



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2289 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

RIFT VALLEY RAILWAYS WORKERS UNION (K).....CLAIMANT

VERSUS

KENYA RAILWAYS STAFF RETIREMENT BENEFITS SCHEME...1ST RESPONDENT

KENYA RAILWAYS CORPORATION.....2ND RESPONDENT

CORPORATE TRUSTEES.....3RD RESPONDENT

AND

RETIREMENT BENEFITS AUTHORITY.....1ST INTERESTED PARTY

ETHICS AND ANTI-CORRUPTION COMMISSION.....2ND INTERESTED PARTY

RETIREMENT BENEFITS AUTHORITY.....3RD INTERESTED PARTY

ALEXANDER FORBES.....4TH INTERESTED PARTY

RULING

On 23rd December 2015, the Claimant filed a claim seeking the appointment of a caretaker committee to manage pensioners' assets currently under the management of the 1st Respondent as well as a forensic audit to be conducted by the 1st and 2nd Interested Parties.

Alongside the claim, the Claimant filed a Notice of Motion under certificate of urgency seeking similar and the plus empanelling of a three Judge Bench to hear the claim.

Subsequently, the 1st Respondent gave notice of a preliminary objection on 21st January 2016 stating the following grounds –

1. That this Court lacks jurisdiction to hear and determine the claim
2. That the issues raised in the claim and the application are *res sub judice* and *res judicata*;
3. That the claim is frivolous, vexatious and an abuse of the court process.

The 2nd Respondent also gave notice of preliminary objection dated 12th February and filed on 15th February 2015 to the effect that this Court lacks original jurisdiction to hear and determine the issues raised by the Claimant.

On its part, the 3rd Interested Party filed grounds of objection on 29th January 2016 stating that it does not manage any retirement benefits scheme and is therefore unnecessarily joined in these proceedings. In any event, there is no specific prayer sought against it. Further, that the 3rd Interested Party has no Recognition Agreement with the Claimant obliging it to disclose information on its employees who are not

members of the Claimant.

After hearing the parties and relying on the Court of Appeal decision in **OWNERS OF MV LILLIAN S -V- CALTEX OIL KENYA LIMITED (1989) KLR** and the Supreme Court decision in **SAMUEL KAMAU MACHARIA & ANOTHER -V- KENYA COMMERCIAL BANK & 2 OTHERS [2013] eKLR** the court held that under Section 46(1) of the Retirement Benefits Act a member of a scheme aggrieved by a decision affecting the running of a scheme may apply for review to the Chief Executive Officer of the Authority. That Section 47 further establishes the Retirement Benefits Appeals Tribunal to which appeals from the decisions of the Retirement Benefits Authority and the Chief Executive Officer lie.

The court further held that although the Employment and Labour Relations Court Act confers jurisdiction on this court to hear and determine employment and labour relations matters, the Act must be read together with other statutes dealing with matters falling within the general jurisdiction of the Court.

Relying on the decision of Mumbi J. in **TOM KUSIENYA & OTHERS -V- KENYA RAILWAYS RETIREMENT BENEFITS SCHEME (Petition No. 353 of 2012)** and **DANIEL OWOUR OBOP & 2 OTHERS -V- RETIREMENT BENEFITS AUTHORITY (Petition No. 159 of 2012)** the court held that parties cannot circumvent the dispute resolution mechanisms established under the Retirement Benefits Act and come to this court directly.

On the basis of these findings, the court reached the conclusion that the dispute resolution mechanism established under the Retirement Benefits Authority had not been exhausted and that the dispute was prematurely before this court. The Judge referred the matter for resolution under the Retirement Benefits Act.

The claimant heeded the court's ruling and referred the matter to the Retirement Benefits Tribunal under RBATCA No. 5 of 2016.

By letter dated 5th July 2017, the Retirement Benefits Appeals Tribunal sent the following letter to the claimant herein –

“RETIREMENT BENEFITS APPEALS TRIBUNAL

Your Ref: TBA

Our Ref: RBATCA No. 5 of 2016

Wednesday, July 5, 2017

The Secretary General

Rift Valley Railway Worker Union (K)

Mfangano Street; Mitihani House; 1st Floor; Estate Wing

P.O. 351 - 00600

NAIROBI

Dear Sir,

RBATCA NO. 5 OF 2016

RIFT VALLEY RAILWAYS WORKERS UNION (K) - VERSUS - RETIREMENT BENEFITS AUTHORITY & OTHERS

We acknowledge receipt of your letter dated 7th June 2017 and the reminder of 3rd instant.

The term of appointment for a majority of Members of the Tribunal ended on 14th February 2017. We are waiting for the Cabinet Secretary for Finance to notify us of the new appointments.

As soon as the Members of the Tribunal are appointed, we shall list your case for hearing in the usual manner.

Yours Faithfully

SIGNED

Boniface M. Mwangangi (ACILEx.)

TRIBUNAL CLERK

In other words the letter informed the claimant that there is no Retirement Benefits Tribunal properly constituted at the moment to hear the dispute.

Based on the forgoing the claimant has come back to this court by application dated 19th October 2017 seeking the following orders –

1. That the matter be certified urgent and be heard urgently and ex-parte in the first instance.
2. That service of same be dispensed with and an earlier inter-party hearing be set.
3. That the matter be placed before Lady Justice Linnet Ndolo for directions touching on her Orders issued on the 19th day of August 2016.
4. That in the meantime, a Permanent Order be issued restraining the respondents herein and or their agents from selling any of the properties listed in the **Legal Notice Number 169 of 2006** until the issues brought out in the matter are heard and determined.
5. That Costs be included in the claim.

He is asking this court to assume jurisdiction over the dispute as there is no properly constituted Retirement Benefits Tribunal to hear his dispute. He pleads that the court has not addressed itself to the contents of the letter by the Clerk of the Tribunal regarding the Tribunal's dysfunctionality on jurisdiction which has led to orders being issued in a vacuum and which orders seeks to render the substance in Cause 2289 of 2015 and Appeal 5 of 2016 and Cause 783 of 2017 all Nugatory.

That the Employment and Labour Relations Court has both Unlimited Original and Appellate Jurisdiction in matters of Employment and Labour Relations as brought out both in the Constitution at Article 162(2) and in Section 12 of the enabling Act, so that it is an overt departure from the position of the law, the position adopted by the court in the said ruling that allowed the respondent's preliminary objection, that the Court does not have Jurisdiction in the said matter.

That it is not true as alleged that the union lacks the requisite locus standi to prosecute the matter. The union is indeed a registered institution with the requisite standi to prosecute. The union is as well one of the signatories to the Schemes Trust Deed and Rules, so that to allege that same does not have the *locus standi* to prosecute is being less than candid.

That Associations are registered under the Societies Act Cap 108 Laws of Kenya while the Trade Unions are registered under the Labour Relations Act 2007, so that the respective mandates as have been bestowed to these institutions vary and depart significantly. The claimant further avers that it is this referenced association that is being used by the cartels to fleece the pensioners' scheme of its assets and prime properties to the detriment of the over 10,000 pensioners.

That the fact that the union is one of the parties that attested to the Schemes Trust Deed and Rules is testament to the fact that it does not only have the requisite *locus standi* to prosecute the matter but that it is so mandated by the Supreme Law, the enabling statutes and the Schemes Trust Deed and Rules to so do.

Upon being served, the 1st, 3rd and 4th respondents have again raised several preliminary objections, which in essence raise the following grounds of objection –

1. That this Court is *functus officio* and has no jurisdiction to entertain the current application leave alone the claim.
2. That the issues raised in the application are *res judicata*.
3. That the Application is fatally defective and incompetent as it is not predicated upon any suit
4. That the claimants have no *locus standi* to bring and agitate the claim.
5. The application as filed is an unmitigated abuse of the Court process, frivolous, vexatious, baseless and tantamount to an appeal against the orders of the Court made on the 13th October 2017 in ELRC No 783 of 2017 as consolidated with Misc. Application No 99 of 2017.

They have further raised grounds of opposition to the application, which I will not deal with in this ruling, which is only considering the grounds of preliminary objection.

The parties agreed to proceed by way of written submissions.

In the submissions filed on behalf of the 1st, 3rd and 4th respondents and the 4th Interested Party, it is submitted that Ndolo J. declined to exercise jurisdiction and referred the matter to the Retirement Benefits Authority. It is further submitted that the decision of the Court of Appeal in **KENYA PORTS AUTHORITY -V- INDUSTRIAL COURT OF KENYA & ANOTHER** in which the court defined what a trade dispute is binds this court with the consequence that this court lacks jurisdiction to determine this case.

It is further submitted that the decision of Ndolo J. was not challenged and stands to date, and that this court is therefore *functus officio*, that the application dated 19th October 2017 is not predicated upon any claim and is fatally defective, has no foundation and must fail.

It is further submitted that in ELRC 783 of 2017 as consolidated with Misc. Appl. No. 99 of 2017 this court categorically held that it has no jurisdiction over matters of pension.

It is thus submitted that this court has no jurisdiction over this matter. It is further submitted that under the Labour Relations Act a trade union can only deal with an employer to regulate relations between employees and employers, that the 1st respondent is not the employer of the claimant's members or an employer organisation and that the court in Cause 783 of 2017 held that –

“The persons the claimant purports to represent in this application are no longer employees of the interested party. They are retirees. The court is therefore of the view that the claimant does not have the locus standi to prosecute this claim on behalf of the beneficiaries of the 1st respondent's retirement scheme.”

It is further submitted that the application by the claimant at paragraphs 6, 7, 8 and 9 is a disguised appeal against the decision of Abuodha J. in Cause 783 of 2017

They pray that the application be dismissed.

The 2nd respondent also filed submissions dated 16th February 2018 supporting the submissions of the 1st and 3rd respondents and the 4th Interested Party.

The 2nd respondent further submits that the present application is an abuse of court process relying on the decision of the Court of Appeal in **JOHN FLORENCE MARITIME SERVICE LIMITED & ANOTHER -V- CABINET SECRETARY FOR TRANSPORT AND INFRASTRUCTURE & 3 OTHERS** where the court stated –

“The rationale behind res judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter.

Res judicata ensures the economic use of court's limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts.”

The 2nd respondent further relies on the decision of MATIVO J in **GRAHAM RIOBA SAGWE & 2 OTHERS -V- FINA BANK LIMITED & 5 OTHERS** in which the court set out what would amount to abuse of court process as follows –

“However, the employment of judicial process is only regarded generally as an abuse when a party improperly uses the issue of the judicial process to the irritation and annoyance of his opponents... However, abuse of court process in addition to the above arises in the following situations:-

a) Instituting a multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action.

b) Instituting different actions between the same parties simultaneously in different courts even though on different grounds...”

It is submitted that in ELRC Cause 783 of 2017 and Misc. Appl. No. 99 of 2017, the claimant herein sought similar prayers, that the decision of the court has not been subjected to appeal.

The claimant filed grounds of opposition to the preliminary objection in which it states that this court is established under Article 162(2)(b) as a special court to hear matters arising from industrial relations, that the court has unlimited original and appellate jurisdiction in employment matters.

That the ruling of 19th August 2016 did not discuss the claim, but referred the matter to the Retirement Benefits Tribunal, which is dysfunctional. It is the claimant's position that the case is not *res judicata*, that the application is not defective as Cause 2289 of 2015 is still pending.

The claimant further states that it has locus standi to articulate the interests and rights of its members who are members of the scheme and that the rights of workers fall within the Industrial Relations System.

It is submitted that the claimant is a signatory in the Trust Deed. That it therefore has *locus standi* to represent its members who are members of the Pension Scheme.

Determination

I have considered the submissions of the parties on the preliminary objections filed by the 1st and 3rd respondents and 4th Interested Party as well as the claimant's reply. The issues for determination are whether this court is *functus officio*, whether this suit is *res judicata*, whether claimant has *locus standi* and if the suit is fatally defective and abuse of court process.

From the outset, it want to clary that ELRC No. 7893 of 2017 between **RIFT VALLEY RAILWAYS WORKERS UNION (K) -V-**

KENYA RAILWAYS STAFF RETIREMENT BENEFITS SCHEME & ANOTHER has not been placed before me. I therefore cannot comment on the issues in dispute therein or whether the determination therein relates to the issues now before me.

Functus Officio

Functus officio is defined in Black's Law Dictionary 10th Edition as

“having performed his or her office” (of an officer or official body) without further authority or legal competence because the duties and functions of the original commission have been fully accomplished. The term is sometimes abbreviated to *functus* <the court was *functus*>

It means that the court has already finished its work and has no further function to carry out as far as the matter is concerned. It means no longer holding office or having official authority.

The respondents and 4th Interested Party have submitted that the issues in dispute herein have been fully ventilated before and settled so that this court no longer has authority to go back to it.

I have looked at the ruling of Ndolo J. delivered on 19th August 2016. At paragraphs 20, 21 and 22 the court stated as follows –

“I have looked at the Claimant’s pleadings in this light and have reached the conclusion that the dispute resolution mechanisms established under the Retirement Benefits Act have not been exhausted and the claim is therefore prematurely before the Court.

That being the case, the Court must decline to exercise jurisdiction and refer the matter for resolution under the Retirement Benefits Act.

In view of this finding I do not find it necessary to make a finding on the other issues raised in the preliminary objections.”

The court referred the matter for resolution under the Retirement Benefits Act. It did not make a finding on the issues raised in the preliminary objection. It did not make any finding on any of the issues raised in the suit. More specifically, it did not make any determination other than to refer the matter to be dealt with under the Retirement Benefits Authority.

I therefore find that this court is not *functus officio*.

Jurisdiction

In the written submissions of the 1st Interested Party dated 10th March 2016 and filed on 11th March 2016, it states that it had already held several unsuccessful meetings with some of the affected associations which are members of the Kenya Railways Retirement Benefit Scheme with a view of resolving pertinent issues affecting the Kenya Railways Benefit Scheme but many including the claimant herein have been neglecting or absconding to attend the consultative meetings. This means that it has already dealt with the issue and the next level of action is by the Retirement Benefits Tribunal.

The Retirement Benefits Act provides that complaints be raised first with Chief Executive Officer of the 1st Interested Party and that persons dissatisfied with the decision of the Chief Executive Officer may appeal to the tribunal. The Tribunal is not functional. The claimant/applicant has submitted a letter from the Clerk to the Tribunal to that effect.

This court has original jurisdiction in all employment matters as set out in Section 12 of the Employment and Labour Relations Act.

Pension matters are no doubt employment matters. As the claimant/applicant has stated, it is a signatory to the Trust Deed where it presents the interests of its members. Article 165(5) of the Constitution expressly provides that the High Court has no jurisdiction in matters falling within the jurisdiction of the courts contemplated under Article 162(2).

The law did not anticipate a *lacuna* and where a tribunal which is required to exercise original jurisdiction is not in place a court with unlimited original jurisdiction like this court cannot be said to lack jurisdiction to hear the matter. There is no law that states that this court cannot exercise jurisdiction reserved for a tribunal, which is not functional. A litigant will not be left without a remedy because the relevant authorities have failed to exercise their functions to appoint members of the tribunal.

I therefore find that this court has jurisdiction to hear issues relating to pension and must assume such jurisdiction where the tribunal that is supposed to exercise such jurisdiction is not operational.

Locus Standi

The claimant has stated that it is a signatory to the Trust deed of the 1st respondent. Its members are members of the Scheme and that is why it is a signatory to the scheme. I find that the claimant has *locus standi* to file this suit on behalf of its members who are members of the 1st respondent. I further find that this court is not *functus officio* and no final determination has been made by this court in this suit.

Further, the suit is not *res judicata* as there is no final determination that has been made in this suit.

On the issue of abuse of court process, I find that since the suit was referred to a tribunal that is dysfunctional and therefore no determination has been made on the issues in this suit, the claimant/applicant has not abused the process of this court by asking the court to assume jurisdiction in the absence of the Retirement Benefits Tribunal.

For these reasons, I find the preliminary objections filed herein without merit and dismiss the same.

In view of the very weighty issues raised in the application dated 19th October 2017, which relate to the wastage of the assets of the 1st respondent, I proceed to grant a temporary injunction restraining the 1st respondent or its agents from disposing of any of the properties listed in **Legal Notice No. 169 of 2006** pending the hearing and determination of the application dated 19th October 2017.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 17TH DAY OF AUGUST 2018

MAUREEN ONYANGO

JUDGE