



**Butoyi (As a substitution for Canute Ifute Butoyi - Deceased) v Attorney General
(Cause 828 of 2022) [2024] KEELRC 2211 (KLR) (18 September 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2211 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 828 OF 2022
JK GAKERI, J
SEPTEMBER 18, 2024**

BETWEEN

**SYLVESTER SHIHOYA BUTOYI (AS A SUBSTITUTION FOR CANUTE IFUTE
BUTOYI - DECEASED) CLAIMANT**

AND

THE HON ATTORNEY GENERAL RESPONDENT

JUDGMENT

1. The Claimant (deceased) Mr. Canute Ifute Butoyi commenced the instant suit at the High Court vide a Plaint filed on 8th May, 2017 alleging that he was initially employed by the Respondent as a teacher in January 1959 and then transited to an Administrative Officer and rose to become Under Secretary second-in-charge, Finance Department, Ministry of Agriculture in 1996.
2. The claim was amended on 21st September, 2022 following the death of the Claimant.
3. The Claimant's name was substituted with that of Sylvester Shihoya Butoyi.
4. It is the Claimant's case that on 5th March, 1997, he received a letter dated 23rd September, 1996 which brought forward his retirement from 31st September, 1996 to 30th September, 1996 and on 30th September, 1996, he was charged in Nairobi Criminal Case No. 2458 of 1997 for neglect of duty contrary to Section 128 of the Penal Code but was acquitted on 7th May, 1999 and presented his claim to the Ministry of Agriculture for terminal benefits and in default he filed HCCC No. 714 of 2000 which was determined in 2013 where the court held that the deceased was entitled to pension and any other emoluments that were due to him upon retirement.
5. The Claimant (deceased) avers that when the decree was presented to the Director of Pension, the Claimant was paid Kshs.3.5 million as his basic pension in October 2015 and the amount did not include interest for the period September 1996 to October 2015.



6. The Claimant prays for;
 - i. Kshs.7,980,000.00 plus interest at court rates.
 - ii. Costs of this suit plus interest at court rates.

Respondent's case

7. By a statement of defence filed on 13th June, 2017, the Attorney General denies all the allegations made by the Claimant but admits that he was paid the sum of Kshs.3.5 million in October 2015 and having received a demand and notice of intention to sue the Government. It denies withholding of interest.
8. The Respondent prays for dismissal of the Claimant's case with costs.

Claimant's evidence

9. Documentary evidence on record reveal that the Claimant, Mr. Canute Ifute Butoyi died on 21st January, 2019 and Letters of Administration were granted to Regina Canute Butoyi and Sylvester Shihoya Butoyi on 7th October, 2019 and the grant was confirmed on 14th June, 2021.
10. The Claimant's (deceased) evidence was adduced by Sylvester Shihoya Butoyi who confirmed on cross-examination that the Claimant died on 29th January, 2019 and that he had authority to continue the case by virtue of the confirmed grant.
11. The witness confirmed that he was unaware of the terms of payment of gratuity to the deceased or the type of pension the deceased had.
12. On re-examination, the witness testified that the court ordered that the Respondent should pay gratuity to the deceased.

Respondent's evidence

13. Mr. Michael Kagika, RWI testified that the payment voucher on record came from his office and the Pensioner (deceased) was paid his dues.
14. The witness testified that in the Public Service, there are two pension schemes, namely; Defined Benefit Pension and the Defined Contributory Benefit Scheme.
15. In the former, the employee does not contribute towards pension and it is a charge on the Consolidated Fund and the Claimant (deceased) was in such a scheme.
16. That the Department of Pension paid the deceased in 2014 including arrears.
17. The witness admitted that payment had been deferred by virtue of the Public Service Commission Letter received in 1998 but rescinded in 2014.
18. On re-examination, the witness testified that pension does not earn interest.

Claimant's submissions

19. Counsel for the Claimant submitted on whether the Respondent ought to pay interest that accrued on the deceased's pension and whether the court has jurisdiction to determine the suit before it.
20. As regards interest, counsel submits that although the deceased's tenure of employment dates back to 1996, his pension dues were only paid in 2014 and no reason for the delay was given.



21. Counsel cites Section 5 of the Pension Act to reinforce the submission.
22. Reliance is also made on the sentiments of the court in *Okoiti & 11 others V County Governments Retirement Scheme & 164 others; County Pension Fund Financial Services Ltd & 8 others (Interested Parties)* (2022) KEELRC 13584 on a Defined Contributory Benefit Scheme, to urge that interest was payable as it involves the employee and employer's contributions and interest earned on the aggregate contributions.
23. Counsel submits that the deceased's pension was paid without interest and did not factor in inflation.
24. Counsel cites Section 53A of the *Retirement Benefits Act* to buttress his submission on payment of interest.
25. As to whether the court has jurisdiction to hear and determine the suit, counsel urges that the court has the requisite jurisdiction but cites no provision of law from which the court derives such jurisdiction.
26. Counsel submits that the deceased's pension was paid in accordance with a Court Order in H.C.C.C No. 714 of 2000 and by parity of reasoning, this court ought to do the same on the interest claimed.
27. According to counsel, since an individual has the right to pension benefits by law and relying on the *Okoiti's case* (Supra), the Claimant is entitled to interest in the sum of Kshs.7,980,000.00.

Respondent's submissions

28. On the interest claimed by the deceased's estate, the Attorney General submits that the Director of Pensions cannot pay Pension Benefits until prompted by the relevant Ministry which clears an employee and the Director of Pensions has no role in the clearance process and in the instant case processing of the deceased's pension commenced after the Director of Pension received the letter dated 18th November, 1997 but the Public Service Commission vide letter dated 29th April, 1997 instructed the Director of Pensions to withhold the deceased's retirement benefits due to misconduct but the Public Service Commission rescinded the directive vide letter dated 30th April, 2014 and the deceased was paid on 23rd September, 2014.
29. That the Director of Pensions did not intentionally withhold the deceased's pension as the office had no authority to pay and in any case the deceased's scheme was Defined Benefit financed by the Consolidated Fund.
30. The Attorney General submits that CWI admitted that he was not privy to the agreement between the deceased and the employer.
31. That Section 53B of the *Retirement Benefits Act* relates to recovery of unremitted pension contributions by the employer and the decision in the *Okoiti's case* (Supra) was not on payment of interest on pension.
32. On jurisdiction, the Attorney General submits that the court has none to determine this claim and cites the sentiments of Supreme Court decisions in *Republic V Karisa Chengo & 2 others* (2017) eKLR and *Albert Chaurembo Mumba & 7 others V Maurice Munyao & 148 others* (2019) eKLR to urge that as the Claimant retired from employment and thus a pensioner, there was employment relationship with the employer.
33. Reliance was also made on the decision in *Christopher Warui V Office of the Auditor General & another* (2021) eKLR to urge that the framers of *the Constitution* of Kenya envisioned a restricted jurisdiction of the court to disputes relating to employment and labour.



Analysis

34. The deceased filed the instant suit at the High Court in 2017, which partly explains the delay in having it determined as it was not until 1st November, 2022 that Mulwa J. ordered its transfer to this Court and it took almost one (1) year before the suit was placed before this Court.
35. It is common ground that the deceased worked for the Government and rose to the position of Under Secretary and retired in October 1996 after attaining the age of 55 and his claim was prepared and submitted to the Pensions Department and received in November 1997.
36. It is equally not in dispute that by letter dated 29th April, 1997, the Public Service Commission directed the Pensions Department to withhold the deceased's retirement benefits due to misconduct under Section 113(1) of *the Constitution* of Kenya and the decision was rescinded vide letter dated 30th April, 2014 and pension dues were paid.
37. Similarly, by a decision delivered on 6th September, 2014 in HCCC No. 714 of 2000, the High Court decreed that the deceased was entitled to withheld pension dues and emoluments.
38. It is unclear whether the Claimant's dues were paid pursuant to the court's declaration or revocation of the earlier directive by the Public Service Commission.
39. The pith and substance of the Claimant (deceased's) case is that he is entitled to interest for the delayed pension payment from 2000 – 2014, the sum of Kshs.7,980,000.00.
40. The issues that commend themselves for determination are;
 - i. Whether the court has jurisdiction to hear and determine the suit.
 - ii. Whether the Claimant is entitled to interest on pension dues.
41. On the court's jurisdiction, while the Claimant's counsel urges that the court has jurisdiction to hear and determine the suit, counsel for the Respondent argues that it does not have the requisite jurisdiction. However, counsel for the Claimant has not cited any specific provision of law from which the court derives its jurisdiction to hear and determine this case.
42. In determining this issue, the home port are the widely cited sentiments of Nyarangi JA in the celebrated decision in Owners of Motor Vessel "Lillian S" V Caltex Oil (Kenya) Ltd (1989) KLR as follows;

“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 downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.”
43. It is trite law that a court derives its jurisdiction from the law.



44. In Samuel Kamau Macharia & another V Kenya Commercial Bank & 2 others (2012) eKLR, the Supreme Court was categorical that;

“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 upon it by law . . .”

45. It requires no belabouring that Article 162(2)(a) of the Constitution of Kenya empowers Parliament to establish a court with the status of the High Court to hear and determine disputes relating to employment and labour relations and Parliament established this court by enacting the Employment and Labour Relations Court, 2012 whose Section 12(1) encapsulates the jurisdiction of this court.

46. Section 12 of the Act provides that:-

1. The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the court relating to employment and labour relations including – . . .

47. Sub-section (1) of the Employment and Labour Relations Court Act catalogues ten (10) types or categories of disputes which the court has jurisdiction to hear and determine.

48. Although Section 12(1) of the Act is inexhaustive, any addition must be construed ejus dem generis the ten (10) categories of disputes.

49. Similarly, and significantly, Section 12 of the Act provides that:-

2. An application, claim, or complaint may be lodged with the Court by or against an employee, an employer, a trade union, an employer’s organization, a federation, the Registrar of Trade Unions, the Cabinet Secretary or any office established under any written law for such purposes.

50. This far it is discernible that neither the provisions of Article 162(2)(a) of the Constitution of Kenya nor those of the Employment and Labour Relations Act or the Employment Act appear to suggest that the Employment and Labour Relations Court has jurisdiction to hear and determine claims grounded on pension.

51. In the Chaurembo Case (Supra), the Supreme Court had this to say as regards Section 12(2) of the Employment and Labour Relations Court Act, 2011;

“We do not see how a Pensioner fall within the listed category of persons and parties that can make an application or institute proceedings before the Court. From the foregoing, it is thus clear that the Employment and Labour Relations Court had no jurisdiction to hear and determine a dispute that relates to trustees of a pension scheme and members of the scheme particularly where the said members are no longer employees of the sponsor . . .”

52. The court further stated;

“In our view, once a member leaves the employment of a Sponsor, by becoming a Pensioner, then there is no longer a relationship of employer-employee that exists between such a Pensioner and the Sponsor. The relationship that exists in that case becomes that of trustee and beneficiary members of a trust and that relationship is governed by the Retirement Benefits Act, Trustee Act Cap 167 of the Laws of Kenya and the general common law on the



law of trusts. It is important to note that nowhere in the *Employment and Labour Relations Court Act* is there jurisdiction conferred on the Employment and Labour Relations Court to resolve issues between trustees of a pension scheme and members of the pension scheme (pensioners) . . .

However, the Court of Appeal in Civil Appeal No. 236 of 2012 Kenya Ports Authority (Supra) held that pension disputes are not included within the definition of a trade dispute, consequently, the then Industrial Court did not have jurisdiction to hear and determine pension disputes. That the then Industrial Court acted in excess of its jurisdiction in determining the dispute involving the scheme, a jurisdiction that was reserved for the authority. From the foregoing, we are inclined to agree with the Court of Appeal based on our understanding of Section 12(2) of the *Employment and Labour Relations Court Act* which states . . .”

53. In a nutshell, the Court held that the Employment and Labour Relations Court has no jurisdiction to hear and determine a dispute between a Pensioner and Trustees of a Pension Scheme.
54. The court is further guided by the sentiments of the court in Christopher Warui V Office of Auditor General and another (2021) eKLR where Nzioki Wa Makau J. expressed the view that;

“The fact that his case is about pension dues and the binding decision of the Supreme Court clearly demonstrate that this matter is not for this court.
55. In the instant case, the Claimant’s suit against the Attorney General is based on interest on pension dues already paid to the deceased and the suit was filed almost 20 years after the Claimant’s retirement.
56. Flowing from the foregoing, it is the finding of the court that it has no jurisdiction to hear and determine the instant suit and proceeds to down its tools.
57. Consequently, the Claimant’s suit against the Respondent is struck out for want of jurisdiction.
58. Parties to bear own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 18TH DAY OF SEPTEMBER 2024

DR. JACOB GAKERI

JUDGE

Order

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI



JUDGE

