



**Bosire v Telkom Kenya Limited & another (Cause E016 of 2023)
[2023] KEELRC 2993 (KLR) (23 November 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2993 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E016 OF 2023
CN BAARI, J
NOVEMBER 23, 2023**

BETWEEN

VINCENT KAUNDA BOSIRE CLAIMANT

AND

TELKOM KENYA LIMITED 1ST RESPONDENT

**ZAMARA FANAKA RETIREMENT FUND (PROVIDENT & PENSION
SECTIONS) / ZAMARA VUNA PENSION PLAN ALIAS ZAMARA
ACTUARIES, ADMINISTRATORS & CONSULTANTS LIMITED/ALEXANDER
FORBES RETIREMENT FUND 2ND RESPONDENT**

RULING

1. This ruling relates to the 2nd Respondent's Preliminary Objection dated 13th April, 2023. The 2nd Respondent through the objection, seeks the striking out of the Claimant's suit premised on the following grounds: -
 - a. That this Honourable Court lacks jurisdiction under Section 12 of the *Employment and Labour Relations Court Act* to determine a dispute arising from a Retirement Benefits scheme.
 - b. The Claim and application herein, contravenes Section 46 of the *Retirement Benefits Act* which requires disputes arising from a Retirement Benefits scheme to be first referred to the Chief Executive Officer of the Retirement Benefits Authority with a view to ensuring that they are determined in accordance with the provisions of the relevant scheme rules or the Act under which the scheme is established.
 - c. The Claim and application herein contravene Section 48 of the *Retirement Benefits Act* which requires that an appeal from the decision of the Chief Executive Officer should be lodged with the Retirement Benefits Appeals Tribunal established under section 47 of the same Act.



2. Parties urged the preliminary objection orally before Court on 18th October, 2023. The Claimant further filed submissions on the objection on 18th October, 2023.
3. Mr. Ngethe submitting for the 2nd Respondent, argued that this Court does not have jurisdiction to hear and determine this case under Section 12 of the [Employment and Labour Relations Court Act](#), as this is a matter arising from a retirement benefit scheme.
4. It is Counsel's further submission that Section 46 of the [Retirement Benefits Act](#) (RBA), requires disputes arising from retirement benefits schemes to be referred to the Chief Executive Officer (CEO) of RBA, and further that Section 48 of the same Act, provides that if a party is not satisfied with the decision, the matter can be referred to the Retirement Benefits Appeals Tribunal.
5. Counsel submits further that the Claimant was an employee of the 1st Respondent, who joined the retirement scheme of the 2nd Respondent. It is submitted that the Claimant received his retirement payment upon retirement, but was not satisfied with it, hence this case.
6. It is the 2nd Respondent's submission that there is no employer-employee relationship between the Claimant and the 2nd Respondent and that Section 12 of the ELRC Act does not refer to disputes arising from retirement pension as falling within the jurisdiction of this court. The Respondent placed reliance on the case of Staff Pension Fund & Kenya Commercial Bank Staff Retirement (DC) Scheme 2006 & another v Ann Wangui Ngugi & 524 others [2018] eKLR where the Court stated that Section 12 cannot be expanded to include issues to do with retirement benefits.
7. It is submitted for the 2nd Respondent that it has already made its decision and paid money in exercise of its function under the RBA Act, and that any issue can only be raised through review and appeal mechanisms under the Act. It is further submitted that the Claimant admitted in his pleading having written to the Respondents and copied the letter of complaint to the RBA, which in essence, means he is aware of the dispute resolution mechanisms under the RBA Act.
8. The 2nd Respondent finally submits that this Court does not have jurisdiction to entertain this matter, and the same should be struck out.
9. The Claimant appearing in person submitted that this Court has jurisdiction to hear and determine this matter in accordance with Sections 12 of the ELRC Act and Section 87 of the [Employment Act](#).
10. It is the Claimant's submission that the dispute herein, concerns breach of his contract. He placed reliance in the Supreme Court's decision in Albert Chaurembo Mumba & 7 others as registered Trustees of Kenya Ports Authority Pensions Scheme vs. Maurice Munyao & 148 others [2019] eKLR for the holding that the dispute herein, does not relate to a trustee and a member of the scheme, but that he was an employee of the 1st Respondent.
11. It is the Claimant's submission that the 1st Respondent was in arrears of his salary for 6 months and which it ended up paying the Claimant using the salary scale of a sales agent grade 3 that attracted a salary of Ksh 46,888/= instead of Ksh 85,0000, which consequently affected his pension.
12. The Claimant further submits that his dispute relates to miscalculation and money not remitted, hence breach of contract. He sought to rely in the case of Sarah Mang'oli v Kenya Medical Research Institute & Another [2020] eKLR where Lady Justice Wasilwa held as follows:

“.....the Claimant's claim relates to moneys not remitted to her pension account by her employer, the 1st Respondent. The Claimant's claim therefore emanates from her contract of employment and she avers that the employer failed to remit her pension dues to her



pension scheme. The claim is therefore not a dispute about pension but about a breach in the employment contract. (emphasis theirs)

That being the position, this claim is distinguishable from the authorities cited where the dispute emanated from failures on the part of the pension scheme administrator....”

13. It is his submission that this court is clothed with jurisdiction and the objection should be dismissed.

Analysis and Determination

14. Upon careful consideration of the Preliminary Objection, the Claimant’s written submissions and the oral submissions by both parties, the issue for determination is whether this Court has jurisdiction to hear and determine this suit.

15. In the celebrated case of Mukisa Biscuit Manufacturing Co. Ltd –vs- West End Distributors Ltd [1969] EA 696, the Court described a preliminary objection in the following words: -

“...A preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration...” Sir Charles Newbold, P at Page 701 proceeded as follows;

A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion...”

16. The Claimant’s claim is that he was an employee of the 1st Respondent, and in a retirement benefits scheme operated by the 2nd Respondent. It is his assertion that the 1st Respondent failed to pay him his six (6) months’ salary between the period December, 2010 and 2011, which occasioned miscalculation of his pension, and which was under paid by the 2nd Respondent in July, 2019.

17. The 2nd Respondent’s contention is that the Claimant’s claim concerns a pension dispute, which dispute does not fall within the jurisdiction of this Court per Section 12 of the ELRC Act. It is the 2nd Respondent’s assertion that the jurisdiction of this Court is ousted by Sections 46 and 48 of the Retirement Benefits Act.

18. Section 46 of the RBA Act states thus: -

“(1) Any member of a scheme who is dissatisfied with a decision of the manager, administrator, custodian or trustees of the scheme may request, in writing, that such decision be reviewed by the Chief Executive Officer with a view to 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.”

19. Further Section 48 states: -

“(1) Any person aggrieved by a decision of the Authority or of the Chief Executive Officer under the provisions of this Act or any regulations made thereunder may appeal to the Tribunal within thirty days of the receipt of the decision.”



20. The Claimant is dissatisfied with the amount paid to him on account of pension benefits by the 2nd Respondent. The 2nd Respondent already made the payment to the Claimant way back in July, 2019.
21. It is not disputed that the Claimant left the service of the 1st Respondent in the year 2011. It is also not in dispute that the 2nd Respondent paid the Claimant's pension benefits upon his attainment of the age of 50 years, in July, 2019. By this alone, it is clear that no employer-employee relationship exists between the Claimant and the 1st Respondent.
22. The Supreme Court in *Albert Chaurembo Mumba & 7 others (sued on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) v Maurice Munyao & 148 others (suing on their own behalf and on behalf of the Plaintiffs and other Members/Beneficiaries of the Kenya Ports Authority Pensions Scheme)* [2019] eKLR held thus: -

“In our view, 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 there jurisdiction conferred on the Employment and Labour Relations court to resolve issues between trustees of a pension scheme and members of the scheme (pensioners).”

23. It then follows that by reason of there not being an employer-employee relationship between the 1st Respondent and the Claimant, this Court has no jurisdiction to entertain a suit between the two parties.
24. Section 12(1) of the ELRC Act, provides for the jurisdiction of the Court as follows: -

“(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—

- (a) disputes relating to or arising out of employment (emphasis mine) between an employer and an employee;
- (b) disputes between an employer and a trade union;
- (c) disputes between an employers' organisation and a trade union organisation;
- (d) disputes between trade unions;
- (e) disputes between employer organisations;
- (f) disputes between an employers' organisation and a trade union.....”



25. The foregoing provisions, do no place a pension dispute within the jurisdiction of this Court. Further, Section 46 of the RBA Act, clearly stipulates where such a dispute would lie, and which certainly, is not before this court.
26. This said, the Claimant having left the employ of the 1st Respondent in the year 2011, and having received the disputed pension benefits in July, 2019, means that this suit is by simple arithmetic, statute barred by dint of Section 90 of the Employment Act, which states:
- “Notwithstanding the provisions of section 4 (1) of the Limitation of Actions Act, no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof.”
27. The cause of action in respect of the salary underpayment accrued three years after 2011, which takes us to the year 2014, while the suit herein, was filed in March, 2023. On the disputed pension benefits, the dispute is one that should have been lodged with the Chief Executive Officer of the RBA, so that whichever way one looks at it, this Court does not have jurisdiction to entertain the suit.
28. Nyarangi J in Owners of Motor Vessel Lilian “S” v Caltex Oil (1989) eKLR in the following words:
- “Jurisdiction is everything and without which, the 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 tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”
29. I therefore return that this Court is devoid of jurisdiction to entertain this suit, with the effect that the preliminary objection succeeds and the suit struck out in its entirety
30. I make no orders on costs.
31. Orders accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 23RD DAY OF NOVEMBER, 2023.

C. N. BAARI
JUDGE

