



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 2003 OF 2015**

**Formerly HCCC No. 983 of 2004**

*(Before Hon. Lady Justice Maureen Onyango)*

JIMMY R. KAVILU.....1<sup>ST</sup> CLAIMANT

BERNADETTE KARIUKI.....2<sup>ND</sup> CLAIMANT

JOHN NJUGUNA NGANGA.....3<sup>RD</sup> CLAIMANT

JOHN A. H. OPIAYO.....4<sup>TH</sup> CLAIMANT

DOUGLAS MAKIML.....5<sup>TH</sup> CLAIMANT

JOHN GACHAMBA GACHOKA.....6<sup>TH</sup> CLAIMANT

KEZIAH NJERI MUNGAI.....7<sup>TH</sup> CLAIMANT

PRISCA NYALWAL.....8<sup>TH</sup> CLAIMANT

CECILIA KAGIKA.....9<sup>TH</sup> CLAIMANT

CECILIA KAGIKA.....10<sup>TH</sup> CLAIMANT

LEONARA ACHIENG SUNGA.....11<sup>TH</sup> CLAIMANT

JOB OTIENO BANDO, TABITHA

AKINYI ABEKA and AGNES ANNE

*ABEKA (Suing as the personal /legal representatives*

*of JANE ALICE ABEKA – Deceased).....12<sup>TH</sup> CLAIMANT*

SALOME K. KILONZO.....13<sup>TH</sup> CLAIMANT

JULIUS MAINA MWAURA.....14<sup>TH</sup> CLAIMANT

ABDUL BASHEIKH.....15<sup>TH</sup> CLAIMANT

**VERSUS**

STANBIC BANK KENYA LIMITED.....1<sup>ST</sup> RESPONDENT

PHILIP SAMUEL ODERA.....2<sup>ND</sup> RESPONDENT

MAURICE TOROITICH.....3<sup>RD</sup> RESPONDENT

WILSON ODADI.....4<sup>TH</sup> RESPONDENT

CHRISTINE SABWA.....5<sup>TH</sup> RESPONDENT

WENDY MUKURU.....6<sup>TH</sup> RESPONDENT

PETER MAKAU.....7<sup>TH</sup> RESPONDENT

(The 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> respondents

are being sued on their own behalf and as The

Trustees of Stanbic Bank Kenya Limited Staff Pension

and Life Assurance Scheme, the 8<sup>th</sup> respondent

hereinafter referred to as ‘the scheme’)

**THE TRUSTEES OF STANBIC BANK KENYA**

**LIMITED STAFF PENSION AND**

**LIFE ASSURANCE SCHEME.....8<sup>TH</sup> RESPONDENT**

#### **RULING**

The Respondents through the firm of Obura Mbeche & Company Advocates filed a Preliminary Objection on 19<sup>th</sup> October 2018. The Respondent’s Preliminary Objection is based on the following grounds:

1. That this Court lacks the jurisdiction to hear and determine the suit herein as the jurisdiction to hear and determine the retirement benefits dispute is not conferred to this Court whether under the constitution or by the Employment and Labour Relations Court Act.
2. That the Retirement Benefits Act has provided an alternative dispute resolution mechanism by section 46 and 47 of the said act.
3. That section 15 of the Employment and Labour Relations Court recognises alternative dispute resolution mechanisms.

In response to the Preliminary Objection the Claimants filed a Replying Affidavit sworn by Jimmy R. Kavilu on 1<sup>st</sup> November 2018. The Claimants aver that the Preliminary Objection is res judicata as the Respondents being the Defendants in HCCC No. 983 of 2004 filed a Preliminary Objection dated 4<sup>th</sup> September 2006 contending that the High Court had no jurisdiction to determine the matter. Further that the High Court on 23<sup>rd</sup> May 2008 dismissed the Preliminary Objection

The Claimants further aver that the matter is “*mixed grill case*” as the Claimants cannot split their claim among the various courts and that it would be functional as opposed to technical to have this Court determine the matter. The Claimants aver that the Provisions of Part VI of the Retirement Benefits Authority Act (No. 3 of 1997) do not bar the Claimants from filing the suit before this Court.

The Claimants aver that the Constitution 2010 does not empower the Court to apply the Constitution retrospectively. The Claimants further aver that the Respondents have filed numerous applications seeking to delay the course of justice.

#### **Respondents’/Applicants’ Submissions**

The Respondents submitted that the jurisdiction of this court is provided under Section 12 of the Employment and Labour Relations Court Act, which section contemplates the disputes between employers and employees and trade unions in respect of Collective Bargaining Agreements. The Respondent submitted that except the misjoinder of the 1<sup>st</sup> Claimant the rest of the dispute arise from a pension’s scheme that is between Stanbic Bank Kenya Limited and the Trustees of Stanbic Kenya Limited Staff Pension and Life Assurance Scheme. Further, that the jurisdiction of this Court does not extend to pension matters as stipulated under Section 12 of the Employment and Labour Relations Act.

The Respondent submitted that decisions by trustees of a registered pension scheme giving rise to a dispute under section 46 of the Retirement Benefits Act are to be appealed to the Chief Executive Officer of the Retirement Benefits Authority. The Respondents relied on the case of *Agricultural Livestock and Fisheries & 3 Others Ex-parte Douglas M. Barasa, Collins Wafula Makunja and Richard*

**Wamalwa** where the Court held:

*“For a matter to fall exclusively within the relevant provisions of the two statutes, the parties to the dispute must necessarily be employee, employer, trade union, employers’ organisation or federation unless the same relates to registration and enforcement of collective agreements. In the instant case, the Applicants do not in relation to the Respondents fall within the description of either of the aforesaid status.”*

The Respondents submitted that Nambuye J. in her Ruling on jurisdiction delivered on 28<sup>th</sup> May 2008, anchored her decision on section 60 of the Constitution, now repealed. The Respondents submitted that the High Court and the Employment and Labour Relations Court (ELRC) are neither the same court nor do they exercise the same jurisdiction. The Respondent relies on the Supreme Court decision in **Republic v Karisa Chengi & 2 others [2017] eKLR**.

The Respondents submitted that the issue being raised presently is different from the issue that was argued before Nambuye J. as the ELRC and the High court are distinct as provided in both statute and the Constitution.

The Respondents submitted that the lack of a Tribunal does not mean that this Court can cloak itself with jurisdiction to hear pension disputes and that this is a matter in which this Court must down its tools for lack of jurisdiction. The respondent submitted that where a procedure has been provided for by statute, it must be strictly followed and relied on the decision in **Speaker of National Assembly v James Njenga Karume [1992] eKLR**.

### **Claimants’/Respondents’ Submissions**

The Claimants submitted that the issues raised in the preliminary objection had already been determined by Nambuye J. in her Ruling. The Claimant relied on the decisions in **Omondi v National Bank of Kenya Limited and Others [2001] 1 EA 175** and **Trade Bank Limited v LZ Engineering Limited [2000] 1 EA 266**.

The Claimants submitted that the prayers sought emanate from the employment relationship between the Claimant and the 1<sup>st</sup> Defendant. The Claimant submitted that section 12 of the Employment and Labour Relations Court Act provides that the jurisdiction of this Court relates to employment and labour relation disputes relying on the case of **Suzanne Achieng Butler & 4 Others v Redhill Heights Investments Limited & another [2016]**.

The Claimants distinguished the authorities relied upon by the Respondents and in particular in **Secretary Agriculture, Livestock and Fisheries & 3 Others Ex- Parte Douglas M. Barasa, Collins Wafula Makunja and Richard Wamalwa** where the court held that it would be better to err in favour of upholding jurisdiction than to turn the Claimants away without being heard.

The claimants submitted that the Respondents are using the avenue of preliminary objections to delay and defeat the course of justice.

### **Determination**

There are several issues arising for determination. The first is whether the preliminary objection is *res judicata*. I do not think so. The preliminary objection that was determined by Nambuye J. (as she then was) was in respect of the jurisdiction of the High Court as then constituted under the repealed constitution. As correctly pointed out, the jurisdiction of High Court as then constituted was unlimited. In her ruling she stated as follows –

*“The ushering in of the amended plaint as the current plaint brings to the fore the 5<sup>th</sup> question which is a determination as to whether the plaintiffs claim is in the wrong forum. The basis for saying so is the provisions of Section 46, 47 and 58 of the Retirement Benefits Act No. 3 of 1997 as well as case law relied upon by the defence. The benefit contention is whether the Retirement Authority or this court is the proper forum for the resolution of the dispute herein. On the par to the Court there is common ground that Section 60 of the Kenya Constitution vests it with unlimited jurisdiction both in civil and criminal law. It reads Section 60(i). There shall be a high court which shall be a superior court of record and which shall have unlimited original jurisdiction in civil and criminal matters and such other jurisdiction and powers as may be conferred on it by this constitution or any other written law.”* (Emphasis added)

The issue of jurisdiction that was before the court for determination then is not the same as what is before this court now. The ruling therein concerned the jurisdiction of the High Court while the issue now is the jurisdiction of the Employment and Labour Relations Court as constituted under Article 162(2) of the constitution. The present issue has not been determined thus the preliminary objection is not *res judicata*.

The next issue for determination is whether this court has jurisdiction to hear and determine the issue here. It is the contention of the claimants that this is a mixed grill case. The claimants’ claim raises employment issues and seek a prayer concerning employment as well as pension dues for the claimants. Both emanate from the employment relationship between the claimants and 1<sup>st</sup> respondent. In the case of **Suzanne Achieng Butler & 4 Others –V- Redhill Heights Investments Limited and Another (2016)** at paragraph 18 the court faced with the same mixed grill case observed thus –

*“Happily, this is the approach taken by our courts to the question. In this regard, I can do no better than quote Abuodha J. of the Employment and Labour Relations Court, who, faced with a “mixed grill case” delivered this jurisprudence gem:*

*The objection rekindles the debate on what a Court should do in mixed grill cases. Would an employee who during the tenure of his*

employment borrowed money or took a mortgage predicated on the employment relationship upon contesting termination of his services split his claim among the various Courts? This Court in the case of **Peter Mutisya Musembi & another v. National Bank of Kenya (2014) eKLR** borrowing from the Australian cases of **Dean Patty v. Commonwealth Bank of Australia 2000 FCA 1072** and **Philip Morris Inc. v. Adam P. Brown Male Fashions Ltd (1981) 148 CLR** became of the view that the argument that this Court and indeed other Courts of concurrent jurisdiction properly seized of a matter cannot adjudicate upon consequential or factual question which on the face of it appear to be within the exclusive jurisdiction of another Court in the same judicial tier would unreasonably emasculate and whittle down the inherent power of a Court of law to do justice without undue regard to technicalities.”

Although I agree with what is stated in the above case, the situation here is different. The bulk of the claim herein concerns the factor to be used to compute the terminal benefits of the claimants. The suit is against the decision of the Trustees of the Scheme. The only claim against the employer is that of the 1<sup>st</sup> claimant in so far as he is disputing the conversion of his 6 months’ notice to terminal leave. The rest of his claim is similar to that of the other claimants.

The case of **Abdalla Osman & 628 others vs Standard Chartered Bank (K) Limited & others ELRC Cause No 59 of 2018**, this Court found that whereas the Employment and Labour Relations Court has jurisdiction to entertain disputes brought by employees against their employers or disputes relating to their rights as employees or former employees, there is however an alternative procedure provided by statute to deal with pension disputes under Sections 46 and 48 of the Retirement Benefits Act (“the RBA Act”). The Court further found that where there is in existence an alternative dispute resolution mechanism provided by the constitution or statute, the Employment and Labour Relations Court ought to withhold its jurisdiction in favour of the alternative resolution mechanism.

In the case of **Agricultural Livestock and Fisheries and 3 Others Ex-parte Douglas M. Barasa, Collins Wafula Makunja and Richard Wamalwa** the court held that:

*“..for a matter to fall exclusively within the relevant provisions of the two statutes, the parties to the dispute must necessarily be employee, employer, trade union, employers’ organisation or federation unless the same relates to registration and enforcement of collective agreements. In the instant case, the Applicants do not in relation to the Respondents fall within the description of either of the aforesaid status.”*

In the case of **Speaker of the National Assembly –V- James Njenga Karume (1992) eKLR**, the court held that –

*"Irrespective of the practical difficulties enumerated by Mr.\* Mukuria, these should not in our view be used as a justification for circumventing the statutory procedure... In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. We observe without expressing a concluded view that order 53 of the Civil Procedure Rules cannot oust clear constitutional and statutory provisions.... The application is allowed and we stay all the orders made by the High Court on 20<sup>th</sup> May 1992."*

In the present case the Retirement Benefits Act provides for the procedure for redress in disputes relating to pensions at Section 46 as follows –

#### **46. Appeals to the Chief Executive Officer**

**(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.**

The Act further provides for an appeal at Sections 47, 48 and 49. As stated by the court in the case of **Abdalla Osman & 628 Others –V- Standard Chartered Bank (K) Limited & Others**, under the doctrine of exhaustion the court ought to withhold jurisdiction in favour of alternative dispute resolution.

The case of **Staff Pension Fund & Kenya Commercial Bank Staff Retirement (DC) Scheme 2006 and another v Anne Wangui Ngugi & 524 others (2018) eKLR** is a Court of Appeal decision whose facts are strikingly similar to those in this case. The case concerned an appeal from the Employment and Labour Relations Court dismissing a preliminary objection on grounds that the Employment and Labour Relations Court lacked jurisdiction to hear and determine any dispute relating to a retirement benefits or pension scheme and any appeal for determination by the Retirement Benefits Appeals Tribunal. The case set out the procedure and process under the RBA Act as follows:

*“Section 46 of the Act provides for appeals to the Chief Executive Officer (CEO) of RBA and states that 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 CEO 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 schemes is established...By section 48 (1) of the Act, any person aggrieved by the decision of the RBA or CEO has a right of appeal to the Tribunal - The Retirement Benefits Tribunal (Tribunal). By section 48(2), any dispute between any person and RBA as to exercise of powers under the Act is also appealable by either party to the Tribunal...”*

The jurisdiction of this Court is provided under Section 12(1) of the Employment and Labour Relations Court which section states thus:

**(1) The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including—**

- (a) disputes relating to or arising out of employment between an employer and an employee;**
- (b) disputes between an employer and a trade union;**
- (c) disputes between an employers' organisation and a trade union's organisation;**
- (d) disputes between trade unions;**
- (e) disputes between employer organisations;**
- (f) disputes between an employers' organisation and a trade union;**
- (g) disputes between a trade union and a member thereof;**
- (h) disputes between an employer's organisation or a federation and a member thereof;**
- (i) disputes concerning the registration and election of trade union officials; and**
- (j) disputes relating to the registration and enforcement of collective agreements.**

Section 12(1) of the Employment and Labour Relations Court is therefore very precise on the disputes that are to be determined by this Court.

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 Ngingi and 524 Oth*

*ers (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. I do realise the plight of the claimants who retired more than 20 years ago and have been in the court corridors since 2004. It would however be pointless to hear the case now only to have the decision contested.

The case of **JIMMY R. KAVILU**, the 1<sup>st</sup> claimant which contains claims both for terminal benefits and retirement benefits under the RBA will however be split with the claim on terminal benefits remaining to be determined by this court while the claim for retirement benefits will be referred to the Retirement Benefits Authority.

Each party shall bear their costs both here and in the High Court.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 4<sup>TH</sup> DAY OF FEBRUARY 2019**

**MAUREEN ONYANGO**

**JUDGE**