kenya (***Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual***) High Court Practice and Procedure Rules, 2006. It seeks the following orders against the respondent. **THE REGISTERED TRUSTEES POSTAL CORPORATION OF KENYA STAFF PENSION SCHEME.**

- (i) A declaration that the petitioners are entitled to the secure protection of the law in accordance with section 70(a), 74(1) and 82(1) and (2) of the Constitution of Kenya.*
- (ii) A declaration that the petitioners rights under sections 70(a), 74(1) and 82(1) and (2) of the Constitution of Kenya have been, are being and are likely to be contravened by the Respondent.*
- (iii) A declaration that the assets and funds of the Respondent are to be managed for the benefit and the best interest of the members including the Petitioners.*
- (iv) An order directing the respondent to forthwith stop contravening and or violating the fundamental rights and freedoms of the petitioners in the performance of its functions of its functions of its office of trustees under the provisions of the Retirement Benefits Act and the Constitution of Kenya.*
- (v) An order do issue restraining and or prohibiting the Respondent and or the Respondent's workers, officers, agents or any body or authority acting for and on behalf of the Respondent or under authority or direction of the Respondent from selling disposing off, offering for sale or otherwise dealing with the properties namely L.R. Number 209/50008-150025 otherwise known as third Ngong Avenue Maisonettes situate in Nairobi before an offer similar to the one made to the other members of the Respondent Scheme is given to the petitioners.*
- (vi) An order to issue restraining or prohibiting the Respondent or the Respondent's workers, officers, agents or anybody or authority acting for and on behalf of the Respondent from evicting or removing the applicants from that property known as LR. Number 209/5008-150025 otherwise known as Third Ngong Avenue Maisonettes situate in Nairobi.*
- (vii) Any other order which this Honourable court shall deem just to grant for the purpose of enforcing and ensuring enforcement of the Constitutional provisions herein above disclosed.*
- (viii) Costs of this petition be provided.*

The petition was filed with a supporting affidavit sworn on 13th June 2008 by **JULIUS KIMOLO MASEKI** the first petitioner. It was deponed in the said affidavit, inter alia, that all the petitioners were tenants in premises known as LR. No. 209/5008-150025 otherwise known as Third Ngong Avenue Maisonettes at monthly rent of Kshs.16,000/-; that the first, second, fourth, sixth and eighth petitioners were former employees of the former Kenya Post & Telecommunication Corporation while the third and seventh petitioners were still in the service of the Postal Corporation of Kenya; that during 2007/8 the Respondent offered for sale to its members and sitting tenants its properties aforesaid at stated reserved prices and deliberately excluded the offer to the petitioners; that in the said letter of offer the Respondent

disclosed to respective tenants and members the prices for the houses and warned tenants that failure to comply with the terms of their offer would prompt the respondent to advertise the sale of the houses to the public; that the Respondent by the letters of offer allowed the said tenants and or members to continue occupying the houses and paying monthly rent until finalization of the sale process; that on 30th April 2008 the Respondent wrote to the petitioners demanding that they render vacant possession of the suit premises by 31st July 2008 to pave way for sale of the estate by public auction; that the Respondent placed an advertisement in the local daily newspapers for the sale of the suit premises in which they also invited the petitioners to bid for the purchase; that the petitioners were aggrieved as the action of the Respondent was in breach of, inter alia, section 40(b) of the Retirement Benefits Act, discriminatory and oppressive and would render them destitute, subjected the petitioners to unfair competition; notices to vacate were not given to other tenants and members in similar houses, and the notice was too short for the petitioners to make arrangements to relocate their families.

The petitioners filed written submissions through their advocates on 28th October, 2010. In the said submissions, the petitioners counsel summarized the facts in the petition and supporting affidavit. Counsel contended that the actions of the respondent contravened or were likely to contravene section 82(2) the Constitution with regard to the petitioners. The contravention was firstly, that the respondent had initially offered for sale the houses to other pension scheme members who were sitting tenants in priority over third parties and members of the public, and gave reserve prices. However, in respect to the petitioners the respondents made them bid for the purchase of the houses alongside members of the public which treatment by the respondent on the petitioners was different selective, oppressive and discriminatory. Secondly, the respondent's act of advertising the houses for sale to members of the public and inviting the petitioners who were sitting tenants to bid, amounted to applying double standards in the treatment of its members and the petitioners felt discriminated against, oppressed and prejudiced. Thirdly, the action of the respondent in demanding that the petitioners render vacant possession of the houses on or before 31st July 2008 for sale to the public, while members living in similar houses under similar conditions were allowed to continue living in the said houses until finalization of the sale process, was application of double standards.

Counsel contended that section 70(a) of the Constitution was violated or is likely to be contravened in respect of the petitioners. On this, reliance was placed on the provisions of section 40 of the Retirement Benefits Act 1997 which required trustees to manage members' properties by upholding the best welfare and interests of its members. It was the contention that it was not in the best interests of the petitioners, as members, to give them three (3) months notice to vacate premises which they had always occupied considering that the petitioners had school going children. Secondly, it was not in the best interests and welfare of the petitioners, as share members, to demand that the petitioners make bids for the purchase of the premises alongside other members of the public.

Counsel also contended that the actions of the respondent contravened or were likely to contravene the provisions of section 74(1) of the Constitution. It was contended that the treatment accorded by the respondent to the petitioners was inhuman and likely to render the petitioners destitute.

The application was opposed. A replying affidavit sworn on 29th September, 2008 by Deborah Jepchumba Limo the Pension Scheme Administrator and Secretary of the Board of Trustees was filed.

It was deponed in the said affidavit, inter alia, that section 40 of the Retirement Benefits Act required the pension scheme to manage/assets for the overall benefits and best interests of all the scheme members, not just a selected few, such as the eight (8) present petitioners; that the scheme had a membership of more than 3000; that the actions of the respondent were neither discrimination, oppressive or prejudicial to the petitioners; that competition between the petitioners and members of the public for sale of the subject premises would determine the true value of the property; that the petitioners occupied the property as tenants and that the terms of the lease required only one (1) months notice while they were in fact given three (3) months notice; that the respondents had an unfettered discretion to sell the properties subject to the Retirement Benefits Act; that there was no legal right available to the petitioners to be granted priority

in the purchase of suit premises; that in regard to the said property the tenants (**petitioners**) were not accorded priority to purchase the housing units because the property was to be sold as a single unit for redevelopment in order to reap maximum benefit or return to the respondent as a pension scheme for the benefit of all members; that the petitioners were free to bid for sale of the property; that the petitioner's attachment to the premises were greatly outweighed as the value of the property would be greatly enhanced by the re-development.

The respondent also filed grounds of objection on the same date. The said grounds, on the main, seem to address the matters raised in the replying affidavit.

The respondent, through their counsel M/s Gachanja & Company filed written submissions on 13th November 2008. It was contended in the said submissions, inter alia, that these proceedings should have been brought under Order 39 of the Civil Procedure Rules (Cap 21) for injunctions rather than as a Constitutional Petition.

It was counsel's contention that the relationship between the petitioners and the respondent was that of tenants and landlord only. The occupancy of the premises was therefore governed by the terms of lease agreement. There was no legal or equitable right for a tenant to challenge the sale of the property by the landlord under the Registration of Titles Act. Reliance was placed on section 23(1) of the Act. Reliance was also placed on Mombasa HCCC No. 46 of 2008 – **ALI MUSA AHMED & OTHERS –Vs- THE REGISTERED TRUSTEES OF POSTAL CORPORATION OF KENYA STAFF PENSION SCHEME** – where Azangalala J. held that consultation with members of the pension scheme was not necessary before deciding to sale pension scheme houses. Reliance was also placed on Nakuru HCCC No. 41 of 2008 **ELIUD LAGAT & OTHERS –VS THE BOARD OF TRUSTEES POSTAL CORPORATION OF KENYA PENSION SCHEME** – wherein Koome J. held that there was no requirement that tenants be consulted before sale of flats.

Counsel contended also that the Trust Deed and Rules governing the respondent clearly spelt out the Trustees obligations. It was counsel's argument that the main obligations the respondent was to ensure ***“the provision of pension and other retirement benefits for employees of the founder upon their retirement from the founder's service.....”*** Counsel submitted that the Trust Deed bestowed on the Trustees powers to lease, mortgage, exchange, sell or otherwise deal with land and assets of the respondent.

Counsel argued also that the provisions of the Constitution cited were also not violated by the respondent. Counsel submitted further the petitioners had not demonstrated any violations under the sections of the Constitution relied upon. Counsel also contended that the respondent was a private entity, and the relationship was private terms not inviting a Constitutional reference. Therefore, the respondent was wrongly brought to court in this Constitutional Reference.

Lastly, counsel submitted that there was no contravention of the provisions of section 40(b) of the Retirement Benefits Act. It was the contention that the said section enjoins trustees to act in the best interests of members and the sponsor. In trying to dispose of the premises, the respondent was acting in accordance with those best interests.

On the hearing date Mrs. Kingoo Wanjau for the petitioners and Mr. Gachanja for the respondent relied on the submissions filed.

Having considered the petition, documents filed, the submissions on both sides and the law, I am of the view that the first issue is what the relationship of the petitioners, on the one hand and the respondent, on the other, is.

There is no dispute that the respondent is a pension scheme. There is no dispute that they are the owners of the premises herein. There is no dispute that they are the landlords. There is no dispute that the petitioners are tenants in the premises. All the petitioners claim to be members of the pension scheme. The respondent claims that two of them are not members.

In the undisputed facts placed before me, I am of the view that the relationship between the petitioners

and the respondent is that of tenants and landlord. Even if some of them or all of them are members of the pension scheme, that cannot give them another status, unless the tenancy agreement or an ancillary agreement provides for another relationship. No such additional agreement has been shown to me that would enlarge the relationship. I therefore find and hold that the relationship between the petitioners and the respondent with regard to the premises, is that of tenants and landlord.

The second issue is whether there are Constitutional issues raised in the petition. The petitioners have come to court alleging contravention of section 70(a), 74(1), 82(1) & (2) of the Constitution (now replaced). They have come to this court under section 84. The respondent is a private individual. The Attorney General was not made a party.

In **KENYA BUS SERVICES LTD –VS- ATTORNEY GENERAL (2005)** IKLR 787 the court stated: -

“Dealing now with the question can a private individual maintain an action for declaration against another private individual or individuals for breach of the fundamental rights provisions of the Constitution. The rights and duties of individuals and between individuals are regulated by private law. The Constitution on the other hand is an instrument of Government. It contains rules about the Government of the country. It is my view therefore that the duties imposed by the Constitution under the fundamental rights provisions are owed by the Government of the day to the governed. I am of the view that an individual or a group of individuals as in this case, cannot owe a duty under the fundamental rights provisions to another individual or a group of individuals since no duty can be owed by an individual or group of individuals to another or individuals under the fundamental rights provisions of the Constitution, no action for a declaration that there has been a breach of duty under the provisions can be or be maintained in the case before me, and I so hold.”

Our case herein falls on all fours with the situation in the above case. The petitioners and the respondent are private persons or institutions. Their relationship is a private relationship of tenants and landlord governed by provisions of a lease. The respondent being a private person or institution, no constitutional reference can be maintained against it. It cannot breach a duty under the fundamental rights sections of the Constitution.

Even if there was an issue about compliance with provisions of the Trust Deed and the Retirement Benefits Act 1997 – those would still be in the nature of private contractual and statutory issues. They would have nothing to do with the Constitution. Mere breach of the provisions of a statute or an agreement or the provisions of a Deed of whatever form, does not give rise to an action under the fundamental rights provisions of the Constitution.

I have no doubt in my mind that these proceedings were wrongly brought under the Constitution. They are in the area of private law. They should have been brought under the Civil Procedure Act (Cap 21) or any other applicable law. They should not have been brought under the fundamental rights provisions of the Constitution. They are not sustainable as such, as they do not disclose Constitutional issues.

I can do no better than echo what was stated in RE: **APPLICATIONBAHADUR (1986) LRC (CONST)** 297 at page 298 – where the court stated: -

“The Constitution is not a general substitute for the normal procedures for invoking judicial control of administrative action where infringements of rights can find a claim under substantive law, the proper course is to bring the claim under that law and not under the Constitution” (See Harrikson-Vs-Attorney General of Trinidad and 1979 3WLR 62 applied)”

I will have to dismiss the petition herein on the above reasons.

In the result, therefore, I dismiss the petition herein. The costs will be borne by the petitioners jointly and severally.

Dated and delivered at Nairobi this 4th day of March 2011.

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GEORGE DULU

JUDGE

In the presence of

Ms Munga holding brief for Ms Kingoo Wanjau for petitioners.

Ms Sajan holding brief for Mr. Gachangja for respondent

C Muendo – court clerk