



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
OF KENYA AT NAIROBI
CAUSE NO.367 OF 2018

ARTHER NJOROGE NGANGA..... CLAIMANT

- VERSUS -

LAPTRUST (UMBRELLA) RETIREMENT

FUND BOARD OF TRUSTEE.....1ST RESPONDENT

NAIROBI WATER AND SEWARAGE

COMPANY LIMITED.....2ND RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 22nd June, 2018)

RULING

The claimant filed the memorandum of claim on 19.03.2018 through M’Njau & Mageto Advocates. The claimant prayed for judgment against the respondent for:

- a) A declaration that the underpayment of the claimant retirement benefits including withheld salary underpayments, salary arrears, in breach of the increments as contained in the collective bargaining agreements for 2005, 2012 and 2015 respectively was unconstitutional, illegal, unlawful, malicious, and null and void.
- b) The respondents be ordered to pay the claimant’s the unlawfully withheld retirement as tabulated in Paragraph 15 above all amounting to Kshs. 8, 804, 085.36.
- c) General damages.
- d) Costs of the cause.
- e) Interest of the cause at court rates.
- f) Any other relief which the Court deems fit, just and expedient to grant.

The 1st respondent filed a notice of motion on 23.04.2018 through Kiplagat & Company. The motion was stated to be under section 2, Rule 15(1) (d), order 51 rule 51 of the Civil Procedure Rules and section 3A of the Civil Procedure Act. The respondent prayed that the claimant’s suit filed by the memorandum of claim dated 19th March 2018 be struck off for lack of jurisdiction. The application was supported with the attached affidavit of Christopher Mitei. The ground in support of the application is that the law governing the dispute is provided for under the Retirement Benefits Act. In particular it is urged that the dispute should go to the chief executive officer of the Retirement Benefits Authority under section 46 of the Act which provides, “**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 a 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.**” It is further urged that an appeal from the decision by the Chief Executive Officer of the Authority under section 46 is appealable to the Retirement Benefits Appeals Tribunal. Thus the court lacks jurisdiction to hear and determine the present suit.

The claimant opposed the application by filing grounds of opposition on 14.05.2018. The grounds are as follows:

- a) The application is incurably defective, bad in law, lacking in merit, incompetent, frivolous, vexatious, and otherwise an abuse of court process.
- b) The Court has exclusive jurisdiction, as created under Article 162(2)(a) of the Constitution, over employment and labour matters including pension.
- c) The application offends Article 50 and 41 of the Constitution.
- d) The respondent was served on 29.03.2018 but had not filed a response.
- e) Rules of the Court have no provisions for striking out of pleadings and section 2 rule 15 of the Civil Procedure Rules have no relevance to the Court and the Court has not been properly moved.
- f) The issue to be determined in the suit not limited to calculation of Retirement Benefits for which Retirement Benefits Authority has complimentary jurisdiction on as there are other issues of failure to pay salary increments contained in the CBAs for the years 2005, 2012 and 2015.
- g) Instead of striking out the suit, the same would be transferable to the inferior tribunal.
- h) The application offends Article 159 of the Constitution as it raises technical matters and not merits of the case.
- i) The suit raises serious triable issues to be heard and determined by the Court on merits.

Submissions on the application were filed for the parties. The Court has considered the matter in dispute and returns that the application will fail upon the following findings:

- 1) As per the prayers and the pleadings in the memorandum of claim, the claimant has presented a composite suit including issues of pension and unpaid salaries. Such intertwined matters are clearly outside the jurisdiction of the Chief Executive Officer under section 46 of the Act.
- 2) The Court finds that in appropriate cases and as submitted for the claimant the jurisdiction of the Chief Executive Officer under section 46 of the Act is complimentary to other available jurisdictions such as the Court's jurisdiction. Thus the use of the word "**may**" in the section suggests that the jurisdiction under the section was not to be mandatory, it is elective or optional, and may not be invoked in appropriate cases – such as the composite present suit.
- 3) The applicant has not exhibited the decision of the manager, administrator, custodian or trustees of the scheme as envisaged or contemplated under section 46 of the Act that the applicant says is in dispute in this matter and which would be amenable to the jurisdiction of the Chief Executive Officer as envisaged under the section.
- 4) As submitted for the claimant the applicant has not invoked the rules of the Court in instituting the application and that serves as an impetus towards dismissing the application.

In conclusion, the application filed for the 1st respondent on 23.04.2018 is hereby dismissed with costs and parties are invited to take directions on further steps in the suit.

Signed, dated and delivered in court at **Nairobi** this **Friday 22nd June, 2018**.

BYRAM ONGAYA

JUDGE