



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA (P), KARANJA & MURGOR, J.J.A)

CIVIL APPEAL NO. 623 OF 2019

BETWEEN

THE BOARD OF TRUSTEES,

TELEPOSTA PENSION SCHEME.....APPELLANT

AND

THE RETIREMENT BENEFITS APPEAL TRIBUNAL.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

THE RETIREMENT BENEFITS AUTHORITY.....3RD RESPONDENT

BONIFACE MARIGA & 948 OTHERS.....4TH RESPONDENT

*(An Appeal from the Ruling and Orders of the High Court of Kenya at Nairobi (Nyamweya, J.) delivered on 6th December 2018*

*in*

*Civil Application No. 141 of 2017)*

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**RULING OF THE COURT**

1. **The Board of Trustees of the Teleposta Pension Scheme**, (the appellant) filed before the High Court at Nairobi an application seeking an order of certiorari to quash the judgment and orders of **The Retirement Benefits Appeals Tribunal** (the 1st Respondent) made in **Tribunal Civil Appeal No. 7 of 2011**. The Applicant also sought an order of prohibition to prohibit the 1st Respondent from any further dealing with the said appeal.

2. The 4th respondents herein, who were the appellants before the Tribunal subsequently filed an application, seeking that this suit be struck out on grounds that the High Court lacks jurisdiction to entertain the suit which arises out of employment benefits due to the 2nd Interested Parties, which is constitutionally the exclusive mandate of the Employment and Labour Relations Court (ELRC). Further, that the suit discloses no reasonable cause which can be litigated before any court other than the Employment and Labour Relations Court.

3. The appellant filed Grounds of Opposition to the application contending, *inter alia*, that the applicant's judicial review application sought to invoke the supervisory jurisdiction of the High Court over the Retirements Benefits Appeals Tribunal, which was a judicial or quasi-judicial authority established under **Section 48** of the Retirement Benefits Act, and had been granted the powers of subordinate court of the first class under **Section 49** of the said Act. Further, that **Article 165(6)** of the Constitution specifically vested in the High Court supervisory jurisdiction over subordinate courts and any person, body or authority exercising a judicial or quasi-judicial function.

4. Secondly, that the dispute herein did not relate to employment or labour relations as envisioned by **Article 162 (2)(a)** of the Constitution and **Section 12** of the Employment and Labour Relations Act (the ELRC Act), but concerned the exercise of jurisdiction by the Retirement Benefits Appeals Tribunal with regard to the imposition of a formula for calculation of lump sum retirement dues payable to pensioners, which formula was alleged to be *ultra vires* the Retirement Benefits Act and in breach of the applicant's Trust Deed. That for the High Court to be stripped of jurisdiction, the dispute must fall exclusively within the jurisdiction of **Article 162(2)** of the Constitution which is not the case in the instant matter.

5. The application was canvassed by way of written submissions that were highlighted at a hearing held on 15th October, 2018. Each party made strong representations on the issue of jurisdiction. Counsel for the 4th respondents urged the Court that pension benefits were employment benefits arising out of an employee-employer relationship and were therefore within the exclusive jurisdiction of the ELRC; that the rights under **Section 12** of the Employment and Labour Relations Act can also be asserted by way of judicial review and that the ELRC, being a court of equal status with the High Court had supervisory jurisdiction over tribunals dealing with employment and labour relations matters; that since the Court had no jurisdiction, the only remedy was to strike out the suit, and the Court had no power to transfer the suit to the ELRC in accordance with **Section 17** and **18** of the Civil Procedure Act, which only allowed the Court to transfer a matter to a subordinate Court but not a court of equal status.

6. Counsel for the 3rd respondent on the other hand submitted that the court had power to transfer the dispute to the ELRC for hearing and determination. Counsel however supported the 4th respondent's position that it was the ELRC that had jurisdiction to hear and determine the dispute by virtue of **Article 23(3)**, **Article 162(2)(a)** and **Article 165(3)(b)** of the Constitution as read with section 12 of the ELRC Act; that the nature of the dispute concerned employment and labour relations, as the employment relationship was the basis of a trust deed of a pension scheme.

7. The appellant presented three fronts of arguments on the application. Their first was that **Article 165(6)** of the Constitution gave the High Court and not the ELRC supervisory jurisdiction over tribunals; that while **Article 162 (2)(a)** of the Constitution granted exclusive jurisdiction to employment and labour relations matters, **Section 12** of the ELRC Act which was enacted pursuant to **Article 162(2)(a)** did not give any jurisdiction to the ELRC to hear issues of retirement benefits, and the case before this Court was between retirees and a pension fund and not between employer and employees.

8. Secondly, that the ELRC did not have exclusive jurisdiction in this case as there were mixed issues involved, the primary issue being the supervision of the exercise of power by the respondent, and any employees issues raised were secondary; that at the very best the High Court had concurrent jurisdiction with the ELRC; that should it be found that the High Court had no jurisdiction, the court still had the power to transfer the suit to the ELRC, and in that regard that the Civil Procedure Code did not apply to judicial review matters and **Section 17** and **18** of the Act only applied to transfer of suits between subordinate courts not the High Court.

9. Having heard the parties on the issue of jurisdiction, the learned Judge held that the court had jurisdiction to hear and determine judicial review cases as prescribed by **Article 165 (6)** of the Constitution which provided that the High Court had supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function in that regard. The Court found that the suit involved the 4th respondent's rights arising from employment, and also fell within the jurisdiction of the ELRC and that this was therefore one of those hybrid cases where both the High Court and ELRC had concurrent jurisdiction as the issues therein cut across the exclusive jurisdiction reserved for the two courts.

10. The Court found that the issues that arose were predominantly and substantially employment issues, since the question of the propriety of the 1st Respondent's decision would have to be examined in light of the applicable employment laws and instruments and that this was a matter that would be more competently heard by the ELRC, which had both the exclusive and supervisory jurisdiction to hear the matter, even though the court also had supervisory jurisdiction over the Respondent.

11. That is principally the finding that aggrieved the appellant and propelled it to this Court on appeal. Parties herein filed their submissions and appeared before us virtually for purposes of highlighting the said submissions. At the hearing, learned counsel Mr. Rabut appeared with Ms. Noella Lubano for the appellant, Ms. Annette Nyakora appeared for the 1st and 2nd respondents; Jack Bwire appeared for the 3rd respondent while Mr. Amadi and Angela Merichi appeared for the 4th respondent.

12. Before the highlighting of the submissions commenced, learned counsel Ms. Merichi, and Mr. Bwire informed the Court that they were supporting the appeal. On her part, Ms. Nyakora informed the Court that they were not taking any sides and would be happy to be heard by either the High Court or the ELRC. Mr. Amadi on his part informed the Court that his stand was that neither the High Court nor the ELRC had jurisdiction to entertain the matter. He was nonetheless informed by the Court that the issue he was raising had not been raised before the High Court, and further that having not filed a cross appeal, he could not raise the issue *in vacuo*.

13. Ultimately, all parties agreed that in view of the Supreme Court decision in **Republic vs. Karisa Chengo & Others (2015) eKLR**, the issue of the jurisdiction of the ELRC had been settled with finality. In that respect, there was concurrence that the appeal was for allowing. The parties could nonetheless not agree on the issue of costs and they therefore left it to the Court to determine.

14. We have considered the issue of costs. We note that as a general rule, costs follow the event. Costs are also awarded at the discretion of the Court but such discretion, like in all other cases must be exercised judicially and not on a whim. In this case, we appreciate the fact that the Supreme Court decision which settled the issue of jurisdiction was made when this matter was still pending. We appreciate that the issues raised in the appeal were not idle and it was important for a determination to be made one way or another. We note further that the case of **Albert Chaurembo Mumba and 7 others vs Maurice Munyao & 148 others (2019) eKLR** which settled the issue of jurisdiction of the ELRC in relation to Trustees of Pension Funds and members of a pension scheme (pensioners) was decided when this matter was still pending before this Court and neither the appellant nor the 4th respondent can be blamed for the appeal coming this far.

15. Bearing all these facts in mind, we feel that no party should be condemned to pay the other costs. Accordingly, the order that commends itself to us is that this appeal be and is hereby allowed with an order that each party bears its own costs of the appeal.

**Dated and delivered at Nairobi this 9th day of July, 2021.**

**D. K. MUSINGA, (P)**

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**JUDGE OF APPEAL**

**W. KARANJA**

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**JUDGE OF APPEAL**

**A.K. MURGOR**

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**JUDGE OF APPEAL**

*I certify that this is a*

*true copy of the original.*

*Signed*

**DEPUTY REGISTRAR**