



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, KARANJA & KOOME, JJ.A)

CIVIL APPEAL 191 OF 2014

BETWEEN

BETHWELL ALLAN OMONDI OKAL.....APPELLANT

VERSUS

TELKOM (K) LTD (FOUNDER).....1ST RESPONDENT

RETIREMENT BENEFIT AUTHORITY.....2ND RESPONDENT

CHAIRMAN BOARD OF TRUSTEE.....3RD RESPONDENT

KENYA COMMERCIAL BANK LTD.....4TH RESPONDENT

ALEXANDER FORBES FINANCIAL SERVICES.....5TH RESPONDENT

CO-OP INVESTMENT TRUST.....6TH RESPONDENT

OLD MUTUAL ASSET MANAGER.....7TH RESPONDENT

LLOYD MASIKA LTD.....8TH RESPONDENT

REGENT MANAGEMENT LTD.....9TH RESPONDENT

DELLOITTE AND TOUCHE.....10TH RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Nairobi (Lenaola, J) dated 18th December 2013

in

H. C. Petition No. 377 of 2013)

JUDGMENT OF THE COURT

Bethwell Allan Omondi Okal, hereinafter referred to as the appellant, was employed by **Telkom (K) Ltd** (1st respondent) in 1988, as a Telecommunication Technician. His duties included manning, constructing and maintaining telecommunication installations. He was sent on early retirement and was entitled to a monthly pension emolument as a member of the Teleposta Pension Scheme, identified as PF 62924.

The appellant filed Petition No. 377 of 2013 in the High Court with several grievances against the respondents. The appellant was concerned that in a meeting held at KICC on 17th June 2013, the respondents were involved in a scheme to weed out members of the Teleposta Pension Scheme Fund whose monthly take home pension was below Kshs. 5000. The appellant was also convinced that resolutions in Annual General Meetings (AGMs) had failed to be implemented. He was also concerned that the 1st respondent held elections which eliminated participation of some members in contravention of their rights. The appellant felt that the 1st and 2nd respondents irregularly extended the terms of favoured trustees whilst employing rules to bar participation of other members. Further that there was an overall compromise on the provisions of the Retirement Benefits Act (RBA). The appellant believed that there existed a conspiracy to swindle funds from the scheme and to accord some members of the scheme an increase in pension to the sum of Kshs. 6,000/= while others were to receive an increase of only Kshs. 30/=.

The appellant felt that the efforts of the 'junior workers' who risked their lives to execute the 1st respondent's mandate, which included installation and maintenance of 15-foot poles or radio masts as high as 50 metres above the ground; working in foul-smelling manholes; exposure to dangerous chemicals and radiation and risks of electrocution, ought to be compensated by the implementation of a free and fair pension package. The appellant set out particulars of corruption, fraud and mismanagement which include:-

“procurement of goods and services with no regard to the Procurement Act; recruitment of many agents towards the administration of the Fund such as Alexander Forbes Financial Services (5th Respondent), Old Mutual Asset Manager (7th Respondent), KCB (4th Respondent), Co-op Investment Trust (6th Respondent), Lloyd Masika Ltd (8th Respondent) and Regent Management (9th Respondent) which funds would otherwise go to the members as 'Bonus' or yearly increments; the perpetual hiring of the 5th and 10th Respondents which is a source of compromising financial performance and contributes to misappropriation of funds; compromised legal services; manipulation by the 1st respondent of who becomes trustee and illegal extension of their term in office; resolutions at AGMs are not effected; failure by the Retirement Benefit Authority to oversee the management of the Scheme though several notices have been dispatched to them; and the Board of Trustee's fraudulent preparation of financial statements.”

The appellant also set out particulars of discrimination as follows:-

“Only employees who served as senior managers and above are allowed to take part in elections to become trustees; irregular increments for employees in different pension brackets; member inputs during AGMs are ignored; financial statements and other documents presented at AGMs printed in too small to read font in order to frustrate the majority and those of advanced years; and that the 1st respondent founded the Trivial Pension Payout to purposefully (sic) do away with members who take home a monthly pension of Kshs. 5000/= and below.”

The appellant therefore sought the following orders:-

“a) A declaration that the election of members nominated trustees rules and regulations are discriminative, non- inclusive, biased and an affront to the fundamental human right as is contemplated in Article 38 and 27 and therefore be declared null and void. And a declaration of

the principle and purpose of Annual General Meeting which must be all inclusive and facilitated as a one event each year.

b) A permanent injunction restraining the Respondent whether by itself, its officers, agents and or servants or whomsoever is acting on its behalf from entering any agreement for the transferring, disposing, selling assets of Telposta Pension Scheme in any way whatsoever interfering with the financial standing until the Petitioner outstanding demands are addressed satisfactorily. And operate, manage and obey within the instruction of Article 43, 21, 22 and 25 of the new Constitution and the universal declaration of human rights under the United Nations conventions governing Rights, Principles and Policies.

c) A declaration that the trivial pension payout is injurious dehumanizing discriminative Autocratic repressive and traumatic and a travesty of justice system wrong in law principle and policy as covered in the objects of Retirement Benefit authority Act as the instrument of labour practice and abuse fundamental rights and freedoms as contained in Article 43 and 57 henceforth a restitutive justice be ordered to address inadequacies.

d) A declaration that the Petitioner is entitled to guaranteed payment of pension increment. In strict observance of Article 1, 5, 7, 8, 22 and 25 of United Nations Universal Declaration of human rights agreements and the subsidiary legislation contained in the instrument of discrimination or such policy that TRIVIALIZES a group of Retiree Removed or Made livable or Reviewed in strict observance to the new Constitution.

e) The declaration that the hiring of six Corporate Consultants or Managers is Exploitative to the extreme as fund income are(sic) wiped out in their fees and their continued presence be declared an abuse of public procurement and disposal Act of 2005 and therefore a violation of the rule of law, the abuse of office is therefore by omission and commission and therefore an act of impunity on the sponsor, the administrator and the board of trustees. They be surcharged for resultant loses and irregularities incurred by the scheme.

e) General, Punitive and Exemplary damages for scandals, trivialities, favouritism, discrimination and degrading treatment causing wanton destruction and untold harm to my public image, credential, eligibility, reputation and disharmony to my family in contravention to my Rights as contemplated in Articles 27, 28, 33 and 43 with a further violation of my fundamental freedom and Right of Expression, equality and information as elaborately addressed through the Article 33, 35 and for the honour associated with the recognition of the voting rights Article 38 and those contemplated in Article 57 of the Right of senior citizens – the older persons Rights.

f) A mandatory injunction restraining the defendant whether by themselves, their agents, servants, representatives or otherwise from administering the fund until a proper AGM is called to deliberate and interrogate the budgetary estimates, the future health, viability and relevancy of the pension scheme in the face of multiple intermediaries, agents, managers whose yearly ballooning cost is a threat to the fund health future.

g) The cost of this suit.” (sic)

The 1st respondent filed grounds of opposition on 4th October 2013 stating that: the petition was misconceived, frivolous, vexatious, incomprehensible and lacked merit; it failed to disclose a cause of action; and that it was fatally defective and an abuse of the Court process as it was neither dated nor signed. The 2nd respondent did not file a response to the Petition but made oral submissions before the Court.

The 3rd – 10th respondents filed grounds of opposition dated 23rd September 2013 and denied that there existed a legal entity known as the 3rd respondent, that is, the **Chairman Board of Trustee** capable of suing or being sued and as such no orders can issue against him. It was also denied that the cited **Articles 38 and 27 of the Constitution of Kenya** were at all relevant in regard to the Petition and could not

therefore support prayers (a) and

(f) of the Petition. It was argued that the appellant had completely failed to demonstrate the nature of his rights or fundamental freedoms which the respondents were alleged to have violated. Further that the appellant had also failed to demonstrate how the respondents had violated **Articles 43, 21, 22 and 25 of the Constitution** together with the Universal Declaration of Human Rights under the UN Conventions. It was denied that the appellant had demonstrated the manner in which the respondents had allegedly interfered with its financial standing or transferred, disposed or sold off the Scheme's assets.

It was also argued that prayer (c) of the Petition could not be ordered as against the 3rd to 10th respondents since it was not shown how, if at all, the respondents were involved with the computation or payment of his pension. Further that the appellant had failed to demonstrate how the hiring of corporate consultants or managers was exploitative or scandalous and/or an abuse of the Public Procurement and Disposal Act.

It was also put forward that the RBA and Rules thereunder provide for procedures and avenues in which such grievances by members of a pension scheme can be adjudicated and determined. Consequently it was argued that the court lacked jurisdiction to hear and determine the Petition. Further that the allegations put forward by the appellant did not amount to violations of the fundamental rights and freedoms but were instead squarely within the purview of the RBA.

It was noted that the 10th respondent is a partnership of practising members of the Institute of Certified Public Accountants of Kenya and not a limited liability company as alleged by the appellant. Further that the appellant had failed to demonstrate how the appointment of the 10th respondent as auditors of the Scheme would result in a compromise of the financial reporting. It was denied that there was a legal requirement that an auditor should be a watchdog of a Retirement Benefits Scheme. **Sections 34 of the RBA** requires only that the financial statements of a Retirement Benefits Scheme be audited.

Peter K. Rotich, the Administrator/Trust Secretary of Teleposta Pension Scheme Trustee's filed a replying affidavit on behalf of the 3rd – 10th respondents sworn on 11th October 2013 vehemently denying the allegations made in the Petition and put the appellant to strict proof.

In making its determination, the court (Lenaola J. (as he then was)) made known his displeasure about the manner in which the pleadings and facts were presented before the Court by the appellant. Acknowledging that the appellant was acting in person, the learned Judge was nonetheless quick to point out that in cases where there is an allegation of violations of Constitutional rights, a petitioner is at the basic minimum, required to not only cite the provisions of the Constitution that have been violated but also the manner in which they have been violated together with the remedy sought.

The learned Judge found that though the appellant had made serious allegations of discrimination and violations of **Chapter 12 of the Constitution**, he had failed to present the Court with any evidence or factual basis supporting the allegations. Concurring with the respondents, the learned Judge was of the opinion that the pleadings had completely failed to disclose a cause of action against the respondents. He held that, the appellant had other avenues through which to air out his grievances as set out by the Trust Deed, the RBA and the rules thereunder. Reiterating the position of the High Court in **Alphonse Mwangemi Munga & 10 Others v African Safari Club Ltd [2008] eKLR**, the learned Judge held that a Petition under the Constitution was not a substitute for known legal procedures. The learned Judge felt that though the Court had jurisdiction to determine alleged constitutional violations, first opportunity had to be given to relevant bodies or organs to deal with the dispute as provided for in the relevant statute. On this proposal he cited with approval the case of **Narok County Council v Trans Mara County Council [2000] 1 EA 161**. Ultimately, the learned Judge dismissed the Petition with each party ordered to bear its own costs.

Aggrieved with the decision, the appellant now prefers this appeal on fifteen grounds as contained in his memorandum of appeal dated 13th July 2014. He later, on 14th, October, 2016 filed lengthy submissions

whose contents we have noted. There was no response to these submissions from the respondents, and we were not informed whether the same were served on the respondents or not. When the matter came up for hearing before the Court on 3rd November 2016, the appellant appeared in person; **Mrs. Purity Mbabu** appeared for the 1st respondent; **Mr. Kiche** for the 2nd respondent; and **Ms. Rono** for the 3rd to 10th respondents.

In his submissions the appellant stated that there was no section in the RBA dealing with review of pension and relied on the **Societies Act (Cap 108) and the Cooperative Societies Act (Cap 490)**. The appellant insisted that there was no equity between members of the Scheme as shown where he received an increment of Kshs.30/= in his pension as compared to increments of Kshs.5000/= received by others. The appellant relied on the overriding objective and pleaded that Courts cannot be constricted to pleadings alone. The appellant argued that his Petition should not have been dismissed simply because it had not been drafted properly. The appellant relied on Articles 10 and 203 of the Constitution; Rule 10 of the so called “*Mutunga Rules*”; and **Article 1 of the European Protocol on Protection of Property**.

Opposing the appeal, Mrs. Mbabu for the 1st respondent reiterated her position that there was no cause of action as against the 1st respondent and no prayers directed against it. Counsel felt that no reason had been raised to disturb the decision of Lenaola J. Further, that the appellant had failed to demonstrate any of his Constitutional rights which had been violated by the 1st respondent. She urged the Court to dismiss the appeal.

Mr. Kiche for the 2nd respondent on his part also opposed the appeal on the ground that no constitutional issue was raised by the appellant as against the 2nd respondent. Counsel submitted that the RBA has set out mechanisms to deal with issues by members of a Pension Scheme against its management which the appellant had failed to do. Counsel submitted that the appellant was relying on mere allegations and had failed to supply the Court with Constitutional Articles that had been violated. Convinced that there was no cause of action revealed against the 2nd respondent, counsel urged the Court to dismiss the appeal.

Mrs. Rono for the 3rd to 10th respondents also opposed the appeal, submitting that the Trust Deed provides for resolution of disputes by way of arbitration which the appellant had neglected to do. Counsel also submitted that the Societies Act and the Cooperative Societies Act do not apply since the 3rd respondent is neither a Society nor a Cooperative. Further, that the 3rd respondent is not a public entity and is therefore not bound by the provisions of Chapter 12 of the Constitution. Counsel was also of the same mind that the appellant had failed to cite the provisions of the Constitution that had been infringed, the manner in which they had been infringed and the remedy he sought. Counsel urged the Court to dismiss the appeal with costs since the appellant had also filed a Petition No. 241 of 2015 seeking similar orders but as against the 3rd respondent only.

In reply, the appellant admitted that he may not have filed his documents properly but he sought the consideration of the court anyway. The appellant urged the court to invoke **Section 1A and 1B of the Civil Procedure Act** so as to consider issues that he had not raised.

As the first appellate Court this Court is minded of its duty to re-evaluate, re-assess and re-analyse the material placed before the High Court and then come up with its own conclusion, independent of the decision of the trial court. See: **Abok James Odera t/a A. J. Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR.**

This Court in **Kenya Ports Authority v Kuston (Kenya) Limited [2009] 2 EA 212** pronouncing itself on this issue held *inter alia* that:-

“On a first appeal from the High Court, the Court of Appeal should 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 that respect. Secondly that the responsibility of the Court is to rule on the evidence on

record and not to introduce extraneous matters not dealt with by the parties in the evidence”

We have keenly and painstakingly gone through the said petition, the responses thereto by the several respondents and the reply to those responses. Even after going through the said petition, we must say that we are unable to fathom why most of the named respondents were sued at all. There is no clearly defined cause of action against them. From what we are able to decipher from these pleadings, the appellant is unhappy with the pension he receives from his former employer, Telkom (K), and the manner in which the Retirement Benefit Authority (RBA), also runs its affairs. He feels discriminated against following the implementation of what was referred to as “TRIVIAL PENSION PAYOUT, the details of which we need not delve into. The gist of his complaint was that some categories of retirees were being paid less increments in their pension payments than others.

He fell in the category that was receiving smaller increments. He also appears to have some grievances over the manner in which Annual General Meetings (AGM) of the RBA were being conducted. He also made allegations of fraud, corruption and mismanagement, against the some of the named respondents and their agents.

All these claims and allegations were put in the body of the constitutional petition.

After considering all the material before him, and we must say, the learned Judge did a good job of it, he found that although the appellant was acting in person, his petition failed to meet the irreducible minimum expected for a Court to determine what a litigant’s claim is in a constitutional matter. Even as we went through the record and tried to visualise what exactly the appellant wanted, we empathised with the learned Judge. When a litigant moves to court, it must be clear from his pleadings what exactly his grievance is and what remedy he is seeking from the court. It is not for the court to second guess or imagine what the cause of action is and what relief a litigant expects from the court.

Pleadings are not just a formality; they are essential in order to frame issues for the determination by the court and to enable the parties know exactly what case they are expected to meet. This issue was aptly addressed in the time honoured English case of

Thorp v Holdsworth [1876] 3 Ch. D. 637 at 639 where the Court held that:

“The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules...was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues, and thereby diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing.”

This level of precision is demanded more so in Constitutional Petitions where violations of fundamental rights and freedoms have been alleged. This Court in **Anarita Karimi Njeru v Republic [1976-1980] 1 KLR 1272** pronounced itself as follows:

“We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

The appellant may want to argue that the above was the position that preceded the coming into force of the Constitution of Kenya 2010, or the introduction of **Section 3A, 3B of the Civil Procedure Act**, and **Section 1A and 1B of the Appellate Jurisdiction Act** (the so called oxygen Rule), which he is now urging us to invoke. Unfortunately, the position has not changed much, particularly when it comes to constitutional matters.

This Court reiterated the position in **Anarita Karimi (supra)** succinctly in **Mumo Matemu vs. Trusted Society of Human Rights Alliance and 5 others Civil Appeal no 290 of 2012 (2013) eKLR** where it stated:

“(41) We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point.

However, our analysis cannot end at that level of generality. It was the High Court’s observation that the petition before it was not the “epitome of precise, comprehensive, or elegant drafting.” Yet the principle in Anarita Karimi Njeru (supra) underscores the importance of defining the dispute to be decided by the court. In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to Article 159 of the Constitution and the overriding objective principle under section 1A and 1B of the Civil Procedure Act (Cap 21) and section 3A and 3B of the Appellate Jurisdiction Act (Cap 9). Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle.” (emphasis added).

We agree with the learned Judge that the appellant just collected some material or information, put it in form of a constitutional petition and just dumped it on the lap of the Court to literally sift through and determine what it was about. He failed to state clearly his constitutional rights which had been violated, the persons who had violated them, and the remedies he was seeking from the Court. The appellant made many allegations as against the respondents; of fraud, corruption, mismanagement and discrimination but failed to provide any factual or evidentiary basis to support his claims. The appellant also failed to not only cite the articles of the Constitution he felt the respondents offended, but also failed to show the manner in which the respondents violated them. It is not enough to mention perceived violations of the Constitution in generalities as the appellant has done in his petition. Even the provisions of **Section 1A and 1B of the Civil Procedure Act** and **Section 3A and 3B of the Appellate Jurisdiction Act** cannot be invoked in his aid.

On that score alone, the appellant’s petition was for dismissal.

We note however that the learned Judge did not stop there. He proceeded to try and decipher and understand the petitioner’s grievances. Having done so, he made a finding to the effect that the grievances in question did not raise constitutional issues but rather, there were other dispute resolution mechanisms that ought to have been pursued. Since the complaints were basically against RBA, the learned Judge found that there were provisions in the Retirement Benefits Act, which the appellant should have invoked to pursue his claim. Any dispute should have been referred to arbitration in the first instance pursuant to Clause 36 of the Consolidated Deed of Trust and Rules, made under the RBA. If the appellant was dissatisfied with the decision of the arbitrator, then he could appeal to the Appeals Tribunal established under the RBA.

The Appellant might want to argue that he has a constitutional right of access to justice, and we agree that he does, but the High Court and this Court have pronounced themselves many times to the effect that a party must first exhaust the other processes availed by other statutory dispute resolution organs, which are by law established, before moving to the High court by way of constitutional petitions. See **International Centre for Policy and Conflict & 4 others vs The Hon. Uhuru Kenyatta and others, Petition No. 552 of 2012**, and **Speaker of National Assembly vs Njenga Karume [2008] 1KLR 425**.

We hold that if indeed the appellant had any dispute with the RBA, he ought to have followed the route prescribed by the RBA, before proceeding to the High Court. We hold like the court below, and for the reasons we have given, that the appellant's petition lacked merit and was for dismissal. Accordingly, we dismiss this appeal, and given the appellant's social and pecuniary status, we shall, albeit most reluctantly, order that each party bears its own costs.

Dated and delivered at Nairobi this 24th day of February, 2017.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR