



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA**

**AT NYERI**

**ELRC JR NO.E001 OF 2021**

***(Before D.K.N.Marete)***

**REPUBLIC.....APPLICANT**

**RETIREMENT BENEFITS APPEALS TRIBUNAL..... 1ST RESPONDENT**

**AND**

**RETIREMENT BENEFITS AUTHORITY.....1ST INTEESTED PARTY**

**BARCLAYS BANK STAFF PENSION FUND.....2ND INTERESTED PARTY**

**ABSA BANK PLC.....3RD INTERESTED PARTY**

**WATCON WYATT INTERNATIONAL LIMITED.....4TH INTERESTED PARTY**

**AND**

**PETER KIBOCHA MAINA.....EXPARTE APPLICANT**

**R U L I N G**

This is an application by way of Preliminary Objection dated 17th May, 2021 and comes out as follows;

*1. As per the holding of the Supreme Court of Kenya, whose decision is binding on this Honourable Court, in Albert Chaurembo Mumba & 7 others v Maurice Munyao & 148 others, Supreme Court Petition No.3 of 2016, this court lacks the jurisdiction to entertain and determine pension disputes.*

The Applicant, in an Applicants Reply to Preliminary Objection dated 24th May, 2021 posits that this is an application for Judicial Review to examine the legality of the decision of the Retirement Benefit Appeals Tribunal.

The Applicant’s further case is that the decision sought to be evidenced was made by the Retirement Benefits Authority in the first instance and is now before the Retirement Benefits Appeals Tribunal.

The 1st Respondent in her written submissions dated 6th July, 2021 in support of the preliminary objection comes out as follows;

*19. .... there is no doubt whatsoever that the subject matter of the Ex-parte Applicant’s application herein centres on an alleged miscalculation by the pension scheme and is a dispute between the trustees of the pension scheme and a pensioner of the said scheme.*

*20. As expressly stated in the Albert Chaurembo Mumba case (supra) the Employment and Labour Relations Court has no jurisdiction whatsoever to hear and/or determine disputes that relate to trustees of a pension scheme and members of the scheme, particularly where the said members are no longer employees of the Sponsor. In light of the foregoing position and that in the case Samuel Kamau Macharia case (supra), a court of law cannot therefore entertain any matter before it without the requisite jurisdiction.*

*21. ....in light of the foregoing, this honourable court does not have the requisite jurisdiction to entertain the Ex-parte Applicant’s*

application dated 17th May, 2021, it follows that the application ought to be dismissed accordingly.

The 2nd Interested Party also supports the preliminary objection on grounds of lack of jurisdiction.

The 2nd Interested Party, the objector in her written submissions dated 5th July 2021 posits a case of lack of jurisdiction of this court to deal with issues in dispute. On this, she seeks to rely on the authority of **Samuel Kamau Macharia and Another v. Kenya Commercial Bank and Two others, Sup. Ct. Civil Application No.2 of 2011 (2012) eKLR**, where the court held thus;

*“Court’s jurisdiction flows from either 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. We agree with counsel for the first and second respondents... that the issue as to whether a court of law has jurisdiction to entertain a matter, for without jurisdiction, the procedural technicality, it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings...where the Constitution exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a court of law beyond the scope defined by the Constitution.”*

She further seeks to rely on the authority of **The Owners of the Motor Vessel “Lillian S” vs Caltex Oil (Kenya) Ltd (1989) KLR**, the court held thus;

*“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step (Emphasis Ours). Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.*

Again,

In the case of **Albert Chaurembo Mumba & 7 others v Maurice Munyao & 148 others, Supreme Court Petition No.3 of 2016**, the court 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 (para.146)*

Further,

9. The Supreme Court went further to observe that the Act did not confer any jurisdiction on the Employment and Labour Relations Court to entertain matters in the nature of pension disputes. The court stated thus;

*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).*

10. Finally, the apex court concluded thus;

*We do not see how a pensioner falls 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. Besides, the trust so established as a pension scheme retains autonomy from both the sponsor and the employees hence its regulation by the Authority.*

The 1st Interested Party in her written submissions dated 6th July, 2021 also comes in with a case of no jurisdiction on the part of this court to entertain this cause.

The Ex-parte Applicants in his written submissions dated 24th June, 2021 brings out a different dimension on the issue of jurisdiction. It is his case that before the formation of the Retirements Benefit Appeal Tribunal (RBAT,) this matter was filed before this court in the form of a Constitutional Petition where the issue was one of the employer (Absa Bank PLC) for reducing his basic pay and pension benefits in Petition No.4 of 2019. The ruling of court came out as follows;

- a) *The dispute on the determination of retirement benefits was referred to the newly constituted RBAT;*
- b) *The matter of constitutional infringement to be determined in this honourable court; and*
- c) *Parties given liberty to apply to this honourable court for interposition if necessary.*

It is the Applicant’s submission that the issue before this court is original and touches on an employers default in reducing his basic pay for

purposes of computation of his pension. It is not indeed an issue of computation of pension as was envisaged by the Supreme Court decision in Petition No.SC 3 of 2016 now utilized as a basis for support of this preliminary objection.

The issue before this court, the judicial review application is on the determination of base /pensionable pay. This is determinable and computed by the employer for purposes of computation of pension. It is related to and arises out of employment and therefore the subject of this court's Judicial Review or Appellate portfolio. The Applicant/Respondent answers this in the positive and therefore submits a case for dismissal of the preliminary objection.

It is his submission that this court has jurisdiction to hear and determine the issues in disputes as this does not relate to the centrality of a pension matter but one within the ambits of the employment court.

It is important that at this stage, we are able to distinguish the two subject matters involved in this litigation. The first and original is one of basic pay as presented by the employer for purposes of computation of pension. The second one is the actual computation of pension, an issue now before the Respondents. I note and identify the first issue as the one being subjected to this application/preliminary objection.

I am therefore inclined to dismiss the preliminary objection and order relief as follows;

- i) An order of Certiorari to remove into the honourable court and quash the decision of the Retirement Benefits Appeal Tribunal to dismiss the Appellants Application dated 11/9/2020 to join of Absa Bank PLC and Watson Wyatt International as Respondents to RBAT No.2 of 2016.
- ii) An order of Mandamus directed to the Retirement Benefits Appeals Authority to compel them to allow access to justice through suing by way of enjoining as defendants Absa Bank PLC and Watson Wyatt International.
- iii) An order of Decrealation that the Applicant has the right of relief from the actions of Absa bank PLC and Watson Wyatt International.
- iv) The costs of this preliminary objection shall be borne by the Respondent and Interested Parties.

**DATED AND DELIVERED AT NYERI THIS 23RD DAY OF MARCH, 2022.**

**D.K.NJAGI MARETE**

JUDGE

**APPEARANCES**

**1. MR. MBWIRE INSTRUCTED BY OCHIENG, ONYANGO, KIBET & OHAGA ADVOCATES FOR 2ND INTERESTED PARTY.**

**2. MR.KAMANDE AND KIMATHI HOLDING BRIEF FOR PROFESSOR MUMMA INSTRUCTED BY PROFESSOR ALBERT MUMMA & COMPANY ADVOCATES FOR 1ST INTERESTED PARTY.**

**3. EX-PARTE APPLICANT IN PERSON**