

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CAUSE NO. 84 OF 2020

(Formerly HCCC No. 781 of 2003)

ANTHONY KABIMBA GUSINJILU & 112 OTHERS.....CLAIMANTS

VERSUS

THE TRYPONOMIASIS RESEARCH INSTITUTE.....RESPONDENT

RULING

1. The Claimants seek through their motion dated 16th December 2009 to set aside the *ex parte* proceedings and judgment/decree dated 10th July 2009. The matter was previously handled by the High Court of Kenya under the case No. HCCC 781 of 2003. It was transferred to this Court on 6th February 2020 by consent of the parties. When endorsing the transfer Mbogholi Msagha J. (as he then was) stated that the matter was transferred to the ELRC Court for hearing and determination expeditiously. Since the transfer in February 2020, the matter appeared for mention on 19th February 2020 before Onyango J. the Principal Judge of this Court and received directions for mention on 30th March 2020. The matter was never placed before the learned Judge to deal until 23rd June 2020 and parties did not appear at the said date and the Judge directed that parties were to move the Court. They did not move the Court until 19th January 2021 when they took a date for mention on 17th February 2021 whereat the matter was placed before Onyango J. the Principal Judge of this Court for directions. The learned Principal Judge directed the parties to appear before me for directions on 23rd February 2021. At the directions the decision of the Court of Appeal was not on the file and parties were directed to avail a copy and mention scheduled for 15th March 2021 when the Court on reading the Ruling by the Court of Appeal directed parties file responses to the motion to make submissions on the said application. The Court of Appeal had directed the reinstatement of the motion of 16th December 2009 and directed the hearing of the same on priority basis by the High Court. Unfortunately, the motion of 16th December 2009 was not traced on the file prompting this Court to beseech parties to avail a copy and deferring the Ruling to today.

2. I have laboured to set this out in order to demonstrate that the delay in delivering the Ruling on the motion was not purely a fault of the Court or the parties but a mishmash of reasons stretching from the withdrawal of Counsel for the Respondent from acting for it to hearing of the case before Sitati J. in February 2009 to transfer of the case to this Court. She delivered a judgment in which the Respondent was required to pay Kshs. 41,987,120/80 which comprised the retirement benefits dues, the golden handshake the employees were entitled to as well as their costs of the suit and interest at Court rates from 20th May 2002. The Court of Appeal while directing the matter be referred to the High Court on the 25th October 2019 was well aware of the matter involving pension dues. As such, the matter could not be transferred to this Court by the High Court as the consent of the parties no matter how well intentioned it was cannot confer jurisdiction to this Court on a matter that was purely in respect to a pension claim adjudicated by the High Court. In the case of **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 the Supreme Court (P.M. Mwilu D.C.J & V-P, Ojwang, Wanjala, Njoki & Lenaola SCJJ) held

[67] This is another juridical moment when this Court is called upon to adjudicate and give guidance as the court of last resort on a matter having a central bearing in the daily lives of our senior citizens and the general work force. The subject dispute does not only bring into sharp focus the controversies surrounding the mismanagement of pension schemes but also beckons for settlement by this court of the constitutional questions as to the right adjudicatory fora and the jurisdictional limits of the superior courts in the resolution of disputes between pensioners or members, beneficiaries of a pension scheme, the Registered Trustees of the pension schemes, and the Sponsors of the schemes or employers in regard to the management of the pension schemes.

[68] Despite the abundance of arguments on other issues in this appeal, we shall for the purpose of this appeal restrict ourselves within the contours of the following issues for determination:

(a) Supreme Court's Jurisdiction over the dispute;

(b) Which is the forum with original jurisdiction in the first instance to hear and determine the dispute between Pensioners and the Trustees of a Pension Scheme;

.....

[146] 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). (underline mine)

3. The Supreme Court has pronounced itself elaborately in the decision above and I have nothing useful to add save to indicate that the matter must now be dealt with as the Court of Appeal indicted in its Ruling of 25th October 2019 – expeditious disposal of the Notice of Motion dated 16th December 2009. The file should be mentioned on 5th July 2021 before the Presiding Judge of the Commercial Division of the High Court for hearing and determination as directed by the Court of Appeal.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 29TH DAY OF JUNE 2021

Nzioki wa Makau

JUDGE