



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. 44 OF 2018

IN THE MATTER OF ARTICLE 22(1) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF CONTRAVENTION OF RIGHTS AND FUNDAMENTAL

FREEDOMS UNDER ARTICLES 2(4), (5) AND 43, 27(1) & (2),

52, 22 AND 159 OF THE CONSTITUTION OF KENYA, 2010

ANN WANGUI NGUGI & 524 ORS.....PETITIONERS

VERSUS

KENYA COMMERCIAL BANK STAFF PENSION FUND.....1st RESPONDENT

KENYA COMMERCIAL BANK

STAFF RETIREMENT (DC) SCHEME 2006.....2nd RESPONDENT

KENYA COMMERCIAL BANK.....3rd RESPONDENT

RULING

1. The Petitioners filed a Petition against Kenya Commercial Bank Staff Pension Fund, Kenya Commercial Bank Staff Retirement (DC) Scheme 2006 and Kenya Commercial Bank on 28 May 2018 alleging the violation of Articles 2(1), 19, 20(3), 22(1), 23(1), 25(c), 27(1) & (2), 35(1)(b), 43(1)(e), 57(b) & (c) and 47(1) of the Constitution. The alleged violations related to computation and payment of retirement benefits.

2. When the Petition was served upon the Respondents, they filed a *Notice of Preliminary Objection* on 15 August 2019 asserting

1. **THAT** the Petition is bad in law, a cynical abuse of the court process and ought to be dismissed forthwith for reasons that:
2. **THAT** the Petition does not lie as of right or otherwise as the case before the Employment & Labour Relations Court does not and did not involve the interpretation or application of the Constitution as alleged or at all, and is as such defective.
3. **THAT** the Petition is a disguised appeal against the decision of the Retirements Benefits Tribunal dated 19th September 2014, yet the law does not provide for an appeal from the decision of the Retirement Benefits Tribunal and such right can neither be implied nor inferred to confer jurisdiction to the Employment & Labour Relations Court Act or the High Court to entertain an appeal.
4. **THAT** the jurisdiction to hear any question respecting the interpretation of the Constitution including the determination of the question whether any law is inconsistent with or in contravention of the Constitution as the question whether anything is said to be done under the authority of the Constitution or any law is inconsistent with or in contravention of the Constitution must be specifically conferred by the Constitution.
5. **THAT** the issues raised in the Petition are *res judicata* having been conclusively determined in the Retirement Benefits Tribunal

Judgment of 19th September 2014 as well as the judgment of the Court of Appeal in Civil Appeal No. 20 of 2017, Staff Pension Fund and Kenya Commercial Bank Staff Retirement (DC) Scheme 2006 & Ar v Ann Wangui Ngugi & 524 Ors.

6. **THAT** this Honourable Court lacks the jurisdiction to hear and determine this matter as no appeal, automatic or otherwise, lies from a decision of the Retirement Benefits Tribunal and no such provision is made available under the Retirement Benefits Act and/or any other legislation.

3. On 5 December 2019, the Deputy Registrar scheduled the preliminary objection for hearing on 28 January 2020.
4. Ahead of the hearing of the objection, the Petitioners filed their submissions on 18 December 2019 while the Respondents filed their submissions on 28 January 2020.
5. The Court took arguments on 28 January 2020.
6. The Court has keenly considered the submissions and the authorities cited and relied on by the parties.
7. The gravamen of the cause of action/violations set out by the Petitioners relate to alleged unlawful amendments of the to the pension scheme(s) in place, reliance on unilateral actuarial factors in computing pensions contrary to the Trust Deed(s) and Rules, and discrimination in computation and payment of pensions among others.
8. The foundational question the Court must consider at the outset is whether it has jurisdiction over the dispute advanced in the Petition (between trustees and beneficiaries), despite it being given a constitutional veneer.

Jurisdiction

9. The Supreme Court addressed at length the question of jurisdiction over disputes between trustees and pensioners in *Albert Chaurembo Mumba & 7 Ors v Maurice Munyai & 148 Ors* (2019) eKLR.
10. The original jurisdiction over such disputes, the Supreme Court held, lay with the Chief Executive Officer of the Retirements Benefits Authority by virtue of section 46(1) of the Retirement Benefits Authority Act.
11. In exercising the original jurisdiction, the Court noted, the Chief Executive Officer was exercising a quasi-judicial function, and was also bound by the Constitution and its values and principles.
12. Under section 48 of the Retirements Benefits Act, a party dissatisfied with the determination of the Chief Executive Office has recourse through an appeal to the Retirement Benefits Authority Tribunal.
13. In the same authority, the Supreme Court unambiguously concluded at paragraphs 146 and 148 that the Employment and Labour Relations Court had no jurisdiction to adjudicate over disputes between trustees of (pension schemes) and members of the schemes (pensioners).
14. The Supreme Court also held at paragraph 155 that the High Court also lacked jurisdiction over such disputes.
15. In light of the authoritative and binding settlement of the law as emerges from the foregoing decision from the Supreme Court, this Court has no option but to uphold the *Notice of Preliminary Objection* without even discussing the other points raised.
16. The Petition filed in Court on 28 May 2018 is struck out with costs to the Respondents.
17. The Ruling could not be delivered as earlier scheduled due to the current COVID19 pandemic.

Dated, signed and delivered through email in Nairobi on this 24th day of April 2020.

Radido Stephen

Judge

Appearances

For Petitioners	Ms. Maina instructed by Koceyo & Co. Advocates
For Respondents	Ms. Onyango instructed by Kaplan & Stratton Advocates
Court Assistant	Judy Maina