



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA, GATEMBU & M'INOTI, JJA)

CIVIL APPEAL NO. 204 OF 2017

BETWEEN

GEORGE OMONDI & 210 OTHERSAPPELLANTS

AND

RETIREMENT BENEFITS APPEALS TRIBUNAL.....1ST RESPONDENT

CENTRAL BANK OF KENYA PENSION FUND2ND RESPONDENT

RETIREMENT BENEFITS AUTHORITY.....3RD RESPONDENT

(Being an appeal from the Judgment of the Employment and Labour Relations Court at Nairobi (M.N. Nderi, J.) delivered on 28th August, 2015 in

Nai. ELRC Appeal No. 5 of 2014)

JUDGMENT OF THE COURT

1. In its judgment, the subject of this appeal, that was delivered on 28th August 2015, the Employment and Labour Relations Court (ELRC) upheld a preliminary objection by the 3rd respondent, Retirement Benefits Authority (RBA) and dismissed the appellants' appeal with costs on the ground that the ELRC has no jurisdiction to hear and determine an appeal arising from a decision of the Retirement Benefits Appeals Tribunal, 1st respondent (RBA Appeals Tribunal). The learned Judge of the ELRC, **M. N. Nderi, J.**, pronounced:

“This court ... is not persuaded that it has jurisdiction to entertain an appeal from a decision of the Retirement Benefits Appeals Tribunal established under Section 47 of the Retirement Benefits Act, Cap. 197 of the Laws of Kenya. To hold otherwise would be resulting (sic) to innovation and craft since the Act does not expressly confer such appellate jurisdiction on the High Court or the Employment and Labour Relations Court.”

2. The appellants are aggrieved. They maintain that the ELRC has jurisdiction; that this Court should therefore set aside that decision and remit the matter back to the ELRC for determination on merit.

3. The background, in brief, is that the appellants, are former employees of Central Bank of Kenya. They were members of the Central Bank of Kenya Pension Fund, the 2nd respondent (the Pension Fund). They were dissatisfied by the manner in which their retirement benefits were computed.

4. In March 2010 the appellants presented their claim to the RBA under Section 46 of the Retirement Benefits Authority Act, Act No. 3 of 1997 (The Act) complaining that the Trust Deed and Rules of the Pension Fund had been altered to their detriment. They sought, among other reliefs, a declaration that the amendment of the Trust Deed and Rules in July 1996 was illegal, null and void; a declaration that their benefits should be calculated on the basis of the Trust Deed and Rules prior to the amendments; and an order directing the Central Bank of Kenya and the Trustees of the Pension Fund to recalculate the benefits.

5. After considering the matter, the RBA rejected the appellants' complaints in a decision given on 16th June 2010. The appellants were

unhappy with that decision. They lodged an appeal before the RBA Appeals Tribunal. After hearing the same, the RBA Appeals

Tribunal delivered its judgment on 11th September 2013 in which it found that the amendment of Trust Deed and Rules was proper; that the amendments complained of improved the benefits payable to the appellants; and that the appellants' retirement benefits were properly calculated and paid. The RBA Appeals Tribunal dismissed the appellants' subsequent appeal and ordered each party to bear its own costs.

6. The appellants were still dissatisfied. On 10th October 2013, they lodged an appeal, Civil Appeal No. 534 of 2013, before the High Court of Kenya at Nairobi. That appeal was subsequently transferred to the ELRC as Civil Appeal No. 5 of 2014. On 31st March 2015, RBA filed a notice of preliminary objection seeking dismissal of the appeal on grounds that the court has no jurisdiction to hear and determine the appeal and that there is no right of appeal from the decision of the RBA Appeals Tribunal in view of the provisions of the Act. After considering written submissions filed by the parties on that objection, the learned Judge, as already stated, delivered the impugned judgment on 28th August 2015.

7. In their present appeal, the appellants in their memorandum of appeal have faulted the Judge for equating the jurisdiction of the RBA Appeals Tribunal to that of the High Court and in holding that an appeal from that RBA Appeals Tribunal only lies to this Court; that the Judge went against his own decision in a different case where he had held that recourse by way of appeal to the High Court from such decision is available; and that it was erroneous for the Judge to summarily reject the appellants' appeal bearing in mind their fundamental right to have their dispute fully ventilated through the legal process, up to, if necessary, the Supreme Court of Kenya.

8. Appearing for the appellants, learned counsel **Dr. John Khaminwa** and **Mr. Daniel Mwesigwa** who held brief for **Mr. Gikandi Ngibuini**, relied on written submissions which they highlighted. It was submitted that the RBA Appeals Tribunal is created under Section 47 of the Act and cannot be equated to the High Court which is created under Article 165(3)(c) of the Constitution; that in any case, under Article 169(1) (d) of the Constitution, the RBA Appeals Tribunal has the status of a subordinate court, and under Section 65 of the Civil Procedure Act, appeals from subordinate courts lie to the High Court.

9. It was urged that the Judge had in a different case, **Pension Scheme vs. Attorney General and others, Industrial Court Petition No. 16 of 2013**, upheld that position and departed from that decision without giving reasons. A decision of the High Court in **Nasim Devji & others vs. Retirement Benefits Appeals Tribunal, Civil Appeal No. 108 of 2012** where **Ougo, J.** held that as the RBA Act is silent on the issue of appeals, the provisions of the Civil Procedure Act should apply, was also cited.

10. It was submitted that although there is no express provision in the Act conferring jurisdiction on the ELRC in relation to appeals from the RBA Appeals Tribunal, there is equally nothing in the Act excluding the ELRC from entertaining such appeals; that the right of appeal is an integral part of the fundamental right to a fair hearing under Article 50 of the Constitution; that Article 259 of the Constitution demands a progressive interpretation of the Constitution; that the ELRC, as opposed to this Court, is the right forum for determination of an appeal from the RBA Appeals Tribunal. Reference was also made to Section 12(1)(a) of the Employment and Labour Relations Courts Act conferring original and appellate jurisdiction on the ELRC in support of the appellants' case.

11. It was submitted further that there may be circumstances when "*jurisdiction is not everything*" and in matters of extreme public interest the court may exercise inherent jurisdiction notwithstanding absence of an express provision conferring jurisdiction. Reference was made to the decision of the Supreme Court of Kenya in the case of **Nyutu Agrovet Limited vs. Airtel Networks Kenya Limited and another, SC Petition No. 12 of 2016** for the proposition that appellate jurisdiction is not necessarily founded on an express statutory provision.

12. Opposing the appeal, learned counsel for the Pension Fund, the 2nd respondent, **Mr. Chrysustum Akhaabi**, also relied on written submissions which he highlighted. It was submitted that the right of appeal requires specific prescription; is conferred by law and cannot be inferred; that the Act does not contain any provision on appeal to the High Court or to the ELRC and the Judge was right in holding that there is no right of appeal to the ELRC from a decision of the RBA Appeals Tribunal; and that the only provision dealing with appeals in the Act is Section 48 which vests the RBA Appeals Tribunal with jurisdiction.

13. Counsel cited the Supreme Court decision in **Re the Matter of Advisory Opinions of the Court under Article 163 of the Constitution, Constitutional Application No. 2 of 2011**, arguing that assumption of jurisdiction by courts in Kenya is regulated by the Constitution, statute law or principles laid out in judicial precedent and a court cannot arrogate to itself jurisdiction.

14. The decision of this Court in **Nyutu Agrovet Limited vs. Airtel Networks Kenya Limited [2015] eKLR** was also cited for the proposition that a party who desires his appeal to be heard should demonstrate under what law that right to be heard is conferred. Also cited was the Supreme Court decision in **Samuel Kamau Macharia & another vs. Kenya Commercial Bank Limited & 2 others [2012] eKLR** for the proposition that a court of law can only exercise jurisdiction as conferred by the Constitution or other written law.

15. Counsel pointed out that in the case of **Staff Pension Fund & Kenya Commercial Bank Staff Retirement (DC) Scheme 2006 and another vs. Ann Wangui & 524 others, Civil Appeal No. 20 of 2017**, this Court has held that there is no right of appeal to the ELRC from a decision of the RBA Appeals Tribunal; that the Supreme Court case of **Nyutu Agrovet Limited vs. Airtel Networks Kenya Limited and another** cited by the appellants' counsel is distinguishable as it relates to Section 35 of the Arbitration Act which confers original jurisdiction on the High Court.

16. According to counsel there is no merit in the claim that the appellants' rights to fair hearing were breached.

17. **Miss. Opakas**, learned counsel holding brief for **Mr. Ohaga** for RBA, the third respondent, also relied on written submissions. It was pointed out that the appellants have been pursuing a multiplicity of actions following the dismissal of the appeal by the ELRC on 28th August 2015; that on 9th September 2015, the appellants filed judicial review proceedings before the High Court in Judicial Review Application No. 9 of 2015. Thereafter, on 22nd March 2016, another application was filed before the RBA Appeals Tribunal by some of the appellants

seeking a review of its decision which application was dismissed on 21st October 2016. Subsequently, on 2nd November 2016, the appellants filed an application before the ELRC for review of the orders the subject of the present appeal.

18. On the question of the right of appeal, it was submitted for RBA that the jurisdiction of the ELRC is set out under Sections 12(1) and 18 of the Employment & Labour Relations Court Act; that the Act does not provide for the right of appeal against a decision of the RBA Appeals Tribunal; that, on the strength of the case of *Mackenzie Moulding Mogere & another vs The Trustees of Teleposta Pension Scheme and others, Civil Appeal No. 221 of 2015* decisions of the RBA Appeals Tribunal can only be submitted to the supervisory jurisdiction of the ELRC; and that the right of appeal must be conferred by written law. The case of *Samuel Kamau Macharia & another vs. Kenya Commercial Bank Limited & 2 others* (above) was again cited.

19. In his brief rejoinder, Dr. Khaminwa submitted that there need not be an express provision conferring a right of appeal as exemplified in succession matters where appeals are entertained without express provision for appeal.

20. We have considered the appeal, the submissions and authorities cited by counsel. The issue that arises is whether there is a right of appeal to the ELRC from decisions of the RBA Appeals Tribunal. In other words, does the ELRC have jurisdiction to entertain appeals from the RBA Appeals Tribunal?

21. Heeding the constitutional demand under Article 162(2) of the Constitution, Parliament enacted the Employment & Labour Relations Court Act, 2011 which, under Section 12(1) provides that the ELRC shall have exclusive original and appellate jurisdiction to hear and determine disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of the Act or any written law extending jurisdiction to it relating to employment and labour relations. Section 12(5) of that Act provides that the court shall have jurisdiction to hear and determine appeals arising from decisions of the Registrar of Trade Unions and decisions of any other local tribunal or commission as may be prescribed by any written law.

22. Rule 2 and 8(1) of the Employment and Labour Relations Court (Procedure) Rules, 2016 are also relevant. Rule 2 defines an appeal as an appeal made to the court against an order, decision or proceedings under any written law and includes appeals from the Cabinet Secretary, Director of the Work Injury Benefits Authority, Registrar of Trade Unions, Subordinate courts and tribunals. Rule 8(1) of those rules requires the filing of a memorandum of appeal “*where any written law provides for an appeal to the court.*” Having regard to those provisions, we agree with counsel for the respondents that the right of appeal should be conferred by a written law.

23. The RBA is established under Section 3 the Act. It is charged with the responsibility of regulation, supervision and promotion of retirement benefits schemes, protection of the interests of members and sponsors of retirement benefits sector and the development of the retirement benefits sector, among other functions. As already noted, it is to the RBA that the appellants initially complained about amendments of Trust Deed and Rules of the Pension Fund and that the retirement benefits paid to them were not properly calculated.

24. Under Section 46 of the Act, any member of a scheme who is dissatisfied with a decision of the manager, administrator, custodian or trustees of a scheme may request, in writing, that such decision be reviewed by the Chief Executive Officer of RBA 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.

25. Section 48 of the Act then provides for appeals to the RBA Appeals Tribunal by any person aggrieved by a decision of the RBA or of the Chief Executive Officer of RBA. The RBA Appeals Tribunal is established under Section 47 of the Act and its powers, set out under Section 49 of the Act, include, “*on the hearing of an appeal, the Tribunal shall have all the powers of a subordinate court of the first class to summon witnesses, to take evidence upon oath or affirmation and to call for the production of books and other documents.*” There is no provision in the Act, for escalation of disputes beyond the RBA Appeals Tribunal to ELRC.

26. As stated by *Nyarangi, JA* in the decision of this Court in the often-cited case of *Owners of the Motor Vessel “Lillian S” vs. Caltex Oil (Kenya) Ltd [1989] KLR1*:

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

27. In *Samuel Kamau Macharia & another vs. Kenya Commercial Bank Limited & 2 others [2012] eKLR*, the Supreme Court of Kenya pronounced that “*a court’s jurisdiction flows from either the Constitution or legislation or both. Thus, 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*” and that “*whether a court of law has jurisdiction to entertain a matter before it...goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings.*”

28. In the absence of any provision conferring jurisdiction on the ELRC to entertain appeals from decisions of the Appeals Tribunal, in effect a third right of appeal, we agree with the conclusion reached by learned Judge of the ELRC upholding the preliminary objection that was taken by the 3rd respondent. There is support for this conclusion in the recent case of *Staff Pension Fund & Kenya Commercial Bank Staff Retirement (DC) Scheme 2006 and another vs. Ann Wangui & 524 others* where this Court, differently constituted, dealt with this very issue, and after analyzing the law and past decisions, concluded:

“From the above analysis, we hold that the law does not provide an appeal from the decision of the Retirement Benefits Tribunal and such right of appeal can neither be implied nor inferred to confer jurisdiction to ELRC or the High Court...to entertain an appeal. It follows that the appeal filed by the respondents is incompetent.”

We respectfully agree.

29. We are not persuaded, as urged by counsel for the appellants, that the Supreme Court decision in ***Nyutu Agrovet Limited vs. Airtel Networks Kenya Limited and another*** (above) alters that position. The Supreme Court in that case addressed the specific issue, “*whether there is any right of appeal to the Court of Appeal upon a determination by the High Court under Section 35 of the [Arbitration] Act.*” The majority in that case concluded, with specific reference to Section 35 of the Arbitration Act, that “*unfair determinations by the High Court should not be absolutely immune from the appellant review*” and “*that circumscribed appeals may be allowed to address process failures as opposed to the merits of the arbitral award itself*”. In his dissenting opinion, **D.K. Maraga, SCJ**, the Chief Justice and President of the Supreme Court expressed that, “*I find no warrant whatsoever to imply the silence in Section 35 as a tacit right of appeal against decisions made thereunder.*”

30. Quite apart from the fact that the Supreme Court was in that case addressing the specific question of whether there is a right of appeal from decisions of the High Court rendered under Section 35 of the Arbitration Act, which is not the case here, the majority in the same decision also expressed that, “*with regard to a right of appeal, our position is that such right can either be conferred by the Constitution or a statute.*”

31. The result of the foregoing is that there is no merit in this appeal. It is accordingly dismissed with costs to the 2nd and 3rd respondents only.

Orders accordingly.

Dated and delivered at Nairobi this 8th day of May, 2020.

D.K. MUSINGA

.....

JUDGE OF APPEAL

S. GATEMBU KAIRU, (FCIArb)

.....

JUDGE OF APPEAL

K. M’INOTI

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original

Signed

DEPUTY REGISTRAR