



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT MOMBASA

ELRC PETITION NO. E009 OF 2021

IN THE MATTER OF: ARTICLE 22, 23, 159 & 165 OF THE CONSTITUTION OF KENYA 2010.

AND

IN THE MATTER OF: INTERPLAY BETWEEN KENYA PORTS

AUTHORITY AND KENYA PORT AUTHORITY PENSION SCHEME

AND

IN THE MATTER OF: APPOINTMENT OF CAROLYNE WANJIKU KODO AS PENSION

ADMINISTRATOR OF KENYA PORTS AUTHORITY PENSION SCHEME ON

SECONDMENT BY KENYA PORTS AUTHORITY

AND

IN THE MATTER OF: INTEGRITY OF A PENSION ADMINISTRATOR WHILE

STILL AN EMPLOYEE OF THE SPONSOR OF A PENSION SCHEME

AND

IN THE MATTER OF: VIOLATION OF ARTICLE 57 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF: INFREINGMENT OF TREASURY CIRCULAR NO. 18/2020 DATED 24TH NOVEMBER 2010

BY KENYA PORT AUTHORITY AND KENYA PORTS AUTHORITY PENSION SCHEME IN THEIR

JOINT APPROVAL TO APPOINT CAROLYNE WANJIKU KODO AS THE PENSION

ADMINISTRATOR OF KENYA PORTS AUTHORITY PENSION SCHEME WHILE

STILL SERVING AS AN EMPLOYEE OF KENYA PORTS AUTHORITY.

AND

IN THE MATTER OF: ARTICLES 10, 47, 57, 67 & 165 OF THE CONSTITUTION OF KENYA 2010.

BETWEEN

PHILIP NGETICH.....1ST PETITIONER

HASSAN GUYO.....2ND PETITIONER
MOHAMMED AKIBAR OMAR.....3RD PETITIONER
JIMMY ANDIBA MUTERE.....4TH PETITIONER
ABDULAZIZ ALI SHEKUE.....5TH PETITIONER
MOHAMED YUSUF ABDILE.....6TH PETITIONER
MOHAMED BOHERO.....7TH PETITIONER

-VERSUS-

CAROLYNE WANJIKU KODO.....1ST RESPONDENT
KENYA PORTS AUTHORITY.....2ND RESPONDENT
KENYA PORTS AUTHORITY PENSION SCHEME.....3RD RESPONDENT

RULING

1. On 6th September 2021, the petitioners herein filed a Petition against the 1st, 2nd and 3rd Respondents and pleaded, *inter alia*:-,

a) that they (the Petitioners) are retired employees of Kenya Ports Authority (the 2nd Respondent) and members of Kenya Ports Authority Pension Scheme (the 3rd Respondent) while the 1st Respondent is currently serving as the Pension Administrator of the 3rd Respondent Pension Scheme and also as an employee of the 2nd Respondent, being its Head of Pension.

b) that the 3rd Respondent is a Pension Scheme to which eligible employees of the 2nd Respondent make their own individual contributions while the 2nd Respondent contributes to the Scheme as a Sponsor of the Scheme.

c) that Kenya Ports Authority Pension Scheme (*hereinafter referred to as the Pension Scheme*) is managed by a Board of Trustees made up of representatives of Kenya Ports Authority (*hereinafter interchangeably referred to as the Sponsor*) and representatives of retired members, who are stakeholders of the Pension Scheme.

d) that the principle objective of the Pension Scheme is to provide the members with benefits upon retirement from Kenya Ports Authority in accordance with rules governing the Pension Scheme.

e) that on 24th November 2010, the Government, on the advice of Retirement Benefits Authority, issued Treasury Circular No. 18/2010 to the effect that all Pension Schemes should be completely delinked from their Sponsors; and that employees of Pension Schemes should be paid from funds held by the Pension Schemes, and should be answerable to the Schemes' Boards of Trustees and not the Sponsor in order to avoid conflict of interest.

f) that the 1st Respondent remains an employee of the Sponsor where she holds the position of Head of Pension Grade HE2, C/No. 563125, despite having been appointed to the post of the Pension Scheme Administrator vide a letter dated 7th December 2020. That the 1st Respondent accepted a five (5) year performance based contract under a consolidated letter of offer dated 25th February 2021.

g) that the 1st Respondent, while accepting the five year contract as Pension Administrator, never resigned from employment with the Sponsor, but instead dishonestly requested the Sponsor to second her to the Pension Scheme, effectively remaining an employee of two different public offices under two different contracts and receiving two salaries.

h) that the Pension Scheme's contract with the 1st Respondent is an illegality.

i) that the Respondents have contravened Articles 10, 27, 47 and 57 of the Constitution of Kenya 2010.

j) that Pension Scheme funds is a sensitive issue in this country and the Court can take judicial notice of some Pension Schemes in the past that were terribly mismanaged with Pensioners suffering huge losses.

k) that there is a looming danger of the same fate befalling the Pension Scheme and should that happen, the petitioners will suffer huge losses and will be left with no means to support themselves on retirement.

2. The Petitioners seek the following reliefs:-

- a) a declaration that the 2nd Respondent, Kenya Ports Authority, has acted in an unlawful manner by interfering with the affairs of the Kenya Ports Authority Pension Scheme without the involvement of the Scheme.**
- b) a declaration that the 2nd Respondent, Kenya Ports Authority, has no authority to second employees to the 3rd Respondent unless it is on the 3rd Respondent's request.**
- c) an order be issued to nullify the appointment of the 1st Respondent, Carolyn Wanjiku Kodo, as the Kenya Ports Authority Pension Scheme Administrator.**
- d) a permanent injunction restraining the 1st Respondent from assuming the position of Kenya Ports Authority Pension Scheme Administrator, or any other full time employment with the 3rd Respondent while she remains an employee of the 2nd Respondent.**
- e) an order be issued directing Kenya Ports Authority Pension Scheme to re-advertise the post of Pension Administrator within a specified time.**
- f) costs of the petition.**
- g) such orders and directions as the Court may deem fit to meet the ends of justice.**

3. The petition was filed contemporaneously with an urgent Notice of Motion dated 3rd September 2021 vide which conservatory orders were sought pending hearing and determination of the petition. The application was placed before the Vacation Duty Judge at Nairobi on 7th September 2021. The said application was certified as urgent and directed to be served for inter partes hearing in this Court.

4. On 15th September 2021, the 1st Respondent filed a detailed affidavit in response to the petition wherein she, *inter alia*, admitted being the current Pension Scheme Administrator of KPA Pension Scheme which comprises KPA Pension Scheme (*also known as Defined Benefit Scheme*) and KPA Retirement Benefits Scheme 2012 or Defined Contribution (DC) Scheme, having been hired as such by the joint Board of Trustees on 7th December 2020 through a competitive interview process, and having been seconded to the Pension Scheme by the Sponsor (the 2nd Respondent). That in the period 2017 to December 6th 2020, the 1st Respondent was an employee of Kenya Ports Authority (the Sponsor) designated as Head of the Pension Department; and no complaints have been raised on her integrity to date. The 1st Respondent (the Administrator) further deponed that her salary is paid by the Scheme, and that she does not receive two salaries as stated in the petition.

5. The 1st Respondent further deponed:

- a) that the 2nd Respondent (the Sponsor) is the founder of both Schemes (comprising the 3rd Respondent) and that the RBA Act provides for the Sponsor to have most members nominated to the Board of Trustees as the Sponsor bears the liability. That the Pension Schemes Board of Trustees has a maximum of nine (9) members, three (3) of whom are elected by members while the remaining six (6) are nominated by the Sponsor (the 2nd Respondent).**
- b) that Treasury Circular No. 18 of 2010 Clause 10 advocates for Schemes to meet their own administration costs independent of the Sponsor, that the joint Board of Trustees of the 3rd Respondent pays the team (employees) hired by it, and that the employees report to the Board.**
- c) that secondment of employees is provided for under the HR Manual and the PSC guidelines, and that once seconded, one becomes an employee of the receiving company and is paid by it; in this case the 3rd Respondent's joint Board of Trustees.**
- d) that the Administrator (1st Respondent) became an employee of the 3rd Respondent on 7th December 2020 as stated in her appointment letter by the Joint Board of Trustees and the secondment letter from KPA.**

6. The 1st Respondent also filed (on 15/9/2021), an affidavit in response to the said Notice of Motion and a Notice of Preliminary Objection dated 14th September 2021 against both the application and the entire suit, on the following grounds:-

- a) that this Court lacks jurisdiction to entertain the entire suit and the application dated 3/9/2021 by virtue of the provisions of Article 159 (2) (c) of the Constitution, Section 46 of the Retirement Benefits Act, Clauses 33 and 34 of Kenya Ports Authority Retirement Benefits Scheme Trust Deed and Rules since:-**
 - (i) the dispute has not been subjected to negotiations and arbitration.**
 - (ii) the dispute has not been referred to the Chief Executive Officer of the Retirement Benefits Authority for review**
 - (iii) that the suit has been filed contrary to the provisions of the law, Deeds and Rules of the Trust.**

7. On its part, the 2nd Respondent (the Sponsor) filed a Notice of Preliminary Objection on 15th September 2021 and objected to this Court's

jurisdiction on the following grounds:-

(a) the issue raised in the petition is with regard to the Management of the Kenya Ports Authority Pension Scheme, the 3rd Respondent, which is the function of the Retirement Benefits Authority established under Section 3 as read together with Section 5 of the Retirement Benefits Authority Act, Chapter 97 of the Laws of Kenya, and therefore this Court lacks jurisdiction to entertain this claim.

(b) pursuant to Sections 46,47, 48 and 49 of the Retirement Benefits Authority Act, the power to hear and determine disputes regarding the management of Retirement Benefits Schemes is first vested in the Chief Executive of the Retirement Benefits Authority and or the Retirement Benefits Authority and an appeal from their decision to the Appeal Tribunal established under Section 47 of the Act and not this Honourable Court. This Court therefore lacks jurisdiction.

(c) The dispute herein is an ordinary dispute that ought to be resolved through a specialized mechanism under the Retirement Benefits Authority Act, which dispute has been clothed as a constitutional petition when the same does not raise any violation or threatened violation of the Constitution of Kenya and thereby the Court lacks jurisdiction to hear this case.

8. When the matter came up before this Court on 16th September 2021 for inter partes hearing of the Petitioner's Notice of Motion dated 3rd September 2021 as directed by the Vacation Duty Judge on 7th September 2021, the Court noted that the 1st and 2nd Respondents had challenged its jurisdiction to hear and determine both the application and the petition/suit herein. Parties were therefore directed to file written submissions on the said two Preliminary Objections, and to appear before the Court on 30th September 2021 for highlighting of those submissions.

9. The 2nd Respondent filed its written submissions on 21st September 2021, while the 1st Respondent filed on 29th September 2021. The 3rd Respondent did not file a Preliminary Objection but nevertheless filed written submissions on 29th September 2021 supporting the Preliminary Objections filed by the 1st and the 2nd Respondents. The petitioners' written submissions were received in this Court's Registry on 30th September 2021 after being filed in the High Court's Registry at Mombasa on 29th September 2021. Highlighting of the written submissions was done by counsel for all the parties on 30th September 2021 as earlier directed.

10. The nature and scope of any dispute presented to a Court of Law is discernable from the pleadings presented to the Court by the party seeking the Court's intervention and reliefs sought, regardless of the law cited and/or invoked in those pleadings, and from responses and/or Counter-Pleadings subsequently filed.

11. From the averments made in the Petitioner's petition dated 3rd September 2021 and filed in Court on 6th September 2021 and reliefs sought therein and which I have substantially reproduced in paragraphs 1, 2 and 4 of this Ruling, **the dispute before the Court purely relates to the management of Kenya Ports Authority Pension Scheme (the 3rd Respondent), appointment of the 1st Respondent as the Scheme's Administrator by the Pension Scheme's Board of Trustees and her secondment to the Scheme by the 2nd Respondent (the Sponsor).** This scenario brings the dispute within the purview of Sections 46, 47 and 48 of the Retirement Benefits Act. Section 46(1) of the Retirement Benefits Act provides as follows:-

“any member of a Scheme who is dissatisfied with the 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 Schemes rules or the Act under which the Schemes is established”.

12. The Supreme Court had the following to say in Petition No.3 of 2016 between Albert Chaurembo Mumba & 7 others (sued on their own behalf and on behalf of predecessors and successors in title in their capacity as the Registered Trustees of Kenya Ports Authority Pension Scheme) and Maurice Munyao & 148 Others (suing on their own behalf and on behalf of the plaintiffs and other members/beneficiaries of the Kenya Ports Authority Pension Scheme):-

“[88] A reading and interpretation of the provisions of Section 46(1) poses no difficulty and leaves no doubt that the Section requires that any member, beneficiary or dependents of the Scheme who is aggrieved or dissatisfied by any decision made by a manager, administrator or trustees of the Scheme while exercising their powers under the provisions of the relevant Scheme Rules or the Act under which the Scheme is established, may if he or she wishes make a written request to the CEO to review such decisions with a view to ensuring that such decisions are in accordance with the provisions of the relevant Scheme Rules or the Act under which the Scheme is established and above all lawful.

[89] It is clear that the powers of adjudication given to the CEO under the said provision is in respect of the application of the rules of retirement benefits Scheme and the prevailing written law under which the Scheme is established, in this case the Deed of Trust establishing the Kenya Ports Authority Pensions Scheme.”

13. Section 47 of the Retirement Benefits Act establishes the Retirement Benefits Appeal Tribunal and Section 48 of the Act sets out the appeal Tribunal's jurisdiction as follows:-

“(i) any person aggrieved by a decision of the Authority or 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.

(2) where any dispute arises between any person and the authority as to the exercise of the powers conferred upon the Authority

by this Act, either party may appeal to the Tribunal in such a manner as may be prescribed”.

14. The Supreme Court further stated as follows in the **Albert Chaurembo Mumba** case (supra):-

“[115] in our considered view, the purpose of the RBA Act as a whole would be best served by reading the words as imperative terms that require, in the absence of any contrary laws, a strict interpretation of its provisions and that the administrative resolution mechanisms and the appellate process by the Retirement Benefits Appeal Tribunal is exhausted in the first instance before recourse can be taken to the Superior Courts. This position was well set out in the case of Tom Kusienya (supra), in which the High Court expressly recognized the dispute resolution mechanism under the RBA Act...

[116] the foregoing verdict also finds support in the adage principle in administrative law of “Exhaustion of Administrative Remedies” and from the jurisprudence emanating from this Court and the lower Courts, which has been restated with notoriety to the effect that where there exists an alternative method of dispute resolution established by legislation, the Courts must exercise restraint in exercising their jurisdiction conferred by the constitution and must give deference to the dispute resolution bodies established by statutes with the mandate to deal with such specific disputes in the first instance...”

15. The Respondents have urged this Court to find that it lacks jurisdiction to entertain the petition herein as the dispute involves management of a Retirement Benefits Scheme, but which, they argued, has been clothed as a constitutional matter in a bid to circumvent Section 46(1) of the RBA Act. I agree with the Respondents.

16. In the case of **Owners of Motor Vessel Lilian ‘S’ –vs- Caltex Oil (Kenya) Ltd, Civil Appeal No. 50 of 1989** - later popularly known as the **Lilian “S”** case, Nyarangi JA (as he then was) had the following to say:-

“...a question of jurisdiction ought to be raised at the earliest opportunity and the Court ceased of the matter is then obligated 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. 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”.

17. The dispute presented in the petition herein ought not to have been filed in this Court. The petitioners ought to have presented their grievances to the Chief Executive Officer of the Retirement Benefits Authority or the Retirement Benefits Authority under Section 46(1) of the RBA Act. This Court lacks original jurisdiction to handle the dispute; **and cannot make one more step thereon.**

18. Although the petition is presented to this Court as a Constitutional Petition, the Petitioners have not, in their pleadings, demonstrated that there has been a violation or a threatened violation of the Constitution. Jurisdiction cannot be conferred on a Court through the art and craft of drafting of pleadings. As I preceded to point out in paragraph 10 of this Ruling, the nature and scope of any dispute presented to a Court of law is discernable from the pleadings filed and reliefs sought therein.

19. Consequently, and having considered respective submissions filed by counsel for the parties herein, I uphold the Preliminary Objections raised by the 1st and 2nd Respondents and order that both the petition herein and the Notice of Motion dated 3rd September 2021 be, and are hereby struck off. Each party will bear their own costs.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 18TH DAY OF NOVEMBER 2021.

AGNES M.K. NZEI

JUDGE

ORDER

In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this ruling has been delivered via Microsoft Teams

Online Platform. A signed copy will be availed to each party upon payment of Court fees.

AGNES M.K. NZEI

JUDGE

Appearance:

Mr. Gikandi for Petitioners

Miss Osido for the 1st Respondent

Miss Baraza for or the 2nd Respondent

