



Adika v Embassy of Sweden Nairobi (Employment and Labour Relations Petition E144 of 2023) [2024] KEELRC 2608 (KLR) (24 October 2024) (Judgment)

Neutral citation: [2024] KEELRC 2608 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS PETITION E144 OF 2023**

MN NDUMA, J

OCTOBER 24, 2024

BETWEEN

NICHOLAS IMBUGWA ADIKA PETITIONER

AND

EMBASSY OF SWEDEN NAIROBI RESPONDENT

JUDGMENT

1. The petitioner was employed by the respondent between 3rd October 2006 until 11th May 2016 when he was summarily dismissed from employment with the respondent. Upon summary dismissal, the respondent withheld pension dues to the petitioner until 17th May 2023, when the respondent paid the gross pension payable to the petitioner in the sum of Kshs. 5,135,897.00 less taxes making a net payment of Kshs. 3,797,528.00 credited directly to the petitioner's account.
2. The petitioner states that at all material time, he demanded payment of his pension but the respondent without any justification and/or any explanation withheld the tax dues unlawfully for a period of seven (7) years.
3. That the unlawful withholding of the pension amounted to unfair labour practice and violation of petitioner's right to own property as well as his social economic rights in violation of Article 40 and 41 of *the Constitution* of Kenya 2010.
4. The petitioner prays the court to grant him interest on the sum illegally and unfairly held by the respondent for a period of 7 years at such rate as the court shall deem just and equitable to grant.

Replying Affidavit

5. The respondent states that this court has no jurisdiction to entertain this suit in so far as: -



- a. That this honourable court has no jurisdiction to hear this matter as the complaints and allegations raised by the petitioner relate to a pension dispute.
 - b. The *Retirement Benefits Act, Trustee Act* Cap 167 establishes a mechanism to, inter alia, resolve all disputes relating to pensions including the matters that have been raised by the Petitioner.
 - c. The petitioner has not exhausted the available procedural mechanisms for the resolution of the dispute herein, before moving this honourable court.
 - d. Without prejudice to the above, the respondent duly paid the petitioner's pension as remitted by the Swedish Pension Agency (the Agency); and
 - e. There was no agreement between the petitioner and the Agency and/or the respondent to pay interest on the pension entitlement and as such interest is not payable.
6. That the petitioner worked as the respondent's program Managing Democracy Governance vide a contract dated 1/1/2008. The position was terminated on 11/5/2016.
 7. That sometime in April 2016, it came to respondent's attention that the petitioner had issued instructions for Kshs. 54,259,700.00 to be transferred to an account the Petitioner had opened in the name of the respondent. That the petitioner had proceeded to withdraw a sum of Kshs. 2,800,000.00 from the account which he deposited in his personal account.
 8. That the respondent commenced disciplinary proceeding against the petitioner which culminated in his summary dismissal. That due process was followed in this regard.
 9. That the respondent reported the matter to the police and the Petitioner was charged in a Criminal Court Case No. 638 of 2016, Republic versus Nicholas Imbugwa. That as the criminal case progressed, the respondent came to a decision that the petitioner's pension entitlement was Kshs. 5,135,897.00.
 10. That the petitioner was subsequently paid all the dues to him in line with the decision of the Agency.
 11. That at all material time, the Respondent responded to the petitioner's emails on the question of his pension dues. That the Pension Scheme was governed by the Agency which was responsible for the processing of the pension.
 12. That the respondent did not refuse to pay the petitioner his pension but awaited the decision of the Agency.
 13. That the trial magistrate made the following decision of fact at paragraph 9 and 10 of the judgement: -
 - a. The prosecution had established that Kshs. 54,000,000.00 was fraudulently transferred to the bank illegally opened by the Petitioner.
 - b. Out of the Kshs. 54,000,000.00, Kshs. 2,800,000.00 was transferred to the Petitioner's personal account at KCB Bank Kenya Limited.
 - c. The prosecution had proved that the Petitioner fraudulently received the Kshs. 2,800,000.00 and
 - d. The prosecution further proved that the Kshs. 54,000,000.00 belonged to the Respondent
 14. That in view of the above it would be unconscionable for the petitioner to demand for payment of interest which he is not entitled to having been adjudged by the court to have defrauded the respondent.



15. That the respondent by a letter dated 10/1/2023 reached out to the petitioner to provide his identity card and bank details where payment of his pension was to be made. That the petitioner delayed the payment by engaging in demands for payment of interest.
16. That there was no agreement between the respondent and the petitioner for payment of interest on the pension entitlement. That funds were remitted to the petitioner on 17/5/2023 after he had accepted the payment.
17. That a claim for interest cannot be founded on alleged breaches of constitutional rights in the manner alleged by the petitioner in paragraph 33-37 of the supporting affidavit in the petition.
18. That no cause of action has been established in respect of the alleged claim for interest and that the petition is thus ripe for striking out.
19. That the court cannot impute new terms into the Pension Scheme between the parties.
20. That the general common law on the law of trust is that interest is only payable where there is an agreement to pay interest. To the extent that there is no such agreement between the parties in this action the claim for interest is without legal basis.
21. That the Petitioner has not demonstrated any breach of the petitioner's constitutional rights whether as pleaded or at all.
22. The petition is without merit in any event and it be dismissed for lack of evidence and merit with costs.

Supplementary Affidavit and Submissions

23. The petitioner joined issue with the respondent on the depositions made in the replying affidavit and puts the respondent to strict proof thereof.
24. The petitioner states that this court has jurisdiction over this matter in terms of section 46 of the Retirement Benefits Authority Act (RBA) which provides: -
 - i. “(1) Any member of a scheme who is dissatisfied with a decision of the manger, administrator, custodian or trustees of the scheme may request in writing, that such decisions be reviewed by the Chief Executive Officer with a view of 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.”
 - ii. While section 46(1) of the RBA Act offers a procedural mechanism for addressing pension scheme grievances, the specific circumstances of this case involve issues of equity, unfair administrative action meted against the Petitioner, and application of the bill of rights that call for judicial intervention. Further, my grievance transcends typical pension disputes and requires comprehensive redress that can only be effectively and adequately provided through the court's equitable and constitutional jurisdiction pursuant to Articles 22(1), 23(1), 165, section 12(1) of the *Employment and Labour Relations Court Act* and section 9(4) of the *fair Administrative Action Act*.
 - iii. This petition invites this honourable court to exercise its judicial discretion guided by the principles in Articles 10(2)(b), 28 and 40 of *the Constitution* of Kenya. That the violation of my article 40 rights (right to property) resulted from the infringement of several other rights, including the right to fair administrative action (Article 47), fair labour practices (Article 41), and social and economic rights (Article 43).



25. The petitioner cites case law which support the view held by the Petitioner that this court has jurisdiction to hear and determine this matter including: -
- a. Arvind Shah & 7 others versus Mombasa Bricks & Tiles Ltd & 5 others Petition No. 18 (E020) of 2022 eKLR.
 - b. ALianze versus Saul Cavil Appeal 134 of 2017 [2022] KECA 583 (KLR)(24th June 2022) (Judgment) eKLR
 - c. Nicholus versus Attorney General & 7 others in Petition Ae007 OF 2007
 - d. Republic versus National Environment Management Authority [2011] eKLR and
 - e. Republic versus Independent Electoral and Boundaries Commission (IEBC) Exparte.
 - f. National Super Alliance (NASA) Kenya & 6 others [2017] eKLR.
26. Th petitioner adds that though section 46(1) of RBA offers a procedural mechanism for addressing pension scheme grievances, the specific case involve issues of equity, unfair administrative action and violation of the bill of rights by the Respondent against the Petitioner which require court intervention.
27. That constructive trusts can be applied in case where there is unconscionable conduct, breach of fiduciary duties or inequitable behaviour which is unconscionable and deceitful on the part of the defendant resulting into breach of trust obligations.
28. That Article 10 of *the constitution* supports the doctrine of constructive trust justifiable by this court and
- the availability of an alternative remedy does not necessarily bar an individual from seeking constitutional relief. This is because the act of seeking constitutional relief is contingent upon the adequacy of an existing alternative means of redress. If the alternative remedies is deemed inadequate in addressing the issue at hand then the court is not restrained from providing constitutional relief.”
29. The petitioner emphasizes that the Chief Executive Officer under section 40 of the RBA lack the jurisdiction to interpret *the constitution* and compel the respondent to do anything. That denying the petitioner access to the court would leave the petitioner without a remedy.
30. That the court must conclude that there is no effective or adequate remedy available outside judicial review channels. That the court to also consider discretion under section 9(4) of the *Fair Administrative Action Act* 2015 and admit the petition for lack of any adequate remedies available to the petitioner under RBA.
31. The petitioner cites the case of Omega Enterprises (Kenya) Limited versus Eldoret Sirikwa Hotel Ltd & 2 others [2001] eKLR, where the Court of Appeal held: -
- There is no doubt that if a party is deprived of the use of his money he must be compensated therefore by an award of interest there on from the date he (was) (sic) so deprived.”
32. Furthermore, the petitioner submits citing Nahnkumar M. Shah versus Mumias Sugar Company Ltd [2010] eKLR after analyzing comparative jurisprudence from common law courts, held that: -
- the above analysis informs my conclusion that Kenyan courts have power at common law to award interest for late payment of a debt on damages irrespective of whether or not there is



an agreement between the parties and there is also no impediment to awarding compound interest for the late payment if circumstances justify the same and if such interest will serve the end of justice.”

33. Furthermore, in *Ajay Indravadan Shah versus Children’s International Bank Ltd* [2003] eKLR, the Court of Appeal held that section 26(1) of the *Civil Procedure Act* is ousted only where the parties have not in their agreement expressly agreed on the question of interest as follows: -

...we further understand these provisions to be applicable only where the parties to a dispute have not by their agreement, fixed the rate of interest payable, if by their agreement the parties have fixed the rate of interest payable then the court has no discretion in the matter and must enforce the agreed rate unless it be shown in the usual way either that the agreed rate is illegal or unconscionable or fraudulent.”

34. The petitioner concludes by reference to the case of *H. N. Sharma and another versus Government of City of Delhi and others* on 21st August 2020, where the High Court of Delhi held as follows: -

The law on grant of interest on delayed payment of retirement benefits is no longer res integra. Time and again this question has cropped up before various courts and it has been held that when the employer delays the release of pensionary benefits, it is bound to pay interest, on account of the delay. Without burdening this judgment with several judgments for the sake of prolixity, I may only refer to the judgment of the Calcutta High Court in the case of *Padma Nath versus State of West Bengal and others* [2019] SCC unluecal 2185 which captures some of the judgments on this issue.”

Submissions by the Respondent

35. The respondent emphasizes the lack of jurisdiction of this court to entertain this petition there being no constitutional issues raised in the petition for determination; for failure by the respondent to exhaust statutory mechanism under RBA to resolve the dispute and for lack of an agreement between the parties to be enforced by the court on the issue of interest payable on delayed pension.
36. That it would be unconscionable to enrich the Petitioner who has been adjudged by the criminal magistrate court to have unlawfully appropriated funds of the respondent even though the Petitioner was acquitted of the criminal charges facing him in the matter.
37. The court is referred to the case of *Samuel Kamau Macharia and another versus Kenya Commercial Bank Limited & 2 others* [2012] eKLR on the principle that jurisdiction in everything and is conferred only by the law, statutory or constitutional and not by craft or innovation. The court is urged to down its tools and strike out the petition.
38. The court is further referred to the Court of Appeal decision in *Albert Chaurembo Mumba and 7 others* (sued on their own behalf and on behalf of predecessors, and on successors in the title in their capacity as the Registered Trustees of Kenya Ports Authority Pensions Schemes versus Maurice Munyao and 148 others (suing on their own behalf and on behalf of the plaintiff and other members/beneficiaries of the Kenya Ports Authority Pensions Scheme [2019] eKLR where the court held that: -

Once a member leaves the employment of a sponsor, by becoming a pensioner, 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 beneficiaries (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 the court empowered to resolve issues between trustees of a pension scheme and members of the scheme (pensioners).”

39. The respondent further cites the High Court decision in Jumar versus Postal Corporation of Kenya [2024] KEELRC in which the court struck out an employment claim on the basis that where there is a clear dispute resolution mechanism set out under section 46 and 48 of the Act, an employee should proceed under that basis to have his claim determined.
40. The respondent submits further that the Petitioner admits that there is a procedure under the Act but stops short of confirming the statutory steps of redress and completely excludes the applicability of the Appeals Tribunal. The respondent submits that on the above basis alone the petition be struck out for lack of jurisdiction. That the petition is caught by the twin constitutional principle of the doctrine of exhaustion and that of avoidance which divests this court of jurisdiction to determine the dispute as fore marketed by the Petitioner.
41. The court is referred to the Court of Appeal decision in Speaker of the National Assembly versus Karume [1992] KECA where it was held that where there is clear procedure for the redress of any grievance prescribed by an Act of Parliament then that procedure should be strictly followed. This was emphasized by the Court of Appeal in Mutange Tea and Coffee Company Ltd versus Shikana Limited and another [2013] eKLR.
42. On the doctrine of avoidance, the court was referred to the Supreme Court decision in the Communications Commission of Kenya and 5 others versus Royal Media Services Limited and 5 others [2014] eKLR where it was held that a court will not determine a constitutional issue where a matter may be properly decided on another basis. This case is cited with approval in numerous High Court decisions including Brookside Dairy Limited versus Mohamed and another [2022] KEHC and Aliela versus Kenton Cutlege Trust and another [2023] KEE LRC. In the latter case the court said: -

not every grievance or dispute shall be litigated under *the constitution*; where a dispute can be litigated under common law or statute, the best course is to have it litigated thereunder, it matters not that alternatively it can be litigated under *the constitution*.”

The Respondent prays that the petition be dismissed with costs.

DETERMINATION

43. The court has carefully considered the deposition and submissions by the parties well set out above
44. The facts leading to the filing of the petition are not in dispute. The petitioner was paid pension by the respondent seven (7) years later upon termination of employment. The respondent does not seem to expressly proffer any justifiable reason for the delay in the payment of the pension.
45. The respondent however defends itself by stating that a claim for payment of interest on delayed pension does not raise any constitutional issues for determination: It is a mundane item that should have firstly be taken to the Retirement Benefit Tribunal under section 46(1) of the RBA. That the petitioner is inhibited from filing this suit by the doctrine of exhaustion of alternative remedies therefore and secondly, that the petitioner is caught by the principle of avoidance since this is a dispute that definitely would have been resolved by a reference to the Retirement Benefit Tribunal and that the dispute presents no demonstrable constitutional issues for determination.



46. The respondent emphasizes that there was no agreement for payment of interest on delayed pension dues and in any event the petitioner was dismissed for unjustly enriching himself by appropriating unlawfully, funds belonging to the respondent.
47. The issues raised by the respondent are preliminary objections in nature that may lead to the striking out of the petition.
48. The Petitioner has admitted that indeed that there is an alternative remedy available at the Retirement Benefit Tribunal on the matter of payment of interest but the tribunal is devoid of jurisdiction to determine the constitutional issues raised here to wit deprivation of property rights under section 40 of *the constitution*, violation of economic and social rights under Article 43 and unfair administrative action in violation of Article 47 of *the Constitution* which the court is now seized of.
49. Upon careful consideration of all the above issues, this court is of the finding that the petitioner ought to have first referred this matter to the Retirement Benefits Tribunal. The petitioner is guilty of not exhausting alternative remedies.
50. Furthermore, the court finds that it is not necessary to determine the constitutional issues raised in this petition to afford the petitioner appropriate relief of payment of interest that is due and owing to him by fact of late payment by the Respondent. The Petitioner ought to have avoid this suit in favour of other appropriate statutory remedies available to him.
51. For purposes of completeness, the court is cognizant of the circumstances that led to the summary dismissal of the petitioner and the longtime it took to finalise the criminal trial at the magistrate court. These are factors that have a bearing on the delayed payment of the pension dues owing to the petitioner. The petitioner does not come to this court with clear hands therefore.
52. Accordingly, the court strikes out the petition for having been filed prematurely before this court and finds the petition to be an inappropriate mode of litigating the dispute presented before court.
53. Given the nature of the dispute, the court finds this a proper case for each party to bear their costs of the suit.

DATED AT NAIROBI THIS 24TH DAY OF OCTOBER 2024

MATHEWS NDUMA

JUDGE

Appearance:

M/s. Mumbi for Petitioner

M/s. Okuta for Respondent

Mr. Kemboi – Court Assistant

