

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

PETITION E007 OF 2020

CYRUS WANYERI KANYI & 101 OTHERS.....APPLICANTS

VERSUS

KENYA COMMERCIAL BANK & ANOTHER.....RESPONDENTS

RULING

1. The Respondents/Applicants assert in their notice of motion application that the issues raised in this Petition are substantially the same issues raised by the 1st to 69th Petitioners before the Retirement Benefits Appeals Tribunal (RBAT) in Civil Appeal No. 3 of 2010 which was heard and fully determined by the Tribunal and a judgment delivered by the Tribunal on 19th September 2014. The Respondents/Applicants asserts that the Petition herein should be struck out on the grounds that it does not disclose any cause of action and that in the alternative it be struck out for being an abuse of the Court process and/or is scandalous, frivolous and vexatious. The grounds are expressed on the face of the motion and in brief are that the 1st to 69th Petitioners purported to file an ‘appeal’ against the decision to the ELRC being Industrial Cause Appeal No. 10 of 2014 and that the Respondents’ preliminary objection to the appeal was initially dismissed by the ELRC on 12th February 2016 but on appeal to the Court of Appeal vide Civil Appeal No. 20 of 2017 the Court of Appeal on 16th March 2018 declared that no right exists in law for an appeal of the Tribunal to the ELRC.

2. The Petitioners are naturally opposed to the motion and cited their Petition and the supporting affidavit filed therein as their opposition to the notice of motion by the Respondents. The supporting affidavit to the Petition is sworn by Mr. Cyrus Wanyeri Kanyi and he depones *inter alia* that the Petitioners’ relationship with the Respondents is governed by the Retirement Benefits Act, the trust deed and various documents existing at the respective times that they exited their employment. The Petitioners assert that they were entitled to retirement benefits as per the said trust deed and various documents governing the scheme including the relevant laws. The affiant goes further to depone that the retirees were subsequently paid their dues as determined, assessed and calculated by the Respondents. He deponed that the Petitioners were neither consulted nor involved in calculation of their final retirement dues and that consequently they lodged a complaint with the CEO of the Retirement Benefits Authority and subsequent appeals to the Retirement Benefits Tribunal as required under the Retirement Benefits Authority Act. He deponed that the appeals were dismissed by the Tribunal on 19th September 2014 and subsequently lodged an appeal being Appeal No. 10 of 2014 before the Employment & Labour Relations Court and that the matter is currently before the Court of Appeal. The affiant deponed that he verily believed that the Petitioners are entitled to all the information and documents relating to the calculation of their retirement benefits by the Respondents – to wit, the pension computations work sheet for each of the Petitioners, actuarial reports concerning the pension scheme between 1990 and 2010 and the trust deed and/or any amendments thereto covering the period between 1990 and 2010. He deponed that the refusal by the Respondents to avail the information, which is critical to enforcing their labour rights relating to their employment with the 1st Respondent, amounts to contravention of their fundamental rights to fair labour practices in terms of Article 41 and their right to access information under Article 35 of the Constitution.

3. The motion was canvassed through oral arguments and Ms. Onyango for the Respondents submitted that the Court does not have jurisdiction to hear the Petition and cited the case of **Albert Chaurembo Mumba & 7 Others v Maurice M. Munyao & 148 Others [2016] eKLR** and asserted that neither the Employment & Labour Relations Court nor the High Court have jurisdiction to hear matters regarding disputes arising from relationships between pensioners and their sponsors. She argued that the Petition is bad in law and that the Court should down its tools as it lacked jurisdiction and for this proposition cited the case of **Motor Vessel Lilian “S” v Caltex Oil (K) Limited [1989] KLR 1**. The second ground she argued was that the matter was *res judicata* as the Petitioners had preferred an appeal to the Retirement Benefits Appeals Tribunal and raised the issues which are the issues in this suit. Counsel argued that the facts and issues in dispute have been dealt with by a court of competent jurisdiction and are thus *res judicata*. She cited the case of **Thomas Owen Ondiek & Another v National Bank of Kenya & Another [2015] eKLR** and stated that the Court does not have jurisdiction to entertain this Petition. She urged the dismissal of the Petition with costs to the Respondent.

4. The Petitioners’ Counsel Mr. Gacheru submitted that the Court has jurisdiction to hear the Petition and stated that the case of Chaurembo called in aid by the Respondents was distinguishable as the issue before the Supreme Court dealt with actual calculations of retirement benefits and that the case before me is entirely different as it relates to a dispute between former employees and their employer and is thus distinguishable. He argued that the case before this Court was not before the Tribunal and the Petitioners are seeking very clear orders – information on their retirement benefits calculation and thereafter would decide whether to go to Court or not. He submitted that as per the Petition paragraph 10, the 70th to 102nd Petitioners were not parties and that for the plea of *res judicata* to succeed the parties should be the same. He submitted that the issues in dispute were not heard on merit and that *res judicata* does not apply where the decision is not on merit. He argued that in the case of Chaurembo, the Supreme Court referred the dispute back to the Tribunal to hear it and submitted that in the event this Court found it had no jurisdiction, which he submits it has, it should refer the dispute to the High Court for determination.

5. In brief rejoinder, Ms. Onyango submitted that the decision in the Chaurembo case speaks of both the High Court and the ELRC lacking jurisdiction. She submitted that the decision by the Supreme Court is binding on this Court. In regard to the argument that the issues of the Constitution were not raised at the Tribunal, she submitted that it matters not that the 70th to the 102nd Petitioners were not parties in the initial suit. She argued that this Court lacks jurisdiction however one looks at it and that it lacks jurisdiction to even make an order of

transfer. She submitted that if the Court finds it lacks jurisdiction then it can only strike out the Petition per the decision in the **Motor Vessel Lilian “S” v Caltex Oil** (*supra*). She prayed that the Petition be struck out with costs to the Respondents.

6. The matter before me is a Petition by the Petitioners who were former employees of the 1st Respondent. They have sued their former employer and the Kenya Commercial Bank Staff Pension Fund Trustees. It is a dispute relating to their Pension. The Respondents argue that the Court lacks jurisdiction and that the matter is *res judicata*. *Res Judicata* is defined by **Black’s Law Dictionary Tenth Edition** thus: ‘a thing adjudicated’ – an issue that has been definitively settled by judicial decision. An affirmative defence barring the same parties from litigating a second lawsuit on the same claim or any other claim arising from the same transaction or a series of transactions and that could have been – but was not – raised in the first suit. The Dictionary proceeds to give the three elements for *res judicata* to apply - (1) an earlier decision on the issue, (2) a final judgment on the merits, and (3) the involvement of the same parties, or parties in privity with the original parties. It is also known as former adjudication, claim preclusion and *res adjudicata*. In the plain dictionary meaning as defined in **Concise Oxford English Dictionary Twelfth Edition** *res judicata* means – a matter that has been adjudicated by a competent court and may not be pursued further by the same parties. It is also known as “judged matter”. 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

[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).

The Supreme Court in that case went ahead to remit the matter back to the CEO of the Retirement Benefits Authority to hear the matter noting the appeal from his decision lay to the Retirement Benefits Appeals Tribunal.

7. In my considered view, where jurisdiction does not lie, a Court has no power to take one more step. It must down its tools once it is of the opinion it does not have jurisdiction. Other than the issues before me being classic examples of *res judicata*, I find and hold that in view of the determination by the Supreme Court, this Court does not possess any jurisdiction and even if the matter is crafted as the Petition herein where it is asserted that the 70th to 102nd Petitioners were not party to the previous suit that is now stated to be pending before the Court of Appeal, this Court lacks jurisdiction and in that regard must down its tools. The Petition is struck out and each party to bear their own costs.

It is so ordered.

Dated and delivered at Nairobi this 15th day of December 2020

Nzioki wa Makau

JUDGE