



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MAKHANDIA, KIAGE & OTIENO-ODEK JJA)

CIVIL APPEAL NO. 114 OF 2016

BETWEEN

SAMSON MAKUBO MARIGO.....APPELLANT

Versus

THE PERMANENT SECRETARY MINISTRY

OF INTERNAL SECURITY.....1st RESPONDENT

THE PUBLIC SERVICE COMMISSION.....2nd RESPONDENT

THE ATTORNEY GENERAL.....3rd RESPONDENT

(Being an appeal from the Ruling and Order of the Employment and Labour Relations

Court (Maureen Onyango J.) dated 14th March 2016 in Kisumu ELRC Cause No. 94 of 2015)

JUDGMENT OF ASIKE-MAKHANDIA, J.A

The appellant filed two separate suits against respondent arising from the same cause of action. The first suit was Kisii High Court CC No. 42 of 2002. The second case was Kisii Employment and Labour Relations Court (ELRC) Cause No. 94 of 2015. The Ruling arising from the second ELRC cause is the subject matter of this appeal.

At all material times to this suit, the appellant was an Assistant Chief of Kurutiyanga sub-location, Bukira North Location in Kuria. He served as Assistant Chief from 1989 to 1995 when he was interdicted. On 1st January 2001, his interdiction was lifted and he was retired in public interest from 1st September 1996. On 10th August 2009, the respondent wrote a letter to the appellant reinstating him and retiring him on grounds of age.

From the foregoing undisputed facts, the appellant asserts that he was to be paid salary up to 30th June 2007. Interestingly, the appellant was promoted to the position of Assistant Chief II (Job Group F) with effect from 1st July 2006 yet he had been retired in 2007. The appellant avers that to date, he has not been paid his salary.

In the interim, the appellant filed suit at Kisii High Court being HCCCNO. 42 of 2002. The claim in the suit was general damages for unlawful dismissal and loss of pension; loss of earnings for the whole period; special damages, exemplary damages and costs of the suit as well as interest at court rates. On 6th September 2007, Kaburu Bauni, J delivered a judgment awarding the appellant the sum of Ksh. 80,000/= as general damages and Ksh. 10,000/= as special damages with interest at court rates. The appellant's claim for loss of earnings and damages were dismissed. In dismissing the claim, the learned Judge stated that a claim for loss of earnings was a claim for special damages, the appellant did not tell the court the specific amount he was claiming; he did not specifically plead and calculate his loss. The learned judge further held that there was no good reason for the court to award exemplary damages.

Subsequent to the judgment of the Kisii High Court in Civil Suit No. 42 of 2002, the appellant filed Kisii ELRC Cause No. 94 of 2007. In this Claim, the appellant sought the following reliefs and orders from the ELRC:

(a) Implementation of the judgment passed in Kisii HCCC No.

42 of 2002.

(b) Payment of a sum of Ksh. 1,232,748/= being loss of salary for

132 months from 1st September 1996 at the rate of Ksh. 9,339/= per month; Ksh. 277,200/= being house allowance from 1st September 1996 to 30th June 2007 at the rate of Ksh. 2,100/= per month and a further Ks. 65,340/= being medical allowances from the month of September 1st 1996 to 30th June 2007 all totaling Ksh. 1,575,288/=. The appellant also claimed for pension arrears from 1st July 2007 to date.

Upon hearing the parties in this matter, by an order dated 14th March 2016, Maureen Onyango, J issued an order that the court had no jurisdiction to handle the matter as it was supposed to be handled by the Retirement Benefits Authority. This order is the subject of appeal before this Court.

At the hearing of this appeal, the appellant appeared in person. The respondents were represented by Ms. J. Langat. Both parties filed written submissions in the appeal.

In the memorandum of appeal dated 19th December 2016, the appellant has listed the grounds of appeal to be:

(i) That the learned judge erred in law in finding that the court had no jurisdiction to handle the matter as it was supposed to be handled by the Retirement Benefits Authority.

(ii) That the judge erred in law as the matter had already been determined in Kisii High Court Case No. 42 of 2002 where the award for general damages was awarded and the only remaining part was touching between the employer to employee contract in regard to special damages and exemplary damages.

(iii) The judge came to a conclusion that was inconsistent with his finding of fact and law.

The appellant further identified and listed the following issues for consideration and determination by this Court:

(a) Whether the applicant has a right to appeal against the verdict herein.

(b) Whether the ELRC had jurisdiction to handle the matter.

(c) Whether the matter herein is supposed to be handled by the Retirement Benefits Authority as ordered by the learned judge.

(d) Whether Kisumu ELRC No. 94 of 2015 is Res Judicata.

(e) Whether Kisii HCCC No. 42 of 2002 was determined on merit and whether the only remaining part is special damages.

(f) What is the exact amount the appellant is entitled to.

In his submissions, the appellant rehashed the background facts leading to the dispute between the parties. He repeated the submissions made before the learned High Court Judge in Civil Case No. 42 of 2002.

He reiterated the contents of the documentary evidence tendered in court.

It was averred that the respondents only paid him gratuity, half-salary arrears for two months but has not been paid salary arrears from 1st September 1996 to 30th June 2007 plus pension as per the decision of the Public Service Commission vide letter dated 10th August 2009.

The appellant urged that the dispute between the parties does not fall under the Retirement Benefits Authority (RBA) and it is purely meant to be dealt with by the Public Service Commission. That the Retirement Benefits Authority is meant to deal with retirement benefits but the appellants case is premised on unlawful interdiction, withheld salary and benefits which do not fall within the mandate of the RBA.

On res judicata, the appellant submitted the two suits Kisii HCCC No. 42 of 2002 and Kisii ELRC Cause No. 94 of 2015 are totally different.

The respondents through the State Law Office filed written submissions titled 3rd Respondent's submissions in solving the issues before this Court, the 3rd respondent identified the following issues for determination:

(a) Whether the Court has jurisdiction.

(b) What is the alternative remedy?

(c) Who bears the costs of this suit?

Citing the cases of **Owners of the Motor Vessel Lillian SS – v- Caltex Oil (Kenya) Limited (1989) KLR 1** and the Supreme Court case of **S.K. Macharia - v- KCB & 2 others, Civil Application No. 2 of 2011**, the respondent submitted that when a court has no jurisdiction, it must down its tools. Founded on the two cases cited, the respondent submitted that in the instant matter, this Court should uphold the doctrine of exhaustion which provides that courts should exercise restraint and let the alternative process be concluded before invoking its own jurisdiction.

It was urged that Sections 46 and 48 of the Retirement Benefits Act provides for the process of resolving pension disputes between pensioners and the management of the pension scheme. Where a dispute resolution mechanism exists outside the courts, the same should be exhausted before the jurisdiction of the court is invoked. (See **Geoffrey Muthinja & another – v- Emmanuel Muguna Henry & 1756 others [2015] eKLR.**)

Founded on foregoing decision, it was submitted that the appellant’s first point of recourse is the Retirement Benefits Authority as provided in Sections 46 and 48 of the Retirement Benefits Act.

The respondent concluded its submissions urging that courts have no jurisdiction to entertain disputes involving retirement benefits as there are alternative procedures under the Act to be followed. The respondent

urged that this appeal be dismissed with costs.

This being a first appeal, it is my duty to analyze and re-assess the evidence on record and reach my own conclusions. In **Selle -vs- Associated Motor Boat Co. [1968] EA 123**, it was expressed:

*“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (**Abdul Hameed Saif –v - Ali Mohamed Sholan (1955), 22 E. A. C. A. 270.**)”*

I have considered the written submissions filed by both parties and the authorities cited. There is one critical issue to be determined in this appeal namely: did the learned ELRC judge err in holding that “the court had no jurisdiction to handle the matter as it is supposed to be handled by the Retirement Benefits Authority”?

I have examined the record of proceedings before the ELRC judge on 14th March 2016. The proceedings went as follows:

14th March 2016

Coram:

Before Hon. Lady Justice Maureen Onyango J.

C/A Okoth/Hassan

Nyawencha for Claimant.

Nyawencha:

I have served but not served an affidavit of service. I wish to take another mention date.

Court:

This Court has no jurisdiction to handle this matter as it is supposed to be handled by the Retirement Benefits Authority.

Hon. Lady Justice Maureen Onyango

Dated: 14th March 2016

My perusal of the proceedings and order made on 14th March 2016 reveals that the learned ELRC judge did not give reasons for the order that the ELRC had no jurisdiction to handle the matter. The 3rd respondents in his written submissions before this Court stated that Sections 46 and 48 of the Retirement Benefits Authority Act provide for the procedure to be followed if there is a pension dispute between an employer and management of the pension fund. The 3rd respondent’s submissions on Sections 46 and 48 of the Retirement Benefits Act is their own understanding of the Order of the ELRC judge. The learned ELRC judge did not refer to these sections when making the order and I cannot second guess if these sections were the reasons for the order as made.

It is trite that an order, ruling or judgment of a court must give reasons for the decision. By analogy, **Order 21 Rule 5 of the Civil**

Procedure Rules states that in a judgment, the court shall state its finding or decision with reasons therefore upon each separate issue. A good judgment or dispositive order must tell the losing party why he lost. I have examined the proceedings before the ELRC judge and there is no reason given for the final order by the learned judge. In the absence of the reason for decision, I have no option but to set aside the order and direct that the dispute between the parties be heard afresh before the ELRC.

I further note that when the order was issued on 14th March 2016, the matter had been listed for mention before the court. It has often been stated that no substantive or dispositive orders should be issued on a mention date. The order was also made *suo moto* by the learned judge without the benefit of hearing and input from the parties. I thus find that the learned judge erred in issuing final and dispositive orders on a mention date. I have no option but to set aside the order made on 14th March 2016 on a mention date.

For the foregoing reasons, I decline to pronounce myself on the issue of res judicata as this should be determined before the trial ELRC court. I also decline to pronounce myself as to whether it is the ELRC or the Retirement Benefits Authority with jurisdiction to handle the matter. The issue of jurisdiction should be determined on merit by the ELRC judge hearing the matter. All the other issues and grounds of appeal raised in this appeal should be determined after the jurisdictional and res judicata issues have been considered and determined on merit after an inter partes hearing by the ELRC.

The upshot is that this appeal has merit. I would set aside the orders made by the ELRC judge on 14th March 2016 and remit the matter to the ELRC to be heard *de novo* by any other ELRC judge other than Maureen Onyango J. The appellants would have the costs of this appeal.

As Kiage J.A concurs, orders accordingly.

This Judgment is delivered pursuant to rule 32 (3) of the court of appeal rules since Odek, J.A passed on before the Judgment could be delivered.

Dated and delivered at Nairobi this 19th day of June, 2020.

ASIKE – MAKHANDIA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MAKHANDIA, KIAGE & ODEK, J.J.A)

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JUDGMENT OF KIAGE, JA

I concur with the Judgment of my learned brother Makhandia JA, which I considered in draft, and have nothing useful to add.

Dated and delivered at Nairobi this 19th day of June, 2020.

P.O. KIAGE

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JUDGE OF APPEAL