



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kenya Ports Authority & another v Chamba (Civil Appeal  
161 of 2019) [2022] KECA 439 (KLR) (18 March 2022) (Judgment)**

Neutral citation: [2022] KECA 439 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPEAL 161 OF 2019  
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA  
MARCH 18, 2022**

**BETWEEN**

**KENYA PORTS AUTHORITY ..... 1<sup>ST</sup> APPELLANT**

**REGISTERED TRUSTEES OF THE KENYA PORTS AUTHORITY PENSION  
SCHEME ..... 2<sup>ND</sup> APPELLANT**

**AND**

**BETTY U. CHAMBA ..... RESPONDENT**

*(An appeal from the ruling of the Employment & Labour Relations Court at  
Mombasa (Ndolo, J.) delivered on 21st February 2019 in ELRC Cause No. 496 of 2018)*

**JUDGMENT**

1. The appellants, Kenya Ports Authority and The Registered Trustees of the Kenya Ports Authority Pension Scheme, are aggrieved by a Ruling of the Employment and Labour Relations Court (ELRC) delivered on 21<sup>st</sup> February 2019 in which L. Ndolo, J. overruled their preliminary objection challenging the jurisdiction of that court.
2. In her Statement of Claim filed before the ELRC on 30<sup>th</sup> October 2018, the respondent, Betty U Chamba, sought a declaration that she is entitled to exclusive possession of a house on Pension Scheme Block No. 91 Mbaraki. She also sought an injunction to restrain the appellants from interfering with her occupation of the house.
3. The basis of the respondent's claim, as pleaded, was that she was employed by the 1<sup>st</sup> appellant in 1988; that in the year 2000, she was allocated a pension scheme house at a monthly rent of Kshs.14,000; that the 2<sup>nd</sup> appellant, to whom the houses had been transferred by the 1<sup>st</sup> appellant was to facilitate a formal lease; that no formal lease or tenancy arrangement was entered into; that "in the absence of such a lease,



- the [respondent] is deemed to be a protected tenant of the 2<sup>nd</sup> [appellant] in respect of the tenancy premises terminable as provided for by the statute governing the rent restriction houses.”
4. The respondent averred that on 19<sup>th</sup> March 2018, she was notified that upon her retirement on 27<sup>th</sup> July 2018, she would be required to vacate the house; that subsequent engagements on her request to stay in the house did not elicit a response. She complained that the respondents had pre-determined to allocate the house to an undisclosed employee; that she was threatened with eviction in breach of natural justice, contrary to law, public interest and legitimate expectation, among other grievances.
  5. In their Statement of Defence, in addition to answering the respondent’s claim, the appellants challenged the jurisdiction of the ELRC “on the basis of Section 12(1) of the *Employment and Labour Relations Court Act*” (the Act) and “Section 46 of the *Retirement Benefits Act...*”.
  6. Together with the Statement of Defence, the appellants filed a notice of preliminary objection giving notice of their intention to raise a point of law that the ELRC has no jurisdiction to entertain the claim for the reasons that the respondent “is no longer an employee” of the 1<sup>st</sup> appellant and “the claim does not fall with the purview of Section 12(1)” of the Act and that the court’s jurisdiction is ousted in the first instance by Section 46 of the *Retirement Benefits Act* to deal with a dispute between the respondent and the 2<sup>nd</sup> appellant.
  7. Upon hearing the parties and considering submissions on the preliminary objection, the learned Judge of the ELRC delivered the impugned ruling, and as already stated, dismissed the preliminary objection. Hence the present appeal.
  8. Urging the appeal before us, learned counsel for the 1<sup>st</sup> appellant Mr. Cheruiyot and learned counsel for the 2<sup>nd</sup> appellant Mr. Oweya referred to the memorandum of appeal and submitted that the dispute before the ELRC is not an employment dispute within Section 12(1) of the Act but rather a tenancy issue between the respondent and the 2<sup>nd</sup> appellant; that the relationship between the 1<sup>st</sup> appellant and the respondent is one of former employer and employee and the ELRC has no jurisdiction over the same; that the housing benefit the respondent was enjoying during her employment was a fringe benefit that terminated with the termination of her employment. In that regard the case of *Erick V.J. MakboKha vs. Lawrence Sagini & 2 others [1994] eKLR* was cited.
  9. It was submitted that jurisdiction in relation to pension matters under Section 46 of the *Retirement Benefits Act* as interpreted by the Supreme Court in *Albert Chaurembo Mumba & 7 others as registered Trustees of Kenya Ports Authority Pensions Scheme vs. Maurice Munyao & 148 others [2019] eKLR* vests in the Chief Executive Officer in the first instance. Reference was also made to the Supreme Court decision in *Benson Ambuti Adega & 2 others vs. Kibos Distillers Limited & 5 others [2020] eKLR*.
  10. With that, counsel urged us to allow the appeal, set aside the ruling of the ELRC, and substitute it with a decision upholding the preliminary objection and strike out the suit.
  11. Opposing the appeal, learned counsel for the respondent Mr. Chamwada submitted that the dispute is a tenancy dispute relating to the right of an employee to housing under the Employment Act within the jurisdiction of the ELRC; that the house in question, allocated to the respondent by the 1<sup>st</sup> appellant was transferred to the 2<sup>nd</sup> appellant by the 1<sup>st</sup> appellant; that the respondent has no contractual relationship with the 2<sup>nd</sup> appellant; that there is no pensioner or trustee issue arising and the Retirement Benefits Authority Act has therefore no application; and that the respondent was still an employee when the present claim was instituted.
  12. We have considered the appeal and submission. The only issue is whether the learned Judge was right in holding the ELRC has jurisdiction over the dispute. In the words of the Supreme Court at paragraph



137 in *Albert Chaurembo Mumba & 7 others as registered Trustees of Kenya Ports Authority Pensions Scheme vs Maurice Munyao & 148 others* (above), the “first port of call is to determine the nature of the dispute”. In rejecting the objection to jurisdiction, the learned Judge expressed:

“A reading of the pleadings filed by the parties does not, in my view, disclose a dispute between a pensioner and a pension scheme. In other words, the decision which is the subject matter of the dispute now before the court does not relate to the management of the scheme. Rather, it has to do with a tenancy created by the 1<sup>st</sup> respondent and later assigned to the 2<sup>nd</sup> respondent.

It seems to me therefore that this is not a matter contemplated by the exhaustion provision under Section 46(1) of the *Retirement Benefits Act*. On the contrary, this is purely a tenancy issue which has nothing to do with the relationship between the claimant as a pensioner and the 2<sup>nd</sup> respondent as a pension scheme.” [Emphasis]

13. The characterization by the learned Judge of the nature of dispute as a “tenancy issue” is well supported by the respondent’s pleading in which, as already noted, she averred that she is a “protected tenant” in respect of the “tenancy premises” on account of the failure by the appellants to avail her a “lease for execution.” It is on that premise that she sought, before the lower court, a declaration that she is entitled to exclusive possession of the house in addition to her prayer for an order of injunction restrain interference with her occupation. Is that a matter within the jurisdiction of the ELRC?

14. The *Employment and Labour Relations Court Act* enacted pursuant to Article 162(3) of *the Constitution* provides for the jurisdiction of the Employment and Labour Relations in Section 12(1) as follows:

“(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 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.”



15. It is plain from a reading of those provisions that what is clearly a “tenancy issue” between the respondent and the appellants is not a matter within the jurisdiction of the ELRC. We do not think that the fact that respondent is a retired employee of the 1<sup>st</sup> appellant alters the character of the dispute. The Supreme Court of Kenya was categorical in *Samuel Kamau Macharia and another vs. Kenya Commercial Bank and 2 others*, S.C. Civil Application No. 2 of 2011 [2012] eKLR that a court’s jurisdiction flows from either *the Constitution* or legislation or both and that “a court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law” and “cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law”.
16. More recently, in *Albert Chaurembo Mumba & 7 others as registered Trustees of Kenya Ports Authority Pensions Scheme vs. Maurice Munyao & 148 others* [2019] eKLR the Supreme Court of Kenya restated that *the Constitution* and several statutes prescribe the jurisdictional limits and scope of exercise of such powers by various courts, tribunals and agencies exercising quasi-judicial functions.
17. Whereas the learned Judge was right in stating that the tenancy issue in the suit “has nothing to do with the relationship between the [respondent] as a pensioner and the 2<sup>nd</sup> [appellant] as a pension scheme” and therefore ousting application of the dispute resolution mechanism under the *Retirement Benefits Act*, the learned Judge erred, in our view, in failing to uphold the objection that the claim did not fall within the purview of Section 12(1) of the Employment and Labour Relations Act. To that extent, the appeal succeeds.
18. We set aside the ruling of the ELRC delivered on 21<sup>st</sup> February 2019 and substitute therefore an order upholding the appellant’s objection that the ELRC lacks jurisdiction under Section 12(1) of the Employment and Labour Relations Act to entertain the respondent’s claim. The result is that the respondent’s suit before the ELRC is struck out, with costs in the lower court, to the appellants. Given the circumstances giving rise to this appeal, we order that each party shall bear their own costs of the appeal.

**DATED AND DELIVERED AT MOMBASA THIS 18<sup>TH</sup> DAY OF MARCH 2022.**

**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**

**P. NYAMWEYA**

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**JUDGE OF APPEAL**

**J. LESIIT**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

