



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

ELC NO. 141 OF 2019

MWANAUWANI NASSIR

SHABAN BAKARI

PETER ADOYO

HENRY GITAU

GEORGE MURIMI & 4 OTHERS.....PLAINITFFS

VERSUS

THE REGISTERED TRUSTEES OF KPA PENSION SCHEME.....DEFENDANT

RULING

(Application to have suit struck out on argument that this court has no jurisdiction and that there is no authority annexed in a suit with multiple plaintiffs; plaintiffs being tenants of the defendant and also members of the defendant; defendant being a pension scheme; defendant asserting that the dispute should be referred to the dispute settlement mechanism in the Retirement Benefits Act; The Act providing for a dispute mechanism in disputes between its members; dispute before court not strictly a dispute between members and a scheme but a dispute on whether the pension scheme should sell its houses to third parties or whether occupants should be given first priority; court therefore having jurisdiction in the matter; no authority annexed as provided by the rules but court allowing plaintiffs opportunity to prepare one within a limited period)

1. The defendant has filed an application dated 20 August 2019 seeking orders that the plaintiffs' suit be struck out for want of jurisdiction in light of Section 46 of the Retirement Benefits Act, No. 3 of 1997 and because the plaintiffs have not annexed an authority as required by Order 4 Rule 1 (3) of the Civil Procedure Rules, 2010.

2. To put matters into context, this suit was filed by 9 persons who described themselves as being tenants of different housing units on the land parcel MSA/XVIII/335 situated in Msanifu Kombo Estate within Mwembe Tayari area of Mombasa County. It was pleaded that the defendant holds the said property in trust for the members of the Kenya Ports Authority Pension Scheme. The plaintiffs stated that they contribute to, and are beneficial owners of all the investments and the Scheme Funds under the Kenya Ports Authority Pension Scheme. They averred that the defendant as appointed trustees for the plaintiffs, hold the Pension Scheme Assets and Funds for the benefit and on behalf of the plaintiffs. They stated that they have been occupying the suit properties pursuant to an Occupation Order for staff quarters but they were served with an eviction notice on 31 August 2019. They have averred that they sought intervention through their representatives to no avail. They aver that they have a legitimate expectation that they will be afforded the first opportunity to purchase the units for it does appear that the defendant/applicant wishes to dispose of the same. In the suit, the plaintiffs want the applicant restrained from selling the suit properties or evicting the plaintiffs from the suit properties and that they be afforded an opportunity to purchase the units that they occupy under a tenant purchase scheme under the doctrine of legitimate expectation.

3. The applicant filed defence where it averred inter alia that the suit property has already been transferred to one Suldanka Harti and no reasonable cause of action exists against her. It is contended that the applicant never held the suit property in trust for its members but was a body corporate capable of holding property in its own name and also capable of disposing the same. It is mentioned that its members are only entitled to their pension contributions but not to the investments of the applicant.

4. In this application, the defendant contends that Section 46 of the Retirement Benefits Act, Act No. 3 of 1997, requires that all disputes between a pension scheme and its members be referred to the Chief Executive Officer with the right of appeal to the Retirement Benefits Tribunal under Section 48 of the Act. It is thus contended that the Environment and Land Court has no jurisdiction to hear disputes between a scheme and its members unless it is by judicial review or a constitutional petition from a decision of the Tribunal. The defendant also wants

the suit struck out for failure to annex a written authority as required by Order 4 Rule 1 (3) of the Civil Procedure Rules, 2010.

5. The plaintiffs opposed the motion through Grounds of Opposition stating that the Tribunal lacks jurisdiction to issue an injunction; that the provisions are not mandatory; and that the Environment and Land Court has jurisdiction to hear any dispute relating to land and the environment.

6. In his submissions, Mr. Kongere, learned counsel for the applicant, submitted inter alia that the plaintiffs confirm that they are members of the defendant. He submitted that the suit has abated by operation of law because of a defect in the summons. On jurisdiction, he submitted that this is a dispute between a pension scheme and its members on how the scheme should dispose of its property and thus should be referred to the dispute mechanism in Section 46 of the Retirement Benefits Act.

7. I have considered the matter. First, I need to determine if this is a dispute between a pension scheme and its members as envisaged by the Retirement Benefits Act. I have been referred to Section 46 and 48 of the Act which provide as follows :-

46. Appeals to the Chief Executive Officer

(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.

(2) A copy of every request under this section shall be served on the manager, administrator, custodian or trustees of the scheme.

48. Appeals to the Tribunal

(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.

8. Under the Retirement Benefits Act, pension schemes are registered and regulated by the Retirement Benefits Authority (the Authority). There is a Chief Executive Officer of the Authority (the Chief Executive) who is responsible for the day to day running of the affairs of the Authority. Thus under Section 46 if a member is dissatisfied with a decision of the manager, administrator, custodian or trustees of the scheme, he 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.

9. It will be seen from the above that a member is at liberty to seek a review of a decision of the persons in charge of the scheme to the Executive Officer. But I do not think that this applies to all decisions. In my view, this would apply to decisions under the scheme rules or under the Act. A decision to sell property could be interpreted to mean a decision under the scheme rules and Act, but I do not think that the decision to sell to a person who is not an existing occupant can be considered to be a decision under the scheme rules. I see the dispute here to be one where occupants of premises, which the defendant has decided to sell, claim that they are entitled to be given first priority to purchase, not because they are members of the scheme, but under what they call the doctrine of legitimate expectation, since they are the persons in occupation. The fact that the plaintiffs are members in my view is just coincidence. This indeed is captured in paragraph 13 of the plaint which is drawn as follows :-

“That as residents of the suit property, the defendant ought to have given the plaintiffs first priority to purchase the respective units since we have (been) in occupation and have the capacity to purchase the same under an arrangement akin to tenant purchase scheme.”

10. If the issue before me was one which challenges the decision to sell, that is if the plaintiffs opposed the decision of the scheme to diversify its investment portfolio, then probably that would have been a decision on how the affairs of the scheme are run which could go first to the Chief Executive. But that, as I have explained, is not what I consider to be before me.

11. For the above reasons, I do not find merit in the objection that this court has no jurisdiction.

12. On the second issue, that is if the suit should be struck out for want of an authority, I have looked at the provisions of Order 4 Rule 1 (3). The said law is drawn as follows :-

Where there are several plaintiffs, one of them, with written authority filed with the verifying affidavit, may swear the verifying affidavit on behalf of the others.

13. In this case, the verifying affidavit has been sworn by Mohammed Hassan, who I believe is the 7th plaintiff. There was filed together with the plaint, an application for injunction and the supporting affidavit is sworn by the same Mohammed Hassan. In the affidavit, he has deposed that he has the authority of the other plaintiffs to swear the affidavit but no authority is annexed. I agree with Mr. Kongere, that it is mandatory for there to be a written authority as provided for by the rules. For the moment, I will take this to be an irregularity, which I will take as curable if an authority is filed within a period that I will provide. I will therefore order the plaintiffs to proceed and cure the defect within the next 3 days and fully comply with the provisions of Order 4 Rule 1 (3). If no authority is filed within this period, then I will be at liberty to order that the suit be struck out.

14. I do observe that Mr. Kongere in his submissions, raised the issue that there is an abatement of the suit by operation of law. He himself,

in his submissions, conceded that this is not one of the matters raised in the application before me but in a preliminary objection. In my view, it will be unfair for me to address that point, since what the plaintiffs have addressed themselves on is the application, and there was no indication that the preliminary objection will be argued alongside the application. I will therefore not address myself to the issue of abatement of the suit. If the defendant wishes to pursue that point, then they will need to formally argue it so that the plaintiffs can also be given a chance to respond.

15. From the above, it will be discerned that I have found that this suit is properly before this court and the objection that this court has no jurisdiction is dismissed. I have found that there is a breach of Order 4 Rule 1 (3) and I have given 3 days for this defect to be cured. The defendant was entitled to raise this issue and will therefore have the costs of this application.

16. Orders accordingly.

DATED, SIGNED and DELIVERED at MOMBASA this 31st day of October 2019.

MUNYAO SILA

JUDGE.

IN THE PRESENCE OF:

Mr. Kongere for the applicant.

Mr. Waziri for the respondents.

Court assistant; Koitamet.