



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE 559 OF 2019

(Before Hon. Justice Hellen S. Wasilwa on 30th July, 2020)

SARAH MANG'OLICLAIMANT

VERSUS

KENYA MEDICAL RESEARCH INSTITUTE.....1ST RESPONDENT

KENYA MEDICAL RESEARCH INSTITUTE STAFF PENSION & LIFE

ASSURANCE SCHEME.....2NDRESPONDENT

RULING

1. The Respondents/Applicants, Kenya Medical Research Institute and Kenya Medical Research Institute Staff Retirement Benefit Scheme filed a Notice of Motion application dated 2nd March 2020 against the Claimant/Respondent Sarah Mang'oli.

2. They seek to be heard for orders that the Claimant's suit be struck out or alternatively, her claim for pension be struck out for want of jurisdiction and lastly, for costs of the application to be awarded to the Applicants. The Application is made on the grounds that:-

a. The Claimant is a former employee of the 1st Respondent, Kenya Medical Research Institute, and she retired from the 1st Respondent's employment in the year 2018 as admitted in paragraph (4) of the Statement of Claim.

b. The Claimant is no longer an employee of the 1st Respondent but she continues to occupy the 1st Respondent's premises rent free from the date of her retirement to date. As a consequence thereof any claim relating to the said house and/or any right as a tenant of the 1st Respondent should have been lodged before the Civil Division of the High Court.

c. The Claimant's primary claim relates to a pension and/or is a pension dispute on her pension contribution under the 2nd Respondent's Staff Pension & Life Scheme.

d. The Claimant's dispute emanates and substantively concerns payment of pension dues which disputes are regulated by the Retirement Benefits Act, No. 3 of 1997 which provides for a dispute resolution mechanism for such disputes.

e. Section 46 and 48 of the Retirement Benefits Act provides for the mechanism for resolving such disputes and/or the Claimant's claim as pleaded by the Claimant in the Statement of Claim.

f. The Retirement Benefits Act does not confirm jurisdiction to this Honourable Court as was held by the Court of Appeal in Civil Appeal No. 20 of 2017, Staff Pension Fund & Kenya Commercial Bank Staff Retirement (DC) Scheme 2006 & Another -vs- Ann Wangui Ngugi & 524 Others.

g. The Honourable Court has no jurisdiction to hear this matter.

h. It is in the interest of justice that this Honourable Court protects its sanctity and grants the Orders as sought.

3. The Applicants also filed a Supporting Affidavit sworn by the Principal Human Resource Officer of the 1st Respondent, Gachuhi Mungai who avers that the Claimant has circumvented the laid down procedure provided by law in determining disputes concerning pension disputes

by moving this Court. The Claimant was given notice to vacate the 1st Respondent as she was no longer an employee of the 1st Respondent and that the claim relating to the house is a landlord/tenant dispute which should have been filed in the High Court.

4. The Claimant/Respondent filed a Replying Affidavit dated 16th March 2020 confirming that she has since retired from the employment of the 1st Respondent. She avers that the 1st Respondent who was required to remit monthly, her Pension contributions to the defined Benefits Scheme managed by the 2nd Respondent, failed to remit the said contributions resulting to an outstanding and unpaid pension amount of Kshs. 2,833,993.04/= as at 30th June 2018. That the provisions of the law and case law cited by the Applicants are not applicable to this suit for reasons that:-

a. The instant dispute relates to pensions deducted from the Claimant's salary and never remitted to the 2nd Respondent as shown in the annexed statement from the 1st Respondent marked SM 1.

b. Sections 46 and 47 of the Retirements Benefits 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. From the Claimant's pleading before Court, it is clear the Claimant has no dispute whatsoever with the 2nd Respondent and the 2nd Respondent has not rendered any decision against the Claimant which decision can trigger the dispute resolution mechanism under the Act.

c. The Respondents have not disputed the Claimant's averment that the 1st Respondent never transferred to the 2nd Respondent pension deducted from her salary.

d. In any case, this Honourable Court has jurisdiction to determine pension disputes as has been held by Superior Courts of law. In the case of Albert Chaurembo Mumba & 7 Others v Maurice M. Munyao & 148 Others [2016] eKLR, the Court of Appeal at Malindi held that this Court has jurisdiction to determine pensions disputes. This Court of Appeal decision is binding on this Court, as was rightly held by this Court in the case of Abdullahi AH Mohammed v Kenya Ports Authority & another [2016] eKLR where this Court held thus: "This Court is constitutionally bound by the decisions of the Court of Appeal. The holding on jurisdiction of this Court, in pension disputes, made by the Court of Appeal at Malindi must therefore apply in resolving the preliminary objection raised herein."

5. The Claimant/Respondent continues to aver that she continued to stay in the 1st Respondent's staff quarters after retirement as she was awaiting settlement of her pension dues to facilitate her moving out of the said quarters and finding alternative housing. That practice of the 1st Respondent and its housing policy allow employees to stay in staff houses pending payment of the former employees' final dues so as to enable the former employees officially relocate from staff quarters.

6. She avers that the 1st Respondent has been unlawfully accumulating rent arrears which it has threatened to deduct from her said unremitted pension deductions and that the 1st Respondent has further threatened to evict her from the said staff quarters. That it will be inequitable and an affront to justice to allow the 1st Respondent to evict her without first paying her pension salary deductions and contends that the application herein is an abuse of the Court process and should be dismissed with costs.

Respondents/Applicants' Submissions

7. The Respondents/Applicants submit that the nature of the Claimant's dispute is substantively a pension claim wherein she seeks for orders to be paid the amount set out in the Statement of Claim, which is connected to a housing dispute wherein she seeks Court orders to restrain the 1st Respondent from evicting her. That **Section 12 of the Employment and Labour Relations Court Act** provides for the jurisdiction of this Court to hear and determine disputes arising out of an employer and employee relationship, trade unions dispute and enforcement of collective bargaining agreements. That the dispute herein has no relation to the Claimant's employment as she is no longer an employee of the 1st Respondent, which fact she has not rebutted and that the housing and pension disputes cannot therefore be determined by this Honourable Court.

8. They cite the case of **Samuel Kamau Macharia & Anor -vs- K.C.B. & 2 Others [2012] eKLR** cited in **Albert Chaurembo Mumba & 7 others -vs- Maurice Munyao & 148 others, Petition 3 of 2016 [2019] eKLR** where the Supreme Court stated as follows:-

"A Court's jurisdiction flows from the Constitution or legislation or both. Thus a Court of Law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred by law".

9. In the Applicants' view, once a member leaves employment of a Sponsor by becoming a pensioner, the employer-employee relationship no longer exists between such a pensioner and the sponsor. That the relationship that then comes into existence is that of a Trustee and Beneficiary, which is governed by the Retirement Benefits Act, the Trustee Act and the general common law on trusts. That notably, there is nowhere in the Employment and Labour Relations Court Act that jurisdiction is conferred on the Employment and Labour Relations Court to resolve issues between trustees of a pension scheme and its members.

10. The Respondents/Applicants also submit that in a recent decision by the ELRC in the case of **Jimmy R. Kavilu & 16 others -vs- Stanbic Bank Kenya Limited & 7 others (2019) eKLR**, the Court held thus:-

"In view of the decisions referred to above and the recent Court of Appeal decision in the case in Staff Pension Fund and Kenya Commercial Bank Staff Retirement Scheme (2006) & Another -V- Ann Wangui Ngugi and 524 Others (2018) this

Court has no jurisdiction to determine matters concerning pensions schemes and trustees thereof.

The only instance where the Court would be seized of the matter would be in a judicial review application contesting the decision of the Retirement Benefits Tribunals. I therefore must decline jurisdiction in this case.”

11. That the Court in Abdalla Osman & 628 others - vs- Standard Chartered Bank(K) Limited & 11 others ELRC Cause No. 59 of 2018 [2018] eKLR held that:-

“Considering the pleadings filed by the Claimants, the ultimate remedy they are seeking is payment of arrears of their lump sum pension plus interest from the pension schemes and not from the employer. They are not enforcing a right under their respective contracts of service. The Court therefore finds that dispute is essentially a pension dispute between pensioners (Claimants) and their respective pension schemes. Consequently, the Court being aware that there is an alternative avenue for resolving the dispute provided by statute, it is only fair and just that it upholds the doctrine of exhaustion. Under the said doctrine, Courts are supposed to exercise restraint and let the alternative process to be concluded before invoking their own jurisdiction.”

12. That the Supreme Court in the Albert Chaurembo case above noted the different decisions emanating from the Courts and stated as follows:-

“What is emerging from the above observations is a situation where disputing parties have options to choose the forum to approach in the quest for justice which in our view is an injustice in itself and a mortification of our judiciary and the jurisdictional competence set by the Constitution in our judicial hierarchy. It portends an imitable case of judicial forum shopping and an abuse of the Court process. The blowback to this is the uncertainty in law created by the discordant and inharmonious manner in which similar disputes related to pensioners and Trustees of pension schemes have been adjudicated before our Courts, tribunals and statutory bodies with quasi-judicial authority...

... It is plain to us, that the architecture, design and engineering of the impugned provision in the Act was aimed at ensuring that disputes as in this case are in the first instance to be adjudicated by the CEO or the Authority with an appeal of such decision lying to the Retirement Benefits Appeals Tribunal. Section 49 of the Retirement Benefits Act provides for powers of Appeals Tribunal being all the powers of a subordinate Court of the first class to summon witnesses, to take evidence upon oath or affirmation and to call for the production of books and other documents. The foregoing provisions go well ahead to show that the Act provides for the mechanisms and procedure to be followed should a dispute/grievance arise between members of a pension scheme and trustees of the scheme escalate on appeal.”

13. It is submitted by the Respondents/Applicants that Sections 46 - 49 of the Retirement Benefits Act provide for a statutory remedy which the Claimant ought to have first exhausted before filing this claim in Court and they urge this Court to hold and find the same. They respectfully reiterate that this Honourable Court has no jurisdiction to hear and determine this matter and urge the Court to down its tools and consequently strike out the suit with costs.

Claimant/Respondent's Submissions

14. The Claimant/Respondent submits that the jurisdiction of this Court has its conceptual framework within Article 162(2) read together with Article 41 of the Constitution of Kenya, 2010 as was stated in the case of Richard Maina Mwangi v John Kaguchia- Chairman Mukurwe-Ini Constituency Development Fund Committee and Another [2015] eKLR. That the prayers she seeks emanate from the employment relationship she had with the 1st Respondent and that the purported eviction is contrary to the policies and practice of the 1st Respondent, which renders the housing dispute an employment dispute which this Honourable Court has jurisdiction to adjudicate upon. She relies on the case of Abdullahi AH Mohammed v Kenya Ports Authority & another (supra) where the Court held:-

“The submission that the Claimant is no longer an Employee of the 1st Respondent, and therefore not eligible to present a dispute between an Employee and an Employer under Section 12, is incorrect. As discussed above, the Court takes cognizance of disputes between Employers and Employees, and disputes incidental or relating to employment and labour relations matters. The personal jurisdiction is not restricted to the Employers, Employees or their respective Combinations, but extends to the other Parties implicated in the employment and labour relations disputes. Secondly 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....”

15. She submits that this Court has previously dismissed similar objections and cites the case of Betty U Chamba v Kenya Ports Authority & another [2019] eKLR where this Court held:-

"7. The Respondents argue that the suit herein does not fail within the purview of Section 12(1) of the Employment and Labour Relations Court Act. The Respondents rely on the ground that the Claimant's employment having terminated upon her retirement on 27th July 2018, the relationship between her and the 1st Respondent is that of former employee/employer.

8. With tremendous respect, I think this is a misapprehension of the jurisdiction of this Court as far as employment matters are concerned. If one were to push the Respondents' argument to its logical conclusion it would mean that the jurisdiction of the Court is restricted to situations where the employment relationship subsists. The Court struggled to find a basis for such

a proposition since majority of employment disputes emerge after termination of employment by whatever means.”

16. The Claimant/Respondent submits that the application and objection are an abuse of the Court’s process and thus fit for dismissal with costs.

17. I have considered the averments of the Parties herein. The issue of this Court’s jurisdiction in pension matters has already been settled by the Court of Appeal in **Civil Appeal 20/2017 Staff Pension Fund & KCB Staff Retirement (DC) Scheme 2006 and Another vs Anne Ngugi & 524 Others (2018) eKLR** (supra) above in which the Court of Appeal held that the Employment and Labour Relations Court (ELRC) has no jurisdiction to handle pension matters.

18. Issues which fall outside the ambit of the Employment and Labour Relations Court (ELRC) however are set out under Section 46 to 49 of the Retirement “Benefits Act.

19. Section 46 of the Retirement Benefits Act states as follows:-

1. Any member of a scheme who is dissatisfied with a 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 scheme rules or the Act under which the scheme is established.

2. A copy of every request under this section shall be served on the manager, administrator, custodian or trustees of the scheme.

20. The matter under Section 46 of the Retirement Benefits Act relate to a dispute between a member and a manager administrator, custodian or trustee of the Scheme. Such matters are handled by the Retirement Benefits Appeals Tribunal.

21. In relation to this Claim, 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.

22. 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.

23. In the circumstances, I find the Preliminary Objection in relation to this Court’s jurisdiction has no merit and I dismiss it accordingly. I direct that the claim therefore proceeds before this Court.

24. Costs in the cause.

Dated and delivered in Chambers via zoom this 30th day of July, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Omwenga for Claimant/Respondent – Present

Rotich holding brief Munge for Applicant/Respondent