



REPUBLIC OF KENYA



**Karani v Attorney General (Cause 2228 of 2016)  
[2022] KEELRC 1718 (KLR) (19 May 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1718 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 2228 OF 2016**

**MN NDUMA, J  
MAY 19, 2022**

**BETWEEN**

**ROBERT THORONJO KARANI ..... CLAIMANT**

**AND**

**ATTORNEY GENERAL ..... RESPONDENT**

**RULING**

1. The respondent filed a Preliminary Objection to the suit filed on November 2, 2016 by the claimant as follows:-
  - (1). That the Employment and Labour Relations Court has no jurisdiction to hear and determine disputes relating to pension as was held by the Supreme Court of Kenya 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) vs 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 where it held that the *Employment and Labour relations Act* does not confer upon the Employment and Labour Relations Court powers to determine issues between pension schemes and its members.
  - (2) That in light of the foregoing decision and by virtue of section 12 (2) of the *Employment and Labour Relations Court Act* which excludes pensioners from persons who can institute proceedings at the Employment and Labour Relations Court, this honourable court lacks the jurisdiction to entertain this claim.
  - (3) That the honourable court therefore lacks jurisdiction to hear and determine this matter in light of the provisions of the law mentioned above.
  - (4) That the claim against the respondent is an abuse of the court process.



2. The respondent filed submissions dated October 9, 2021 and the claimant filed submissions dated November 30, 2021.
3. The facts giving rise to the suit are that the claimant served as a police officer from November 17, 1990 and was promoted through the ranks to the position of senior sergeant.
4. On September 30, 2013, the claimant issued a notice of intention to retire from the National Police Service under the 12-20 year rule in terms of section 6 of the [Pensions Act](#).
5. Section 6 of the [Pensions Act](#) provides:-

Circumstances in which pensions may be granted

(1) “No pension, gratuity or other allowance shall be granted under this Act to any officer except on his retirement from the public service in one of the following cases —

- (i) in the case of a super scale officer, who between the August 13, 1968 and June 30, 1971, or in the case of an officer serving in job group L or above or a teacher in a comparable salary scale, who on or between July 1, 1971 and August 13, 1985, completes not less than ten years public service or attains the age of forty-five within the period commencing on August 13, 1968 and ending on August 13, 1985;
  - (ii) in the case of an officer serving in job group L or above or a teacher in a comparable salary scale who on or between the 14th August, 1985 and the 13th August, 1990, completes not less than ten years’ service and, in addition, attains the age of forty-five years within the period commencing on the 14th August, 1985 and ending on the 13th August, 1990: Provided that the application of the officer to retire from the public service shall be submitted and approved in accordance with the procedure outlined in Personnel Circular no 19 of 13th August, 1968 as amended or replaced from time to time;
  - (iii) where the officer completes not less than five years of pensionable service;
  - (iv) in any other case not falling within the succeeding paragraphs of this subsection, on or after attaining the age of fifty years. cap 189 [Rev 2012] Pensions [Issue 1] 10
- (b) in the case of transfer to other public service, in circumstances in which he is permitted by law or regulations of the service in which he is last employed to retire on pension or gratuity: Provided that, if his service in that other public service is superannuated under the Egerton Agricultural College Retirement Benefits Scheme, which came into operation on 1st July, 1966, the Federated Superannuation System for Universities, or a similar insurance scheme, he has retired on one of the grounds mentioned in paragraphs (a), (c), (d), (e) and (f) of this section;
  - (c) on the abolition of his office;



- (d) on compulsory retirement for the purpose of facilitating improvement in the Organization of the department to which he belongs, by which greater efficiency or economy may be effected;
- (e) on medical evidence, to the satisfaction of the President, that he is incapable by reason of any infirmity of mind or body of discharging the duties of his office and that the infirmity is likely to be permanent;
- (f) in the case of service under the Government, on termination of employment in the public interest as provided in this Act, or, in the case of transfer to other public service, on termination of employment in the public interest under a corresponding provision in any law or regulation relating to the grant of pensions in respect of public service;
- (g) on retirement in circumstances not mentioned in the preceding paragraphs of this section, rendering him eligible for a pension under the Governors' Pensions Act, 1957 of the United Kingdom or under any Act wholly repealed by that Act; [No 5 & 6, Eliz 2, c 62.]
- (h) in the case of—
  - (i) police officers who are subordinate officers;
  - (ii) prison officers below the rank of chief warder, chief warder artisan or chief warder clerk;
  - (iii) administration police officers of or below the rank of senior sergeant;
 and
  - (iv) forest guards grades I, II and III,
 on the completion, in the public service of a period exceeding twelve years but not exceeding twenty years where the officer gives at least one month's notice in writing of his intention to retire: Provided that—
  - (i) a gratuity may be granted to a female officer, in accordance with this Act, who resigns on or with a view to marriage or is required to retire on account of her marriage, notwithstanding that she is not otherwise eligible under this section for the grant of any pension, gratuity or other allowance;
  - (ii) a pension, gratuity or other allowance may be granted in accordance with this Act to an officer on his retirement on or after the 1st January, 1946 from African District Council service or on his retirement on or after the 30th April, 1963 from local authority [Rev 2012] CAP. 189 Pensions 11 [Issue 1] service to which he has been transferred, notwithstanding that there is no provision in that service for the retirement of the officer on pension or gratuity, if the circumstances in which the officer so retires are circumstances in which, had he remained in the service of the Government, he would have been eligible for a pension, gratuity or other allowance under this Act.

(2) For the purposes of paragraph (a)(i) of subsection (1)—

“Job Group L” means the salary scale of that designation set out in Personnel Circular No 6 of 26th May, 1971 and any amendments or additions thereto;



“super scale officer” means an officer who was remunerated under any of the salary super scales set out in the Establishment Circular No 18 of 28th March, 1961 and any amendments or additions thereto. [Act No 2 of 1951, s 2, Act No 54 of 1951, s 3, Act No 45 of 1954, s 2, Act No 65 of 1954, s 2, Act No 43 of 1958, s 3, Act No 26 of 1962, s 4, Act No 10 of 1965, s 2, L N 77/1964, Sch, Act No 10 of 1979, s 3, Act No 5 of 1983, s 2, Act No 20 of 1985, s 2, Act No 4 of 1999, s 55 [Emphasis Added]

6. The police service approved the claimant’s application dated October 16, 2013 for early retirement by a letter dated November 18, 2013, the retirement to take effect on December 1, 2013
7. The claimant was cleared and issued a government liability clearance certificate and a certificate of discharge. The Kenya Police Service then proceeded to process the claimant’s claim of pensions.
8. The pensions department however declined to pay the Pensions for the claimant on the ground that the claim was in contravention of section 6 of the *Pensions Act* in that the claimant at the time of application of early retirement had served for 23 years which exceeded the maximum service of 20 years provided under Section six (6) of the Act.
9. It is the contention by the respondent that this is not a claim based on employer and employee relationship, but is one between a pensioner and the pensions authority, under the Pensions Act and, and therefore the Employment and Labour Relations Court lacks jurisdiction to entertain it in terms of section 12 of the Employment and Labour Relations Act read with article 162(2) of the *Constitution* of Kenya, 2010.
10. The respondent relies on the Supreme Court decision 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) –vs- 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, where the Supreme Court held at paragraph 146 that:-

“In our view, once a member leaves the employment of a sponsor, by becoming a pensioner, there is no longer a relationship 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).”

11. The respondent submits that the relationship between the police service and the claimant ended upon termination of service on the basis of early retirement with effect from December 1, 2013.
12. That based on the decision of the suit court, this court lacks jurisdiction to entertain this suit and the court ought to down tis tools and allow the claimant to pursue other avenues provided under the *Retirement Benefits Act*, and *Trustee Act* to resolve the dispute.
13. The respondent cites the Supreme Court further in the *Chaurembo Mumba case (supra)* as follows:

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.”

14. The respondent further submits that the claimant ought to have exhausted internal mechanisms under section 46(1) of the *Retirement Benefits Act* no 3 of 1997 which provides:-
  - (1) Any member of a scheme who is dissatisfied with a decision of the manager 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.”
15. The respondent submits that the claimant approached court without exhausting the aforesaid remedy and so the suit is premature and should be struck out.
16. That furthermore, the decision by the chief executive officer under section 46(1) is appealable under section 48 of the Act to the Retirement Benefits Appeal Tribunal which the claimant by his wrong filing avoided.
17. That the suit be struck off with costs.

#### **Submissions by claimant**

18. The claimant submits that he seeks a declaration of the court that he is entitled to payment of retirement benefits/service gratuity, after working for 20 years for the National Police Service in that section 76(2) of the *National Police Service Act*, 2011 provides:-

“Where the officer retires after serving for more than twenty years and before attaining fifty years, in terms of subsection (1), the benefits payable shall be calculated as if the officer had retired after twenty years of service. (3) An officer below the rank of sergeant may voluntarily retire from the service upon completion of twelve or twenty years of service.”
19. That the respondent rejected the claim for payment of pension on the basis that the claimant had served for more than 20 years contrary to the *Pensions Act*.
20. Section 6(1) (h) of the *Pensions Act* provides:-

“No pension, gratuity or other allowance shall be granted under this Act to any officer except on his retirement from the public service in one of the following cases—

  - (h) in the case of—
    - (i) police officers who are subordinate officers;
    - (ii) prison officers below the rank of chief warden, chief warden artisan or chief warden clerk;
    - (iii) administration police officers of or below the rank of senior sergeant; and
    - (iv) forest guards grade I, II and III.

On the completion, in the public service of a period exceeding twelve years but not exceeding twenty years where the officer gives at least one months’ notice in writing of this intention to retire (Emphasis added)



21. The claimant submits that section 6(1) (h) of the *Pensions Act* is in conflict with section 76(2) of the *National Police Service Act*, 2011. That therefore, the suit requires interpretation of the two provisions of law and it is only a court of law that has authority to interpret the statutes and resolve any perceived conflict in the two provisions that is likely to disenfranchise retirees in police service.
22. That the chief executive officer of the Retirement Benefits Authority, has no powers to interpret the law, and or clear the apparent conflict in the applicable statutes. That there is no scheme in this suit within the meaning given to it by the Supreme Court in Chaurembo Mumba case (*supra*) and therefore, the decision of the Supreme Court is distinguishable from this case in that Chaurembo case concerned the Kenya Ports Authority Scheme (emphasis mine) whereas this case concerns an individual employee who is seeking to be paid pension upon early retirement from his employer.
23. That this dispute is therefore related to employment within the meaning of section 12 of the Employment and Labour Relations Act.
24. That in terms of *Shiva Carriers Limited vs Imperioa Bank Limited and Another* [2018] eKLR,
 

“For a provision of a statute to be construed to oust the jurisdiction of the High Court, the law is that the intention to oust must be clear and meriting no elaborate arguments.”
25. In the case of *Standard Limited and 2 Others vs Christopher Ndarathi Murungaru* [2016] eKLR, the Court of Appeal stated:-
 

“an ouster clause in clear, firm and unequivocal language, will be given effect subject to satisfying a number of considerations.”
26. The Court of Appeal was guided by the Supreme Court in that matter in the case of *Judges and Magistrates Vetting Board vs the Centre for Human Rights and Democracy* S C Petition No. 13A, 14 and 15 of 2013 in which the Court stated, ouster clauses must be interpreted and construed strictly because they had the effect of curtailing the jurisdiction of the court and render the relevant matter non-justiciable before the court.
27. The claimant submits that the preliminary objection is misguided, it lacks merit and it be dismissed.

### **Determination**

28. The present suit is between an individual employee, who has just retired from service and is seeking to be paid pension by the employer. The claimant followed the relevant law, in the police service and applied to be retired early, under section 76(2) of the *National Police Service Act*, 2011 which provides that if an officer retires after service for more than twenty years and before attaining fifty years, the benefits payable shall be calculated as if the officer had retired after twenty years of service.
29. This provision was clearly enacted in recognition of section 26 of Pension Act, cap 189 which provided for payment of pension to public officers under early retirement scheme if they had served for more than 12 years but not exceeding twenty years. The *Pensions Act*, cap 189 is an older statute than the *National Police Service Act* cap 84 of 2011.
30. The stalemate between the National Police Service and the Retirement Benefits Authority on the interpretation of the two provisions is a matter of interpretation of the law, which does not fall within the purview of the chief executive officer of the Retirement Benefits Authority nor that of the police service.



31. An intending retiree who has not yet graduated to the level of a pensioner due to a dispute such as this one has only recourse to the Court of law with the jurisdiction to deal with employment and related matters. Therefore, this case is clearly distinguishable from the *Chaurembo Mumba* case aforesaid.
32. Furthermore, there is no pension scheme sued in this dispute by a member. The respondent herein is the Hon Attorney General, representing the National Police Service, the employer of the claimant.
33. Accordingly, this court has jurisdiction to resolve this dispute which revolves solely on a matter of interpretation of the two relevant statutes and guide the authorities concerned accordingly.
34. The preliminary objection lacks merit and is dismissed with costs in the cause.

## CONCLUSIONS

**Dated and delivered at Nairobi this 19<sup>th</sup> day of May, 2022**

**Mathews N Nduma**

**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 15<sup>th</sup> March 2020, this ruling has been delivered to the parties online with their consent. 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 18 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.

**Mathews N Nduma**

**Judge**

## Appearances

**M/s Oyugi for respondent/objector**

**Mr Abubakar for claimant**

**Ekale – Court assistant**

