



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**JUDICIAL REVIEW NO. 36 OF 2018**

*(Formerly Judicial Review No. 141 of 2017)*

**Before Hon. Lady Justice Maureen Onyango**

**IN THE MATTER OF AN APPLICATION BY THE REGISTERED TRUSTEE OF TELEPOSTA PENSION SCHEME FOR  
LEAVE TO APPLY FOR JUDICIAL REVIEW ORDER OF *CERTIORARI* AND PROHIBITION IN RESPECT OF THE  
DECISION OF THE RETIREMENT BENEFIT APPEAL TRIBUNAL MADE IN CIVIL APPEAL NO. 7 OF 2011 ON 13<sup>TH</sup>  
FEBRUARY 2017**

**AND**

**IN THE MATTER OF ARTICLES 22, 25, 48, 50 (1) AND 258 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF ARTICLE 165(6) AND (7) OF THE CONSTITUTION OF KENYA (2010)**

**AND**

**IN THE MATTER OF ARTICLE 159, 2(d) OF THE CONSTITUTION OF KENYA, (2010)**

**AND**

**IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORM ACT CAP 26 OF LAWS OF KENYA**

**AND**

**IN THE MATTER OF THE FAIR ADMINISTRATIVE ACT NO. 4 OF 2015**

**AND**

**IN THE MATTER OF SECTION 49 AND 52 OF RETIREMENT BENEFITS ACT NO. 3 OF 1997 AND RULE 10 OF THE  
RETIREMENT BENEFITS (TRIBUNAL RULES 2000)**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**AND**

**THE RETIREMENTS BENEFITS APPEAL TRIBUNAL...1<sup>ST</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**AND**

RETIREMENT BENEFITS AUTHORITY.....1<sup>ST</sup> INTERESTED PARTY

BONIFACE MARIGA AND 948 OTHERS.....2<sup>ND</sup> INTERESTED PARTY

GIDEON MBURU NG'ANG'A AND 176 OTHERS..3<sup>RD</sup> INTERESTED PARTY

BEN OULO AND 135 OTHERS.....4<sup>TH</sup> INTERESTED PARTY

AND

THE BOARD OF TRUSTEES

TELEPOSTA PENSION SCHEME.....EXPARTE APPLICANT

### RULING

The Applicants filed a Notice of Motion Application on 26<sup>th</sup> April 2019 seeking orders that the firm of Messrs Amadi and Amadi advocates be granted leave by this Court to come on record as advocates for M. D Oloo and 108 others as listed under *prayer C of the orders sought* and that the said advocates be deemed properly on record. They further pray that LUKA NGUTTA NGOLOPA be enjoined as an interested party and that upon the aforementioned prayers being granted, the appeal herein be struck out. Further, that the Claimants/Applicants be granted leave to enforce the judgment issued by the Retirement Benefits Appeals Tribunal (1<sup>st</sup> Respondent) on 13<sup>th</sup> February 2017 as a Decree of this Court.

The Application is made on the grounds that: all the Applicants being the appellants in the main suit are relevant parties to this suit and that through their advocate on record, they will be able to table objective material in the process of adjudicating the issues in this suit. That the Applicants were contributors to a scheme run by the Ex-Parte applicant in the main suit and that further LUKA NGUTTA NGOLOPA did not give Koceyo and Company Advocates instructions to withdraw from this matter. That it would be a miscarriage of justice if all Applicants herein are not enjoined as parties in this suit as any decision rendered by this Court will affect them. That by dint of **Article 159 of the Constitution**, the Applicants collectively have the right to have any dispute adversely affecting them to be heard before a competent court and that it is trite law that this court may on its own motion add a party to a suit to necessitate the determination of the real matters in dispute.

That **Section 12(1), 12(3) and 12(5) of the Employment and Labour Relations Court Act** and **Rule 2 and 8(1) of the Employment and Labour Relations Court (Procedure) Rules** are clear that the right of appeal must be conferred by law and that **section 49 and 52 of the Retirement Benefits Act (RBA)** govern the procedure of Appeals. That this Court lacks jurisdiction to hear and determine any dispute on retirement benefits or pension scheme and any appeal arising from the determination of the retirement benefits tribunal in connection with or relevant to such scheme such as the appeal herein. That this matter has in the past been determined by the 1<sup>st</sup> Respondent on 13<sup>th</sup> February 2017 in **Tribunal Civil Appeal No. 7 of 2011** wherein all the applicants herein were at that stage participants and subject to the said proceedings. That neither the Constitution of Kenya nor statute namely the Employment and Labour Relations Court Act and the Retirement Benefits Authority have conferred any specific right of appeal to this court and as such, no right of appeal lies to this court. That this court's jurisdiction is limited to resolving disputes arising from employer-employee relationship.

The Application is supported by the Affidavit of George Odhiambo Oloo who is one of the Applicants with express authority from the other applicants to swear this affidavit. He avers that they have all unilaterally instructed the said Amadi and Amadi advocates to come on record on their behalf and to represent them in this instant suit. That before appealing to Retirement Benefits Appeals Tribunal (RBAT) as envisaged by provisions of the RBA, they first sought audience before the CEO of the Retirement Benefits Authority and that such appeal to the tribunal was thus a second appeal. That consequently, a third appeal has been preferred before this Court. That LUKA NGUTTA NGOLOPA informed him that Koceyo and Company Advocates informed the court in the course of proceedings that it no longer represented him and the said firm subsequently withdrew from representing the interests of any party in these proceedings. That they will be greatly prejudiced if the orders sought herein are not granted.

George continues to aver that most of his former colleagues have suffered great financial and psychological loss and grief by virtue of not receiving their dues from the scheme, despite most of them contributing significant amounts of money over a long period of time to the scheme. That the said tribunal had directed the Ex-Parte Applicant Scheme to compute and pay all benefits and dues to all the applicants herein including him while applying the rules of the scheme in its computation. That since the date of delivery of judgment, they have not been able to enjoy any fruits of the said judgment as numerous applications together with this appeal have been preferred. That the Respondents herein are unlikely to suffer any prejudice in the event the said orders are granted and that it is in the interest of justice to grant the orders.

Together with the application, the applicants filed a notice of preliminary objection in which they object to the jurisdiction of this court.

The 2<sup>nd</sup> Interested Party filed a Replying Affidavit sworn by one Boniface Mariga on behalf of the 2<sup>nd</sup> Interested Parties. He deposes that the Application herein is misleading as it is based on fraudulent misrepresentation and non-disclosure of material facts. That the applicants should not be enjoined as interested parties since they have no legal interests in the suit herein and that they have not met the threshold of what constitutes an Interested Party. That the Applicants have never been represented by the firm of Koceyo and Company Advocates in these proceedings and neither were they parties to **RBAT No. 7 of 2011** hence they are not beneficiaries of the Tribunal Judgment. That the Applicants are barred by law from being enjoined at this stage since **section 46 and 48 of the RBA** provide for the proper procedure of instituting a pension benefits claim which must be filed as a complaint in the Retirement Benefits Authority followed by an Appeal in the RBAT. That the Applicants have not followed this procedure but intend to be prematurely enjoined in this matter, which is prejudicial, that

the outcome of the substantive Judicial Review Application will not affect them and that they can still independently proceed at the Retirement Benefits Authority.

Boniface continues to aver that the Judicial Review Application relates to the procedural compliance of the proceedings at the RBAT wherein the applicants never participated and that this court being a Judicial Review Court can only deal with matters relating to procedure and not merits of a case as is being sought by the applicants. That the Applicants have not submitted before this court any justifiable amounts they are individually entitled to but rather have made general assertions that they should also be paid. That they have also only attached a list of their names which is not compelling enough to have them enjoined in this matter now. That further, no documentary evidence has been annexed to ascertain that the applicants are indeed members of the Ex-Parte Applicant Scheme. That they contradicted themselves stating that the matter before this court is an Appeal instead of Judicial Review. That they claim this court lacks jurisdiction to determine this matter yet they seek to be enjoined, which defeats the purpose for them being enjoined as striking out of the suit will not help their cause.

That the issue of joinder of parties was determined by a ruling made by Nyamweya J. on 7<sup>th</sup> May 2018 where similar applications were dismissed with costs. That the Applicants have thus been misadvised to be enjoined in this matter. Further, that the same parties filed an application for review of the said Ruling dated 7<sup>th</sup> May 2018, which was dismissed by this court on 31<sup>st</sup> May 2019. That they have now filed this instant application seeking to be enjoined thus clearly abusing the court process. That this application is therefore *res-judicata* as a similar application has been heard on merit and disposed of. That the absence of the Applicants will not hinder this Court from effectively adjudicating the substantive application.

The Ex-Parte Applicant filed its grounds of opposition on 16<sup>th</sup> July 2019 opposing the application herein on grounds similar to those made by the 2<sup>nd</sup> Interested Party in its replying affidavit. Its position is that **Order 9 Rule 9 of the Civil Procedure Rules** requires an advocate wishing to come on record for a party to a suit in which judgment has been issued to first seek leave of court and since no judgment has been issued in the Judicial Review proceedings herein, there is no basis for the Applicants' advocates to apply for such leave. That the Application is therefore misconceived and lacks merit and that the Applicants having failed to follow the Ruling of Aburili J. of 7<sup>th</sup> November 2017 are barred from being enjoined at this stage. That in any event, there is in force conservatory interim orders issued by the High Court in ***Blasio Ondiek vs. the Retirement Benefits Appeals Tribunal, Constitutional Petition No. 560 of 2017*** restraining the Respondents from enforcing/implementing the decision of the 1<sup>st</sup> Respondent of 13<sup>th</sup> February 2017. That whereas there is no right to appeal against the decision of the 1<sup>st</sup> Respondent, there is a right to question its decision making process by way of Judicial Review proceedings. That the objection by the Applicants to the jurisdiction of this Court therefore has no merit as there has been no appeal preferred by the Ex-Parte Applicant. That once a court determines that it has no jurisdiction, it must down its tools. That the Applicants cannot thus approbate and reprobate. It prays that the application herein be dismissed with costs.

### Oral Submissions

The Applicants' advocate, Mr. Amadi submitted that the firm wished to come on record for the 109 individuals as shown in the application and that the court can do an audit and compare with the 948 claimants' names in the original claim filed with the RBA because they have a right to representation. That the applicants are not seeking to be enjoined as they are already in the suit except for Mr. Luka Ngolova who wishes to be enjoined as he had not withdrawn from the suit as alleged.

The Ex-parte Applicant's advocate, Ms. Lubano submitted that the application herein is not clear whether it was for joinder or for leave for advocate to come on record. That the Applicants' advocate ought to have instead filed a Notice of Change. She relied on the case of ***Kazungu Ngari vs. Mistry V Naran***. That what they expected is identification numbers (personal file (PF) numbers) confirming that the applicants were members of the scheme or were parties to the original proceedings. That it is not the duty of the court or any of the Respondents to bear the burden of such proof. That the Exparte's Applicant's position is that the Applicants were not parties and cannot be enjoined in this suit as the orders for review do not affect them. That the distinction of this being a Judicial Review application and not an Appeal can be found in the case of ***Republic -V- Procurement Administrative Review Board and 3 Others Ex Parte Saracen Media Limited*** and that if this court has no jurisdiction as alleged by the Applicants, then no orders can be issued as explained in the case of ***Owners of Motor Vessel 'Lillian S' -V- Caltex Oil Kenya Limited (1989) eKLR***. That the Applicants cannot enforce an order which they did not participate in. Further, that while the proceedings herein operate as a stay, there is also a pending application for stay in the Court of Appeal. That some of the Applicants are deceased and there are no letters of administration.

For the 2<sup>nd</sup> Interested Party, Ms. Maina in opposing the application submitted that their position is that this is a joinder of parties. That Koceyo and Company Advocates who represents 949 members of the Exparte Applicant have never represented a single person listed in the application herein, who are therefore strangers. That the window for joinder of parties was closed on 23<sup>rd</sup> May 2018 and that all who sought to be enjoined thereafter were not allowed as per ruling of Nyamweya J. That if at all the applicants were members of the scheme, they ought to have perused the court record because it is open to the public.

Further, that this application must fail for contradicting itself by seeking a joinder while contesting the jurisdiction of this court, as the applicants cannot seek contradictory orders. She prays for this Court to dismiss the application, which the 2<sup>nd</sup> Interested Party avers only seeks to delay justice for the 914 members of the scheme, with costs to the 2<sup>nd</sup> Interested Party.

The Applicants' advocate in a brief response, submitted that the court can establish that George Odhiambo Oloo who swore an affidavit in the application is part of the suit before the RBA and that the suit before the Constitutional Division has not been provided to them and presumably not to this court.

### Analysis and Determination

The issues for determination are –

- (i) Whether this court has jurisdiction to hear this suit;
- (ii) Whether the applicants are parties to this suit;
- (iii) Whether or not the law firm of Amadi and Amadi Advocates should be granted leave to come on record for the applicants; and,
- (iv) Whether LUKA NGUTTA NGOLOPA should be enjoined as an Interested Party.

In any suit where jurisdiction is contested, it is imperative that the court deals with the same before proceeding any further as was held in the case of **Owners of Motor Vessel 'Lillian S' -V- Caltex Oil Kenya Limited (1989) eKLR**. This is because without jurisdiction a court would be acting in vain.

The Applicants have objected to the jurisdiction of this court in their notice of preliminary objection filed with the application. The issue of jurisdiction was the subject of the ruling By Nyamweya J. which transferred this matter from the High Court to this court. It is thus res judicata. I do not think it is necessary for me rehash the reasons given in the ruling that informed the transfer of this suit to this court.

On the issue of leave for Amadi and Amadi Advocates to come on record, I agree with arguments by counsel for the Ex Parte Applicant and 2<sup>nd</sup> Interested Party that there is no judgment in this suit and the provisions of **Order 9 Rule 9 of the Civil Procedure Rules** which require an advocate wishing to come on record for a party to a suit in which judgment has been delivered is not applicable. Counsel only needed to file a notice of appointment.

On the issue of joinder this court is guided by the decision in **Republic -V- Salaries and Remuneration Commission ex parte Parliamentary Service Commission & 4 others [2018] eKLR**, where the court held that:

*“Since judicial review orders are concerned with the decision making process rather than the merits of the decision, a party who contends that he or she is directly affected by the proceedings ought to bring himself or herself within the ambit of the judicial review jurisdiction and ought not to apply to be enjoined thereto with a view to transferring judicial review proceedings into ordinary civil litigation. In my view, for a party to be joined to the proceedings under Order 53 Rule 3(2) aforesaid the applicant ought to disclose to the court how he or she is directly affected. The court cannot be expected to act in the dark by joining such a person with a view to satisfying itself as to the effect of the orders sought on the application at a later stage of the proceedings. However, the decision whether or not to join a party is an exercise of discretion and if no substantial purpose or benefit will be gained by the joinder of a person to the proceedings and where the said joinder will militate against the expeditious disposal of the said proceedings which by their nature ought to be heard and determined speedily, the court will be reluctant to join the intended party to the proceedings. In an application of this nature, the applicant ought to adduce some material upon which the court can determine whether the applicant is directly affected by the proceedings...”*

The Applicants have pleaded that they are part of the 948 members of the Ex Parte Applicant who constitute the 2<sup>nd</sup> Interested Party. It would appear from their application that they wish to split from the 2<sup>nd</sup> Interested Party and to be represented by Amadi and Amadi Advocates, with the Exception of LUKA NGUTTA NGOLOPA who wishes to be enjoined to these proceedings. As submitted by the 2<sup>nd</sup> Interested Party, no documentary evidence has been annexed to confirm that the Applicants are members of the Ex-Parte Applicant Scheme or that they were part of the original proceedings at the RBAT. On this ground alone, the entire application would fall as these are Judicial Review proceedings questioning the validity of the decision of the RBAT.

In any event it is not for the Court to decide on the representation of parties. If it is true that the applicants are already party to this suit then their application is redundant. It would appear from the prayers sought that the application was made under the mistaken belief that this is an appeal against the decision of the RBAT, which it is not.

In the case of LUKA NGUTTA NGOLOPA, no document was annexed to show that he was part of the 948 litigants at RBAT or that he had been removed from the said list as alleged. The Applicant is thus barred from seeking joinder or rejoinder in this suit at this stage pursuant to the Ruling of Aburili J. of 7<sup>th</sup> November 2017, which closed the window for joinder of parties on 23<sup>rd</sup> January 2018. Subsequent applications for joinder were dismissed with costs by Nyamweya J. in the ruling of 7<sup>th</sup> May 2018. Any application seeking the same orders directly or indirectly is thus an abuse of the court process and *res judicata* as the issue has been finally determined by a court of competent jurisdiction. A party dissatisfied by the decisions of Aburili J. and Nyamweya J. have only the options of review or appeal from the same. As was stated in **Republic v SRC exparte case** this court cannot exercise the discretion to ‘re-enjoin’ the said Luka Ngutta Ngolopa as an Interested Party.

I further agree with the submissions of Ms. Lubano and Ms. Maina that the Applicants have contradicted themselves by referring to the matter before this court as an Appeal instead of Judicial Review and seeking to strike out these proceedings while at the same time seeking leave to enforce the RBAT judgment. It is my opinion that if a party contests jurisdiction, it cannot seek any other orders from the same court as was held in the case of **Owners of the Motor Vessel Lillian S v Caltex Oil (Kenya) Limited [1989] eKLR**, once a court determines that it has no jurisdiction, it cannot give any other orders.

For the foregoing reasons, I find no merit in the application with the consequence that the same is dismissed.

There shall no orders for costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 7<sup>TH</sup> DAY OF NOVEMBER 2019**

**MAUREEN ONYANGO**

**JUDGE**