

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CAUSE NO. 9 OF 2017

(Formerly High Court Civil Suit No. 137 of 2010)

PETER MUTHUCI NJIRU.....CLAIMANT

VERSUS

HONORABLE ATTORNEY GENERAL.....RESPONDENT

JUDGMENT

1. The Claimant herein filed suit in the High Court at Embu on 26th August 2010 on the eve of the Promulgation of the new Constitution of Kenya 2010. The case was transferred to the Industrial Court (presently known as the Employment & Labour Relations Court) by Ong'udi J. on 2nd January 2014. The Claimant averred in his suit that he was at all times material to this suit an employee of the Government working under the Ministry of Water. He averred that he retired in July 2008 upon reaching the mandatory retirement age and was entitled to all his benefits. It was pleaded that he had pursued his terminal benefits in vain as the ministry under which he had worked purports that the Claimant had lived in a Government house and never cleared his house rent. He averred that he paid his rent through his salary deductions. He sought a declaration that the said deduction and non payment of his pension was illegal and an order for release of his benefits. He also sought general damages, costs of the suit and interest and any other relief the court may be pleased to grant. After a series of appearances before Ongaya J. my predecessor, leave was granted to the Claimant to amend his suit. He added the Director of Pensions as the 2nd Respondent, Principal Secretary Ministry of Water and Irrigation as the 3rd Respondent.

2. The Respondent filed a defence on 10th July 2016 and in it asserted that the pension is only paid upon the requisite clearance and compliance by the retiree. The Respondent averred that the Claimant's suit contravened the express provisions of the Government Proceedings Act particularly Section 12 and 13. It was averred that the Claimant is not entitled to the remedies sought in his claim. It was averred that this court lacked the jurisdiction to adjudicate the Claimant's claim and gave notice of the intention to raise and argue a preliminary objection to the claim before the Employment Court. The Respondent thus sought the dismissal of the claim with costs.

3. After a series of appearances before Ongaya J. my predecessor, leave was granted to the Claimant to amend his suit. He added the Director of Pensions as the 2nd Respondent, Principal Secretary Ministry of Water and Irrigation as the 3rd Respondent and pleaded that the 2nd and 3rd Respondents purported to recover a sum of Kshs. 599,431/- from the Claimant allegedly for rent no paid. The Claimant thus claimed this sum which was wrongfully recovered from the Claimant. He amended his prayers to include the declaration that the deduction from the Claimant's dues and or the non-payment of the Claimant's pension is illegal and/or unlawful and a further order directing the Respondents to release all benefits and/or dues to the Claimant including the Claimant's monthly pension. He also sought the special damages of Kshs. 599,431/-, general damages as well as costs of the suit and interest from 2008.

4. The Respondent filed a memorandum of response in respect of the 3 Respondents on 11th December 2017 and averred that the suit as taken out and filed offended the mandatory provisions of Cap. 39 and Cap 40 of the Laws of Kenya. The Respondent gave notice that it would raise a preliminary objection at the hearing seeking to have the suit dismissed with costs. The Respondents admitted the jurisdiction of the court.

5. On 19th March 2018 when the case came up for hearing, the parties opted to have the suit determined on the basis of documentation as provided for under Rule 21 of the Employment & Labour Relations Court (Procedure) Rules 2016 though the Claimant was in court. His advocate was absent and he had sent a colleague to hold his brief as he was bereaved.

6. The Claimant filed submission on 25th April 2018 while the Respondent did not. In his submissions the Claimant submitted that he was entitled to the prayers sought as the Respondents' defence was a mere denial. He submitted that he had produced documentary evidence in support of his claim which was not challenged by the Respondents. He urged the court to find in his favour. He submitted that his occupation of the house at Embu was at the rate of Kshs. 7,000/- which was revised to Kshs. 12,000/- in 2012 after an evaluation. He thus submitted that he was surcharged a sum of Kshs. 753,940/-. The Claimant thus sought the award of Kshs. 753,940/- as the sum was erroneously indicated as Kshs. 599,431/- in his amended claim.

7. The matter before me has caused some vexing. The suit was before the High Court which, in my considered view, was imbued with the requisite jurisdiction to determine the matter of rental payment or overpayment and recoveries of rent by the Government as against the Claimant who was its employee. Those issues are not *strictu sensu* a matter under the Constitution of Kenya 2010 Article 162(2) court despite them involving an employer on one hand (Government) and the employee on the other (present Claimant former Plaintiff). The Claimant retired in 2008 during the life of the former Constitution and his claim on pension would be best placed at the proper forum which is either before the Retirement Benefits Tribunal or the court under the Retirement Benefits Act which is expressly indicated to be the High Court. He had crystalized rights under the former Constitution which the High Court was and is still well placed to deal with. On my part I

would have declined jurisdiction when the matter was referred to this Court by the High Court as this dispute is not on an employment matter *per se* nor does any of the reliefs sought fall within my jurisdiction under the Employment Act or the Labour Relations Act, the Labour Institutions Act or the Employment & Labour Relations Court Act to name but a few of the statutes that confer jurisdiction to the Employment & Labour Relations Court. In light of the foregoing I would remit the matter to the High Court at Embu to pen a judgment as parties cannot confer on me jurisdiction I do not possess. Without it I cannot take one more step. The Deputy Registrar of this court to remit the file to Embu High Court for the determination of the matters in issue. Costs will abide the determination of the High Court.

It is so ordered.

Dated and delivered at Nyeri this 29th day of May 2018

Nzioki wa Makau

JUDGE