IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, KIAGE & MURGOR, JJ.A)

CIVIL APPEAL NO. 236 OF 2012

KENYA PORTS AUTHORITY……..…..……..…….. APPELLANT

BETWEEN

INDUSTRIAL COURT OF KENYA ……..1ST RESPONDENT

KENYA DOCK WORKERS UNION…….…..……2ND RESPONDENT

KENYA DOCK WORKERS RETIREES

ASSOCIATION..…….……...3RD RESPONDENT

(An appeal from the ruling of the High Court of Kenya at Nairobi (Korir, J) dated 21st February 2012

in

H.C. Misc. Civil Appl. No. 995 of 2007)

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JUDGMENT OF THE COURT

The Appeal before us arises from a ruling of the High Court ***(Korir, J.)*** on 21st February 2012 dismissing, the appellants application seeking among other things, an order of certiorari removing to the High Court to quash that part of the Industrial Court award dated 5th April 2007 delivered in Industrial Cause No. 52 of 2007, and that part of the Industrial court's award relating to the withdrawal of a contributory pension scheme introduced in 1999, and a demand by the respondents for the scheme to revert to the noncontributory scheme.

The facts are that by a Kenya Gazette supplement No. 35 dated 11th June 1999 issued by the Minister for Transport and Communications, and headed ***"The Kenya Ports Authority (Pensions) (Cessation of Application) Regulation 1999"*** the Kenya Ports Authority (Pensions) Regulations 1983 ceased to apply, with effect from 1st January 1999, and the Kenya Ports Authority Pensions Scheme (***KPA Pension scheme***) registered under the provisions of the Retirement Benefits Act (***the RBA***) and the Income Tax Act was to be established and would be applicable to the employees of the Kenya Ports Authority effective 1st January 1999. Effective from the 1st January 1999 the appellant commenced deducting pension contribution from its employees. The KPA Pension scheme was eventually registered under the

RBA in June 2001. The respondents' case was that the deductions prior to registration of the KPA Pension scheme were unauthorized, and as such, they demanded that all the sums irregularly deducted between 1st January 1999 and June 2001 be refunded back to them.

On 5th April 2007 the Industrial court ordered that,

i. the contributions of the employees who are still in service for the period under consideration i.e. 1st January 1999 to June 2001, be credited to their accounts under the contributory Pension Scheme and certificates to be issued to them;
ii. that the contributions of both the Authority and the employee for the employees who have since left employment, be paid or refunded to them or to their next of kin in accordance with the contributory Pension scheme rules and regulations; and
iii. that the Board of Trustees strictly enforce the contributory Pension Scheme in accordance with the law, especially the RBA and the rules and regulations, as well as the Trust deed.

The appellant being dissatisfied with the decision of the Industrial Court, filed the Notice of Motion dated 19th December 2007 seeking, a review of the decision. The grounds were that part of the award dated 5th April 2007 complained of was *ultra vires* the scope of the statutory powers of the Industrial Court under the Trade Disputes Act, Cap 234 (now repealed) and that the court had no powers to make orders in relation to the KPA Pension Scheme; that the decision was unlawful as it usurped the power and authority of the Retirement Benefits Authority (***the Authority***) to regulate, supervise and promote retirement benefit schemes under the RBA; and that the decision was unreasonable and untenable to the extent that the contributions ordered to be refunded include pension dues already paid or computed for payment upon retirement.

When the appeal came up for hearing, ***Mr. Imende***, learned counsel for the appellant appearing with ***Mr. Mogere*** submitted that in failing to allow the order for certiorari to quash the decision of the Industrial court, the learned judge failed to address the matter that was before him. The first ground was that the High Court should quash the decision of the Industrial court, as it had no jurisdiction to hear the dispute. Counsel submitted that as the complaint was in respect of breaches under the RBA, and not the Employment Act Cap 226 or the Trade Disputes Act Cap 234 (both now repealed), it should not have been determined by the Industrial Court. It was enough that the KPA Pension scheme was in existence, and section 46 and 47 of the RBA did not require the scheme to have been registered. On the second issue, counsel submitted that in dealing with the complaint, the High Court dismissed all the grounds, and failed to appreciate that the order for refund of the contributions was irrational, uncalled for and untenable since any payments by the Pension Scheme required to be made in accordance with the RBA and the scheme rules, furthermore, the amounts computed as refund by the respondents was without basis. This should have been considered by the High Court in its supervisory capacity. The decision was outrageous, incapable of implementation and should have been quashed by the High Court.

Finally, counsel submitted that there was an inordinate delay of 4 years in delivery of the ruling by the High Court which was not explained and was contrary to section 77 and 79 of the Constitution on the requirement for a fair hearing within a reasonable time, and Order 21 rule 1 of the Civil Procedure Rules on the requirement for delivery of judgments and rulings within 60 days.

Mr. Wameyo learned counsel for the 2nd respondent on his part submitted that the dispute was referred to the Industrial court under the Trade Disputes Act, as Section 40 of the RBA provides that form A requires to be signed by the employer and the employee yet no form A was signed. According to sections 22, 23 and 24 RBA a scheme requires to be registered under a certificate. The High Court considered these provisions and concluded that at the time that the deductions were made, the scheme was not registered under the RBA and consequently, the RBA could not regulate this scheme. Since there was no pension scheme under the RBA, the Trade Disputes Act applied and the learned judge was correct in his findings that the Industrial Court had jurisdiction. Counsel referred to a report of the Ministry of Labour and Manpower Development dated 17th January 2003 which found the deductions to have been illegal, as they commenced before the KPA Pension scheme was registered, and the workers consent was not

sought. It also confirmed that the scheme was registered in 2001 and the trust deed also came into effect in 2001. Consequently, the refund required was for the period of 1999 to 2001. Counsel explained that pensions are deferred payments based on the employees' salaries who were at work at that time, and as such were subject to determination under the Trade Disputes Act. On the delay of the judgment, counsel contended that this could not be interpreted against a party to a suit. Counsel urged that the appeal be dismissed.

Mr. Were and ***Ms. Jin,*** learned counsel for the 3rd respondent identified themselves with the submissions of counsel for the 1st and 2nd respondents. Regarding the scheme, they submitted that the RBA was not operational, and there was no Tribunal that the dispute could be referred to. Counsel contended that the issue of computation of the amount due to the 1st respondent was not before this court; and no prejudice had been occasioned by the appellant on account of the delay in delivery of the judgment. Counsel concluded that if the respondents are not paid, they stand to lose, as the amounts continue to earn interest.

In response ***Mr. Imende***, countered that, the moneys deducted are a part of the scheme and the retirees continue to receive monthly pensions, but are demanding a lump sum payment for the intervening period which is not due to them. The cause of action was filed in 2002 in the Industrial Court, and by this time the RBA and the Tribunal were operational. As the scheme was registered in 2001, the RBA was the correct authority to determine the dispute.

Having considered the pleadings, the ruling and the rival submissions of respective counsel we consider that the issues for our consideration are as follows:

i. *whether disputes regarding retirement benefits are within the jurisdiction of the Industrial Court, and within the meaning of trade disputes as defined under the Trade Disputes Act (now repealed).*

ii. *whether the High Court erred in failing to find that the award of the Industrial Court Act was irrational and untenable and incapable implementation; and*

iii. *whether there was an inordinate delay in delivery of the ruling by the High Court to the prejudice of the appellant.*

Turning to the issue of whether disputes regarding pension contributions are capable of being determined by the Industrial court, the appellant's contention is that the learned judge failed to appreciate that the Industrial court did not have jurisdiction to determine the dispute, as it related to pension contributions, and which dispute should have been resolved under the provisions of the RBA, and not under the Employment Act or the Trade Disputes Act.

In the judgment, the learned judge found that the Industrial Court had jurisdiction to determine the dispute over pension contributions, and in arriving at it's decision, the High Court relied on sections 46 and 47 of the RBA, and came to the conclusion that since the appellant's retirement benefits scheme was not registered with the RBA by the time the dispute arose, it did not qualify to be considered as a pension scheme, within the meaning of the RBA. Consequently, the dispute was incapable of being determined under the RBA and was rightly determined by the Industrial court under the Disputes Act.

Matters appertaining to jurisdiction have numerously been restated by this Court on numerous occasions, and we make one more reference to the *locus classicus* decision to ***THE OWNERS OF MOTOR VESSEL "LILLIAN S' VS CALTEX OIL KENYA LTD [1989] KLR 1*** where the court stated:-

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

The Supreme Court in ***SAMUEL KAMAU MACHARIA & ANOTHER VS KENYA COMMERCIAL BANK & 2 OTHERS Application No. 2 of 2011[2012] eKLR*** stated,

"A court's jurisdiction flows from the Constitution or legislation or both. Thus a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred by law."

And where a court has exceeds its jurisdiction in the case of ***KENYA NATIONAL EXAMINATION COUNCIL VS REPUBLIC Civil Appeal 266 of 1996***, this Court observed:-

"Only an order of court can quash a decision already made and an order of court will issue if the decision made is without or in excess of jurisdiction or where the rules of natural justice are not complied with or for such like reasons."

In determining whether or not the High Court reached the right decision, on the question of jurisdiction, it is imperative that we consider the nature of the dispute that was before the Industrial Court.

From the record, the respondents have complained that the contributions deducted from the appellant's employees were pension contributions for the period between 1st January 1999 and 1st January 2001, when the noncontributory scheme ceased, and before the appellant's pension scheme was registered. It is for this period that they demand that the pension's contributions be refunded back to them.

The appellant on the other hand contends that at all times the deductions involved pension contributions which were deducted from the employees following the Gazette Notice no. 35 of 1999 which had brought the pension scheme under the 1983 regulations to an end, and introduced instead the Kenya Ports Authority Pension Scheme, under the RBA.

From this discourse, what the parties hereto have made inherently clear is that, the dispute was in respect of pension contributions, deducted from the appellant's employees.

The Industrial court at that time, unlike the Industrial court today which is established under the Constitution 2010, was established by an Act of Parliament namely, the Trade Disputes Act. Section 14 specifically provides that the Industrial court was established to settle trade disputes. ***"Trade disputes"*** under section 2 are defined as,

"A dispute or difference between employer and employees or between employees and employers and trade unions, or between trade unions and trade unions with the employment or non employment, or with the conditions of labour, of any person and includes disputes regarding the dismissal or suspension of employees, the redundancy of employees, allocation of work or recognition agreements; and it also includes an apprehended trade dispute."

From this definition, it is abundantly clear that trade disputes concern dismissal or suspension of employees, the redundancy of employees, allocation of work or recognition agreements. Pension disputes are not included within the definition of a trade dispute. Consequently, there can be no doubt that the Industrial court did not have jurisdiction to hear and determine pension disputes, which was contrary to the express stipulations of the Trade Disputes Act.

The respondents' complaint is not that the sums were not pension contributions, their complaint is that the deductions were not authorized for the period between 1st January 1999 and June 2001, when the KPA Pension Scheme was not registered under the RBA, and consequently, as the dispute involved unauthorized deductions, it remained a trade dispute capable of being determined by the Industrial court.

The learned judge agreed that the pension dispute could not be determined by the RBA for reasons that the appellant's scheme was not registered with the Authority in accordance with sections 46 and 47 of the RBA, and consequently, it remained a dispute within the meaning of the Trade Disputes Act, which the Industrial court had capacity to determine it.

It is evident from the Gazette Notice no. 35 that, with the revocation of the noncontributory scheme, a new scheme, the KPA Pensions Scheme came into existence, but which required to be registered under

the provisions of the RBA and the Income Tax Act, to replace the pension scheme under the regulations 1983. The effective date was 1st January 1999, and the KPA Pension scheme was to be applicable to all the employees of the Kenya Ports Authority.

With the establishment of the KPA Pension Scheme, it is implicit that all matters appertaining to the establishment of a pension scheme were effective from 1st January 1999, including but not limited to, registration of the KPA Pension Scheme under the RBA, deduction of employee contributions, payment of pension dues to retiring employees, all of which required to be in accordance with the provisions of the RBA.

The contention that no pension scheme existed after 1st January 1999 has no credence. The KPA Pensions scheme came into existence by virtue of Gazette Notice No. 35, and was required to be registered under the RBA, so as to fall within the ambits of its provisions.

Section 57 of the RBA sets out the Transitional provisions and stipulates,

"Any person who, at the commencement of this Act, is a trustee or manager of a scheme to which this Act applies shall, within sixty days of the commencement, or within such longer period as the Minister may, in consultation with the Authority prescribe, apply for registration under this Act:

Provided that the period prescribed under this section shall not exceed three years."

Considering that the RBA provisions allowed for a transitional period, a delay in the registration of the scheme did not mean that no scheme existed or that no pension deductions could be effected commencing 1st January 1999, where the appellant was mandated to commence pension deductions, from its employees during the interim period, pending the registration of the scheme. Consequently, we consider that such deductions were carried out in adherence to the Gazette Notice for the benefit of the KPA Pension scheme.

In compliance with Gazette Notice No. 35, the KPA Pension Scheme was eventually registered under the RBA in 2001. This being the case, all pension deductions accrued to the benefit of pension scheme, and for all intents and purposes the contributions formed an integral and indivisible part of the pension funds belonging to the KPA Pension Scheme.

It is instructive that, the instant dispute was filed in the Industrial court in 2001. By this time the KPA Pension Scheme had been duly registered by the RBA, and additionally, the RBA dispute resolution mechanisms had become operational. In our view, the High Court ought to have enquired why the respondents chose to file the dispute in the Industrial Court, instead of proceeding under the RBA, having regard to the distinct nature of the dispute, or why the Industrial court did not in its decision refer the pension dispute to the RBA.

In the circumstances, we find that, the High Court reached the wrong conclusion on the scope of the Industrial court's jurisdiction in respect of the pension dispute, and should have issued an order of certiorari to quash the decision, for reasons that the Industrial court acted in excess of its jurisdiction in determining the KPA Pension scheme dispute, a jurisdiction that was reserved for the f the RBA.

That finding would have been sufficient to dispose of the appeal. But we shall proceed to examine the other two issues raised by the appellant.

The second issue is whether the High Court erred in failing to find that the orders of the Industrial Court, particularly in relation to the pension dispute were irrational, untenable, and incapable implementation.

The appellant's complaint is that in its judgment, the Industrial Court went on to order the appellant to revert back to the noncontributory pension scheme under regulation 1983, and also ordered the appellant to refund the amounts deducted between 1st January 1999 and June 2001, back to both the existing and

retired employees, or to their next of kin.

It is evident that the High Court did not consider the rationality of the Industrial court order, or whether the order was capable of being executed.

At this point it is essential to mention the *Wednesbury* principles as set out in the case of ***ASSOCIATED PROVISIONAL PICTURES HOUSES VS WEDNESBURY CORPORATION*** ***[1948] 1 KB 233*** where Lord Green M.R stated:-

"Decisions of persons or bodies which perform public duties or functions will be liable to be quashed or otherwise dealt with by an appropriate order in judicial review proceedings where the Court concludes that the decision is such that no such person or body properly directing itself on the relevant law and acting reasonably could have reached that decision".

These principles were reiterated in the case of ***Council of Civil Service Unions & Others vs Minister for the Civil Service*** ***[1984] 3 All ER 935*** where Lord Diplock stated:-

"Judicial review has I think developed to a stage today when reiterating any analysis of the steps by which development has come about, one can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground….. "illegality", the second ground "irrationality", and the third "procedural impropriety"…..By illegality as a ground for judicial review I mean that the decision maker must understand correctly the law that regulates his decision- making power and must give effect to it. …..By irrationality, I mean what can be by now referred to as '*Wednesbury*** ***unreasonableness' (****SEE ASSOCIATED PROVINCIAL PICTURE HOUSES LTD V WEDNESBURY CORP* ***[1947] 2 All ER 680... It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person would had applied his mind to the question to be decided could have arrived at it…"***

We will begin by considering whether the Industrial court could order the appellant to revert back to the noncontributory scheme.

Under section 11 and 60 of the Kenya Ports Authority Act Cap 391, the Minister for Transport and Communications is empowered to approve and make such rules and regulations as to the conditions of service of employees of the Kenya Ports Authority including the granting of pensions, gratuities and other retiring allowances to employees and their dependants and the grant of gratuities to the estate or dependants of deceased employees, including the establishment and maintenance of sick funds, superannuation and provident funds and the contributions payable thereto and the benefits receivable therefrom.

Pursuant to the provisions of the Kenya Ports Authority and by virtue of the Gazette Notice No 35, the Minister established the KPA Pension scheme, a decision which was well within the Minister's powers. Any court orders for the reversion of the noncontributory scheme should have been made against the Minister who, it is evident, was not a party to the suit, and not the appellant. Consequently the order having been made against the appellant and not the Minister rendered itself unenforceable against, and incapable of implementation by the appellant.

Furthermore, the High Court disregarded the doctrine of separation of powers, as set out under the repealed Constitution, and ought to have appreciated that it was beyond the mandate of the Industrial court or any other tribunal, to question the Minister's decision to establish the KPA Pension scheme, or indeed to order the reinstatement of the noncontributory scheme, which effectively had ceased to exist under the Gazette Notice.

As to whether the Industrial court could order the appellant to refund the deductions, to a great extent would have been dependent on the legal status of the KPA Pension scheme in relation to the appellant.

Section 2 of the RBA defines a ***"retirement benefits scheme"*** as

"any scheme or arrangement (other than a contract for life assurance) whether established by a written law for the time being in force or by any other instrument, under which persons are entitled to benefits in the form of payments, determined by age, length of service, amount of earnings or otherwise and payable primarily upon retirement, or upon death, termination of service, or upon the occurrence of such other event as may be specified in such written law or other instrument".

We have already stated that the KPA Pension scheme was established in 1999, and registered under the RBA in 2001. Pursuant to this registration, it became a body corporate, a separate legal entity from the appellant, capable of suing and being sued, and mandated to conduct its business in accordance with the RBA provisions. As such, any order for the refund of pension deductions should have been made against the KPA Pension scheme, and not the appellant.

In the case of ***PRIME SALT WORKS LTD VS KENYA INDUSTRIAL PLASTICS (2001) 2 EA 528,*** this Court observed that the concept of fair adjudication requires that no person shall be judged in his own cause, and no person shall be condemned unheard; that these are the two principles of natural justice that must be observed by courts save where their application is expressly excluded.

The pension contributions once deducted from the employees formed part of the scheme funds, and became the property of the KPA Pension scheme, to be administered in the manner specified by the RBA. With respect to this, the High Court failed to appreciate that, since the scheme funds belonged to the KPA Pension scheme, which did not have an opportunity to ventilate its own case, such orders for refund of the scheme funds, were tantamount to a violation of the rules of natural justice by the Industrial court.

The irrationality of the Industrial court order was further compounded by section 2 of the RBA, which provides that payments from the scheme funds can only be made to persons entitled to benefits determined by age, length of service, amount of earnings or otherwise and payable primarily upon retirement, or upon death, termination of service, or upon the occurrence of such other event as may be specified in such written law or other instrument.

It is evident that, the KPA Pension scheme was only capable of making payments in the manner specified by the RBA, and no other. Given these unequivocal legal constraints imposed on payments from pension schemes, it is evident that an order for refund from scheme funds amounted to an illegality, and was incapable of execution, as refunds to the respondents' members clearly did not fall within the definition of persons eligible for payment, under the RBA, and could not be paid as such.

It is clear to us that the Industrial court orders in respect of the pension contributions were illegal, irrational and unreasonable, and incapable of implementation, and we find in these circumstances that the High Court misdirected itself, in failing issue an order for certiorari as sought by the appellant.

On the final issue of whether the inordinate delay in delivery of the judgment was prejudicial to the appellant, and rendered the award unconstitutional, we advert to the case of ***MANCHESTER OUTFITTERS SUITING DIVISION LIMITED & ANOTHER VS STANDARD CHARTERED FINANCIAL SERVICES LIMITED & ANOTHER [2002] eKLR*** citing the case of ***ELIZABETH BARGANZA VS TYSONS HABENGA Civil Appeal No. 285 of 1997*** where this Court stated:-

"In this case the delay if (15 months) was too inordinate and should not have occurred unless there were compelling reasons which the learned judge should have explained in the judgment. No doubt by the time she wrote her judgment, human as she is, the learned Judge lacked the "feel" of the case. Also the length of time between the hearing and the case and writing of judgment gave rise to a suspicion that a miscarriage of justice had occurred through submissions being forgotten or lost.

The observations equally apply to the four years delay of the learned judge in delivering his judgment which is the subject matter of the appeal before us. In the circumstances I would agree with Mr. Nowrojee that such a judgment so delayed lacked credibility of a judgment. For this reason alone the appeal is allowed."

We agree with the sentiments expressed therein, and find that in the instant case, the delay of four years without explanation, was inordinate.

In the result, we allow the appeal, set aside the order of the High Court dated 21st February 2012, and substitute therefor an order allowing the Notice of Motion filed on 19th December 2007, with costs to the respondents in that motion. The appellants shall also have the costs of this appeal.

DATED and DELIVERED at NAIROBI this 31st day of JULY, 2014

P. N. WAKI

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

K. MURGOR

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR