



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CAUSE NO. E662 OF 2020

CHRISOPHER WARUL.....CLAIMANT

VERSUS

OFFICE OF THE AUDITOR GENERAL.....1ST RESPONDENT

DIRECTOR OF PENSIONS.....2ND RESPONDENT

RULING

1. The 1st Respondent and the Office of the Attorney General who appeared for the Director of Pensions (the 2nd Respondent herein) each filed a Notice of Preliminary Objection dated 2nd March 2021 against the Claimants’ Claim dated 15th October 2020 on the grounds that the claim is time barred and offends the mandatory provisions of Section 90 of the Employment Act, 2007 and is also an abuse of the Court process. Further, that the Claim ought to be struck out with costs for being incompetent. The Attorney General’s further ground is 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) 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.**

2. The Preliminary Objections were canvassed through written submissions. The 2nd Respondent through the Attorney General submits that the circumstances in which a preliminary objection may be raised were explained by the Court of Appeal in **Mukisa Biscuits Manufacturing Ltd v West End Distributors Ltd [1969] EA 696** 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 argued 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”.

3. The Respondents submit that this Honourable Court has no jurisdiction to determine this claim. That the Jurisdiction to determine whether anything done under the authority of the Constitution, contravenes the Constitution is governed by Article 165(3)(d)(ii) and that the Supreme Court has stated that matters reserved for the ELC and ELRC cannot be determined by the High Court and vice versa per the case of **Republic v Karisa Chengo & 2 Others [2017] eKLR.** That in the case of **Albert Chaurembo Mumba & 7 Others (supra)**, the Supreme Court stated that:

“[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)

.....

*[148] From the foregoing, we are inclined to agree with the Court of Appeal based on our understanding of **Section 12(2) of the Employment and Labour Relations Court Act** which states:*

“An application, claim or complaint may be lodged with the Court by or against an employee, an employer, a trade union, an

employer's organization, a federation, the Registrar of Trade Unions, the Cabinet Secretary or any office established under any written law for such purpose.

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.

4. The Respondents submit that the cause of action arose on the date the Claimant herein retired from service which is on 20th July, 2015 but the Claimant filed the matter in court on 15th October 2020. That time lapsed on 19th July 2018 and that it is clear the suit is statute barred under Section 90 of the Employment Act which states that:

Notwithstanding the provisions of section 4(1) of the Limitation of Actions Act (Cap. 22), no civil action or proceedings based or arising out of this Act or a contract of service in general shall be 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.

5. The Respondents submitted that the Court of Appeal while dealing with the issue of limitation in the case of **Beatrice Kahai Adagala v Postal Corporation of Kenya [2015] eKLR** stated that their hands were tied as Section 90 of the Employment Act 2007 is in mandatory terms that a claim based on a contract of employment must be filed within 3 years. The 2nd Respondent further submits that the Claimant has not tendered any explanation/justification why he did not move to court for appropriate remedies within the stipulated time frame and has further not shown any continuing injury or damage to warrant the court to review the mandatory time. That this Honourable Court has no discretion to entertain this matter as this is not a mere technicality but a jurisdictional issue. They pray that the matter be dismissed with costs to the Respondents.

6. The 1st Respondent further cites the case of **Ephraim Gachigua Mwangi v Teachers Service Commission & Board of Management Thogoto Teachers College [2018] eKLR** where this Honourable Court held that the suit was out of time and further relied on the case of **David Ngugi Waweru v Attorney General & Another [2017] eKLR** where the Court of Appeal held that there is no room to extend time in case of limitation under Section 90 of the Employment Act. It is the 1st Respondent's submission that it has not in any way violated the Claimant's rights and his claim is therefore baseless, misconceived and devoid of any merit.

7. The Claimant/Respondent is opposed to the preliminary objections raised and submits that the Supreme Court's decision in the case of **Albert Chaurembo Mumba & 7 Others (supra)** does not apply in the present case as the dispute currently before this Honourable Court is NOT a dispute between the trustees of a pension scheme and the members of a scheme. That the Claimant was at all material times a civil servant and not a member of a pension scheme regulated by the Retirement Benefits Authority and the dispute resolution mechanisms set out in the Retirement Benefits Authority Act are thus not applicable to him. The Claimant submitted that Sections 46 and 47 of the Retirement Benefits Authority Act are clear that it is only a dispute between any member of a scheme and the manager, administrator, custodian or trustees of the scheme which can be determined under the dispute resolution mechanism provided by the said Act. Further, that it is a misguided interpretation of the Supreme Court decision to suggest that all post-employment related issues touching on pensioners cannot be dealt with by this Honourable Court. To this end, they urge this Court to be guided by the case of **Abdullahi Ali Mohammed v Kenya Ports Authority & Another [2016] eKLR** where the Court held:

"...termination of the employment contract does not signal the end of the jurisdiction of the Employment and Labour Relations Court, in disputes relating to or incidental to the terminated contract of employment. The employment contract creates between the Employer and the Employee short term obligations, such as payment of salaries, wages, social security contributions, housing, and paid annual leave. These are obligations arising under current employment. But the employment contract also creates post-employment obligations. It confers benefits such as pensions, life insurance, housing mortgage, medical care etc..... The mutuality of obligations does not always end with the termination of employment. Obligations can be created through the terminated contract, or through other contracts entered into, after termination of employment. These post-employment obligations would not be enforceable, if the Court perceived, as urged by the Respondents, its personal jurisdiction to end with the termination of employment. Disputes between ex-Employers and ex-Employees which arise out of, or relate to the terminated contract are within the jurisdiction of this Court." (emphasis theirs)

8. He further submits that this Honourable Court has jurisdiction to entertain the suit as it relates to breach of the Claimant's employment contract by the 1st Respondent. That this is so because despite approval by the SRC of a salary increment on his salary, the Respondent has failed, neglected and/or refused to effect the same and which has resulted in a severe underpayment of his pension dues. That his salary having been varied through the communication by the SRC, his retirement dues and monthly pension ought to reflect the salary increment. In support of this submission the Claimant relies on 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.

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...."(emphasis theirs)

9. The Claimant submitted that his only grievance with the 2nd Respondent is that it has failed to process his payment using his increased salary despite the said increment being brought to its attention and that this Court in the case of **Republic v Attorney General & Another**

Ex-Parte Sister Nabwire Hendrika [2016] eKLR acknowledged the role of the Office of the Auditor General to be that of a bank paying upon presentation of a cheque in that it pays pension to officers cleared by the department under which they were employed. The Claimant/Respondent submitted that he has been engaged in protracted correspondence with the Respondents since January 2017 pleading for the re-computation of his dues. That during the said period, he came across a letter dated 23rd April 2018 from the 2nd Respondent to the 1st Respondent relating to a similar case in which the former had advised the latter to revise its former employees' pension dues in line with the new salaries' structures approved by the SRC. The Claimant submitted that the 2nd Respondent particularly opined that: "*It is the view of this office that any salary revision approved and implemented on a given date, all serving employees become bonafide beneficiaries. The case in point appears to be clear since the claimant was in service on 1st July 2015, a date which had there been no budget constraints for salary revision implemented, his/her name would still be in payroll, since she/he left service later*".

10. The Claimant submitted that he had to file the present suit after the 1st Respondent vacated the advice given to it by the 2nd Respondent and despite efforts to resolve the matter out of Court. He submits that he continues to suffer a continuing injury which subsists to date since his monthly pensions continue to be underpaid. That therefore his cause of action is alive and his suit is not statutory time barred and that the same was reiterated in the case of **Humphrey Mackori Nyagoe v Kenya Airports Authority & Another [2019] eKLR**. The Claimant urges the Court to consider that he has been denied his rightful dues upon retirement despite having served the 1st Respondent for 35 years and to dismiss the Preliminary Objections. He further pleads with the Court to allow the suit to swiftly proceed on its merits bearing in mind the Claimant's is advanced in age.

11. In matters of jurisdiction, the Court is guided by the law. The Respondents argue that the claim is time barred and offends the mandatory provisions of Section 90 of the Employment Act, 2007. They also claim it is an abuse of the Court process and that further, that the claim ought to be struck out with costs for being incompetent. The Attorney General's further ground is 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 the case of **Albert Chaurembo Mumba & 7 Others (supra)**. In his defence, the Claimant herein, asserts that the Court has jurisdiction to hear the claim and that the case before the Supreme Court is distinguishable as it related to a claim for pension unlike his claim. The Claimant initiated the suit in 2020 and seeks to recover pension benefits. He retired on 20th July 2015. His claim is clearly one in respect of pension. Even if we accept that his claim relates to anything other than pension, the claim was statutorily barred as claims in respect of any employment or labour matter is bound by Section 90 of the Employment and Labour Relations Court Act.

12. The fact that his case is about pension dues and the binding decision of the Supreme Court clearly demonstrate that this a matter is not for this Court. Having found the preliminary objections have grounding and given that in addition, the claim was filed in excess of 3 years and therefore was also stale as at the Claimant had retired 5 years prior to the institution of the suit, I find and hold that the suit herein is devoid of merit and is accordingly struck out. Each party to bear their own costs.

It is so ordered.

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

Nzioki wa Makau

JUDGE