



**National Bank of Kenya Staff Retirement Benefits Scheme & another v Murigi & 135 others
(Civil Appeal E365 of 2020) [2024] KECA 1689 (KLR) (22 November 2024) (Judgment)**

Neutral citation: [2024] KECA 1689 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL E365 OF 2020
DK MUSINGA, SG KAIRU & JM MATIVO, JJA
NOVEMBER 22, 2024**

BETWEEN

**NATIONAL BANK OF KENYA STAFF RETIREMENT BENEFITS
SCHEME 1ST APPELLANT**

**NATIONAL BANK OF KENYA STAFF PENSION FUND REGISTERED
TRUSTEES 2ND APPELLANT**

AND

ELIAS MAINA MURIGI 1ST RESPONDENT

RETIREMENT BENEFITS APPEAL TRIBUNAL 2ND RESPONDENT

**RETIREMENT BENEFITS AUTHORITY & 133 OTHERS & 133 OTHERS &
133 OTHERS & 133 OTHERS & 133 OTHERS 3RD RESPONDENT**

*(Being an appeal from the Judgment of the Employment and Labour
Relations Court of Kenya at Nairobi (M. Onyango, J.) dated 31st
January, 2020 in Judicial Review Application No. 37 of 2018)*

JUDGMENT

1. The facts which elicited the litigation before the Employment and Labour Relations Court (ELRC), culminating in this appeal are fairly straightforward and uncontested. The 2nd to 84th respondents are former employees of the National Bank of Kenya (the Bank). By virtue of their employment, they were members of the National Bank of Kenya Staff Retirement Benefits Scheme (the 1st respondent). In that capacity, they were entitled to their pension benefits as provided in the trust deed and rules of the scheme. Upon ceasing being employees of the Bank, they were paid their benefits. However, they protested that their pension benefits were not calculated in accordance with the scheme rules and filed a



complaint before the Retirement Benefits Authority (the 85th respondent) in accordance with Section 46 of the Retirement Benefits Act. However, their complaint was dismissed.

2. Aggrieved by the dismissal of their complaint, on 23rd November, 2023, pursuant to Section 48 of the Retirement Benefits Act, they appealed to the Retirement Benefits Appeal Tribunal (the 1st respondent) in Tribunal Appeal No. 8 of 2010, seeking to set aside the said decision and an order that the calculations prepared by their Actuary be upheld. By a decision dated 23rd February, 2012, the 1st respondent allowed their appeal as follows:
 - a. The Appeal be and is hereby allowed;
 - b. The 2nd respondent do within thirty (30) days from today calculate and give to each of the appellants and/or beneficiaries a statement of account showing in detail how the benefits due are arrived at;
 - c. If the full benefit is found not to have been paid by the 2nd respondent to any appellant or beneficiary the same be paid within thirty (30) days from today in accordance with the Scheme Rules of the 2nd respondent.
 - d. In default of the 2nd respondent undertaking the activities stated in (b) and (c) above or any one of them within thirty (30) days from the date hereof, the 1st respondent do appoint an Interim Administrator to undertake the assignment at the cost of the 2nd respondent;
 - e. There shall be liberty on either party to apply.
3. Following several execution applications, the appellants paid some amounts to the 2nd to 84th respondents. However, the 2nd to 84th respondents maintained that the said payments were not in tandem with the judgment and applied to the 85th respondent to appoint an Actuary to compute the amounts. Their application was allowed and a report of the Actuary was adopted vide a ruling delivered on 8th August, 2014 as follows:
 - a. The actuarial report be and is hereby adopted as it is in accordance with the orders issued by the Tribunal on 25th June 2012;
 - b. Subject to compliance with the Income Tax Act and/or any other statutory requirements and the variations in the Actuarial as set out below, the 2nd respondent is hereby directed to settle the appellants' individual claim in the manner set out in appendix 1 and appendix 2 and 5 at pages 21 to 34 inclusive of the Actuarial Report. The variations are: -
 1. Benefits Payable under the Rules, dated 4th January 1990-
 - i. Voluntary Early Retirement – a commutation of a lump sum not exceeding Kshs.540,000.00 and the remainder be paid as a pension in periodical instalments in accordance with Rule 49 of the Rules less what has so far been paid if any;
 - ii. Normal Retirement – a commutation of a lump sum not exceeding Kshs.540,000.00 and the remainder be paid as a pension in periodical instalments in accordance with Rule 49 of the Rules less what has so far been paid if any;
 - iii. Medical Retirement – a sum calculated in accordance with Rules 12 and 13 less what has so far been paid, if any;



- iv. Death – a sum calculated in accordance with Rule 15 less what has so far been paid, if any;
 - v. Other Terminations (Including Redundancies, Terminations, Resignations and Dismissals on or after 4th January, 1990 - a sum calculated in accordance with Rule 16 less what has so far been paid, if any;
 - c. The 2nd respondent within thirty (30) days from the date hereof to furnish each of the appellants with a statement of account showing how the benefits paid or payable were calculated and arrived at:
 - (d) Paragraphs 14, 15.4, 16.3, 19, 22, 36, 39 and 56 of the Actuarial deleted from the records of the Tribunal;
 - (e) Each party shall bear its own costs.
- 4. By an application dated 2nd December, 2014 and amended on 17th September, 2015, the 2nd to 84th respondents applied to the 1st respondent for a decree in the sum of Kshs.136,095,357.00 and warrants of execution. By a ruling delivered on 13th February, 2017, the 1st respondent directed the appellants to pay the 2nd to 84th respondents their unpaid pension in accordance with the Actuarial Valuation of NBC valuers. Dissatisfied by the said ruling, the appellants filed Judicial Review Application No. 85 of 2018 at the High Court of Kenya, Judicial Review Division. On 6th December, 2018, the parties appeared before Nyamweya, J. (as she then was) and requested the learned judge to transfer the said suit to the ELRC. Accordingly, the file was transferred to the ELRC by consent, where it was assigned a new number, being ELRC JR No. 37 of 2018. In their judicial review application, the appellants prayed for:
 - a. An Order of Certiorari to remove to quash the decision made by the Retirement Benefits Appeals Tribunal at Nairobi Civil Appeal No. 8 of 2010, Elias Maina Murigi & 133 Others vs Retirement Benefits Authority, National Bank of Kenya Staff Retirement Benefits Scheme and National Bank of Kenya Staff Pension Fund Registered Trustees to wit:
 - i. The 2nd respondent shall pay individually to each of the 83 appellants the sum in the first column set out against their respective names;
 - ii. The sum payable to each of the appellants in i. above be reduced by any sum paid after 8th August, 2014 if any;
 - iii. The 2nd respondent does collect all the tax, if any due on such payment;
 - iv. The 2nd respondent pays interest on the outstanding balance to each appellant at the rate earned by the scheme in each financial year until payment in full.
 - v. The appellants shall have costs of this application abide by the outcome of the judicial review case assessed at Kshs.10,000.00 payable by the respondent.
 - b. An order of mandamus directing the Retirement Benefits Appeals Tribunal to terminate further proceedings in Retirement Benefits Appeals Tribunal at Nairobi Civil Appeal Number 8 of 2010, Elias Maina Murigi & 133 Others vs Retirement Benefits Authority, National Bank of Kenya Staff Benefits Scheme and National Bank of Kenya Staff Pension Fund Registered Trustees.
 - c. That the costs of the suit be awarded to the ex- parte applicants.



5. The Judicial Review Application was supported by a statement and a verifying affidavit both dated 27th February, 2017 and a supplementary affidavit sworn on 26th April, 2017 by Habil Waswani, the Company Secretary of National Bank, the appellants' sponsor.
6. The 2nd to 84th respondent opposed the appellant's judicial review application through a replying affidavit sworn on their behalf by Jack Leonard Gwalla, the 16th respondent on 5th April, 2019. They maintained that the ruling delivered on 13th February, 2017 was not done in excess of 1st respondent's powers, that the appellants were not challenging the judgment delivered by the Tribunal, but rather its ruling made on applications to give effect to the judgment. They termed the exercise as futile and accused the appellants of filing the application to delay them from enjoying the fruits of the ruling delivered in their favour.
7. They maintained that the 1st respondent had jurisdiction to hear and determine disputes by dint of Section 49 of the *Retirement Benefits Act* and that in doing so, it correctly interpreted the law and followed the Rules of natural justice in carrying out its mandate under the said section. They contended that the issues raised by the appellants related to merits of the case, therefore, their application was an appeal disguised as a Judicial Review Application, thus, the application was incompetent and fatally defective.
8. The 85th respondent maintained that there being no direct claim against it, it did not file any response to the application. It maintained that it acted in accordance with Sections 46 and 48 of the *Retirement Benefits Act*, and its mandate in the matter automatically ceased.
9. By a judgment delivered on 31st January, 2020, Onyango, J. dismissed the appellants' Judicial Review Application, holding that the 1st respondent discharged its functions under the *Retirement Benefits Act* and that the appellants had not demonstrated sufficient reasons to justify the intervention of the Court. The learned judge also held that the appellants' application was an appeal disguised as a Judicial Review Application.
10. Aggrieved by the said verdict, the appellants appealed to this Court. In their amended memorandum of appeal dated 4th November, 2021, they have cited the following grounds:
 - a. The ELRC lacked jurisdiction to hear and determine the matter;
 - b. Alternatively, the learned Judge erred in law in finding that the appellants were not entitled to the judicial review orders sought;
 - c. The learned judge erred in law and in fact in failing to acknowledge that the 1st respondent had by its determination of 13th February 2019,
 - i. Re-written its ruling of 8th August 2014 and thereby sat on its own appeal;
 - ii. Overlooked, reviewed and/ or set aside the consent recorded by the parties on 8th April 2016;
 - iii. Acted in excess of its powers provided under the *Retirement Benefits Act* and Retirements Benefits (Tribunal) Rules 2008 and subjected the appellants to double jeopardy by delivering two separate and distinct judgments in the appeal;
 - iv. Issued the respondents with orders before hearing the respondents' application on its merits and further issued orders that were not sought by the respondents in their application;



- v. Demonstrated bias against the appellants by delivering its ruling with singular notice to the respondents and none to the appellants;
- vi. Demonstrated bias in determining that the appellants had not filed a response to the respondents' application when in fact the appellants' replying affidavit in response thereto was clearly on record and not taken into consideration;
- vii. Acted without jurisdiction because the 1st respondent had been rendered functus officio once the parties had recorded their consent in the matter; and
- viii. Relied on an Actuary Report that was determined to be in contravention of the appellants' Trust Deed Rules and therefore invalid.

11. The appellants pray for the following orders:

- (a) the appeal be allowed;
- (b) a declaration that the High Court improperly transferred Judicial Review Application No. 85 of 2018 to the ELRC for hearing and determination;
- (c) a declaration that the ELRC lacked the requisite jurisdiction to hear and determine Judicial Review Application No. 37 of 2018;
- (d) an order that the appellant's Judicial Review Application be heard afresh before court of competent jurisdiction;
- (e) in the alternative, the judgement and orders of Onyango, J. in the ELRC delivered on 31st January, 2020 in Judicial Review Application No. 37 of 2018 be set aside; and
- (f) the costs in the appeal and in the Superior Court be borne by the respondents.

12. When this appeal came up before us for virtual hearing on 24th June, 2024, learned counsel Mr. Nyaoga SC, Mr. Bundotich, Mr. Guto Mogere and Ms. Wambui Muigai appeared for the appellants. Learned Counsel Mr. Wesonga appeared for the 85th respondent. The 2nd to 84th respondents did not attend the hearing either in person or through an advocate, nor did they file submissions. The appellants' filed written submissions and case digest on 19th June, 2024, while the 85th respondent's submission and list of authorities are dated 20th June, 2024.

13. In support of their appeal, the appellants submitted that the trial court erred in failing to find that the tribunal vide its determination of 13th February, 2019 re-wrote its earlier ruling dated 8th August, 2014 and also reviewed the consent recorded on 8th April, 2014, thereby subjecting the appellants to double jeopardy. They contended that the orders made on 13th February, 2017 were a complete departure from the orders set out in the consent which was adopted as an order of the tribunal, and the consent was binding upon the parties unless it was set aside on grounds of fraud or for being contrary to public policy.

14. The appellants maintained that the tribunal lacked jurisdiction under the *Retirement Benefits Act* and the rules to rewrite a judgment or to vary a consent order that it had already adopted. Therefore, the learned judge erred in law by failing to find that the 1st respondent had rewritten its judgment and effectively set aside the consent order. The appellants also contended that the impugned ruling imposed different obligations on the appellants, which fell outside the consent which included the settlement terms which were not agreed upon including calculations which were unilaterally done by the respondents.



15. The appellants also urged that the 1st respondent made orders not pleaded and/or which the appellants were not accorded a chance to respond. The appellants maintained that the 2nd to the 84th respondents in their amended applications were seeking an order for the tribunal to issue a decree but it proceeded to adopt figures from a report that had been compromised in a consent order.
16. The appellants also contended that neither they nor their advocates were served with a ruling notice, and even though the ruling was delivered in open court, no evidence was tendered to demonstrate that a ruling notice was served upon the parties.
17. On whether the learned judge erred in law in finding that the appellants had not filed a response to the 2nd to 84th respondents' application, the appellants urged that the application dated 9th December, 2015 was an amendment to the application dated 2nd December, 2014 and the appellants deposed at paragraph 15 of the affidavit that he did swear an affidavit on 19th November, 2015 and in the said affidavit, he affirmed that the appellants duly complied with orders made on 8th August, 2014. Therefore, the learned judge erred in failing to appreciate that the said fact was not controverted by the 2nd to 84th respondents. Nevertheless, the appellants maintained that the 1st respondent ought to have considered whether the appellant had complied with the order of 13th February, 2017.
18. Regarding the jurisdiction of the ELRC to hear and determine the appeal, the appellants submitted that the relationship between the parties is not one of employer-employee, but rather trustee and beneficiary and therefore, it does not fall within the jurisdiction of the ELRC. They relied on the Supreme Court decision in *Albert Chaurembo Mumba & 7 Others vs. Maurice Munya & 148 Others*, Petition No. 3 of 2016 in support of the holding that the ELRC lacked jurisdiction to hear and determine matters concerning pension. Consequently, the proceedings, including the judgment were nullity ab initio.
19. The 85th respondent concurred with the appellant that the ELRC lacked jurisdiction to adjudicate on a dispute involving a retirement benefit scheme or its trustees and the beneficiaries of the scheme because Section 12 of the Employment and *Labour Relations Act* (the Act) provides an exhaustive list of the disputants who may approach the ELRC and the instant dispute is not one of them. It argued that this Court cannot delve into the substantive merits of the impugned decision without exceeding its appellate role and exercising original jurisdiction in the dispute.
20. The 85th respondent maintained that this dispute is principally between the appellant and the 2nd to the 84th respondents and urged this Court to invoke Rule 33 of the Court of Appeal Rules, 2022 and remit the proceedings to the High Court for hearing.
21. We have considered the appeal and the submissions urged by the appellants and the 85th respondent. The gravamen of the appellants' case is that the ELRC lacked jurisdiction to entertain the judicial review application. The appellants' aforesaid argument as we understand it is that the dispute involved computation of the 2nd to 84th respondents' pension benefits in accordance with the pension scheme rules as opposed to employer/employee related dispute as contemplated under Section 12 of the Act. Jurisdiction, a mantra in adjudication, connotes the authority or power of a court to determine a dispute submitted to it by contending parties in any proceeding. Jurisdiction is a threshold matter which goes to the competence of the court to hear and determine a suit.
22. A court of law is invested with jurisdiction to hear a matter when: (a) it is properly constituted as regards numbers and qualifications of members of the bench, and no member is disqualified for one reason or another; (b) the subject matter of the case is within its jurisdiction, and there is no feature in the case which prevents the court from exercising its jurisdiction; and, (c) the case comes before the court initiated by due process of law, and upon fulfilment of any condition precedent to the exercise



of jurisdiction. The above three ingredients must co-exist in order to infuse jurisdiction in a court. Where a court is drained of the jurisdiction to entertain a matter, the proceedings flowing from it, no matter the quantum of diligence, dexterity, artistry, sophistry, transparency and objectivity injected into it, will be marooned in the intractable web of nullity. (See this Court’s decision in *National Social Security Fund Board of Trustees vs. Kenya Tea Growers Association & 14 Others (Civil Appeal 656 of 2022)* [2023] KECA 80 (KLR) (3 February 2023) (Judgment)).

23. Jurisdiction can be raised at any stage of the proceedings even on appeal. As was held by this Court in *Kenya Port Authority vs. Modern Holding (EA) Ltd* [2017] eKLR:

“We have stressed that jurisdiction is such a fundamental matter that it can be raised at any stage of the proceedings and even on appeal, though it is always prudent to raise it as soon as the occasion arises. It can be raised....at any time, in any manner, even for the first time on appeal, or even viva voce and indeed, even by the Court itself - provided only that where the Court raises it suo motu, parties are to be accorded an opportunity to be heard.”

24. The jurisdiction of the ELRC is provided for under Section 12 of the Act as follows:

“12. Jurisdiction of the Court

1. The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162 (2) of *the Constitution* and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including—
 - a. disputes relating to or arising out of employment between an employer and an employee;
 - b. disputes between an employer and a trade union;
 - c. disputes between an employers’ organisation and a trade union’s organisation;
 - d. disputes between trade unions;
 - e. disputes between employer organisations;
 - f. disputes between an employers’ organisation and a trade union;
 - g. disputes between a trade union and a member thereof;
 - h. disputes between an employer’s organisation or a federation and a member thereof;
 - i. disputes concerning the registration and election of trade union officials; and
 - j. disputes relating to the registration and enforcement of collective agreements.
1. An application, claim or complaint may be lodged with the Court by or against an employee, an employer, a trade union, an employer’s organisation, a



federation, the Registrar of Trade Unions, the Cabinet Secretary, or any office established under any written law for such purpose.

2. In exercise of its jurisdiction under this Act, the Court shall have power to make any of the following orders—
 - i. interim preservation orders including injunctions in cases of urgency;
 - ii. a prohibitory order;
 - iii. an order for specific performance;
 - iv. a declaratory order;
 - v. an award of compensation in any circumstances contemplated under this Act or any written law;
 - vi. an award of damages in any circumstances contemplated under this Act or any written law;
 - vii. an order for reinstatement of any employee within three years of dismissal, subject to such conditions as the Court thinks fit to impose under circumstances contemplated under any written law; or;
 - viii. any other appropriate relief as the Court may deem fit to grant.
4. In proceedings under this Act, the Court may, subject to the rules, make such orders as to costs as the Court considers just.
5. The Court shall have jurisdiction to hear and determine appeals arising from—
 - a. decisions of the Registrar of Trade Unions; and
 - b. decisions of any other local tribunal or commission as may be prescribed under any written law.

25. A court's jurisdiction is determined by examining the pleadings so as to appreciate the gist of the case. This position was articulated by the South African Constitutional Court in *Vuyile Jackson Gcaba vs. Minister for Safety and Security First & Others* Case CCT 64/08 [2009] ZACC 26 as follows:

“Jurisdiction is determined on the basis of the pleadings,...and not the substantive merits of the case... In the event of the Court's jurisdiction being challenged at the outset (in limine), the applicant's pleadings are the determining factor. They contain the legal basis of the claim under which the applicant has chosen to invoke the court's competence. While the pleadings – including in motion proceedings, not only the formal terminology of the notice of motion, but also the contents of the supporting affidavits – must be interpreted to establish what the legal basis of the applicant's claim is, it is not for the court to say that the facts asserted by the applicant would also sustain another claim, cognizable only in another court. If, however the pleadings, properly interpreted, establish that the applicant is asserting a claim ..., one that is to be determined exclusively by... {another court}, the High Court would lack jurisdiction...” (Emphasis added).



26. We have carefully read the entire record particularly the pleadings. The dispute between the parties does to arise from an employer/employee relationship. In fact, as at the time the dispute arose, the 2nd to 84th respondents had ceased to be employees of the bank. The dispute involved computation of their benefits under the pension scheme. The issues raised in this case were settled with finality by the Supreme Court in *Albert Chaurembo Mumba & 7 Others* (sued on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) vs. *Maurice Munyao & 148 others* (suing on their own behalf and on behalf of the Plaintiffs and Other Members/Beneficiaries of the Kenya Ports Authority Pensions Scheme) [2019] eKLR, (P.M. Mwilu D.C.J & V-P, Ojwang, Wanjala, Njoki & Lenaola SCJJ) where it held:-

“(146) In our view, once a member leaves the employment of a Sponsor, by becoming a pensioner, there is no longer a relationship of employer-employee that exists between such a pensioner and the sponsor. The relationship that exists in that case becomes that of trustee and beneficiaries (members) of a trust and that relationship is governed by the *Retirement Benefits Act, Trustee Act* Cap 167 of the laws of Kenya and the general common law on the law of trusts. It is important to note that nowhere in the *Employment and Labour Relations Court Act* is there jurisdiction conferred on the Employment and Labour Relations court to resolve issues between trustees of a pension scheme and members of the scheme (pensioners).”

26. The above being the correct interpretation of the law, we are clear in our minds that the ELRC had no jurisdiction to entertain the dispute relating to computation and payment of the 2nd to 84th respondents’ claim relating to computation and payment of their pension benefits under their pension scheme.

Therefore, the High Court improperly transferred Judicial Review Application No. 85 of 2018 to the ELRC for hearing and determination. It is settled law that jurisdiction cannot be conferred by consent of judicial craft. This position was appreciated by the Supreme Court in *Isaac Aluoch Polo Aluochier vs. Independent Electoral and Boundaries Commission & Others & 19 Others* [2013] eKLR as follows:

“A court cannot expand its jurisdiction through judicial craft or innovation. See *S.K. Macharia and Another v. Kenya Commercial Bank Ltd. & 2 Others*, Sup. Ct. Civil Application No. 2 of 2011; [2012] eKLR. Nor can a party confer on a court power it does not have. Similarly, parties cannot by mutual consent confer jurisdiction when there is none.”

27. In the premises, we allow this appeal, set aside the judgement of Onyango, J. dated 31st January, 2020 issued in Judicial Review Application No. 37 of 2018 in its entirety. Considering that the matter was not heard on merits and that the parties by consent requested the Court to transfer the case to the ELRC, it is our view that it would be unfair for this Court to allow the respondents to bear the consequence of the transfer, yet it was by consent. Accordingly, we order that the appellants’ Judicial Review proceedings be remitted to the High Court, Judicial Review Division, for hearing and determination on merits pursuant to Rule 33 of this Court’s Rules. Costs shall abide by the outcome of the Judicial Review Application.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF NOVEMBER, 2024.



D. K. MUSINGA, (P.)

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

J. MATIVO

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed.

DEPUTY REGISTRAR.

