



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT KISUMU**  
**APPEAL NO. 1 OF 2016**

*(Before Hon. Lady Justice Maureen Onyango)*

**TEACHERS SERVICE COMMISSION.....APPELLANT**

**VERSUS**

**PAULINE KASUMBA OSEMBE (Suing on behalf of the estate of**

**JOHN MUGONYA KASUMA).....1<sup>ST</sup> RESPONDENT**

**THE DIRECTOR OF PENSIONS.....2<sup>ND</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

*(Being an Appeal against the Judgment and Decree of Honourable MS. C. I.*

*Agutu, Resident Magistrate, Busia Law Courts, delivered on 7<sup>th</sup> July 2015*

*in Busia SPMCC No. 95 of 2011)*

**JUDGMENT**

The matter before court is an appeal against the whole judgment and orders of Ms. C I Agutu issued on 7<sup>th</sup> July 2015 in Busia SPMCC No. 95 of 2011 delivered on 7<sup>th</sup> July 2015.

**Facts**

The appellant was the 1<sup>st</sup> respondent in Busia SPMCC No. 95 of 2011 in which the plaintiff, now the 1<sup>st</sup> respondent in this appeal sought the following orders on behalf of the Estate of her deceased husband JOHN MUGONYA KASUMA –

- a) “An order that the defendant do pay retirement benefits and or pension from January 2001 to August, 2008 and that his spouse do continue to earn pension for another five years after the death of her husband.
- b) Costs of this suit.
- c) Any other alternative relief which the court may deem fit to grant.”

The 2<sup>nd</sup> and 3<sup>rd</sup> respondents herein were the 2<sup>nd</sup> and 3<sup>rd</sup> defendants respectively in the suit in the subordinate court.

In their defence, the 1<sup>st</sup> appellant objected to the jurisdiction of the trial court by dint of Sections 87 (1) and (2) of the Employment Act, Section 12(1) of the Labour Institutions Act, 2007 and the Public Authorities Limitations Act. The 1<sup>st</sup> defendant further stated that it was not responsible for payment of pensions and related retirement benefits. The appellant further denied that the deceased was entitled to pension.

After hearing the parties, the learned Magistrate entered judgment against the appellant and ordered that the appellant do pay retirement benefits and/or pensions to the deceased from January 2001 to August 2008 and that his spouse do continue to earn pension for another five

years after the death of her husband.

Aggrieved by the decision, the appellant filed the appeal herein citing the following grounds of appeal –

- 1) That the learned Magistrate acted without jurisdiction by presiding over an employment dispute which is the exclusive mandate of the Employment and Labour Relations Court under law.
- 2) That the learned Magistrate acted without jurisdiction by hearing and determining a matter which was time barred pursuant to the Limitations of Actions Act and Public Authorities Act.
- 3) That the learned Magistrate grossly misinterpreted and misapplied the provisions of the Pensions Act and arrived at an erroneous finding.
- 4) That the learned Magistrate erred in law when she failed to consider and apply the mandatory provisions of the Pensions Act specifically the proviso under section 24(2)(c) of the Pensions Act thereby arriving at an erroneous conclusion of law.
- 5) That the judgment of the court is inconsistent with the law, incurably defective for want of signature therefore contrary to the law.
- 6) That the learned Magistrate erred in law in failing to consider the appellants evidence adduced by its witnesses and presented through documents which raised substantial issues of law and fact regarding payment of pensions to non-citizens.
- 7) That the learned Magistrate erred in law in failing to hold that the statutory responsibility of payment of pensions belongs to the director of pensions and the appellant has no legal capacity whatsoever to implement the judgment.
- 8) That the judgment of the court was made in total disregard to the nature, the rules and regulations and practice attendant to;
  - a) The employment contract between the deceased and the appellant
  - b) The legal and administrative regime relating to payment of free pension under cap 189 of the laws of Kenya.

It is on these grounds that the appellant asks the court for orders that;

- a) This appeal be allowed with costs
- b) The judgment of Hon C.I Agutu, SPMCC Number 95 of 2011 dated 7<sup>th</sup> July 2015 and all consequent orders be set aside.

The appellant submits that the learned magistrate acted without jurisdiction by presiding over an employment dispute which is the exclusive mandate of the Employment and Labour Relations Court. The appellant submits that the suit was filed in a court without jurisdiction because it was an employment contract falling within the jurisdiction of the Employment and Labour Relations Court. The applicant further submits that the learned magistrate acted without jurisdiction by hearing and determining a matter which was time barred pursuant to the provisions of Limitations of Actions Act and Public Authorities Act. It is submitted that the learned magistrate grossly misinterpreted and misapplied the provisions of the Pensions Act and arrived at an erroneous finding. The applicant further submits that the learned magistrate erred in law when she failed to consider and apply the mandatory provisions of the Pensions Act specifically the proviso under section 24(2)(c) of the Pensions Act thereby arriving at an erroneous conclusion of law. The applicant maintains that the learned Magistrate erred in law in failing to consider the appellants evidence adduced by its witnesses and presented through documents which raised substantial issues of law and fact regarding the payment of pension to non-citizens. The applicant also submits that the learned Magistrate erred in law in failing to hold that the statutory responsibility of payment of pensions belongs to the Director of Pensions and that the appellant has no legal capacity whatsoever to implement the judgment.

In their written submissions dated 5<sup>th</sup> June 2017 the 2<sup>nd</sup> and 3<sup>rd</sup> respondents have extracted the issues for determination as follows;

- 1) Whether the learned magistrate acted without jurisdiction by hearing and determining a matter which was time barred pursuant to the provisions of limitations of actions act and public authorities act
- 2) Whether the learned magistrate erred in law by hearing and determining a matter that was the exclusive jurisdiction of the employment and labour relations court.
- 3) Whether the learned magistrate erred in holding that non-citizens were entitled to be paid pensions.

The 2<sup>nd</sup> and 3<sup>rd</sup> respondents submit that the deceased should have filed the suit within 3 years from 27<sup>th</sup> January 2003. They further state that the cause of action started running from or about January 2001 and hence the time of limitation ran from 2001 and 2004 since the deceased was aware that he was entitled to pension from the year 2001. The 2<sup>nd</sup> and 3<sup>rd</sup> respondent submits that the learned magistrate erred in law by hearing and determining a matter that was within the jurisdiction of the employment and labour relations court. The 2<sup>nd</sup> and 3<sup>rd</sup> respondent submit that the deceased was not entitled to be paid pension since at the time of his death he was not a Kenyan citizen. They state that the Pensions Act Section 24 provides that persons who are eligible to be paid pension are persons who are citizens and the deceased was not.

The 1<sup>st</sup> respondent is opposed to the appeal and filed grounds opposing the appeal. The 1<sup>st</sup> respondent asserts that the magistrate's court has

jurisdiction and that the suit was filed before the enactment of the Employment and Labour Relations Court Act therefore was governed by the previous laws. They argue that the appellant ought to have filed the appeal at the High Court in Busia and not the current court. The 1<sup>st</sup> respondent submits that the real dispute is the refusal of the director of pensions to pay the pension and that no employer/employee relationship exists between the two parties. They continue that it is the director who determines who gets pension so the appellant is overstepping its mandate. It is further submitted that the TSC is only tasked with presenting documents and so it is least suited to pursue the appeal seeing that the director did not protest the finding of the trial court. The 1<sup>st</sup> respondent submits that the deceased passed on in 2005 and the pension was to be paid up to and including 2011 and that the law provides that the pensioner or his spouse is entitled to monthly payments of pension to five years.

The court has considered the documentary evidence and opines that the appeal raises the following issues;

- a) Jurisdiction
- b) Whether or not the suit was time barred
- c) Applicable laws in granting and denying pension.

Article 162(2) of the constitution provides that Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to employment and labour relations and Article 165(5) gives exclusive jurisdiction in employment matters to the employment and labour relations court. Section 11 of the Labour Institutions Act establishes the Industrial Court while Section 12(1) provides that the Industrial Court shall have exclusive jurisdiction to hear, determine and grant any appropriate relief in respect of an application, claim or complaint or infringement of any of the provisions of the Act or any other legislation which extends jurisdiction to the Industrial Court, or in respect of any matter which may arise at common law between an employer and employee in the course of employment, between an employee or employer's organisation and a trade union or between a trade union, an employer's organisation, a federation and a member thereof.

The substantive issue for the court to consider is whether the magistrate court has jurisdiction to hear cases arising from employment contracts. While Section 87(1) of the Employment Act provides that a person in an employment agreement may lodge a complaint or suit in the Industrial Court and Subsection (2) provides that no court other than the Industrial Court shall determine any complaint or suit, Section 16(2) of the Employment and Labour Relations Court Act provides that the Chief Justice in consultation with the Principal Judge may by a gazette notice designate any magistrate's court to hear matters relating to labour laws.

This is a first appeal and as a first appellate court this court has the responsibility to analyse the evidence presented and arrive at its own decision. The court appreciates that the trial court had the advantage of hearing and seeing the witnesses but will reach its own independent decision based on the evidence on record.

The court gave directions on 27<sup>th</sup> February 2017 that parties proceed by way of written submissions. The parties highlighted their submissions in court. The appellant asked court to allow the appeal on only the ground that the magistrate's court did not have jurisdiction. The court has considered and weighed the submissions of all the parties and the case laws therein.

The court finds that the main issue of contention between the parties in the trial at the magistrates' court is the payment of retirement benefits. The court takes note that there was an employment relationship between the plaintiff and the 1<sup>st</sup> respondent. The 2<sup>nd</sup> respondent is the body charged with payment of the pension and other benefits of retiring employees subject to the Pension Act while the 3<sup>rd</sup> defendant is the government legal advisor. The issue of jurisdiction was raised both at the trial in the magistrate court and in this appeal. In *Owners of Motor Vessel 'Lillian S' –V- Calter Oil (Kkenya) Limited (1989) KLR 1*, the Court held that jurisdiction is everything. Without it the court has no power to make one more step.

The appellant submits that the trial court had no jurisdiction to hear and determine the matter. A court must have jurisdiction to enter a valid enforceable judgment. In the Supreme Court decision in *Samuel Kamau Macharia V KCB [2012] eKLR* the court stated that a courts' jurisdiction flows from either the constitution or legislation or both and thus a court can only exercise jurisdiction conferred by the constitution or other written law.

This suit was filed in the magistrate's court in March 2011. At the time the Employment and Labour Relations Court Act had not been enacted and the applicable law was the Labour Institutions Act which at Section 12(1) and (2) states as follows –

## 12. Jurisdiction

**1. The Industrial Court shall have exclusive jurisdiction to hear, determine and grant any appropriate relief in respect of an application, claim or complaint or infringement of any of the provisions of this Act or any other legislation which extends jurisdiction to the Industrial Court, or in respect of any matter which may arise at common law between an employer and employee in the course of employment, between an employee or employer's organisation and a trade union or between a trade union, an employer's organisation, a federation and a member thereof.**

**2. An application, claim or complaint may be lodged with the Industrial Court by or against an employee, an employer, a trade union, an employer's organisation, a federation, the Commissioner for Labour or the Minister.**

Pension is an employment benefit and therefore within the exclusive jurisdiction of this court. As at the time the suit was filed the Magistrates' court had no jurisdiction to hear employment matters. The learned Magistrate therefore acted without jurisdiction in hearing and determining the matter with the result that the whole process was a nullity.

The second issue is whether the suit was time barred. In order to answer this question the court must first establish when the course of action arose. The evidence on record discloses that at the time of retirement both the appellant and the deceased were under the presumption that the deceased was entitled to pension. His notice of compulsory retirement dated 11<sup>th</sup> September 2000 directed the deceased to forward his documents as listed in the retirement notice to the appellant to facilitate the processing of the pension. It was only after the deceased submitted the documents that the appellant, by letter dated 27<sup>th</sup> January 2003 that he was informed about his ineligibility to earn pension. The letter states –

*Ref: NO.TSC/28440/172 6<sup>th</sup> May 2004*

*Throu'*

*The Head Teacher*

*Rulanda primary School*

*P. O Box 216*

*BUSIA (K)*

*TERMINATION OF SERVICE*

*It has been noticed that according to our records, you are a Uganda Citizen and are not entitled to pension benefits according to the Pensions Act, Cap. 189. Subsequently to this fact, our letter Ref:28440/144 dated 1<sup>st</sup> September 2000 is thereby cancelled since you are deemed to have been on temporary terms and therefore your services are belatedly terminated with effect from 1<sup>st</sup> January 2001. Similarly, our letters of appointment and confirmation in appointment are hereby cancelled.*

*Consequently therefore, the Commission will pay the NSSF the employer's contribution for the period of your service i.e. from 1/1/1968 to 31/12/2000 where you will be paid accordingly as terminal dues.*

*On behalf of the Teachers Service Commission, I wish to take this opportunity to apologise for the error and the inconvenience this anomaly has caused you. We do wish you well in your future endeavours.*

*SIGNED*

*C. MULANDI (MRS)*

*FOR: SECRETARY*

*TEACHERS SERVICE COMMISSION"*

It is therefore on this date, or on 6<sup>th</sup> May 2004 when the appellant belatedly attempted to terminate the employment of the deceased, that the cause of action arose as this is the time the deceased was informed that he was not eligible for pension.

The suit herein having been filed in March 2011, was some 7 years after the accrual of the cause of action. As at 2004 the limitation period was 6 years as provided in Section 4 of the Limitation of Actions Act. The suit was thus filed out of time and is statutorily time barred.

The above two grounds are sufficient to allow the appeal.

I will however consider the third ground, which is whether the deceased and by extension his spouse, is entitled to pension. I had occasion to deal with a similar issue exhaustively in **Kisumu JR No. 4 of 2015 RV The Attorney General and Another Ex parte Sister Nabwire Hendrika**. I reproduce the relevant portion of the decision below–

*“For the court to establish whether or not the Applicant qualifies for pension under Section 24 of the Act it is important to understand the provisions of the section.*

*Section 24 is divided into sub-sections (1) and (2). Subsection (2) deals*

*with definitions. Under the definition of "teacher" there are three different definitions divided into sub- paragraphs (a), (b) and (c).*

*Under (c) there are two further sub-divisions into (i) and (ii). Sub-division (i) provides for "any person being an African "while sub-division (ii) provides for "any person not being an African.*

*Under (ii), there are further categorisations under (a) to (f) all of which provide for persons not being African. It is under this category that there is the provision that the Respondent has relied upon which states;*

*"Was appointed to an aided school as a teacher before the 1st January, 1964 and was not eligible to contribute to the Group Pension Scheme referred to in Education Circular No. 10 of 1963 dated the 9th October, 1963; or b) Was appointed to an aided school as a teacher on or after the 1<sup>st</sup> January, 1964."*

*The proviso that the Respondent relies upon only covers a teacher who is not an African "who was appointed to an aided school as a teacher on or after the 1<sup>st</sup> January, 1964"*

*The Applicant being an African, is covered under (e) (ii) and is entitled to Pension under the Pensions Act. I agree with the applicant that the Respondent misapprehended the provisions of section 24 and erroneously excluded the applicant from benefiting from pension under the Act.*

On the one who is responsible for payment of pension the court held as follows –

*“My understanding of the role of Pensions Office is that it pays pension to officers who are eligible for pension upon such officers being cleared by the department under which they were employed. Its role is like that of a bank paying upon presentation of the cheque. The role of the 2<sup>nd</sup> Respondent is to pay. If there are any issues, it should seek clarification from TSC and not refuse to accept the Pension Forms as it did in this case. It has no mandate to refuse to pay if TSC confirms that payment should be made or if there is an Order of a court directing that payment should be made by or on behalf of TSC.*

*Having ruled that Section 24 does not lock out the Applicant from receiving her pension, there is no valid reason why the Respondent should not pay her.”*

From the foregoing, had the 1<sup>st</sup> respondent's suit not been tainted by the issue of jurisdiction and limitation, she would have been entitled to the pension.

### **Conclusion**

Having found that the learned Magistrate acted without jurisdiction and that the suit was statute barred, the appeal succeeds. I accordingly allow the appeal. The judgment of Hon. I. C. Agutu in Busia PMCC Number 95 of 2011 dated 7<sup>th</sup> July 2015 and all consequential orders is accordingly set aside.

There shall be no orders for costs.

**DATED AND SIGNED AT NAIROBI ON THIS 13<sup>TH</sup> DAY OF JUNE 2019**

**MAUREEN ONYANGO**

**JUDGE**

**DATED AND DELIVERED AT KISUMU ON THIS 16<sup>TH</sup> DAY OF JULY 2019**

**MATHEWS NDERI NDUMA**

**JUDGE**