



Registered Trustees; Kenya Ports Authority Pension Scheme v Bwana (Civil Appeal 50 of 2020) [2023] KECA 772 (KLR) (23 June 2023) (Judgment)

Neutral citation: [2023] KECA 772 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL 50 OF 2020
SG KAIRU, P NYAMWEYA & GV ODUNGA, JJA
JUNE 23, 2023**

BETWEEN

THE REGISTERED TRUSTEES; KENYA PORTS AUTHORITY PENSION SCHEME APPELLANT

AND

BWANA MOHAMED BWANA RESPONDENT

(An appeal from the Ruling and Order of the High Court of Kenya at Mombasa (D.O. Chepkwony J.) delivered on 20th February 2020 in Mombasa HCC No. 79 of 2019)

JUDGMENT

1. The respondent herein, Bwana Mohamed Bwana, instituted a suit being Mombasa HCC No. 79 of 2019 by way of a plaint dated October 7, 2019 in the High Court at Mombasa, in which he contended that he was a member of, contributed to, and a beneficial owner of all the assets, investments and the schemes fund managed by the Registered Trustees of Kenya Ports Authority Pension Scheme, the appellant herein, and a tenant occupying house number 1334 standing on a parcel of land known as Mainland North/Section 1/1334 Nyali Mombasa constituting part of the assets and investments of the said pension scheme.
2. The respondent's claim against the appellant was for breach of the Trust Deed and their duty to act in good faith for the benefit of the respondent and the Scheme Members by advertising to sell by public auction the Scheme Prime Property by tender including but not limited to House number 1334 standing on the parcel of land known as Mainland North/ Section 1/1334 Nyali occupied by the respondent. The said decision was not approved or sanctioned by the members who, were contributors and the beneficial owners of the assets, investment and the scheme funds. Further, the appellant failed to call for meetings which ought to have passed or proposed the resolution that directly affected the acquisition or disposal of the scheme properties in breach of the Trust Deed and the regulations of the Kenya Ports Authority Retirement Benefits Scheme.



3. The respondent was apprehensive that he would lose his pension and the house he was residing in, thus suffering irreparable damage and prayed for judgment against the appellant for a permanent injunction restraining them from transferring, alienating, disposing either by public auction or private treaty the prime properties both movable and immovable assets of the Kenya Ports Authority Pension Scheme including house number 1334 standing on a parcel of land known as Mainland North/ Section 1/1334 Nyali Mombasa; or in the alternative, that the appellant be compelled to give priority to the respondent to purchase the House number 1334 standing on a parcel of land known as Mainland North/ section 1/1334 Nyali and any other members of the scheme interested in purchasing the parcels of land in which their houses stood be given priority.
4. The respondent contemporaneously filed a Notice of Motion Application dated 7th October 2019 seeking a temporary injunction against the appellant restraining them from transferring, alienating, disposing either by public auction or private treaty the appellant 's prime properties both movable and immovable assets, including the House Number 1334 standing on a parcel of land known as Mainland North/ Section 1/1334 Nyali Mombasa pending the reference of the matter to arbitration or the hearing and determination of the matter, in the alternative, the matter be referred to arbitration in terms of clause 27 of the Trust Deed and Regulations of the Kenya Ports Authority Pension Scheme. The respondent in his grounds in support of the application reiterated the averments in the Plaint save to add that the appellant was set to continue with the public auction on 9th October 2019 at 1000 hours unless stopped by the Court. On 7th October 2019, the trial Judge (D. Chepkwony J.) granted the prayers for a temporary injunction, and ordered the matter be referred to arbitration in terms of Clause 27 of the Trust deed and the Regulations of the Kenya Ports Authority Pension Scheme.
5. The appellant thereupon filed a notice of motion application dated October 9, 2019, seeking inter alia, that the ex parte orders granted on October 7, 2019, be set aside; in the alternative and pending the hearing of the application, the orders granted be varied and limited to and only affect the parcel of land known as Mainland North/Section 1/1334 in Nyali Mombasa; and that the respondent 's suit be struck out for want of jurisdiction under article 163 (5) of *the Constitution* and section 46 and 48 of the *Retirement Benefits Act* No 3 of 1997. The appellant 's application was supported by an affidavit sworn on even date by Steven Kyandih, its Secretary, who deponed that they were aggrieved by the orders for the reason that firstly, the suit concerned occupation of and title to various parcels of land and was within the exclusive jurisdiction of the Environment and Land Court. Secondly, the dispute, if any, was between a pension scheme and its member thus outside the jurisdiction of the High Court by virtue of sections 46 and 48 of the Retirement Benefits Authority 1997. Thirdly, the orders granted were final and their effect left nothing to be heard at the inter partes hearing, additionally, the respondent deliberately suppressed material information and thereby obtained orders on the basis of non-disclosure of material facts. Further, the order exposed the appellant to potential law suits from the people who had bid and paid deposits in the hope of acquiring the properties put up so sale with an approximate value of Kshs 4,921,400,000.00/-.
6. On 9th October 2019, the trial Judge (D. Chepkwony J.) varied the order of temporary injunction issued ex parte on October 7, 2019 to the effect that it was limited to and only affected the parcel of land known as Mainland North/Section 1/ 1334 Nyali Mombasa. After hearing the parties and perusing their submissions, the learned Judge delivered a ruling on February 20, 2020, and after noting that the prayers of the Plaint that the respondent was the appellant 's tenant, and sought to be given priority to purchase House number 1334 made the dispute between the parties one within the ambit of article 162 (2) (b) of *the Constitution*, found that the High Court lacked jurisdiction to entertain the application and the suit. The learned trial Judge accordingly directed that the case be transferred to the Environment and Land Court for disposal, and that any party be at liberty to fix the suit for



directions at the Environment and Land Court. The interim orders granted on October 7, 2019 were extended by the learned Judge to “avoid the scenario where the applications and the suit would be rendered nugatory or academic, till direction on the hearing of the two applications are given by the Environment and Land Court”. Lastly, each party was ordered to bear its own costs.

7. The appellant is aggrieved by the said ruling and has proffered this appeal and raises three (3) grounds of Appeal in a memorandum of appeal dated June 18, 2020 and lodged on August 3, 2020, namely that:

1. The learned trial Judge erred in law in transferring to the Environment and Land Court, a suit that had been filed in a court without jurisdiction;
2. The learned trial Judge erred in law in isolating two jurisdictional issues but completely failing to address the second jurisdictional issue thus rendering an incomplete and null ruling;
3. The learned trial Judge erred in law in failing to find that no court had jurisdiction to hear the suit by virtue of section 46 and 48 of the *Retirement Benefit Act* No 3 of 1997.

The appellant therefore seeks orders that the appeal be allowed with costs, and that the ruling and order of the High Court delivered on February 20, 2020 be set aside and substituted with an order allowing the appellant’s Notice of Motion application dated October 9, 2019.

8. We heard the appeal on this court’s virtual platform on December 6, 2022, and learned counsel Mr. Billy Kongere, appeared for the appellant, and highlighted his written submissions dated May 30, 2022. There was no appearance for the respondent despite their advocate having been duly served with the hearing notice. A.A. Mazrui & Company Advocates who are on record for the respondent however filed written submissions dated November 30, 2022. This being a first appeal, the duty of this Court, as set out in the decision of *Selle & another vs Associated Motor Boats Co. Ltd & others* (1968) EA 123, is to reconsider the evidence, evaluate it and draw our own conclusion of facts and law; and will only depart from the findings by the trial Court if they were not based on evidence on record; where the said Court is shown to have acted on wrong principles of law as was held in *Jabane vs Olenja* (1968) KLR 661; or where its discretion was exercised injudiciously as held in *Mbogo & Another vs Shah* (1968) EA 93.

9. The gist of Mr. Kongere’s submissions were that the learned trial Judge erroneously relied on the case of *Daniel N. Mugendi vs Kenyatta University & 3 others* [2013] eKLR to find that a suit filed before a court bereft of jurisdiction could be transferred to a court with jurisdiction. The counsel submitted that the decision *Daniel N. Mugendi vs Kenyatta University & 3 others and Kenya Medical Research Institute v Davy Kiprotich Koech* [2018] eKLR were made in special circumstances, during the operationalisation of the specialized courts established by the 2010 Constitution. The counsel placed reliance on later decisions in *Equity Bank Limited v Bruce Mutie Mutuku t/a/ Diani Tour Travel* [2016] eKLR; *Phoenix of E. A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service* [2019] eKLR; *Pelezia Bakari Salim v Somoire Keen & 2 others* [2020] eKLR; and the Supreme Court of Kenya decision in the case of *Albert Chaurembo Mumba & 7 others vs Maurice Munyao & 148 Others* [2019] eKLR to the effect that a suit filed in a Court without jurisdiction is a nullity and incapable of transfer.

10. On failure to address one of the jurisdictional issues, the counsel submitted that the ELC jurisdiction could not be triggered since section 46 of the *Retirement Benefits Act* No. 3 of 1997 bestowed jurisdiction elsewhere, and that had the learned trial Judge considered this objection, she would not have referred the case to the ELC. Related to this argument was that after failing to find that jurisdiction was with the RBA, other suits filed against the appellant before the same trial Judge, namely *Oscar Nyerere Magero vs Kenya Ports Authority & another* [2021] eKLR and *James Oluoch Ogando vs Kenya Ports Authority Pension Scheme & another* MSA HCC No. 81 of 2019; (unreported) were struck out after the learned trial Judge held that section 46 of the *RBA Act* precluded courts from



entertaining the dispute in the first instance. Further, that similar decisions were also made in other cases namely in *David Njuguna Wambia vs Registered Trustees, Kenya Ports Authority Pension Scheme* MSA HCC No. E001 of 2020 (Unreported); and *Bernard Munyao vs Registered Trustees of Kenya Ports Authorities Pension Scheme* [2020] eKLR; *Fredrick Okwomi Anyasi & 4 others v Kenya Railways Retirement Benefits Scheme & another* [2020] eKLR and *Ann Wangui Ngugi & 524 others v Kenya Commercial Bank Staff Pension Fund & 2 others* [2020] eKLR.

11. A.A. Mazrui & Company Advocates for the respondent submitted that the decision in *Daniel N. Mugendi v Kenyatta University & 3 others* [2013] eKLR is still a good law and the learned trial Judge could not be faulted for relying on the same; as it has been relied on in later cases, namely *Henry Kigen & 6 others vs Baringo County Governor & 2 others* [2020] eKLR, *Pamoja Women Development Program & others vs Jackson Kibumbu Wang'ombe & another* [2016] eKLR and *Wycliffe Amukowa & 2 others v Machakos University* [2022] eKLR since a transfer of a suit is an administrative act and not a substantial decision on jurisdiction. Further, that the trial Judge ought not to be faulted for not entertaining the second limb of the issues raised after finding that the trial court had no jurisdiction, and that the proper forum to address the issue is the pending suit between the parties in the Environment and Land Court being Environment and Land Case no 99 of 2020 - Bwana Mohamed Bwana vs The Registered Trustees, Kenya Ports Authority Pension Scheme.
12. The grounds upon which this court can interfere with the exercise of the learned Trial Judge's discretion were set out in *United India Insurance Co Ltd, Kenindia Insurance Co Ltd & Oriental Fire & General Insurance Co Ltd vs East African Underwriters (Kenya) Ltd* [1985] eKLR as follows:

“The court of Appeal will not interfere with a discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to the various factors in the case.

The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong.”
13. In this regard, it is apparent that the learned trial Judge did not consider the objection raised on jurisdiction on account of the provisions of section 46 of the *Retirement Benefits Act*. It is notable that prayer 5 of the appellant's notice of motion application dated October 9, 2019 that was the subject of the impugned ruling, sought orders that “The Plaintiff's suit be struck out for want of jurisdiction under Article 163(5) (sic) of *the Constitution* and sections 46 and 48 of the *Retirement Benefits Act* No. 3 of 1997”, and the grounds were that the dispute concerned the use and occupation of, and title to land and exclusively within the jurisdiction of the, and was also one between a pension scheme and its members, and sections 46 and 48 of the *Retirement Benefits Act* provide a dispute resolution mechanism outside the Courts and resort to the Court could only be after this mechanism was exhausted.
14. A perusal of the ruling delivered on February 20, 2020 by the trial Judge shows that the first objection on jurisdiction of the trial Court vis-à-vis the jurisdiction of the Environment and Land Court and the provisions thereon of articles 165 (3) and 162 (2)(b) of *the Constitution* were examined in detail. However, while the second objection as regards the existence of alternative dispute resolution mechanism sections 46 and 48 of the *Retirement Benefits Act* is noted in the body of the ruling as having been raised by the appellant, there is no analysis of the issue, nor decision thereon. It is notable in this



regard that the Supreme Court of Kenya held as follows in Albert Chaurembo Mumba & 7 others vs Maurice Munyao & 148 others [supra]:

“[120] On the foregoing basis, we are in agreement with the submissions of the learned counsel for the appellants, and further fault the learned Judges of Appeal and hold that the in-built review and appellate mechanisms established under sections 46 and 48 respectively of the RBA Act should have been exhausted first by the respondents before any other recourse is taken to the superior courts. In our view, section 46 of the RBA Act therefore vests original jurisdiction upon the CEO; thus, the proper forum for the respondents to launch their case was to first write to the CEO then if dissatisfied with the decision of the CEO appeal to the Retirement Benefits Appeals Tribunal.”

15. As regards what course of action should then follow in circumstances such as those that obtained in the trial court, the Supreme Court opined as follows:

“

“(154) However, as it was well elucidated in the case of *Kagenyi v Musiramo & Another* (1968) EALR 43, an order for transfer of a suit from one court to another cannot be made unless the suit has been brought, in the first instance, to a court which has jurisdiction to try it. It is therefore irrelevant as parties cannot consent to confer jurisdiction to a Court/tribunal where it is not provided by law.

As already found that this dispute does not fall within the scope of the Employment and Labour Relations Court despite the transfer...”

16. Arising from this holding by the Supreme Court, we find that the second objection on the lack of jurisdiction of the courts on account of section 46 of the Retirement Benefits Act was a material factor, as a finding thereon would have had implications on the proper forum to hear the dispute, and eventual decision as to whether or not to transfer the suit to the Environment and Land Court. We therefore find that there is justifiable ground to interfere with the trial Judge’s discretion and hereby allow this appeal, and in their place, we make the following orders:

1. The ruling and orders of the High Court made on February 20, 2020 in Mombasa HCC No. 79 of 2019 be and are hereby set aside in their entirety.
2. The suit filed in the High Court in Mombasa HCC No. 79 of 2019 be and is hereby struck out.
3. The Appellant is awarded the costs of the suit in the High Court in Mombasa HCC No. 79 of 2019 and of this appeal.

17. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 23RD DAY OF JUNE 2023.

S. GATEMBU KAIRU, FCIArb

.....

JUDGE OF APPEAL

P. NYAMWEYA

.....



JUDGE OF APPEAL

G. V. ODUNGA

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

